



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL CASE NO.20 OF 2014

(From original conviction and sentence in Criminal Case No.649 of 2011 of the

CM's Court at Kisii delivered on 31st January, 2014 by Hon. A.C.A. ONG'INJO – CM)

JARED MASORE NYAMWEYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein **JARED MASORE NYAMWEYA** was jointly charged with one Albert Omari Otunga vide a charge sheet dated 14th June 2012, with the offence of stealing contrary to **Section 268 (2) (e)** as read with **Section 275 of the Penal Code**. The particulars were that on diverse dates between 9th March, 2011 and 15th March, 2011 at National Bank of Kenya Kisii Branch in Kisii County, jointly stole Kshs. 1,497,904/= the property of Kenya Seed Company Limited.

2. In count II, the appellant and his co-accused were charged jointly with the offence of stealing contrary to **Section 268 (2) (e)** as read with **Section 275 of the Penal Code**. Particulars were that on diverse dates between 15th April, 2011 and 22nd April, 2011, at National Bank of Kenya Kisii Branch, Kisii Township within Kisii County, jointly stole cash Kshs. 1,055,827.50, the property of Kenya Seed Company Limited.

3. In count III, the appellant was charged with the offence of stealing by servant contrary to **Section 281 of the Penal Code**. It was alleged that on diverse dates between 9th March and 15th March, 2011 at National Bank of Kenya Kisii Branch in Kisii Township within Kisii County being a servant to Kenya Seed Company Limited stole Kshs. 1,497,904/= the property of Kenya Seed Company Limited which came into his possession by virtue of his employment.

4. In count IV, the appellant was charged with the offence of stealing by servant contrary to **Section 281 of the Penal Code**. It was alleged that on diverse dates between 15th March, 2011 and 22nd March 2011 at National Bank of Kenya at Kisii Branch, in Kisii Township within Kisii County, being a servant to Kenya Seed Company Limited stole cash Kshs. 1,055,827.50 the property of Kenya seed Company Limited that came into his possession by virtue of his employment.

5. In count V, the appellant faced the charge of giving false information to a person employed in the public service contrary to **Section 129 (a) of the Penal Code**. The particulars were that on 23rd April, 2011, at Kilgoris police station within Narok County, informed No. 62264 CPL Henry Kilonzo, a person employed in the public service as a police officer vide OB 6/23/4/2011 that he had been robbed of Kshs. 2.3million by four men who were armed with rifles and dressed in police jungle jackets at Homa-Bay Mbita junction, information he knew or believed to be false; thereby intending to cause the said No. 62264 CPL Henry Kilonzo to use government resources and misuse manpower during the investigations of the false information.

6. The appellant and his co-accused were tried on all the counts and acquitted on counts 1, 2, 3 and 4 but appellant was convicted on count 5 and sentenced to one year imprisonment or a fine of Kshs. **100,000/=**. It is therefore the appellant's conviction on the 5th count that has precipitated this instant appeal in which he has appealed against both the conviction and sentence and has set out the following grounds of appeal in his petition of appeal:

1. The learned trial magistrate erred in Law and in fact when he convicted the appellant on count no. 5 against the weight of evidence on record.

2. **The learned trial magistrate erred when she failed to find that the evidence on record did not support the charge.**

3. **The sentence of one year or a fine of Kshs 100,000/= was harsh and excessive in the circumstances.**

7. At the hearing of the appeal, the appellant relied on the written submissions filed on his behalf by his advocate Mr. Keriaro on 3rd March, 2016. He submitted that none of the 7 prosecution witnesses testified or proved that the appellant had given false information to a person employed in public service.

8. The appellant submitted that PW7, P.C. Laban Chepkok, who investigated the case did not tell the court if he investigated the aspect of whether or not the appellant had been hijacked and robbed. The appellant argued that it was clear from the testimony of PW6 and PW7 that the report allegedly made by the appellant on his being hijacked and robbed was not investigated.

