



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 201 OF 2014

NANCY KABURA NDEGWAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellant **NANCY KABURA NDEGWA** has filed this appeal challenging her conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts. The appellant was first arraigned in the lower court on 30/8/2012 on a charge of **STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE**. The particulars of the charge were given as follows

“On the 29th day of June, 2012 at Njoro District within the Rift Valley Province stole one mobile phone make Nokia C101 and cash Ksh 10,000/= all valued at Ksh 15,000/= the property of PHYLLIS WANJIRU GITHINJI”

The appellant entered a plea of ‘**Not Guilty**’ to the charge and her trial commenced on 5/10/2012. The prosecution led by **INSPECTOR NYONGESA** called a total of four (4) witnesses in support of their case.

The complainant **PHYLLIS WANJIRU GITHINJI** testified as **PW1**. She told the court that she was a student at Egerton University. On 29/6/2012 the complainant was in her room when her two friends ‘**NANCY KABURA**’ [the appellant] and **AGNES WAITHERA KINYUA** [who testified as **PW3**] came to her room together. **PW3** requested the complainant to allow her utilize her (complainant’s) mobile phone in order to browse the internet. The complainant gave **PW3** her phone. She then left to go and take a shower leaving appellant and **PW3** making tea in her room. When the complainant returned from her shower she found only the appellant in her room. **PW3** had already left. The appellant also left the room and the complainant remained dressing. She then checked for her mobile phone and found it missing. She asked her two friends if any of them had taken the phone but they both denied it. The complainant then reported the loss of her mobile phone to **PW2 SAMSON OTIENO** who was the University Security Officer. **PW3** recorded her statement before the University Security but the appellant had already left to her rural home in Murang’a for the mid-term break.

The appellant returned to the University on 2/7/2012. She still insisted that she had not taken the complainant’s phone.

PW2 SAMSON OTIENO AYAMO told the court that he works as a Security Officer at the Egerton University. He confirms that the complainant made a report to him about the missing phone. He

interviewed both the appellant and **PW3** who were said to have been inside the complainant's room when the phone went missing but they both denied having taken said phone. On 4/7/2012 **PW3** received a parcel from G4S courier services. The parcel was addressed to Egerton University Security Department. The senders name was '**Julie Njeri Kamau, Box 520**' **PW2** opened the envelope and inside found a Nokia C101 phone. Accompanying the phone inside the envelope was a note which read as follows:

"I am Kennedy. This phone was sold to me by Agnes, short and dark. I just need 3k"

The phone, the note and the envelope from G4S were all produced in court and marked as exhibits. **PW2** called the complainant who identified the phone as hers. **PW2** handed the mobile phone back to the complainant and she signed to confirm receipt of the same. Her sim card was no longer in the phone so the complainant purchased a new sim card and continued to use the phone.

One week later on the complainant went to Njokerio Centre to make a withdrawal from the Equity Agent using her phone. Before the theft of the phone she had Ksh 10,000/= in her account but on this day she found there was a balance of only Ksh. 145.00. The complainant enquired from Equity Bank and was informed that a withdrawal of Ksh 9,500/= had been made from her account at Runama Agent in Murang'a. The complainant obtained a copy of her bank statement from Equity Bank and it showed that on 30/6/2012 one '**George Githinji**' an agent in Murang'a withdrew Ksh 9,500/= leaving a balance of only Ksh 145/=. The bank statement was also produced as an exhibit **P. Exb 3**. The complainant immediately suspected appellant because the appellant had travelled to her rural home in Murang'a during that period. The matter was reported to police. The appellant was arrested and charged with the theft of both the mobile phone and the cash.

At the close of the prosecution case the appellant was ruled to have a case to answer and was placed onto her defence. She categorically denied having stolen either the mobile phone or the money. On 31/1/2014 the learned trial magistrate delivered his judgment in which he convicted the appellant of the offence of stealing as charged. After listening to mitigation the court sentenced the appellant to serve a term of six (6) months probation and in addition ordered that the appellant compensate the complainant the sum of Ksh 10,000/= stolen from her Equity Bank account. Being aggrieved by both the conviction and sentence the appellant filed this present appeal. **MR. WANDAKA** Advocate represented the appellant and made submission in support of the appeal. **MS RUGUT** learned State Counsel opposed the appeal and urged the High Court to confirm both the conviction and sentence of the lower court.

As a court of first appeal I have an obligation to analyse and re-evaluate the evidence adduced before the lower court and to draw my own conclusions based on that evidence. The charges contained two main issues for determination

1. The theft of the mobile phone
2. The theft of cash Ksh 10,000/= from the complainant's Equity Bank account.

I propose to deal with each element separately.

