REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 10 OF 2016

REPUBLIC :: RESPONDENT

VERSUS

PEREZI WANGECHI MARUNGO:::::::::::::::::::::: APPELLANT

JUDGMENT

(Arising from the Judgment and Sentence dated 3rd April, 2014 in Thika Criminal Case No. 2534 of 2011 presided over by Hon. M. W. Mutuku, Ag. Senior Principal Magistrate)

A. INTRODUCTION

1. The Appellant herein (Perezi Wangechi Marungo) was initially arraigned before the Senior Resident Magistrate at Thika in Criminal Case No. 2534 of 2011 on 02/06/2011 charged with a single count of obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the offence as originally charged were that on 14/03/2010, in Thika town, Thika Municipality of Kiambu county, with intent to defraud, obtained from Boniface Kiragu Mweru the sum of Kshs. 3,700,000 by falsely pretending that she was in a position to sell to Boniface Kiragu Mweru three containers loaded with computers, a fact she knew to be false.

2. On 06/07/2010, the Prosecutor applied to substitute the charge sheet. The application was granted and he introduced a new charge sheet that had five counts – all of obtaining by false pretences. In all counts the victim was identified as the same person: Boniface Kiragu Mweru.

3. As enumerated later on this judgment, yet again on 28/10/11, the Prosecutor applied yet again to amend the charge sheet. After a contested application in the Prosecution's favour, the new charge sheet was substituted which retained the five counts of obtaining with false pretences. What changed from the charge sheet read to the Appellant on 06/07/2010, were the details of the place where the alleged offences (obtaining) took place. I will return to this later on.

4. In any event, after a fully-fledged trial, the Appellant was convicted on all five counts and sentenced to two years imprisonment. Aggrieved, the Appellant has preferred this appeal enumerating four grounds of appeal as follows:

a. That the Learned Magistrate misdirected herself in fact and law by convicting the Appellant against the weight of the evidence adduced by the Prosecution.

b. That the Trial Court deprived the Appellant of his (sic) constitutional right to a fair trial when it failed and/or refused to consider that the claimant (PW2) had subverted the course of justice by deliberately altering and falsifying evidence when he recorded a second statement with the Thika

Police Station. This act, which was committed after PW1 had already testified but before the complainant had taken the witness stand, struck at the court proceedings in a fundamental way because the false details included in the second statement significantly influenced the conviction of the Appellant.

c. In consequence of (b) above the Learned Magistrate misdirected herself in fact and law by not appreciating that the evidence of the Prosecution witness, PW2, was clearly tainted and the said witness could therefore not be considered a credible witness.

d. The Learned Magistrate misdirected herself in fact and law by not attaching requisite weight on the glaring differences in the two witness statements recorded by the complainant at the Thika Police Station and produced in evidence as Defence Exhibits 1 and 2.

e. Mr. Misati appeared for the Appellant on appeal and submitted orally. Mr. Kinyanjui appeared for the State and opposed the appeal. Mr. Misati combined the four grounds in his argument. All the four grounds are pivoted on the credibility of the testimony of the complainant (who testified as PW2) and whether, still in connection with the testimony of that witness the Appellant was accorded a fair trial. The State, on the other hand, is persuaded that the conviction was safe and the available evidence warranted it.

B. THE STANDARD OF REVIEW IN CRIMINAL APPEALS AND THE ISSUES FOR DETERMINATION

6. As a first appellate Court, I have both an opportunity and a duty to re-evaluate afresh the evidence adduced during the trial and determine for ourselves whether the evidence can sustain the conviction. I draw my matching orders in this regard from the case of ***Okeno v Republic*** **[1973] E.A. 32** where the predecessor to the Court of Appeal instructed:

> ***An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] E.A. 386 and to the appellate Court's own decision on the evidence. The first appellate Court must itself weight conflicting evidence and draw its own conclusions. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's Court's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.***

7. This is the *de novo* review standard I will now proceed to deploy in this appeal. I will first rehash the evidence presented in Court. In my view, the two real issues for determination are the following:

a. First, whether the Prosecution evidence seen in its totality – and especially in light of the seeming inconsistencies and contradictions in the evidence from Boniface – is sufficient to establish that the case made out against the Appellant was proved beyond reasonable doubt.

b. Second, whether the recording of a second witness statement by Boniface in the middle of the trial – and without providing a copy of the new statement to the Defence at the earliest instance rendered the trial unfair and warranting a reversal of the conviction.

8. I will approach the evidence and the law with these two issues in mind. Since the two issues are intricately entwined, I will pursue them in a similarly interwoven fashion.

