



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 177 of 2010

ONGERA MOGUCHE APPELLANT

AND

STATE RESPONDENT

(Being an appeal from the judgment of Hon. Z.J. Nyakundi, SRM dated

2nd September 2010 in Rongo SRMCCR Case No.369 of 2009)

JUDGMENT

1. The appellant herein, Ongera Moguche was arraigned before the Senior Resident Magistrate's Court at Rongo on a charge of stealing by agent contrary to **section 283** of the **Penal Code**. It was alleged that on the 7th day of April [2009] at Rongo Township in Rongo District within Nyanza Province, he stole Kshs.281,000/= which had been entrusted to him by ALO NUROW ALIO SHETO for the purpose of purchasing some maize for the said Alo Nurow Alio Sheto. The appellant denied the offence. The prosecution called 4 witnesses in support of its case against the appellant.

2. PW1 was Ali Nar Ali Sheto (Sheto) a businessman in Rongo Township and a friend of the appellant. From his testimony the facts of the case are that on 7th April 2009 at about 8.00 a.m., he gave out the sum of Kshs.281,000/= to the appellant so that the appellant could buy and deliver 100 bags of maize to him. Sheto was together with Mostata Ario Mam, PW2, when he gave out the money to the appellant. The appellant set off for Langata area in Maasai land where he said he would buy the maize. Mostata accompanied the appellant to Langata where they bought 100 bags of maize and brought the report to Sheto. On the 9th April 2009, the appellant returned to Langata, but this time he went alone but on coming back to Rongo, he did not bring with him the 100 bags of maize, and alleged that he had already sold the maize. The appellant did not however surrender the proceeds of the 100 bags of maize to Sheto.

3. The appellant went back to Langata on 14th April 2009, alone. While at Langata, Sheto received a telephone call from the appellant who asked for a vehicle to carry 110 bags of maize. Sheto made the

necessary transport arrangements and sent Richard Odhiambo Owino, PW3 (Owino) to Langata to carry the maize. Owino, who was paid Kshs.14,000/= for transport testified that he went to Langata Maasai as instructed. The appellant, who was in Langata loaded Owino's vehicle with the maize but instead of taking the maize to Sheto's in Rongo, the appellant instructed Owino to take the maize to Jogoo Estate in Kisii town. The maize was offloaded and kept in a store at Jogoo Estate on the instructions of the appellant.

4. The appellant then went underground until 26th April 2009. In the meantime the appellant communicated with Sheto through letter dated 26th April 2009, promising to avail the money on 27th April 2009. Then he switched off his phone. Sheto was forced to report the matter to the police but the appellant ran away when he saw Sheto. On 7th May 2009, Sheto and the appellant met. The appellant promised to pay the money on 10th May 2009. He wrote a letter dated 7th May 2009 in which he undertook to pay the money. He did not do so and remained underground until 16th May 2009. On that date, the appellant wrote another letter to Sheto promising to pay up on 31st May 2009. The three letters were produced as **P. Exhibits 1, 2 and 3** respectively. When the appellant failed to pay up on 31st May 2009, Sheto led the police to the appellant's house and he was arrested.

5. When Sheto was cross examined, he testified that he and the appellant were friends. He also testified that he did not record anywhere that he had given Kshs.281,000/= to the appellant on 7th April 2009, but he confirmed that he gave the appellant the stated sum of money in the presence of Mostata. Sheto also admitted that he had filed Kisii CMCC No.357 of 2008, against the appellant for the sum of Kshs.281,000/=, but that the appellant had refused to pay the said sum unless Sheto paid him Kshs.77,000/=.

6. PW4, was Number 62215 Police Constable Edwin Nyongesa who told the court that Sheto reported the case to him at Kamagambo police station on 3rd May 2009. On 31st May 2009, Sheto led PC Wanje and PW4 to the home of the appellant from where they arrested the appellant. After recording statements, PC Nyongesa charged the appellant with the present offence. In cross examination, PC Nyongesa stated that the appellant did not disclose the amount he owed Sheto in the letters marked **P. Exhibit 1-4**.