On the first issue of the complainant alleged that her mobile phone a Nokia C101 was stolen from her room at the Egerton University on 29/6/2012. The complainant was unable to state with certainty who stole her phone. All she was able to say is that she left her two friends the appellant and **PW3** in her room whilst she went to bathe. The complainant left **PW3** whom she had permitted to use her phone to browse the internet holding said phone. When the complainant returned from her bath **PW3** had left the room. Only the appellant was there. At that point the complainant did not check to confirm that her phone was still in her room. It is only after the appellant left that the complainant noticed that her phone was missing. Thus it is not clear at which point in time the phone went missing. Was it after **PW3** left the room or was it after the appellant left the room. Indeed the last person whom the complainant saw holding her phone was **PW3**. She was a key suspect and the court is not told why the police did not charge **PW3** with any offence.

The next time this phone was seen was when a parcel sent through G4S courier services and addressed to Egerton University Security was received by **PW2**. Inside that parcel was a mobile phone. The complainant identified the phone as hers. It is not clear how the complainant determined that was her stolen phone. She had no document to prove ownership as she stated that the receipt got lost. The complainant stated that her phone had a scratch mark on the right side. It is not clear from the record whether she showed the trial court any such scratch mark on the phone exhibited in court. Be that as may despite this absence of proof of ownership the court will proceed on the basis that the recovered phone did actually belong to the complainant.

PW2 told the court that the mobile phone arrived in an envelope from G4S courier. The senders name was identified as **'Julie Njeri Kamau of P. O. Box 520 Nakuru Tel 0704532560'**. I have anxiously perused carefully the testimony of **PW4 CORPORAL ANNE NDEGWA** who investigated the matter. At no time did she bother to go to G4S to find out who sent the parcel. The officer made no attempt to investigate the name, box number or the telephone contact of the sender. In my view this was sheer laxity on the part of this officer. It is very easy to trace a person using a mobile number through the service provider.

Likewise it would have been fairly simple to go to G4S officers and make enquiries on who had sent the phone. I have no doubt that those records were available. Indeed under cross-examination as Page 19 Line 6 **PW4** admits that

“My statement doesn't mention investigating the theft of the phone”

It is apparent that **PW4** made absolutely no effort to enquire about the theft of the phone or who sent it back to Egerton. There is no link shown to exist between this Julie Kamau and the accused

PW2 told court that accompanying the phone in the same envelope was a note. The note purportedly written by one **'Kennedy'** claimed that **'Agnes'** had sold him the phone. Agnes is **PW3**. Police did not bother to investigate this angle. No link is shown to exist between this **'Kennedy'** and the appellant. No analysis was ever done of the handwriting on the note to compare it with appellant known or sample handwriting.

I note that the prosecution did on 19/4/2013 make an application to compel appellant to supply sample handwriting. Counsel for the appellant opposed the application. The learned trial magistrate on 2/5/2013 made a ruling in which he disallowed the application. This in my view was the correct ruling because it is clear that the application was a mere afterthought – the prosecution were grasping at straws and trying to investigate the case whilst the trial was already in progress. In any event the prosecution had the option of utilizing known writings of the appellant which I am sure could have been readily available from the University. **PW4** did not bother to pursue this option. I find that there is absolutely no evidence to link the appellant to the recovery of the mobile phone. If anything the evidence of recovery squarely points at **PW3** and the mysterious **'Kennedy'** as the culprits.

In his judgment at Page 8 Line 5 states

“Agnes [PW3] having been given the phone by Phyllis [complainant] when she went into the shower could have taken the cell phone because Phyllis did not check for it until a few minutes after Nancy [the appellant] had left. She could then have sold it to Kennedy who perhaps was coincidentally travelling to Murang'a and withdrew the money there ...”

With respect to the learned trial magistrate this is pure innuendo and supposition. There is no evidence to prove the identity of this **'Kennedy'**. There is nothing to prove that **'Kennedy'** and the accused knew each other.

A court ought not to make findings based on its own imagination of how events could have occurred. Findings must be based on tangible evidence adduced in court. In any event this narration by the trial

court still places **PW3** and not the appellant as the suspect in the theft of the phone.

I find that there is absolutely no evidence to prove that it was appellant who stole the complainant's phone. Nobody saw her take the phone and it was not recovered on her. Indeed in his evidence **PW2** stated that when he called the number it was '**Kennedy**' who responded. No attempt was made to find this '**Kennedy**'. The decision to charge the appellant is based on mere suspicion and it is well known that suspicion alone cannot form the basis for a conviction in law.

