



REPUBLIC OF KENYA

High Court at Kitale

Criminal Appeal 76 of 2011

KEITH YAMANE WANYAMA ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from the original conviction and sentence of E.A. Obina – RM. in Criminal Case No. 605/2010 delivered on 16th June, 2011 at Kitale.)

J U D G M E N T.

The appellant, **Keith Wafula Yamane**, appeared before the Resident Magistrate at Kitale charged with four counts viz stealing contrary to section 275 of the penal code, obtaining goods by false pretences contrary to section 313 of the penal code, personation contrary to section 382 of the penal code and making a document without authority contrary to section 357 (a) of the penal code.

After trial, the appellant was convicted and sentenced to three (3) years imprisonment on count one.

He was acquitted on counts two, three and four. On count one, the particulars were that at an unknown date in the month of October, 2009 at Nyayo Building Nairobi, the appellant stole the 2009 October payslip of No. 220126 APC Harun Komen, the property of the said APC Harun Komen.

Being dissatisfied with the conviction and sentence on the said count one, the appellant preferred the present appeal essentially on the grounds that his conviction was based on a defective charge sheet and was against the weight of the evidence.

At the hearing of the appeal, the appellant appeared in person and submitted that the charge sheet was defective in that the charge sheet indicated that the case file number was No. 605 of 2009 while the proceedings show that it was file number 605 of 2010 thereby indicating that there were two different files in this matter.

Further, the name of the appellant as shown in the charge sheet is different from that shown in the court proceedings and judgment.

The appellant contended that the foregoing errors were substantial and cannot be corrected under section

382 of the Criminal Procedure Code.

The appellant submitted that his conviction was against the weight of the evidence as the evidence adduced by PW1 and PW2 was contradictory and inconsistent thereby rendering it unworthy of credibility. Further, PW1 and PW2 alluded to an original payslip yet the payslip availed in court was a photocopy which was inadmissible under section 68 of the Evidence Act.

The appellant also submitted that there was contradiction in the evidence of PW5 with regard to the date when the offence was reported and that the evidence by PW2 regarding his alleged identification was insufficient. Further, the alleged guarantors were not called to testify and confirm his alleged signatures and also those who arrested him were not called to testify.

In opposing the appeal and in response to the submissions by the appellant, the learned prosecution counsel, **Mr. Chelashaw**, submitted that the evidence relied upon by the trial court was sufficient to prove the case against the appellant beyond reasonable doubt.

On the alleged defectiveness of the charge sheet, the learned prosecution counsel submitted that section 214 CPC could not apply as the error pointed out by the appellant related to a variance in the date of the offence. In any event, the charge was amended and the fresh charge sheet was read afresh to the appellant.

Further, no prejudice was occasioned to the appellant.

The learned prosecution counsel submitted that the contradictions alluded to by the appellant did not go to the root of the charge and that a payslip not belonging to the appellant was found in his possession.

It was contended by the learned prosecution counsel that the appellant converted the payslip for his own fraudulent use. Therefore, his conviction by the trial court was proper.

Having heard both the appellant and the state respondent, the duty of this court remains to consider the evidence afresh and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Briefly, the prosecution case was that the complainant **APC Harun Komen (PW5)**, lost his October, 2009 payslip while stationed at the D.C.'s office Kasarani, Nairobi. In the month of November, 2009, he noted that strange deductions were made to his salary. The deductions related to monies allegedly owed by him to two hire purchase firms with branches in Kitale. These were African Retail Traders (ART) and Credit Traders.

Upon enquiry, the complainant learnt that his missing October, 2009 payslip had been fraudulently used to obtain goods from the said hire purchase firms. This was confirmed by **Joseph Ochieng Ojala (PW1)** and **James Omanga (PW2)** both employees of A.R.T. As well as **Josephat Mutungu Juma (PW4)**, employee of Credit Traders Ltd.

The three witnesses (PW1, 2 and 4) confirmed that the appellant was the person who obtained goods from them on hire purchase using a payslip and I/d in the name of the complainant Harun Komen.

P.C. Praitto Onyambu Gesengi (PW3), of the C.I.D. Kitale, investigated the matter and thereafter charged the appellant accordingly.

In his defence, the appellant denied the charges facing him. He said that he purchased a T.V. Set and sofa set from Credit Traders Kitale on 19th November, 2008. However, on 21st January, 2009, he was interdicted from the Administration Police Force prior to completion of his payment for the said goods. He was later called by a manager of Credit Trader to negotiate on how he will continue paying for the goods which were in the house of his first wife, an employee of Argos Furnishers Kitale. He went to see his said wife at her place of work so that they may negotiate on how to pay for the goods. The two were not in good terms. They broke into a fight. She called the police and he was arrested. He was later

arraigned in court on charges which were strange to him.

The learned trial magistrate considered the foregoing defence alongside the evidence adduced against the appellant by the prosecution and concluded that the offence of stealing had been proved against the appellant beyond reasonable doubt. The rest of the offences were however not proved as required by law.

Having considered the evidence afresh, this court concurs with the learned trial magistrate that the offence of theft was proved against the appellant as required by law. This is because, firstly, there was no dispute that indeed a payslip belonging to the complainant (PW5) was stolen from him and was later traced after having been used to obtain goods on hire purchase. The transaction facilitated by the stolen payslip among other documents was undoubtedly fraudulent. The person responsible for the said transaction was presumed to be the person responsible for the theft of the payslip on the basis of his possession thereof a few days or weeks after its theft. Secondly, there was credible and sufficient evidence from the employees of the Hire Purchase Firms (i.e. PW1, 2 & 4) showing that the appellant was the person responsible for the fraudulent transaction using the stolen payslip. In his defence, the appellant denied the offence and implied that he was implicated after being arrested for fighting with his wife at her place of employment. He made no attempt to explain or give an account of how he came into the possession of the stolen payslip which he used to obtain goods by fraudulent means.

Therefore, on evidence, the appellant's conviction was sound and proper.

On the points of law raised herein by the appellant, this court agrees with the learned prosecution counsel that section 214 (1) of the Criminal Procedure Code was inapplicable in the circumstances. The variance between the charge and the evidence or proceedings or filing with respect to time is not a material defect. The same may be extended to the numbering of a case file as long as it relates to the same charge and person. In any event, the mis-numbering of the court file number herein was more of a typographical error than anything else.

With regard to the Evidence Act (Cap 80 LOK), section 64 provides that the contents of documents may be proved by primary or by secondary evidence.

It did not matter whether it was the original payslip or a copy hereof which was produced in evidence by the prosecution. A copy of a document just like the original is admissible under the Evidence Act.

Consequently, the trial court did not act in breach of the Evidence Act by admitting as proper Evidence a copy of the stolen payslip and more so considering that the original may have been in the hands of the appellant.

This appeal lacks merit even on points of law. In the end result, the appeal is dismissed in its entirety.

[Delivered and signed this 7th day of May, 2013.]

J.R. KARANJA.

JUDGE.