



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL 4 OF 1986

SAMUELL KARUGA WANDAI.....APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Samuel Karuga Wandai was originally charged with the theft of Kshs 4,018,946.00, the property of Kimunye Investment Company Limited. This theft was said to be theft by an agent contrary to section 283(c) of the Penal Code. Apart from the averment that the appellant was the advocate of Kimunye Investment company Limited, the charge was not clear as to what the terms of the agency were. The charge ends by saying:-

“..... Stole cash Kshs 4,018,946 the property of the said M/s Kimunye Investment Company Limited which had been received by the said for the Account of M/s National Bank of Kenya Limited.”

It will be seen that some word or phrase is missing from the charge sheet and that it is not clear what the agency was. Notwithstanding this difficulty, the trial court found that the appellant guilty as charged and sentenced him to five years imprisonment. On first appeal the charge was found to be defective in that the money was said to be to the account of the Bank. But the appellant had been in no doubt what charge he was facing, and no prejudice had been occasioned. The trial court had “clearly found misappropriation”, which amounted to theft. In the end the decision was as follows:-

“the upshot is that we consider the learned Magistrate was right to believe Gitonga and Kimani and disbelieve thee appellant. However the learned Magistrate convicted the appellant of theft of Kshs 4,018,946.

We are satisfied that it was not proved that he stole the amounts of Kshs 300,180 and Ksh 916,000, Kshs 800,000 Kshs 305,180 and Kshs 538,315.40 making a total of Kshs 2,859,495/40. As he received Kshs 5,734,946 the appellant should have been convicted of theft by agent contrary to section 2,875,450.60 and we substitute that conviction for the conviction recorded by the learned Magistrate.”

It is still not clear what the terms of the agency are. Looking back to the trial court’s judgment, the statement of the offence will be found to be:

“It is clear that the accused received the Kshs 731,946 form Kimunye Investment Company

for a particular purpose namely to pay the vendors advocates M/s Waruhiu & Muite for the purchasers of the piece of land No 280/3 at Thika before March 31, 1979.

.....

It must not be forgotten that the intentions of Kimunye Investments Company and the vendor's advocates M/s Waruhiu & Muite were that the accused will collect the money and pay the vendor before March 3, 1979 as expressly set out in the agreement (Ex 1)"

The learned magistrate had explained that the subsequent agreements were to be treated separately. So it appears that the High Court had supported the theft by agent of this nature. But that of course does not follow, if the starting point is the collection of Kshs 5,731,946 and the theft is said to be Kshs 4,081,946, when the payment by March 31, 1979 concerned a part of the payment in a contract, the sale price of which was Kshs 3,800,000. The learned magistrate's reasoning ***** obscure. On the one hand, it was restricted to the first contract for the sale of land dated December 21, 1978, and on the other hand included the subsequent sale of land, because Kshs 5,731,946 arose on all the contracts. Nor was it possible for he appellant to have completed by March 31, 1978, three months after the date of the contract. It is therefore of interest to know what the High Court thought what he terms of the agency were. That is again a matter of obscurity. It was thought to be clear to the appellant apparently. That "clarity" is presumably/spelt out in the opening words of the appellant's defence, He said:-

"I know the charge I am facing. It is for the period of 1978 to March 1982. I was acting for Kimunye Investments who were buying land from one Gitonga Kihara. During this time I had instructions to collect funds from Members of Kimunye Investment Company and put into my account for the purpose of purchasing land. I did not have any instruction form Kimunye Investments on how I shall disburse the money."

