REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 76 OF 2012

Philip Muiruri Ndaruga.....,.....…….Appellant

Versus

Republic……..…….……Respondent

(Appeal against conviction and sentence in criminal case number 2743 of 2007, R. vs Philip Muiruri Ndaruga at Nyeri, delivered Hon. E. M. Makori, SPM on 3.4.2012).

JUDGEMENT

The appellant herein **Philip Muiruri Ndaruga** was charged with two counts of stealing by clerk contrary to Section 281 of the Penal.[1] The learned Magistrate convicted him on both counts and sentenced him to a fine of **Ksh. 100,000/=** on count one in default one year imprisonment and a fine of **Ksh. 50,000/=** on count two in default one year imprisonment.

The appeal is not opposed. Learned Counsel for the DPP Festus Njue concedes the appeal and in his written submissions argues that:-

a. ***That*** *the judgement rendered by the lower court was not signed.*
b. ***That*** *the typed and handwritten proceeds do not reveal compliance with section* ***200 (3)*** *of the Criminal Procedure Code.****[2]***
c. ***That*** *from the evidence, it is not conclusive whether the appellant had stolen funds or whether the deficiency was due to poor book keeping methods.*

Regarding the issue of the unsigned court judgement, I note with great concern that the judgement availed by the appellant is a hand written photo-copy of the lower courts judgement and that the entire record of the lower court was not availed to this court for this court to confirm the correct position. In fact on 2nd February 2016, I made an order that the Deputy Registrar avails the lower courts file but the file was not availed. I made a similar order on 1st March 2016 but again the lower court file was not availed. More disturbing is the fact that in spite of the two orders mentioned above, no explanation was offered nor is there anything in the file to show that any efforts were made to trace the lower court file. More disturbing is the fact that a court file can just disappear and no one bothers to offer any explanation.

In view of the foregoing, I am not able to determine conclusively whether or not the lower courts' judgement was signed as required under Section **169** of the Criminal Procedure Code.[3]

However, I find guidance in the words of **Sergon J** in *Hilary Ingwe Saywen vs Republic**[4]*** where citing ***Willy John vs R***[5] **the learned judge** held that failure to date and sign a judgment is a mere irregularity which can be cured by the application of Section **382** of the Criminal Procedure Code[6] and there was no prejudice to the appellant. But the failure to comply with the other requirements of the said section is fatal to the conviction. Thus, even if the lower courts file had been availed and it confirms that the lower courts' judgement was not signed, the said omission unlike the other requirements under section **169 (1)** cited above would be a curable defect under Section **382** cited above.

On the issue of failure to comply with the provisions of Section **200(3)** of the Criminal Procedure Code[7] In *Rebecca Mwikali Nabutola vs Republic*[8] the court stated that the provisions of Section **200 (3)** of the Criminal Procedure Code[9] are mandatory and that the record must as of necessity contain a fact that the succeeding magistrate did inform the accused person of the right to recall or re-hear any witness.

In *P H N v R* [10]this court, cited numerous authorities and held that failure to comply with the provisions of Section **200 (3)** would in appropriate circumstances render a trial fatally defective. **It is important to reproduce the provisions of Sections 200 (3)** of the Criminal Procedure Code[11] below:-

> *(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of the right.*

Justice Dulu in the case of *Anthony Musee Matinge vs Republic*[12]stated as follows:-

> *"The above provisions of law are couched in mandatory terms. It is the accused person, and not the advocate who must be informed by the court of the right to re-summon witnesses. He is also the person to state whether or not the case should proceed without recalling witnesses. It is not his advocate to do so on his behalf. In our present case, there is no record that the appellant was informed of his right to recall witnesses. Nor is there a record that he elected not to recall witnesses. His advocate could not respond for him. The response has to be that of the accused. The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality."*

I note from the record that there is nothing to show that that the appellant was explained of his rights under the above section. I however note that his advocate in the lower court addressed the court and expressed the desire to have the case start *de novo* while the prosecution submitted that he desired the case to proceed from where it had stopped and the court ruled that the case would start *de novo* and it thus commenced afresh. Thus, save for the omission by the court to expressly inform the appellant of his rights under the above section, the case commenced afresh. As stated above failure to comply with section **200 (3)** cited above would in appropriate circumstances render a trial fatally defective.

Appropriate circumstances would in my view be where the accused was prejudiced or where the interests of justice so require. To appreciate the above principle it is important to understand the meaning of the expression "*where the interests of justice require it* and where it is not likely to cause *an injustice to an accused person."* The phrase *"in the interests of justice"* potentially has a broad scope. It includes the right to a fair trial, which is a fundamental right of the accused.[13]

The question that follows is whether the trial was fair. As stated above, the case commenced afresh and all the witnesses were cross-examined and re-examined. I find nothing to show that the appellant was prejudiced by the courts failure to explain to him his rights under Section 200 (3) of the Criminal Procedure Code.[14]In any event, the trial commenced afresh, and all the witnesses were recalled, hence, no prejudice at all can be said to have been occasioned to the appellant.

