



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL CASE NO. 407 OF 2009**

HUDSON ICHWARA MOMANYI ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*((From original conviction and sentencing in Criminal Case No. 16 of 2002 at the Chief Magistrate's Court at Nairobi by S. Muketi - Senior Principal Magistrate on 11<sup>th</sup> January, 2013))*

**JUDGEMENT**

The appellant was charged with twelve offences. These offences comprised of six counts of stealing by a person employed in the public service contrary to Section 280 of the Penal Code. The other six counts related to making documents without authority contrary to Section 357 (a) of the Penal Code.

The evidence on record shows that the appellant was employed by Kenya Wildlife Service as a transport officer and his duties entailed the renewal of road licences for several motor vehicles owned by his employer. He would receive money from the employer, purchase the road licences from Kenya Revenue authority and deliver them to his employer.

He denied the offences but after a full trial he was convicted of the offences of stealing contrary to Section 280 of the Penal Code and acquitted of the offence of making documents without authority contrary to Section 357 (a) of the Penal Code. Upon the said conviction he was sentenced to pay a fine of Kshs. 40,000/= in default to serve twelve months imprisonment on each of the offences upon which he was convicted. These were counts no. 1, 3,5,7,9 and 11.

Aggrieved by the said conviction he lodged this appeal. At the hearing of the appeal the learned counsel for the republic conceded the appeal on the ground that Section 200 of the Criminal Procedure Code was not complied with in that the case was substantially heard by the first trial magistrate but when the succeeded magistrate took over it is his counsel and not the appellant who addressed the court in purported compliance with Section 200 of the Criminal Procedure Code. She however added that if the court finds there was sufficient evidence upon which a conviction could be sustained then a retrial may be considered.

On the other hand the learned counsel for the appellant took the court through the evidence and judgment and submitted that the learned trial magistrate should not have convicted the appellant as there was not a considered judgment written which made it difficult to argue the appeal and this was prejudicial to the appellant.

The appellant was supposed to have stolen money by making stickers which were not produced and the learned trial magistrate erred in law by concluding that the failure to produce the document was not fatal.

He resisted the request for a retrial submitting that this would not serve the interest of justice and that the investigating officer refused to appear in court to produce the evidence relating to the documents. An order was made to that effect.

On 2<sup>nd</sup> July, 2007 the matter was placed before yet another magistrate. The learned counsel for the appellant told the court that the matter could proceed where the previous proceedings had reached. The court invoking the provisions of section 200 elected to proceed. As it can now be clear, the learned counsel for the appellant departed from his earlier position to have the case heard de novo and proceed from where the previous trial magistrate had stopped. No reasons were given either by the learned counsel for the appellant or the court in so doing.

I reiterate that the right reserved under Section 200 (3) of the Criminal Procedure Code should be addressed to an accused person and not anyone else. In this case, the address to the court by the learned counsel for the appellant was mis placed and irregular.

On 6<sup>th</sup> February, 2003 the learned counsel for the appellant informed the court that he had instructions that the matter starts de novo and the court agreed with him. That statement by the learned counsel was made without any information directed to the appellant as to what steps should be taken because the original magistrate had been transferred.

That notwithstanding, a few months later on 8<sup>th</sup> May, 2007 the matter was placed before a different magistrate who recorded that Section 200 of the Criminal Procedure Code had been complied with. The learned counsel for the appellant is then recorded to have said the hearing should proceed from where the previous trial magistrate had stopped.

I have perused the records before me and considered the submissions by both the learned counsel for the appellant and the republic. With respect, I agree that the learned trial magistrate did not comply with the provisions of Section 200 (3) of the Criminal Procedure Code in that the right reserved therein belongs to an accused person and not his counsel. That is not the only deficiency in this case. On that ground alone the appeal should be allowed.

On the question of whether or not a retrial should be ordered I have to look at the principles that govern such orders. A retrial would be ordered to serve the interest of justice, provided that no prejudice shall be occasioned to the appellant. In so doing it must be demonstrated that sufficient evidence exists upon which a conviction may be founded and that the witnesses who gave evidence are available to give evidence.

The order may not be given however, to allow the prosecution to fill the gaps left during the original trial. The court should also consider whether or not the appellant was to blame for the state of affairs relating to the record. If it is the court or the prosecution to blame for the omissions ordinarily the court should hesitate to order a retrial because that may cause prejudice on the part of the appellant. The law requires an accused person to be accorded a fair trial which includes completion thereof without undue delay.

The appellant herein was first arraigned in court on 28<sup>th</sup> June, 2007. The judgement was delivered about a year later that is 9<sup>th</sup> June, 2008. His appeal was filed on 29<sup>th</sup> September, 2009 and the time it came up for hearing about four years had lapsed. If a retrial were to be ordered the appellant has to be subjected to an equally long period of waiting the final determination of this matter. Most importantly in convicting the appellant the learned trial magistrate had this to say.

**“Though the stickers were not produced this only affects the charges of making false documents. It was incumbent that they be produced to prove these charges. Failure to produce them though does not affect the charges of stealing. Money was taken by the accused and was not used for the purpose intended. He converted the same for his own use and this tantamount to stealing as envisaged in Section 268 of the Penal Code”.**

From the evidence on record, the offences of making false documents and stealing were so intertwined that the failure to prove one of the other would lead to the collapse of the entire case. Section 268 of the Penal Code cited by the learned trial magistrate defines what stealing is. It was incumbent upon the prosecution to establish beyond any reasonable doubt the connection of the two offences in the charges laid against the appellant. No reason has been advanced as to why the documents were never produced and having failed to do so the benefit of doubt should have been given to the appellant relating to all the offences.

To order a retrial therefore may be prejudicial to the appellant in that the prosecution would seize the opportunity to fill in the gaps that occurred during the main trial. As this was not his mistake, and considering the totality of the evidence adduced before the learned trial magistrate a retrial shall not meet the ends of justice. I therefore decline to order a retrial. Accordingly this appeal is allowed, conviction quashed and sentence set aside. If any fine was paid the same shall be refunded to the appellant.

Orders accordingly

**A. MBOGHOLI MSAGHA**

**JUDGE**

***Dated, signed and delivered at Nairobi this 7<sup>th</sup> Day of May, 2014***