It follows that it is quite obvious that the appellant did not know what charge he would be convicted of, except that he must have thought that he was the agent of Kimunye Investments Company, and there was nothing to do with the National Bank of Kenya. For the National Bank of Kenya was not a party to the sale of 200 acres of land, on December 21, 1978, by the *eminence grise* of this story Mr Gitonga, to the Kimunye Investments Company. True, the Bank's lawyers, Waruhiu & Muite & Co., were said to be the lawyers of Gitonga and would receive payment. As far as the contract was concerned, that was on behalf of Gitonga. Why then was it wrong to pay Gitonga direct? Whether Kimunye Investments Company ever gave the appellant direct instructions at this stage to pay only Waruhiu & Muite, on behalf of the Bank is not clear, and indeed would have been a breach of contract with Gitonga, unless the latter agreed also. Where was that specific tripartite contract that the appellant, acting on the instructions of Kimunye, would only pay to the Bank on behalf of Gitonga, and that Gitonga agreed?

The truth is that the charge was anything but clear. This was pointed out during the trial and brushed aside. It was pointed out on first appeal and turned aside. It is because of this fundamental pack of clarity that the whole case founders, as will now be seen.

Gitonga had large tracts of land. He had borrowed money from the National Bank of Kenya and was unable to re-pay the Bank. He started to sell off parcels of land. He sold 200 acres to Kimunye Investments Company on December 21, 1978. He sold a further 70 acres to the same Company on June 5, 1979. There were further sales intended. Neither the National Bank of Kenya nor Waruhiu & Muite knew of the second sale; at least they are not mentioned at all in that agreement. In the meantime plots were sold to individual persons, and money collected.

Kshs 5,734,946 had been collected on 22nd March, 1982, when the appellant stopped collecting money from members of Kimunye Company. He then gave the following account:-

- 1.Total amount collected Kshs 5,734,946.00
- 2.Payment as follows:-

| | |
|---|-------------------|
| (a) deposit of the first agreement for 200 acres | Kshs 300,000.00 |
| (b) deposit for the second agreement for 70 acres | Kshs 916,000.00 |
| (c) further payment in respect of (a) and (b) above and for purchase of a further 1000 acres in the third agreement | Kshs 2,906,564.40 |
| (d) payment on behalf of Gitonga with the National Bank (K) Ltd | Kshs 800,000.00 |
| (e) surveyors to purchase of Town plot on behalf of Company | Kshs 305,180.00 |
| (f) collection charges and legal fees including consultation for four years | Kshs 305,180.00 |

Kshs 5,760,077.80

Chargo was calculated in this way. Kshs 800,000 had been paid to Waruhiu - Muite. Kshs 916,000 had been paid direct to Gitonga. The balance was Kshs 4,018,094. that is what he is said to have misappropriated. Once that balance sheet was accepted by the High Court, and items (a) Kshs 300,000, (e) Kshs 305,180 (f) legal fees and Kshs 538,315.40 were also accepted, that is the end of the trial court's judgment. Little could be saved from it.

The case was to be decided against all agreements, and payments on some occasions direct to Gitonga were acceptable. The "specific purpose" with which the appellant had to comply in disbursing the money was not on specific purpose, but varied from incident to incident, in the first and subsequent contracts. If the first contract only was in point, the figures would have been restricted. It is also clear that the High Court was more concerned with theft than theft by agent. At any rate there was no over-riding instruction to the appellant how he was to disburse moneys: Kimunye often gave specific instructions to pay Gitonga direct, and indeed had agreed to pay Gitonga's expenses, despite the Bank. It was only in the final sale agreement that provision for payment to the Bank was made.

The case now centers on the last item (c) concerning Kshs 2,906,564.40. The sum concerns an acknowledgment of receipt of Kshs 2,408,564.40 by Gitonga up to April 28, 1981 and Kshs 498,000 collected up to January 1981. Gitonga claimed that he had never received those sums.

As to the acknowledgement, it is in the following terms:-

April 28, 1981

Acknowledgement of receipt

I John Gitonga Kihara do acknowledge the receipt of Kshs 2,408,564.40 (Two Million four hundred and eight thousand and five hundred and sixty four cents forty only) from M/s Karuga Wandai & Co Advocates on behalf of M/s Kimunye Investment Company Limited for the sale of my land as per earlier two agreements.