C. THE PROSECUTION CASE

9. At first blush the narrative emerging from the testimonies of the Prosecution witnesses seems straightforward enough. The Appellant and the two co-victims of the crime (a mother – named Lydia

Mweru Kiragu ("Lydia") – and her son – named Boniface Kiragu Mweru) worshipped together at Elijah Kagiri PCEA Church in Thika. Apparently, they had worshipped together for a long time and then the Appellant seemed to have left at some point only to rejoin the congregation later on. It was in her second sojourn at the congregation that the Appellant struck a close relationship with Boniface. In turn, Boniface would (re)introduce her to his mother, Lydia. The Accused had approached Boniface with a business proposal: she had a consignment of twenty computers and two laptops that she wished to sell. Was Boniface interested in buying them at a whole sale price of Kshs. 300,000?

10. After consulting with Lydia (his mother), who, in any event was to finance the purchase, Boniface agreed to the deal. Lydia, through Boniface, paid the Appellant the amount in two instalments of Kshs. 150,000 each. The consignment was equally delivered in two batches. Everybody was happy with the transaction. Lydia and Boniface used the computers to set up a Cyber Café in Ruiru town; and the Appellant went her merry way away.

11. After a short stint, the Appellant re-appeared on the scene with another business proposal; a bigger one. She had imported, Boniface tells the story, three containers full of computers. These were held at the Port of Mombasa. She was selling them on wholesale price as is for Kshs. 2 Million each. However, she was willing to strike a bargain with Boniface and sell each container-full a sum of Kshs. 1.5 Million each. Would Boniface be interested?

12. Again, after consulting the mother, who, again, was to finance the deal, the answer was yes – despite some early misgivings owing to the size of the deal and the lack of ready customers. Apparently, some persuasion on the part of the Appellant – including a promise to introduce Boniface to ready customers – won the day. The Appellant had said she needed Kshs. 3.7 Million right away to clear the containers from the Port. So, on 14/04/2010, Lydia withdrew Kshs. 3.7 Million from her bank and gave it to Boniface for onward transmission to the Accused. Boniface says in his testimony that he transmitted the amount to the Accused the following day at Blue Springs Hotel in Ruaraka. The promise was that the containers would be cleared in about ten days.

13. The plot thickened. According to Lydia's testimony 05/05/2010 – twenty days later – the computers had not arrived. The Appellant approached Boniface and told him that she needed a further Kshs. 300,000 "for purposes of a bribe for a port official who was going to release the containers." That statement is straight from the sworn testimony of Lydia. Persuaded by this story, she duly withdrew Kshs, 300,000, gave it to Boniface – who, the testimony says – dutifully turned it over to the Appellant. Unfortunately, no computers were delivered even after this extra effort.

14. The Appellant, apparently, disappeared from the scene only to reappear on 19/08/2010 – some three months later. Lydia says the Appellant called her on the phone and said that she had been involved in an accident. She had scars and injuries to prove it according to Lydia. Hence, it was apparently easy for the Appellant to persuade Lydia to part with Kshs. 500,000 more. This was for "late clearance fees for the containers." The pattern was the same: Lydia withdrew the money, gave it to Boniface who, in turn, gave it to the Appellant. As in previous occasions, the Appellant placed a call to Lydia to confirm receipt of the funds.

15. Still, the three containers or their consignment of goods were not delivered. Around 16/09/2010, the Appellant, again, demanded Kshs. 300,000 "to give to a port official." Again, the mother withdrew the sum, conveyed it to the son who, in turn, transmitted it to the Appellant.

16. Finally, on 04/1/0/2010, the Appellant demanded a further Kshs. 321,000 "for transport charges." This was conveyed to her in the same medium – through Boniface. By this time both mother and son had begun suspecting some mischief was afoot but they were desperate.

17. After this last payment, the Accused apparently cut off communication with Lydia and Boniface. When she did pick up her calls, she was rude and dismissive. It was only then that it dawned on Lydia and Boniface that they had apparently been conned. They then enlisted the help of the police which eventually led to the charges the Appellant faced in the lower Court.

D. EVALUATION OF THE PROSECUTION CASE

18. This narrative is culled from the testimony of Lydia who testified as the first witness for the Prosecution. In material regard, the testimony remained unshaken – if incredulous for its seeming naiveté – after cross-examination. This narrative was, in every material regard, corroborated and stabilized by the testimony of Boniface who testified as PW2. The dates matched; the details corresponded and the figures tallied. That remained true until the evidence that emerged from cross examination – and only if one ignores the circumstances and context in which Boniface provided his testimony.

19. First, it emerged that after Lydia had given her testimony and before Boniface could give his testimony, the Prosecution did two things which seen together raise a flaming red flag. First, they sought to amend the charge sheet- a second time - to ensure that the charge sheet matched the testimony that Lydia gave. The Prosecution's application was based on section 214(1) of the CPC. The Prosecution's application to amend the charge sheet was strenuously opposed by the Defence but ultimately allowed. Seen in isolation, the Learned Trial Magistrate was probably right in permitting the amendment. The law permits the Prosecution to amend the charge sheet at any time provided that an opportunity is afforded to the Defence to recall any witnesses and cross-examine them. This opportunity was afforded to the Defence here.