9. The appellant added that the ingredients of the offence of giving false information to a person employed in the public service contrary to Section 129 (a) of the Penal Code were not established which ingredients are that:

a. **The information given must be false.**

b. **The person giving the information must know that it is false.**

10. The appellant cited the case of **Mbogo Samuel Mungai vs Republic High Court Criminal Appeal no. 57 of 2004 (unreported)** which was quoted in affirmation by **Justice G. Odunga in Michael Wamwongo Karongo vs Republic [2013] eKLR**, and the case of **Christopher Omufira Akwabi vs Republic [1990] eKLR**. Mr. Kerario submitted that since the appellant had been acquitted in the first 4 counts which were in the same series and related to the 5th count, there was no reason or basis for a conviction on the 5th count.

11. The appellant's case was that none of the police officers to whom the false information was allegedly given proved to the court that they investigated the information and found that it was false.

12. Mr. Otieno for the state opposed the appeal and submitted that sufficient evidence was adduced by PW4, PW5 and PW6 to support the charge of giving false information to a person employed in public service contrary to **Section 129 (a) of the Penal Code**. According to Mr. Otieno, the police officers rightly concluded that the appellant's report and story that he had been robbed was a mere cover-up after the appellant had failed to pay the money due to the sunflower farmers.

13. This being a first appeal, the court is under a duty to consider the entire evidence adduced before the lower court, re-analyse and re-evaluate it with a view to making its own independent findings on whether the conviction of the appellant on the 5th count should be upheld or not while bearing in mind that I neither heard nor saw the witnesses testify. **See Okeno vs Republic [1972] E.A. 32.**

14. The prosecution called a total of 7 witnesses in support of all the 5 counts before the lower court, however, since the appellant was acquitted in the first 4 counts, this court will focus mainly on the testimonies of the witnesses that touched on or were relevant to the 5th count namely PW5, PW6 and PW7.

15. The particulars of the 5th count, as already stated at the beginning of this judgment were that on 23rd April, 2011 at Kilgoris Police Station, the appellant informed No. 62264 CPL Henry Kilonzo, a person employed in the public service as a police officer vide OB 6/23/4/2011 that he had been robbed of Kshs. 2.3 million by 4 men who were armed with rifles and dressed in police jungle jackets.

16. In order to fully understand the background and genesis of count 5, it is important to briefly go through the testimonies of all the witnesses who testified before the trial court because count 5 is closely related to and occurred from the series of events that gave rise to the other 4 counts for which the appellant was acquitted.

17. PW1 Daniel Ogachi Bichanga testified that in October, 2010, the appellant introduced himself to him as an employee of Kenya Seed Company Limited tasked with the duty of buying sunflower seeds from farmers and that PW1 delivered 5 bags of sunflower seeds to the appellant on the promise that he would be paid for the delivery within 45 days which payment was never made as on the appointed date as the appellant never showed up with the payment, but only called later to claim that he had been robbed of all the money meant for the payment of the farmers.

18. PW2 Stanley Kiprop, an employee with Kenya Seed Company Ltd stated that he was the accountant who on 8th March, 2010 received a complaint from farmers in South Nyanza that they had not been paid. He claimed that a cheque in the sum of Kshs. 1,497,904/= had been dispatched to the farmers through the appellant which cheque was drawn in the names of the appellant's co-accused.

19. PW3 Paul Loluperikoi a manager in charge of production with Kenya Seed Company testified that on 19th April, 2011, he received information that the appellant had been kidnapped and robbed of money while on his way to a place called Sindho. PW3 and PW4 Julius Masai, a security officer then travelled to Kisii to find out the status of the appellant following the alleged kidnapping. PW4 stated that the appellant appeared to be in pain when he saw him. PW4 said that the appellant was a field officer with Kenya Seed Company attached to pastel and sunflower seeds.