This amount however does not include the amount received by me under both agreements signed by me earlier, namely Kshs 916,000 and Kshs 300,000 respectively.

I have received the acknowledgments which I agree with and I want to recount and re-add and find out whether the total is correct.

Also dispute acknowledgment number (one) 1 which I say was included in the agreement. Otherwise I have nothing else to dispute apart from the total arrived at all vouchers are signed by me and are good.

John Gitonga Kihara

In the presence of Alfonce Mullu Muia.”

(Exhibit D2(b).

Gitonga said of that document:-

“I am illiterate and cannot read. I can recognise my Signature.

I signed this letter (MF1 D1 (b) in presence of Alphonse Mullu Muia dated January 28, 1981. The contents of letter D2(b) are correct. The money was from Gakenya but not Kimunye. The money was from Gakenya and not Kimunye as acknowledged in this letter.”

The main feature of Gitonga’s evidence is that he could not recollect how much money he had received from Gakenia Women’s Group. He did not know how much he had received from Kimunye Investments Company. He wanted time to take accounts. Indeed Kimunye Investments ought to have established how much money he had received before rushing to Court.

His plea of illiteracy was accepted by the High Court. It was not dealt with by the trial court, probably because the acknowledgement was not considered by that court to be relevant. What are the legal implications of the plea? Apparently Gitonga’s case was that notwithstanding his signature on the acknowledgment, he had never received the money. Contrasting with that assertion is the statement that the acknowledgment was correct.

Against that is the assertion that the money came from the sale of land by Gitonga to Gakenia Women’s Group. The High Court held that he thought he was acknowledging monies paid under a different transaction with Gakenia Women’s Group, and that fact was corroborated by Gathaya Mwangi PW 10.

The attack against this finding is threefold:

(1) that it contravenes section 100 of the Evidence Act (cap 80)

(2) that Gathaya Mwangi did not corroborate Gitonga;

(3) it was used by Kimunye Investments Company to try and save the land from sale by the Bank.

Section 100 of the Evident Act (cap 80) provides that if the language used in a written instrument is plain and unambiguous and applies to the existing facts accurately, it must be construed according to the plain and unambiguous language of the instrument itself; and extrinsic words do not apply to the facts. *Sarka on Evidence* 12th Edition page 848 cites *North Eastern Railways v Hastings* (1900) A C 260 as an illustration of this principle.

It was said on page 263 of the Carl of Halsbury,

“The words of a written instrument must be construed according to their natural meaning and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.”

Thus where the words are plain, there is no consideration of what one of the parties may have intended or that the parties may have acted differently.

It that were to apply to this case, then of course, as Mr Muthoga protested, the court ought not to have listened to any evidence as what Gitonga thought he was singing. As a matter of law extrinsic evidence was inadmissible.

Mr Harwood submitted that this was not applicable to criminal cases, since the State must certainly be able to prosecute on the basis of fraud or mistake. It was the truth behind the document that mattered.

Both sides may have their respective roles. Section 100 is a rule of exclusion of evidence. It puts the best evidence before the court concerning the provisions made by the parties, based on what they reduced to writing.

But if a document has not been truly made by a signatory, the non est factum rules may apply. Take *saunders v Angliq Building Society* [1970] 3 All ER 961. The headnote reads:

“The plea of non est factum can only rarely be established by a person of full capacity and although it is not confined to the blind and illiterate any extension of the scope of the plea would be kept within narrow limits. In particular, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning.

The burden of establishing a plea of *non est factum* falls on the party seeking to disown the document and this party must show that in signing the document, he acted with reasonable care” (under-lining ours)

There may be circumstances which would allow a signatory to resile from his admitted document of acknowledgement, signed by himself in a criminal case. In this case however, Gitonga does not allege a criminal fraud upon himself. He does not explain how his ‘mistake’ came about. He does not explain his degree of illiteracy, apart from saying that he can only read his own signature. But this was not his first land transaction. It was signed in the presence of another advocate Mullu Muia. Without fraud, or genuine mistake, or without proving that the document is void, the document stands, and if so it must at least create a doubt that money may have been paid.

