



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 104 OF 2014

FAITH NJAMBI KARENGE alias ANN TURNER NJOROGE...APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's

Court at Kibera Cr. Case No. 2743 of 2009 delivered on 18th July 2014).

JUDGMENT

Background

Faith Njambi Karengi alias Ann Turner Njoroge was charged with five counts. **In Count I** she was charged with making a document without authority contrary to Section 357(a) of the Penal Code. The particulars of the offence were that on or about 23rd June, 2009 at an unknown place within the Republic of Kenya with intent to defraud, jointly with others not before the court, made a document, namely, a National Identity Card No. [particulars withheld] in the names of Ann Turner Njoroge purporting it to be a genuine National Identity Card issued by the Director of the National Registration Bureau.

Count II was of uttering a false document contrary to Section 353 of the Penal Code. The particulars of the offence were that on 23rd June, 2009 at Ronald Ngala Street within Nairobi Area, knowingly and fraudulently uttered a certain false document namely a National Identity Card No.[particulars withheld] (Serial Number [...]) in the names of Ann Turner Njoroge to Antony Kibe Ng'ang'a, an account opening officer with Co-operative Bank of Kenya.

In Count III she was charged with stealing contrary to Section 275 of the Penal Code. The particulars were that on 22nd June, 2009 at Drummond Investment Bank (Nairobi Nominees Limited) in Nairobi within Nairobi Area, jointly with others not before Court stole one Standard Chartered cheque leaf serial number 200632, valued at Ksh. 50/-, the property of Nairobi Nominees Limited. In the alternative to this charge, she was charged with handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars of the charge were that on 22nd June, 2009 at Co-operative Bank City Hall Branch in Nairobi within Nairobi Area, otherwise than in the course of stealing, dishonestly handled one Standard Chartered cheque leaf serial No. 200632 valued at Ksh. 50/- knowing or having reasons to believe it to be stolen property.

In Count IV she was charged with stealing contrary to Section 275 of the Penal Code, the particulars

being that on 24th June, 2009 at Co-operative Bank, City Hall Branch, in Nairobi within Nairobi Area, jointly with others not before court stole Ksh. 280,312.50/- the property of Nairobi Nominees Limited.

In Count V she was charged with uttering a false document contrary to Section 353 of the Penal Code in that on 23rd June, 2009 at Equity Bank, City Hall Branch, in Nairobi within Nairobi Area, knowingly and fraudulently uttered a certain false document namely National Identity Card No. [particulars withheld] (Serial Number [...]) in the names of Ann Turner Njoroge to Christine Odhiambo a Cashier at the said Bank.

The Appellant was found guilty in counts I and II and sentenced to three years' imprisonment in each count to be served concurrently. She was dissatisfied with that court's decision and has preferred the present appeal against both the conviction and sentence. The appeal was brought by way of a Petition of Appeal dated 30th June, 2014 in which she set out her grounds of appeal that the evidence adduced in counts 1 and 2 was not sufficient to found a conviction and was never corroborated, that crucial witnesses were never called, that there were material contradictions in the evidence adduced, that the offences were never proved beyond reasonable doubt and that the Appellant's mitigation was not considered before she was sentenced.

Submissions

The appeal was canvassed by way of written submissions. Learned counsel Mr. Kogi and Ms. Kimiri represented the Appellant and the Respondent respectively. The Appellant filed submissions dated 4th May, 2017. It was submitted that a crucial witness one Ann Turner was not called to confirm that she was not the owner of the Identity Card in question. In any case, it was not proved that the said Ann Turner had passed away to warrant the exclusion of her evidence. Further, one Pauline Wangechi Gichohi, to whom the Identity Card Number was said to belong to did not testify thus, weakening the prosecution's case.

With regard to the account opening documents, it was submitted that they were not subjected to a document examiner to show that the appellant had authored them. Further, that PW5 testified that he had no proof to show that the documents were filled in the bank. It was her further submission that the prosecution failed to show that she presented a bank card as introduction of her identity that allowed her to transact. Furthermore, the persons it was alleged she dealt with in the bank, namely a security officer and an operations' staff did not testify in this regard. It was then her view that it was not established that she presented herself to the bank as someone else.

On sentence, she submitted that the learned trial magistrate failed to take into account her mitigation; specifically that she was a single mother and was sick. These circumstances, she added, necessitated a non-custodial sentence. Her view was that the custodial sentence imposed was harsh and excessive. She urged the court to allow her appeal.

Ms. Kimiri opposed the appeal. She submitted that the first count was proved beyond a reasonable doubt in that the National Registration Bureau demonstrated that the identity card number [particulars withheld] belonged to one Pauline Wangechi Gichohi and was not issued to Ann Turner Njoroge. There was also proof, after investigation of fingerprints, that the Appellant was indeed Faith Njambi Karengi the holder of identity card number [particulars withheld] and not Ann Turner Njoroge.