20. PW5, NO. 218477 CIP Richard Mathenge, the DCIO of Nyakach Division, Kisumu County testified that on 25th April 2011 at around 2 p.m. the appellant reported to him a case of robbery with violence which allegedly took place on 19th April, 2011 along Homa Bay Mbita Road. The said report was made to him while he was at the CID office in Homa Bay. PW5 testified that the appellant had made a similar report at Kilgoris police station whereupon he was advised to report the case to Homa Bay Police Station in whose jurisdiction the alleged robbery had taken place. PW5 stated that the appellant was issued with a P3 form and advised to go for treatment. He added that the appellant recorded a statement and availed one Samuel Nyakundi from Transmara as his witness to the said robbery who also recorded a statement. PW5 stated that he after investigating the bank accounts belonging to the appellant's co-accused held at National Bank at Kisii where the cheques alleged to be for the cash due to farmers were allegedly deposited, he concluded that the withdrawals in those accounts were suspicious whereupon he concluded that the alleged robbery was a cover-up since there had been no robbery of that nature in the region.

21. The appellant was then charged with the 5 counts of stealing by servant and giving false information to a person employed in the public service.

22. PW6 No. 62264 CPI Henry Kilonzo testified that on 23rd April, 2011, he was at the Transmara CID office when he received a report of robbery with violence whereupon he instructed an officer to book the report in the OB. He stated that the appellant reported that he was robbed on 19th April, 2011 while on his way to Homa Bay to pay the farmers. PW6 stated that the appellant informed him that he was robbed at about 7.30p.m. by 4 people who presented themselves as police officers asking for a lift only to turn out to be robbers armed with G3 rifles and a pistol. He stated that the appellant claimed that the robbers took control of his car and held him captive for several days but later abandoned him and his car along Osinoni-Kilgoris road where they left him tied up on both legs and hands and he was only rescued later by a passerby who untied him. PW6 narrated that the appellant was brought for the police station by a taxi driver but he did not record the statement of the taxi driver. After booking the report, PW6, in the company of 2 other officers went to the scene where the vehicle had been abandoned and indeed they found the said car and the sisal ropes that had allegedly been used to tie the appellant during the robbery. The police recovered the appellant's car and the ropes. According to PW6, the police at Transmara did not investigate the case further but referred the appellant to Homabay CID office where the robbery was alleged to have taken place upon. Upon being cross-examined by Mr. Kerario, counsel for the appellant, PW6 conceded that he did not dust the appellant's motor vehicle for fingerprints and neither did they use the sniffer dogs to track down the robbers who were reported to have escaped on foot. PW6 said that he did not visit the scene where the motor vehicle was recovered.

23. PW7 No. 55201 PC Laban Chepkok attached to Kisii CID office was the investigating officer who investigated the bank accounts of the appellant's co-accused where the cheques, alleged to have been in respect to cash due from Kenya Seed to the farmers were deposited.

24. At the close of the persecution's case, the appellant was placed on his defence and in his unsworn testimony before the court, he denied being an employee of Kenya Seed Company Limited but stated that he was a businessman dealing in cereals. He confirmed having collected certain cheques on behalf of his co-accused.

25. The appellant stated that on 22nd April, he reported an incident of robbery that took place at the junction between Sotik and Chapilat where 3 men attacked, blindfolded and robbed him of Kshs. 112,000/= after which they abandoned him at a place called Osiman from where he was rescued by a good Samaritan. He stated that he reported the robbery at Kilgoris police station on 23rd April, 2011 at about 7 a.m. while in the company of one Nyakundi and the taxi driver who rescued him and ferried him to the police station. The appellant stated that he was injured in the robbery and he produced a p3 form as Exhibit 1 and his treatment notes as Exhibit 2. He also produced the log book of the car he had at the time of the robbery as an Exhibit. He stated that PW6 is the one who drove his motor vehicle to the police station after it was recovered from the scene of the robbery and that the ropes that the robbers had used to tie him were still inside the car at the time the police recovered it.

Analysis and Determination

26. After perusing the entire record appeal, the petition of appeal and the submissions by the appellant's and state counsel, I note that the only issue that requires my determination in this appeal is whether or not the offence contained in count 5 of the charge sheet, being that of giving false information to a person employed by public service was proved against the appellant beyond reasonable doubt.

