



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 65 OF 2014

RICHARD KIPTUM SAWE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction in Criminal Case No. 2682 of 2011

Republic v Richard Kiptum Sawe in the Magistrate's Court at Kapsabet by B. Limo,

Resident Magistrate dated 31st March 2014.)

JUDGMENT

1. The appellant was convicted for the offence of giving false information to a person employed in the public service contrary to section 129 (a) of the Penal Code. He was sentenced to eighteen months' imprisonment. The appellant has appealed against the conviction and sentence.
2. The particulars of the charge were that on the 6th May 2011 at Kapsabet Divisional Criminal Investigating Officer's office in Nandi County, by a letter dated 20th February 2011, he informed Mr. Samson Thoya, a Superintendent of Police, that Kenya Power and Lighting Account No. 2210270-03 which is assigned to the accused had been allocated to Ruth Chemeli, information he knew or believed to be false and which he knew would cause the arrest of Ruth Chemeli.
3. There are six main grounds in the petition of appeal: first, that the trial court failed to properly analyze the evidence on record, took into account extraneous matters, reached the wrong conclusion and occasioned a miscarriage of justice; secondly, that there was a variance between the charge and the evidence; thirdly, that the prosecution did not discharge its burden of proof to the required standard; fourthly, that the trial court shifted the burden of proof to the appellant; fifthly that the sentence was harsh and excessive; and, sixthly, that the learned trial magistrate ignored the written submissions of the appellant's advocate.
4. The State has contested the appeal. The case for the State is that the evidence tendered by the six witnesses proved the charge beyond reasonable doubt. The State submitted that the appellant knew or believed that the information he gave to Mr. Samson Thoya, a Superintendent of Police, was false. It was submitted that the evidence of PW1 was consistent and required no further corroboration. In a nutshell, the State submitted that the appeal lacked merit and should be dismissed.
5. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been careful because I have neither seen nor heard the

witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E.A 32, *Kariuki Karanja v Republic* [1986] KLR 190.

6. PW1 was Mr. Samson Thoya. He was a Superintendent of Police. He testified that he received a complaint from the accused's lawyers dated 2nd June 2011. The letter alleged that Kenya Power and Lighting (KPLC) Account No. 2210270-03 assigned to the accused had been allocated to Ruth Chemeli. He called Ruth Chemeli who led him to where the power meter is fixed. It was along Kapsabet-Chepterit road. He confirmed that meter No. 22106272 is installed on property known as Nandi/Chepterit/502 and not the one quoted by the accused. Ruth Chemeli also gave him a copy of her KPLC Electricity bill. She had been paying her electricity bills. Her address was P. O. Box 1000-30300 Kapsabet.

7. PW1 then tried to summon the accused but couldn't reach him on phone. He replied to the accused's lawyers vide a letter Ref. CID/C/CRI/6/6/VOLXI/319 dated 20th May 2011 explaining his findings. The advocates did not respond to his letter. He concluded that the accused had given him false information. He started looking for him. PW2, Police Constable Bartonjo arrested the accused on 18th August 2011.

8. PW3, Ruth Chemeli Bett is the proprietor of property known as Nandi/Chepterit/502. The title was cancelled as there is a pending succession cause. She was summoned by the D.C.I.O Nandi District. She was informed that the accused had lodged a complaint against her. The accused had alleged that she had forged his KPLC account number 2210270-03.

9. PW4, Kenneth Salasia worked for KPLC. On 22nd June 2011, he received a letter from the D.C.I.O Nandi requesting for information relating to account number 2210270-03. He checked in the system and confirmed that the account under inquiry was non-existent. The owner of the original account was still operating under Account No. 2210270-01. It was Zena Chepleting on plot No. 674/Nandi/Banja. As of the date of his testimony the account was still in the name of the original owner.

10. PW6 was the investigating officer. He established that Kenya Power Lighting and Company NO: 2210270-03 belonged to Zena Jeptepkeny and not the accused. He reached the conclusion that the accused made a false complaint to the police and against Ruth Chemeli. He knew the accused as he had arrested him before on other charges. Upon cross-examination, he said the accused did not give him power bills for the account. He said Ruth Chemeli disowned account NO. 2210270-03. He said he was investigating Account No. 2210270-03. He stated that the owner of the account is the proprietor of parcel No. Nandi/Chepterit/502. He testified that the accused was not cooperative in the investigations. He said the letter from the accused's lawyers did not indicate the contract or account number.