20. There is a second limit to this right to amend the charge sheet: it must meet the constitutional test of fairness. Like all other procedures in the Criminal Procedure Code, the Prosecution cannot wield the right to amend charges like a secret weapon to ensure that the Defence is kept guessing about the case it is facing or otherwise make a mockery of the right to fair trial. The right to amend must be exercised in a way that it does not offend the outer limits of the right to a fair trial.

21. This second aspect was implicated in this case. It became an issue because of what happened after the amendment. The Investigating Officer, then, proceeded to re-record the statement of Boniface – a key Prosecution Witness – in an apparent bid to ensure that recorded statement matched that of PW1 (Lydia) who had already testified.

22. Worse still, the Prosecution did not avail the changed witness statement to the Defence as by law required. It is only the midst of cross-examination of Boniface that it occurred to the Defence that he had, in fact, recorded two statements only one of which was supplied to the Defence.

23. Again, it may be possible, in another case to excuse or explain a second statement recorded and signed by a Prosecution witness where the details changed are pettifogging merely to correct some venial discrepancies. However, such was not the case here by any measure or standard. I will highlight two changes surreptitiously introduced by the new Statement and only after PW1 (Lydia) had already testified:

a. Consider the opening statement of the two statements:

First Statement:

> "I am the above named Kikuyu Male adult age 33 years single and a businessman within Thika town. I do remember on the month of April 2010. A lady known to me for four years back approached me with a business idea of selling computers. The idea sounded nice and promising and I ordered some twenty computer machines from her at a cost of three hundred thousand (300,000) …"

Second Statement:

> "I am the above named male aged 33 years married with one wife and one child. I wish to state as follows. During the month of March the year 2010, a lady I had known back in the year 2006 and used to attend the same church back then, resurfaced and after a lengthy discussion told me that she shifted to Nairobi and works there with a forwarding and clearing agents. She told me that mostly

she ferries goods from Mombasa to Nairobi and in most cases deals with electricals and computers…"

24. And then, there is, perhaps, the most telling paragraph – the one that details how the bulk of the money was paid:

First statement:

> "She claimed that the one and half million we had given her to facilitate for the single container were not enough and it was either we take the three containers or we loose everything…..She came to my home after two days accompanied by a man claiming to be her personal doctor and that he would help us secure the cargo without husslesince he was an influential man at the port but she demanded that if we want his help we had to part with five million kenya shillings. For fear of losing our money, I secretly gave the money without mother knowing hoping that I would surprise her when the goods arrive…"

Second statement:

> "She said that the three containers were being dispatched at a total cost of six million Kenya shillings (6 M Kshs) but she was capable of negotiating them at one million five hundred thousands (1.5 M kshs)….On April the 14th 2010, my mother and I went and withdrew some three hundred thousand Kenya shillings (3.7 M Kshs) and on 15th April, 2010, I took the cash to Peris at the Blue Springs Hotel, Thika Road. After receiving the money she called my mother and confirmed that she had received the money."

25. The most striking thing about the two statements is that the second statement matches the details given by Lydia in her testimony. It becomes a lot less impressive when one discovers the statement was, in fact, written after Lydia's testimony. It becomes even less impressive when considered against the first statement recorded more than a year earlier – on 20/10/2010 – which seems to have a very different narrative.

26. Among the two biggest differences in the two narratives are, first, how much was, in fact, allegedly paid to the Appellant and in what instalments. The first statement implies that Lydia and Boniface jointly gave the Appellant Kshs. 1.5 Million at first and then Boniface secretly gave her Kshs. 5 million without his mother's knowledge. The second statement matches Lydia's testimony narrating that the first instalment was Kshs. 3.7 Million which was withdrawn by Lydia and given to Boniface to deliver to the Appellant.Then, there is the very pregnant allusion to the fact that Boniface gave the Appellant the money "secretly". This significantly contradicts the Prosecution narrative of how the money was paid to the Appellant. That, on its own, in my view rains reasonable doubts on the Prosecution narrative and would be enough to invalidate the conviction.

27. The State argues, as it did in the Court below, that the differences between the two statements are minor and that they did not prejudice the Appellant. As I have shown above, I need not dwell on that argument. The difference between whether Boniface is 33 years old and single (Statement 1) or 33 years old and married with one child (Statement 2) might be an insignificant detail – although a few of such anomalies would lead to the conclusion that the witness is an unreliable one. However, the difference between paying Kshs. 1.5 Million and then another Kshs. 5 Million on the one hand (Statement 1) and paying Kshs. 3.7 million on the other hand (Statement 2) is anything but minor. Similarly, the difference between giving the Appellant Kshs. 5 Million in the house on the one hand (Statement 1) and giving the Appellant Kshs. 3.7 Million at Blue Springs Hotel in Ruaraka (Statement 2) is definitely significant.