7. At the close of the prosecution case, the appellant was put on his defence. He elected to give unsworn evidence and called no witnesses. He stated that on 7th April 2009 he went to Erdo-Maasai in TRansmara District where he stayed for 3 days buying maize. On the third day, he called Mostata and asked for transport. The vehicle was sent to him as requested and he loaded the maize the same day and sold the whole of it. He stated that he had agreed with Sheto that they do the maize business in an informal partnership with another who had left and before the material day they had already done 3 trips. The business partners were the appellant, Sheto and Mostata. Before long, Sheto started complaining and saying he needed his money. That Sheto wanted his money quickly and before he knew it, the appellant had been arrested. The appellant also stated that he was sued before the CM's court in Kisii where he admitted owing Sheto Kshs.75,000/=. The appellant also stated that he was not employed by Sheto who also never paid for the transport. The appellant also said that he did not understand why Owino never took the maize to Sheto's store as instructed by Sheto. The appellant also testified that Sheto sought him out in the maize business because he had the experience in buying and selling maize.

8. After carefully considering the evidence that was placed before him, the learned trial magistrate dismissed the appellant's side of the story as being unreasonable and found that indeed it had been proved beyond any reasonable doubt that the appellant was given Kshs.281,000/= for the purpose of buying maize which maize was bought and sold but proceeds were not given to Sheto. The trial court was satisfied that the prosecution had proved its case against the accused person beyond any reasonable doubt. The appellant was found guilty as charged and convicted accordingly.

9. The case was referred to probation for a report which was furnished to the court on 2nd September 2010. The appellant was found to be a first offender. He was sentenced to 2 years' imprisonment.

10. The appellant was aggrieved by both conviction and sentence and has appealed to this court on the following 7 grounds filed through the firm of Kerosi Ondieki & Co. Advocates on 7th September 2010. These grounds are that:-

1. *The learned trial magistrate erred in law and misdirected herself fundamentally, in the first instance, by placing the appellant on his defence when the prosecution had not made out a prima facie case against the appellant.*

2. *The learned trial magistrate erred in law and misdirected himself fundamentally in relaying(sic) on uncorroborated evidence of an accomplice.*

3. *The learned trial magistrate misdirected himself in shifting the burden of proof to the appellant and by not making a finding that there was no nexus between the evidence on record and the charge sheet as drawn.*

4. *The learned trial magistrate misdirected himself by not realizing that the legal process before him was orchestrated by the prosecution and amounted to criminalizing a civil case as the evidence clearly pointed.(sic)*

5. *The learned trial magistrate misdirected himself by not realizing that the substantial injustice will be visited on the accused person and there was another case pending before Court in Kisii CMCC No. 357 of 2008 which is still pending and which clearly shows that the complainant was well aware that this is a civil matter.*

6. *The learned trial magistrate fundamentally misdirected himself by not realizing that substantial injustice would result as a result of non representation by an Advocate.*

7. *The learned trial magistrate erred in handling down an excessive sentence in the circumstances of the case.(sic)*

11. The appellant prays that the appeal be allowed.

12. At the hearing of this appeal, I heard submissions from Mr. Kerosi Ondieki for the appellant and Mr. Gitonga for the State. This case is before me as a first appeal and on such an occasion, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, only remembering that it has no opportunity of seeing and hearing the 4 witnesses who testified during the trial. See generally **Pandya –vs- R [1957] EA 336; Ruwala –vs- Republic [1957] EA 570 and Okeno –vs- Republic [1972] EA 32** among other cases. This court is also under a duty to weigh and consider the judgment of the trial court. I have done so.

13. The issues that now arise for determination are **(i)** Whether on the evidence that is on record, the prosecution proved its case beyond any reasonable doubt; and **(ii)** whether Sheto's claim against the appellant is a civil debt as demonstrated by the filing of Kisii CMCC NO.357 of 2008 in which Sheto admittedly sued the appellant for recovery of the sum of Kshs.281,000/=.

14. During the submissions, counsel for the appellant submitted that no evidence was placed before the court below to prove that the appellant was an agent of Sheto, but a business partner. Counsel also submitted that the prosecution evidence, especially the evidence of Sheto and Mostata was at variance as to where the meeting of the three took place before Sheto allegedly gave out Kshs.281,000/= to the appellant. Further that Mostata's evidence does not support the charge. Counsel also pointed out that while Owino claimed that Sheto paid him Kshs.14,000/= for the hired transport, Sheto stated as follows regarding the said payment:-

“The second lot of 110 sacks am the one who sent the vehicle. I did not pay for the vehicle, the owner of the vehicle was paid by the accused. All I wanted was my money.”

15. It was also counsel's contention that if the arrangement between Sheto and the appellant had worked, this case would not have come up and finally that the learned trial magistrate erred by shifting the burden of proof from the prosecution to the appellant. Finally, counsel submitted that the sentence imposed by the trial court was, even after considering the Probation Officer's Report was excessive in the circumstances. He urged this court to allow the appeal, quash the conviction and set aside the 2 year term of imprisonment.