With regards to Count II she submitted that according to PW5 the Appellant presented to him the identity card number [particulars withheld] bearing the name Ann Turner Njoroge from which he made a copy and filled the requisite account opening forms. He opened account number [particulars withheld] on her behalf and thereafter referred her to Co-operative bank, City Hall Branch so she could make a deposit in the said account. It was the counsel's view that the conviction was safe and based on sound and cogent evidence. Further, that the sentences meted out for both counts were lawful and she therefore urged the court to dismiss the appeal.

Evidence

The prosecution's case was that the Appellant approached an investment bank via email and urged them to pay her money due from the account of Ann Turner. The bank prepared the cheque in question and the Appellant had an account opened in the name of one Ann Turner Njoroge to which the said cheque was deposited. When the Appellant went to withdraw the money an anomaly in her identity card led the cashier to suspect its legitimacy leading to her arrest.

PW1, Samuel Wainaina Mwangi was the general manager at Drummond Investment Bank. He recalled that on 11th June, 2009 he was in the office when he received an email from a purported Ann Turner, who was a client, enquiring about her account. The email was for the collection of a cheque in respect of interests on a treasury bond owned by Ann Turner. He asked the finance department to process a cheque for the interest that had accrued in the account which was approximately Ksh 280,000/-. He then sent an email to the purported Ann Turner and informed her that the cheque was prepared. It turned out that the cheque had been issued to an 'Ann Turner' who was not the holder of the account. He saw the cheque from Anti-Fraud investigators. It was from Standard Chartered Bank number [particulars withheld] assigned to AIC Nairobi Nominees Ltd Account number [particulars withheld] endorsed to an Ann Turner. He learnt that the cheque had been presented to another bank and the money withdrawn. He identified the cheque in question. On the same day, **PW2 Edwin Karuga** an accountant at Drummond Investment Bank was sent a mail by the portfolio manager asking him to process a cheque. He checked the client's account and ascertained that there were funds that were interests accrued from a bond bought by one Ann Turner to the tune of Ksh. 280,312.50/-. The cheque was then dispatched to the front office for dispatch to the client.

On 23rd June, 2009, the appellant presented herself at Co-operative Bank, Ronald Ngala Street where she opened account No. [particulars withheld] at City Hall Branch. She was attended by Pw5, **PW5, Antony Kibe Nganga**. The latter later learnt that the appellant had attempted to make a withdrawal from the account deposit using an identity card that was not genuine. **PW3, Kelvin Nyaga** a banker with Co-operative Bank of Kenya confirmed that the appellant deposited a cheque on the 24th of June, 2009 whose beneficiary was Ann Turner. He noted the client's telephone number at the back of the cheque as [particulars withheld], before handing the cheque over for processing.

PW4, Christine Odhiambo of Co-operative Bank, City Hall Branch testified that on the 30th of June, 2009 the appellant presented two deposit slips and an identity card for purposes of withdrawing money from account number [particulars withheld] of Ann Turner. The fonts used on the names in the identity card appeared different which aroused her suspicions. She reported to the operations manager who directed that the customer be apprehended for questioning. After the appellant signed the withdrawal slips she was detained in the bank. On the same day, **PW6 Kingori Githinji** a director of Nairobi Nominees Limited which is part of Francis Drummond & Co. Limited was contacted by a member of staff at Co-operative Bank who enquired about the identity of one Ann Turner Njoroge in connection to a cheque payment they had issued to one Ann Turner. He never saw the appellant but confirmed that the cheque was written in favour of Anne Turner but it was collected by someone who was neither the payee nor had the authority to collect it.

On the 13th of July, 2009, **PW7, Oscar Chrispus** a fingerprints officer with the National Registration Bureau confirmed that identity card number [particulars withheld], serial number 229143578 in the name of Ann Turner Njoroge was genuinely issued to Pauline Wangechi Gichohi. He produced the details of the person in question which included her picture. After searching the bureau's database for matches of the fingerprints supplied he traced a record with identical fingerprints belonging to one Faith Njambi Karengi who was the holder of identity card number [...]. He produced her details including her photograph.

PW8, CPL James Mwaniki attached to the Banking Fraud Investigation Unit re-arrested the appellant from Co-operative Bank's City Hall on 30th June, 2009. He also investigated the case. He summed up the prosecution case. In addition, he testified that in the course of his investigation he was informed by the advocate of Anne Turner that she had passed away on 2nd November, 2009 and given a certified copy of her Death Certificate which he produced in court alongside her identity card. He took the Appellant's

fingerprints which were forwarded to the National Registration Bureau alongside a copy of the Identity card.

After the close of the prosecution case, the court ruled that a prima facie case had been established requiring the Appellant to put up a defence. She gave a sworn statement of defence but did not call any witnesses. She introduced herself as Faith Njambi Karengi, a business lady. She stated that on 30th June, 2009 she was outside Co-operative Bank where she went to meet a friend. She was then approached by a security guard who informed her that someone was calling her inside the bank. The bank informed her that she was a thief. Later two men and a lady arrived and took her to the banking fraud department. That is where she was shown an identity card and informed that she had deposited a cheque which she did not recall having seen. She was taken to Kileleshwa Police Station and was charged on the following day.