27. From the analysis of the evidence tendered by the prosecution witnesses before the lower court it is clear to me that only PW5 and PW6 gave evidence relevant to the 5th count. PW5 concluded that the appellant reported the robbery as a cover up for the theft he had committed. This was a conclusion PW5 arrived at on his own without conducting any investigation to establish if the alleged robbery took place or not. PW5 did not even bother to record the statement of the taxi driver and one Samuel Nyakundi who the appellant testified had rescued him from the scene where he had been abandoned by the robbers. In this regard I concur with the submissions of the appellant's counsel that since the appellant had been acquitted of the offences of theft and theft by servant, and since it is this theft that the appellant intended to cover up with the alleged false report of robbery, then it naturally followed that the offence of giving false information to a person employed as the public servant could not stand on its own because it was anchored/tied to the 4 other counts for which the appellant had been acquitted. PW6 on his part, despite having received the report of robbery directly from the appellant who was in the company of 2 other people who had rescued him from the robbery scene and despite having taken the statement of the appellant and one Nyakundi, who had actually rescued and untied the appellant at the scene where he had been abandoned, confirmed that he did not dust the appellant's motor vehicle for fingerprints or visit the scene of the crime.

28. In effect therefore, none of the police officers who claimed that they investigated the case investigated the robbery report at all. It is also instructive to note that the OB report no. 6/23/4/2011 which the police alleged contained a false report, was not produced in court as an exhibit to enable the court ascertain the exact report the appellant made that was alleged to have been

false as while the police claimed that he appellant reported having been robbed of Kshs. 2.3 million, the appellant himself testified before the court that he was robbed of Kshs. 112,000/= only. It is the OB report that could have disclosed to the court the exact report that the appellant made so as to enable the court determine if it was false or not. Failure to produce the OB report was therefore a fatal and explained omission on the part of the prosecution in their quest to prove the offence of making a false report. It was important for the prosecution to avail the OB report in court so as to give the court an opportunity to peruse the same with a view to determining the exact report made by the appellant before arriving at the finding that the said report was false or not. The trial magistrate stated as follows in respect to the OB report:

“He reported at Kilgoris Police Station, Homa Bay Police Station and even to his employers, PW5 & PW6 were never questioned as to the amount of money accused 1 allegedly lost Kshs. 112,000/= in his defence in my view was an afterthought, and

too late in the day. It is true that PW5 & PW6 did not produce Book in which accused 1’s report was booked but they were very clear of the amount of money accused 1 alleged he had been robbed of and it was not Kshs. 112,000/= but over two million shilling. These are worlds apart and cannot be confused by any standards.

In this regard I do find that accused 1 gave false information that he had been robbed of monies he was meant to go and pay farmers. What is puzzling however is that PW1, PW2, PW3 and PW4 the alleged farmer, the Senior Accountant Kenya Seed, the Production Manager and even Security Officer in-charge of operations have not produced any evidence to prove any deliveries of sunflower seeds on behalf of the said farmers that would warrant the company paying such colossal sums of money.”

29. From the above extract of the trial court's judgment it is clear to me that even the trial court was puzzled and therefore doubted how the complainant (Kenya Seed Company Limited) could claim that a colossal amount of money could have been released to the appellant for the payment of farmers without proof of any deliveries. Having doubted that such an amount could have been released to the appellant, I find that the trial court erred in holding that the appellant gave a false report regarding robbery of Kshs. 2.3 million. The prosecution was under a duty to prove that the appellant had given false information beyond reasonable doubt. The trial magistrate appears to have made an assumption that the appellant had reported a robbery of Kshs. 2.3 million and not Kshs. 112,000/= without any cogent proof. The trial court did not give any consideration to both the oral and documentary evidence adduced by the appellant in respect to the injuries he sustained in the robbery.

30. By holding that the appellant was guilty of giving false information relating to having been robbed of Kshs. 2.3 million and not 112,000/= it would appear that on one hand, the trial court found that it was not possible for the Kenya Seed company to have released a huge sum of money (Kshs 2.3 million) without deliveries) and on one hand, she holds that the appellant falsely reported having been robbed of Kshs. 2.3 million. I hasten to add that the primary charge was that of theft of Kshs. 2.3 million while the offence of giving false information was a secondary charge. The two counts of theft and giving false information were however closely related and occurring in the same transaction as the appellant was alleged to have stolen Kshs. 2.3 million only to make a false report thereafter as a cover-up to the theft. The two events were therefore as connected as conjoined twins in which case one could not survive without the other. It therefore logically follows that if the appellant was acquitted on the primary charge of theft and/or theft by servant, then the secondary charge of giving false information would also automatically collapse.