16. The appeal was opposed on both conviction and sentence. Mr. Gitonga submitted that the business relationship between Sheto and the appellant was constructively that of principal and agent and that the trial court was right in so finding. Secondly, counsel contended that there was no doubt that appellant received Kshs.281,000/= from Sheto and the money was intended for the purchase of maize and payment of the proceeds therefrom to Sheto less the appellant's commission. That the appellant admitted having received the money though in the promissory notes he wrote to Sheto (**P. Exhibits 1-3**) he did not indicate the amount of money which was to be paid to Sheto. Counsel also urged the court to find that though on the surface, this matter appears to have been of civil in nature, the construction of **section 283** of the **Penal Code** shows clearly that what the appellant did constituted a criminal offence and that in this case, there is nothing to bar this case from proceeding contemporaneously with the civil case.

17. On sentence, counsel submitted that 2 out of the permitted maximum 7 years cannot be said to be excessive in the circumstances. Counsel submitted that the appeal lacks merit on both conviction and sentence and urged me to dismiss it.

18. In reply, Mr. Kerosi submitted that the criminal case preferred against the appellant was an afterthought and the same should be dismissed, since it is clear that the appellant was not employed by Sheto.

19. Having considered the above submissions against the backdrop of the evidence that is on record, I am satisfied that the trial court's findings were well founded in law and supported by evidence. The facts are all admitted except as to the amount given out to the appellant and whether there was an agency relationship between the appellant and Sheto. **Oxford Advanced Learners Dictionary – International Student's Edition** - defines an "agent" as :-

“a person whose job is to act for or manage the affairs of other people in business, politics etc.”

20. In the instant case, it is on record that the appellant was the expert in the business of buying and selling maize and that it was for that reason that Sheto entered into the arrangement with him where he (appellant) could buy the maize, sell it and then bring back the principal plus profits less his commission. The appellant himself said he had done a similar assignment for Sheto on three other occasions. I find that the agency relationship between the appellant and Sheto was well established. It is also instructive that the appellant tried to play hide and seek with the appellant after he failed to deliver the 100 bags of maize or surrender the proceeds therefrom. It appears from the testimony that after the first 100 bags, the appellant managed a profit and bought 110 bags which were collected by Owino on 14th April 2009. I have noted the discrepancy in the testimonies of Sheto and Owino concerning payments of Kshs.14,000/= for the transport, but in my view, this contradiction does not go to the root of the case against the appellant. Why did the appellant play hide and seek with Sheto? Why did he not disclose the amount owed to Sheto when he wrote the promissory notes? To my mind, that conduct is inconsistent with innocence.

21. The second issue for determination is whether the fact that Sheto filed Kisii CMCC No.357 of 2008 means that the criminal case should not go on or should not have been instituted. On this matter I agree with counsel for the respondent that nothing precludes institution of criminal proceedings where an offence is disclosed. Civil and criminal proceedings can run concurrently. See the recent highly publicized case of **Kerubo –vs- Nancy Barazain** which Kerubo is pursuing both criminal and civil proceedings against the Hon. The Deputy Chief Justice whose appeal against the decision by the Tribunal set up to investigate her conduct is pending before the Supreme Court.

22. The final issue is the one of sentence. Can it be said that the term of 2 years imprisonment upon conviction of an offence which carries maximum sentence of 7 years excessive in the circumstances and should this court therefore interfere with it. The principle to be applied by an appellate court in deciding whether to interfere with the discretion of a trial court in passing sentence is that an appellate court should not interfere with the discretion by a trial judge as to sentence except in such cases where it appears that in assessing the sentence, the judge acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive. See **Diego –vs- Republic [1985] KLR 621** and **Dismas – vs- Republic [1984] KLR 634**. In the instant case, the sentence of 2 years is neither harsh nor excessive in the circumstances. I note that the trial court considered the Probation Officer’s Report said the report was not binding on him.

23. Accordingly, this appeal has no merit. The same is accordingly dismissed. R/A within 14 days.

24. Lastly, the delay in delivering this judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012. A number of other cases were equally affected, hence my inability to deliver this judgment any earlier than today.

25. It is so ordered.

Dated and delivered at Kisii this 11th day of October, 2012

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mr. C. Okenye for K. Ondieki (present) for Appellant

Mr. Mutuku (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.