I will now proceed to analyze the evidence with a view to determining if it is proved that it was the appellant who withdrew and stole Ksh 9,500/= from the complainant's Equity Account. After the phone was returned to the complainant by the Security Officer **PW2**, she inserted a new sim card and continued to utilize the phone with no complaint. It was only about one week later when the complainant went to withdraw money at an Equity Agent that she realized that a sum of Ksh 9,500/= had been withdrawn from her account. The statement of account from Equity Bank exhibited in court indicates that on 30/6/2012 a sum of Ksh 9,500/= was withdrawn from the account by one '**George Githinji**' at Razy Agent in Murang'a. Here again the police failed dismally in investigating this theft. No officer went to Murang'a to investigate and/or enquire from the agent the identity of the person who had made this withdrawal. Banks do keep very accurate records including name, ID number, telephone and e-mail contact of any person who makes a withdrawal. It would not have been difficult for police to trace this person. **PW4** the investigating officer admits at Page 18 Line 13 that

"I didn't go to Murang'a"

How could police possibly expect to investigate a theft which occurred in Murang'a if they never even bothered to go to Murang'a. There is no evidence that the appellant made this withdrawal. The complainant is a lady and the withdrawal was made by a man known as '**George Githinji**'. No link is shown to exist between this '**George Githinji**' and the appellant. It is not lost on this court that the complainant's name is '**Phyllis Wanjiru Githinji**'. '**Githinji**' is her family name. Could the person who made this withdrawal have been a relative or family member of the complainant? Indeed **PW4** the investigating officer admits under cross-examination at Page 19 Line 10

"I don't know any Githinji except Phyllis the complainant"

The police made no attempt to investigate this angle and/or to rule this out as a possibility.

In the words of the investigating officer at Page 18 Line 14 the only reason why police linked the appellant to the theft of this money was

"We suspected the suspect [appellant] since she left on 29th for Murang'a"

If this statement was not so ludicrous it would be comical. Does that mean that any person in Murang'a was a possible suspect? Police made no enquiry regarding the whereabouts and/or movements of the appellant on 30/6/2012. The withdrawal was made using the complainant's mobile phone and sim card line. Nobody has testified that the appellant was seen anywhere near the Equity Agent in Murang'a that day. The mere fact that the appellant had travelled during mid-term to her family home in Murang'a is not proof of guilt on her part. **PW4** the investigating officer states at Page 19 Line 9

"The statement from Equity doesn't indicate who received the money. George Githinji is the agent who transacted....."

Again I fault the police for slacking in their duty. A trip to Murang'a would certainly have revealed who received and signed for the cash. No attempt was made at all to trace this George Githinji. Being an agent in Murang'a he would have been registered with Equity Bank and would have been easy to trace. The learned trial magistrate proceeds to postulate at Page 8 Line 7

"She [the appellant] could have then sold it [the mobile phone] to Kennedy who perhaps was

coincidentally travelling to Murang'a and withdrew the money there. Of court Kennedy needed an identity so the account being female, Kennedy would also need to be female to identify himself as Phyllis so he can withdraw the cash. But then, where did he get the pin for withdrawing the cash. Did Agnes sell that to him too.....”

Clearly this whole scenario raises more questions than answers. These are the very questions that the trial court was asking itself. The only person who could have explained how the money was withdrawn was this George Githinji. Police were too lazy to make the trip to Murang'a to search for him. They felt it was easier to charge the appellant as a scapegoat. It is mind boggling to see the reasoning (or lack of) which the trial magistrate used to convict the appellant. He stated in his judgment at Page 9 Line 11

“Now we know why she [the appellant] kept the phone on, if she had switched it off, perhaps she would not have known what pin to enter so the phone would come back on. The following day she somehow withdrew money from Phyllis' account in her home town. She knew the pin, she had accompanied Phyllis to Njokerio and saw her enter the pin. How did Nancy identify herself to George Githinji. Only she can answer that question.....”

Again I can only politely term this to be fanciful musings on the part of the trial magistrate.

There is no proof that it was appellant who withdrew this money. There is no proof that appellant knew the complainant's PIN number to enable her withdraw the funds. The complainant at **no** time ever stated in her evidence that she went with appellant to Njokerio to withdraw funds. This statement came from **PW4** and it is not clear where **PW4** got this information.

The trial magistrate erred in misapplying the principle of circumstantial evidence. What he relied on was not evidence. These were mere theories suppositions and rumors. I must again fault the police for totally failing to conduct any meaningful investigations into this matter. The police abdicated their role of investigations to **PW2**. Several loopholes remained in the prosecution case. The conviction of the appellant in my view has absolutely no basis whatsoever. There exists no evidence to support that conviction. Indeed the appellant was in my view entitled to an acquittal at the trial stage. The trial magistrate erred and misadvised himself on several legal aspects. I have no hesitation in quashing this conviction. The sentence imposed is hereby set aside. I further direct that the sum of Ksh 10,000/= paid to the complainant as compensation be refunded to the appellant by said complainant. The appeal succeeds. The appellant is to be set at liberty forthwith unless she is otherwise lawfully held.

Dated in Nakuru this 13th day of October 2015.

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Maureen A. Odera

Judge

Ms Kerubo holding brief for Wandaka for Appellant

Ms Ngovi for State