Determination

It is now the duty of this court to reevaluate the evidence on record and come up with its own conclusions. In so doing the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. **See Okeno vs. Republic [1972] EA. 32.**

After considering the evidence on record and the respective rival submissions, I deduce the issues of determination to be whether crucial witnesses were not called to testify, whether the case was proved beyond reasonable a doubt and whether the sentence passed was justified.

On the issue of calling crucial witnesses, the appellant submitted that Anne Turner and Pauline Wangechi Gichohi were witnesses whose omission of their evidence weakened the prosecution case. Anne Turner is said to have been the holder of the identity card the appellant presented to the bank to open an account into which the cheque, the subject of the charges was deposited. PW8, the investigating officer testified that she died on the 2nd of November, 2011 and he produced a Death Certificate in that regard. Pauline Wangechi Gichohi on the other hand was said to be the real owner of the Identity Card number [particulars withheld] presented to the bank both in the account opening and for purposes of withdrawal of the money that was paid into the account through the cheque. It is the view of this court that the evidence that the two persons would have adduced was ably given by PW7, a fingerprint officer from the National Registration Bureau. On his part, he confirmed that the identity card number [particulars withheld] serial number [...] as presented by the appellant bore the names of Anne Turner Njoroge. A search with the National Bureau showed that that ID number and serial number belonged to the identity card of Pauline Wangechi Gichohi. Hence no gap that would have been filled by the two witnesses was left out. In any case, PW7 testified as an expert. His evidence was also corroborated by PW8 because he had the opportunity to not only see the identity card but physically presented a copy and its details to the national registration bureau for verification. This ground of appeal then fails.

The next issue is whether the case was proved beyond a reasonable doubt. The appellant was convicted in counts 1 and II. In count 1, she was charged with making a document without authority contrary to Section 357 (a) of the Penal Code. The subject document was the national identity card number [particulars withheld] serial number [...] in the name of Ann Turner Njoroge. It was confirmed by PW4 that the Appellant presented this identity card to Cooperative Bank, City Hall Branch on 30th June, 2009 with the intention of withdrawing money from Account number [particulars withheld] in the name of Anne Turner. She had earlier on 24th June, 2009 presented a cheque number [particulars withheld] from Standard Bank payable to Anne Turner. This evidence was adduced by PW3, Kevin Nyaga Njoga of Cooperative Bank, City Hall Branch. Further, according to PW5, it is the appellant who on 23rd June, 2009 opened an account with Cooperative Bank into which on the following day she deposited the cheque. Ultimately, the appellant used the identity card number [particulars withheld] for the aforesaid purposes. The said Identity card number was proved by PW7 that it did not belong to her but to somebody else'. Therefore, only she knew its source. The evidence of PW7 which was corroborated by PW8 established Count 1.

In count II, she was charged with uttering a false document contrary to Section 353 of the Penal Code.

The document in question once again was the same Identity card number [particulars withheld] serial number 22914357 which she presented to PW5, Anthony Kibe Nganga on 23rd June, 2009. As earlier noted, the said identity card was confirmed by PW7 that it did not originate from the National Registration bureau. PW5, Anthony Kibe Nganga did confirm that indeed the appellant went to the Cooperative Bank, Ronald Ngala Street where she opened an account at City Hall Branch on the strength that she was the holder of the said identity card. Accordingly, count II was also proved beyond a reasonable doubt. The defence the appellant gave was dislodged by the strong prosecution case which I hold amounted to a mere denial.

On sentence, the appellant submitted that the same was harsh and excessive in the circumstances. She took issue with the fact that the learned trial magistrate did not consider her mitigation that she was a single mother and sick. I reiterate that sentencing is always in the discretion of the trial court. An appellate court will not interfere with the sentence passed unless the same is manifestly excessive or low or the trial court considered or failed to consider relevant factors in passing the sentence.

In the present case, the appellant was a first offender. The fact that she is a single mother ought to have called on her to be more responsible. Count 1 carries a maximum of 7 years imprisonment whilst count II an imprisonment of up to 3 years. It is my view that the penalty imposed in count II was harsh as it was the maximum provided by the law. Furthermore, the trial court failed to take into account that the appellant was a first offender. Therefore, while I dismiss the appeal on conviction the same on sentence will partially succeed. I substitute the sentence with a 2 year and 6 months imprisonment respectively which sentences will run concurrently. The appellant's cash bail granted on 26th August, 2014 pending the hearing and determination of the appeal is hereby cancelled and shall be refunded to the payee. She is hereby committed to the prison to complete serving the sentence. It is so ordered.

Dated and Delivered at Nairobi this 13th Day of June 2017

G.W NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Wachira holding brief for Mr. Kanyi for the Appellant
2. M/s Kimiri for the Respondent.