The third issue is whether the prosecution tendered sufficient evidence to support the charges. I have carefully evaluated the evidence tendered in the lower court and the submissions by counsel for the DPP and I am persuaded that this is a case where the appellant ought to have been acquitted on both counts

because the offences were not proved as required and the evidence tendered did not meet the required standard of prove in criminal cases and on that ground alone, the appellant ought to have been given the benefit of doubt and acquitted.

The South African case of *Ricky Ganda vs The State*[15]provides useful guidance. In the said case it was held:-

> *" .....The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt"*

To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[16] In 1997, the Supreme Court of Cananda in *R vs Lifchus**[17]*** suggested the following explanation:-

> *"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. ……the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.*
>
> *A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.*
>
> *Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt...."*

In the present case and after carefully considering the defence and prosecution evidence, I find that there were reasonable basis for creating reasonable doubts as to the guilty of the appellant. It is alleged that the circumstances giving rise to the charges in question arose from some audit queries. From the evidence on record, the possibility of the alleged loss (if any) having been caused by poor book keeping methods cannot be ruled out. The basis of the complaint was that a loss or short fall was discovered after auditing was done. No evidence was tendered alleging false entries, fraud or deliberate omissions. No fraudulent transactions or entries were alleged. Failure to balance books of accounts can be occasioned by several reasons. It incumbent upon the prosecution to adduce cogent evidence irresistibly pointing to the offence of theft by a clerk by showing that the amounts in question were received by the appellant as clerk, that he never entered it in the books as required and that he stole or could not account for the same.

The evidence tendered does not support the offence of stealing, and further the necessary *mens rea* and *actus reus* were not proved. It is was alleged that the appellant admitted the alleged loss in writing. Such an admission, in my view can only be used in a civil claim subject to the available defences but cannot form the basis of a criminal conviction.

It is a cardinal principle of criminal jurisprudence that *mens rea* of the accused persons is very much essential ingredient to prove the guilty against the accused. Hence from the evidence on record, it is clear

that the criminal intention to steal by clerk was not established.

Mens rea or criminal intent is the essential mental element considered in court proceedings to determine whether criminal guilt is present while *actus reus* functions as the essential physical element. These two elements, Latin terms for *'culpable mind'* and *'culpable action'* respectively, are required to establish the guilt of a defendant. The essence of criminal law has been said to lie in the maxim *'actus non facitreum nisi mens sit rea.'* There can be no crime large or small, without an evil mind.[18] It is therefore a principle of our legal system, as probably it is every other, that the essence of an offence is the wrongful intent, without which the offence cannot exist.[19] I have evaluated the evidence tendered by the prosecution in the lower court and I am persuaded that the same does not disclose a guilty intent on the part of the appellant.

Thus, ingredients of the offence facing the accused were never proved at all. In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in *Re Winship*[20] where the court stated:-

> *"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction……Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"*

The existence of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it was elegantly affirmed by the House of Lords in the celebrated judgement of **Viscount Sankay** in *D.P.P vs Woolmington.**[21]*** The United States Supreme Court in the above cited case of *Re Winship* held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution.

It is paramount to quote the observations made by the Supreme Court of Indian in the case of *State of Punjab v. Jagir Singh*[22]:-

> *"A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged……..... In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts….."*

It is also trite law that an accused person should only be convicted on the strength of prosecution case and not on the weakness of his defence as it was held in the case of ***Sekitoleko vs. Uganda.***

Guided by the above authorities, and having evaluated the evidence adduced in the lower court and considering the sworn defence of the appellant, I am satisfied that the prosecution never discharged the burden of proof to the required standard. In so concluding I have not only subjected the evidence on record to close scrutiny but also I have examined the defence advanced by the appellant.

The upshot is that this appeal succeeds. I hereby quash the conviction and set aside the said sentence.

Signed, Dated and **Dated** at **Nyeri** this **18th** day of **July** 2016

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2] Cap 75, Laws of Kenya

[3] Ibid

[4] {2003} eKLR

[5]**{1953} 23 E.A.C.A. 509.**

[6] Supra

[7] Ibid

[8] {2012} eKLR

[9] Supra

[10][2016] eKLR

[11] Supra

[12] {2012}eKLR

[13] See the Prosecutor vs Vojislav Seselji- Case No. IT-03-67-PT

[14] Supra

[15] {2012}ZAFSHC 59, Free State High Court, Bloemfontein

[16]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary

[17]{1997}3 SCR 320

[18] Eugene J. Chesney, The Concept of Mensrea in the Criminal Law, 29 AM. Inst. Crim. L. & Criminology 627 {19381939}, Journal of Criminal Law and Criminology, Vol 29, Issue 5 January-February, Winter 1939

[19]Criminal Law, 9th Edition {1930} 287

[20] 397 US 358 {1970}, at pages 361-64, see also the more recent elaboration of the rationale of the principle in R VS Oaks 25 D.LR (4TH) 200 {1987} at pp 212-214

[21]{1935} A.C 462 at page 481

[22] {1974} 3 SCC 277