28. It is common in criminal (and even civil) cases that there will be differences between the written statement of a witness and their viva voce testimony. It is, perhaps, less common that there will be differences between two written statements by the same witness. It is decidedly a lot less common for there to be material differences between two statements by the same witness. Indeed, I believe that the proper approach to evaluating evidence and witness credibility is that, first, an explanation must be given

for the need to record a second statement in any case. Second, even where a plausible explanation is given for the second statement, where the evidence disclosed in the second statement materially differs from that in the first statement, the Trial Court must advert its mind to the variance and come to a reasoned conclusion whether the evidence of that witness, seen as a whole, is reliable or not.

29. In my view, the Trial Court's evaluation of the contradictions in the two witness statements amount to a misdirection. To her credit, the Learned Trial Magistrate adverted her mind to the contradictions in the two statements and evaluated their effect on the ultimate credibility of the witness. However, in my view, the Learned Trial Magistrate's apprehension of the facts is so grossly unshackled to what seems to be plainly true that it amounts to a misdirection. This is what the Learned Trial Magistrate had to say about the differences in the two statements:

The witness, in cross examination, identified his two statements recorded at the police station. In re-examination, he confirmed that the only difference between his two statements was that the first statement did not bear the date and venue where the money was paid, but the contents of the statements were materially the same. Kiragu's evidence was unshaken and maintained that he had given the money in question based on trust.

30. It seems that the Learned Trial Magistrate accepted Boniface's view that the differences between the two statements were minor and only involved dates and the venue where the money was paid. However, as I have demonstrated above, this is plainly not so. The differences between the two statements, and, in turn the difference between Boniface's viva voce evidence and his first statement to the Police are so material that the only proper conclusion that a Court properly seized of the facts can reach is that the witness was not reliable and that his version of the events is probably untrue.

31. The bottom line is that, given the context and circumstances, the Appellant's counsel is right: the testimony of Boniface was wholly unreliable and was unsafe to support the conviction of the Appellant. It could not, in the face of these unexplained contradictions persuade a reasonable tribunal beyond reasonable doubt that the Appellant had taken the amounts described in the charge sheet by false pretences. While the State is right that there is no legal requirement for corroboration of material facts in order to convict an accused of a criminal offence, here, without any other independent evidence to support the evidence of PW1, the circumstances warrant the conclusion that significant doubts are left about the guilt of the Appellant owing to the conduct of the Prosecution and the material contradictions in the evidence of PW2.

32. For good measure, it is important to add the following. The conduct of the investigators in this case fell far short of the required standard. Re-recording a witness statement and changing it in such material ways as to completely alter its meaning reeks of fraudulent conduct. As I have demonstrated above, to claim that the only differences between the two statements are the dates and venues where money was paid is blatant mischaracterization. Even a cursory glance of the two statements reveals that they are materially different.

33. In the context of a criminal trial, it renders the procedure unfair and, therefore, unconstitutional. Article 50 of the Constitution provides that "every accused person has the right to a fair trial which includes the right to have adequate time and facilities to prepare a defence" (Art. 50(2)(c)) and the right "to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence." Art. 50(2)(j)).

34. Under these constitutional rights, the State is under a continuing obligation to disclose all and any evidence it intends to use against an Accused Person. In this case, the State not only failed to disclose such information but connived to "doctor" it and actively keep it away from the Defence. Any conviction arising from such a process cannot be labelled as "fair" by any meaningful standard. The Trial Court ought to have found the trial process unfair and oppressive and refuse to convict on the tainted evidence. The statutory right by the Prosecution to amend charges cannot provide cover for the conduct revealed in this trial.

E. CONCLUSIONS AND DISPOSITION

35. It should be fairly obvious by now that I find the conviction wholly unsafe on two separate grounds enumerated above – (a) that the available evidence in the trial, seen in context, was insufficient to support a conviction on the offences charged and (b) that the procedure deployed here of amending the charge; recording a second witness statement for a Key Prosecution Witness; and failing to serve the re-recorded statement on the Investigators fundamentally tainted the trial process and rendered it unfair and oppressive on the Appellant, and hence, unconstitutionally defective and unsustainable.

36. In the circumstances, the appeal is allowed. Consequently, the conviction is set aside and the sentenced imposed is quashed.

37. Unless the Appellant is otherwise lawfully held, she shall be set at liberty forthwith.

Dated and delivered at Kiambu this 14th day of November , 2016.

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JOEL NGUGI

JUDGE