But looking at the document, surely Mr Gitonga must have understood it. How could paragraphs (2) & (3) have been added, except with Gitonga’s consent? The first paragraph is professionally drafted. The second and third are not. It is his case that he needed to reconsider the totals. One can see from the exhibits how paragraphs (2) & (3) came to be added to paragraph 1. The references to Kshs 916,000 and 300,000 in the first paragraph could only refer to Gitonga’s receipts on the two contracts with Kimunye Investments Company. All supporting vouchers were good according to him, a surprising admission for an illiterate. This is a man who owns such property that he can borrow Kshs 3,000,000.00 from a Bank.

The evidence does not support any confusion with payment from the Gakenia Women’s Group.

2) Gathaya Mwangi PW 10 says quite plainly that the appellant only handed Kshs 555,000 of the money collected by Gakenia Women’s Group.

Kshs 2,955,636 was paid to Gitonga by the Group Direct. This does not corroborate Gitonga’s denial of payment by the appellant nor explain Gitonga’s alleged mistake as to the transaction involved. If anything, it clearly separates the two transactions.

3) Kimani, on behalf of Kimunye, had used Gitonga’s acknowledgment at the stage of trying to prevent the Bank from selling land under its Mortgages power of sale. At that stage, Kimani apparently believed payment had been made to Gitonga by the appellant. Late Kimunye disowned such payment. No reason was given for the change, except Gitonga’s denial.

On the evidence before the High Court, the latter had no justification for allowing Gitonga to resile from his acknowledgment. The burden of proof lay on the prosecution to prove that Gitonga had not received payment, and the issue of payment was highly controversial.

There is no real way of disputing the payment accepted by Gitonga on the vouchers amounting to Kshs 498,000, apart from two, the rest were dated after April 28, 1981. They therefore arose after the payment of Ksh 916,000 and the acknowledgment. The High Court thought that they supported the payment of Kshs 916,000; that there was no further contract towards which these payments could be made, and in any event could not be made direct to Gitonga. As the payment of Kshs 916,000 had been accepted prior to the acknowledgement of April 28, 1981, those vouchers could hardly support that payment. Whether or not the contract arose, these vouchers could be accommodated in the appellant's fee. While Kimani did start off by saying that the appellant could not pay Gitonga directly, that position was not maintained under cross-examination. Kimani agrees that on many occasions the appellant had been authorised to make payment direct. Indeed the whole price of the second contract was paid direct to Gitonga. Kimani said this:-

"I swore that Mr Gitonga had received more i.e. Kshs 3,643,564.40

"If Gitonga admitted he received the money I would drop the charges."

In the final analysis, it was Gitonga's word against the appellants. Kimani was a by-stander. He could not say of his own knowledge whether the money had been paid or had not been paid. As between Gitonga and the appellant, unless there was evidence of fraud or genuine mistake of which one was recorded, no reasonable Court could possibly conclude that the appellant had not paid the money to Gitonga, beyond reasonable doubt.

Gitonga was unsure of the payments made to him. He owed great sums of money. He had several transactions going on at one time. He said Kimunye should not have rushed to court without making sure of what had been paid. That is the real lesson in this case. In contrast, the appellant had been consistent throughout. In view of the failure of the lower Courts to appraise all the evidence generally as well as the evidence and the law regarding the acknowledgment accepted by Gitonga to have been made by him, and in view of the irregularity in the charge, it would be unsafe to support even a conviction of simple theft. Consequently, the appeal is allowed, the appellants' conviction quashed, a sentence set aside, and he is to be set at liberty forthwith unless held for any other lawful cause.

January 5, 1987

NYARANGI, PLATT & GACHUHI JJA