31. In the case of **Peter Ochieng vs Republic (1982-1988) I KAR 832**, Hancox J. stated as follows:

“It is undesirable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of a trial as to the counts upon which it wishes to proceed. Usually, though not invariable, no more than 12 counts should be laid in one charge sheet. The others can be withdrawn under Section 87 (a) of the Criminal Procedure Code, which will entitle the prosecution to bring them again if necessary.”

32. At page 837; Hancox J stated:

“Moreover, the possibility of embarrassment and prejudice to the defence cannot be excluded when there are numerous counts because of the danger of the assumption that because the accused faced many charges, there must be some substance in some of them.”

33. In the instant case, even though the counts in the charge were only 5 and not 12 as envisaged in the above quoted authority, I cannot help but find that the trial court assumed that because the appellant faced many counts, he must have been guilty of at least one count and this explains why despite overwhelming evidence of robbery and her own doubts as to whether or not a colossal amount of money was given to the appellant in the form of cheques, the trial magistrate still went ahead to convict the appellant on count 5.

34. In a nutshell, the trial court blew hot and cold on the issue of the Kshs. 2.3 million thereby giving a judgment that was contradictory, by finding the appellant not guilty of the primary charge and convicting him on the “twin sister” charge.

35. As I have already stated in this judgment, I find that the charge of giving false information was not proved to the required standards.

36. In the case of **Mbogo Samuel Mungai vs Republic Nakuru High Court Criminal Appeal No. 57 of 2004**, it was held:

“To constitute an offence of giving false information as defined in Section 129 of the Penal Code, the giver of that information must personally be knowing or having reason to believe that what he is reporting is false. If he is convinced that the information is true, and after investigations it is found that the information is factually incorrect, the charge of giving false information cannot be sustained.”

37. In the instant case, the appellant made a report to the police that he had been carjacked and robbed. He presented himself to the police in the company of the two witnesses who had reportedly rescued him from the scene where he had been abandoned by the robbers. One of the witnesses to the robbery, one Samuel Nyakundi even recorded a statement over the said attack. The appellant sustained injuries in the robbery incident and the police issued him with a p3 form which was duly filled and produced in court as Defence Exhibit 1 together with the treatment notes. PW4 testified that the appellant appeared to be in pain when he saw him after the robbery incident.

38. The police officers who received his report were categorical that they did not investigate the robbery incident. PW5 stated that after investigating certain bank accounts, he simply concluded that the robbery was a cover-up for the theft of the money held in the accounts. PW6 merely ordered for the booking of the robbery report in the OB and the recovery of the appellant's motor vehicle from the scene of the robbery. It is worthy to note that the ropes that the appellant stated that he was tied with during the robbery were still inside the car at the time of its recovery. I find that the police in this case abdicated their duty to the appellant as a citizen of this country to fully investigate the robbery report with a view to bringing the culprits to book but instead rushed to make unsubstantiated conclusions that the robbery report was a cover up the crime of theft.

39. In the light of the evidence on record, I find that the charge of giving false information was not proved beyond reasonable doubt and that the trial magistrate erred in convicting the appellant without sufficient evidence. If anything, I find that the appellant provided overwhelming evidence pointing to the fact that he had been robbed.

40. I therefore wholly agree with the submissions of Mr. Kerario counsel for the appellant that the conviction on the 5th count was not supported by cogent evidence capable of sustaining it.

41. Consequently, I find that the conviction on count V was unsafe and I accordingly quash it and set aside the sentence. The amount paid for the fine being Kshs. 100,000/= shall be refunded to the appellant.

Dated, signed and delivered in open court this 12th day of May, 2016.

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Accused/Appellant for appellant
- Omwoyo court clerk