11. I have then examined the defence tendered by the accused. He testified as follows-

"I lodged a complaint against the D.C.I.O through the D.P.P for protecting Ruth Chemeli who forged my Electricity Account No. 2210270-03. I have a letter from the D.P.P. I went to Kenya Power and Lighting Company and established that my electricity pay bill No. 2210270-03 no longer belongs to me. Instead the same was allocated to Ruth Chemeli. I don't know how my name was changed. I made a complaint of forgery against Ruth Chemeli the D.C.I.O's office. I want action to be taken against her. I don't have any document to show that Ruth Chemeli forged my record at Kenya Power and Lighting Company. I reported the matter to police and later I was arrested."

12. The key issue to be decided in this appeal is whether the prosecution *established* that the appellant *knowingly* gave false evidence to an officer in the public service. It is not disputed that Mr. Samson Thoya was a Superintendent of Police, an officer in the public service. In his unsworn evidence, the appellant stated that he went to Kenya Power and Lighting Company. He established that his electricity account No. 2210270-03 had been allocated to Ruth Chemeli. He did not know how his details were changed. He then made a complaint against Ruth Chemeli at the D.C.I.O's office.

13. The standard of proof in a matter of this nature was well stated in *Mbogo Samuel Mungai v Republic Nakuru*, High Court Criminal Appeal 57 of 2004 (unreported). The court held as follows-

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

14. In *Michael Wamwongo Karongo v Republic*, Nairobi, High Court Criminal Appeal 631 of 2010 [2013] eKLR, the court held that in a charge under section 129 of the Penal Code *“what matters is what the reportee believes at the time of making the report. What the police may find to be the correct position in the course of their investigations is immaterial”*. See also *Kepha Moses Mogoi v Republic* Nairobi, Court of Appeal, Criminal appeal 99 of 2013 [2014] eKLR, *Daniel Mutungi v Republic*, Mombasa, High Court Criminal Appeal 171 of 2004 [2006] eKLR.

15. The architecture of the prosecution’s case was this: that the appellant knew the information he gave to the Mr. Thoya was *false*. I have studied the letter dated 2nd June 2011. It was from Amasakha & Company Advocates, counsel for the accused. It was addressed to the D.C.I.O Kapsabet Police Station claiming that Ruth Chemeli, the proprietor of property known as Nandi/Chepterit/502 had fraudulently transferred to herself the accused’s electricity account. The letter makes no reference to the account number. The letter specifically asked the police to *charge* the *suspects* in a court of law.

16. In court, the accused said his electricity account is number 2210270-03. PW4, an employee of KPLC, checked in the system and *confirmed* that the account number 2210270-03 was *non-existent*. The accused did *not* produce any bill showing that that was his account. He said he had *no* document to show Ruth Chemeli forged the account details. Fundamentally, the account was *not* assigned to Ruth Chemeli. Ruth’s account is number 2210627. Infact, the primary account number 2210270-01 belonged to another person, Zenah Jeptepkeny.

17. I have thus reached the inescapable conclusion that KPLC account number 2210270-03 was non-existent. It could not belong to the accused or Ruth Chemeli. There was *no* basis *at all* for the complaint made by the accused to Mr. Thoya. The allegation that the accused had “established from KPLC” that Ruth Chemeli had fraudulently transferred the account was a figment of his imagination. It was discounted by the evidence of PW3 who worked at KPLC. I am satisfied that the accused *knew* the information was *false*. He did not even have a utility bill to show he was ever allocated that account. It follows as a corollary that the accused *personally knew or had reason to believe that what he was reporting was false*.

18. The burden of proof was discharged by the prosecution by the evidence of PW1, PW3 and PW4. That onus never shifted to the appellant. I am satisfied that the accused gave false information to a person employed in the public service contrary to section 129 (a) of the Penal Code. There was no variance between the charge sheet, the particulars or the evidence.

19. The offence carries a sentence of up to three years imprisonment. The accused was sentenced to serve eighteen months’ imprisonment. Sentencing is at the discretion of the trial court. Considering the nature of the offence, I cannot then say the sentence was draconian. I cannot say in this case that the learned trial magistrate *acted upon some wrong principles or overlooked some material factors*. I thus decline the invitation to review the sentence.

20. In the result, I find that the appeal is devoid of merit. I uphold the conviction and sentence handed down by the learned trial Magistrate. The entire appeal is dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 16th day of July 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant (in person).

Ms. R. N. Karanja for the State.

Mr. J. Kemboi, Court clerk.