



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller, Nyarangi JJA & Platt Ag JA)

CRIMINAL APPEAL 56 OF 1985

BETWEEN

NELEAH RWAMBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nairobi, Torgbor J)

JUDGMENT

The appellant Neleah Rwamba appeals against her conviction for theft contrary to section 275 of the Penal Code, which was confirmed on first appeal, and the sentence imposed upon her, as reduced by High Court on first appeal, to 9 months' imprisonment. She has been on bail pending appeal to this court.

The essence of this appeal is whether the evidence was clear enough to prove a charge within the ambit of section 268(2) (e) of the Penal Code. Section 268 defines theft as including fraudulent conversion to the use of any person other than the general or special owner of the thing or property said to have been converted. Sub-section (2) (e) provides :-

“(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner”

This provision has been considered in several cases, and perhaps the most relevant is *Menzour-Ahmed vs R* [1957] EA 386. It is plain that the operation of the section depends upon the ascertainment of the will of the person alleged to have converted the money; and this is seen in contradistinction to the will of the owner, as appears from instructions to the accused, or the understanding of the course of conduct expected of the accused, as to what the accused was to do with the money on behalf of the owner. On the basis of what the accused should do, it can be seen whether or not the accused used the money at the accused's own will. Thus having ascertained this distinction between the will of the owner and the will of the accused, it will be necessary to observe whether the accused acted under a colour of right; because if that were so, then the conversion would not have been proved to have been fraudulent beyond reasonable doubt.

On the facts of this case, a cheque for Kshs 100,000 was to be paid by the advocates Vohra & Gitau, to the complainant Pauline, as compensation for her loss arising out of the death of her husband, Njue. It appears that a cheque was a difficult matter for Pauline to deal with in January 1978. At that time she had no bank account. The appellant, her sister-in-law, had been helping her throughout this litigation. The

appellant is a person of long experience in the Ministry of Health, and was generally a commanding figure in her family. The appellant and Pauline had been to see Mr Gitau on several occasions about the payment of compensation to Pauline, Pauline's minor daughter, and Pauline's mother-in-law Salome. Mr Gitau understood that the appellant would help Pauline to open a bank account if Pauline so desired. But on one of these visits, Mr Gitau understood that Pauline would like an open cheque. This was also to be the kind of cheque by which Salome was to receive compensation in the sum of Kshs 10,000 as a dependent of her deceased son Njue. Mr Gitau gave Pauline and Salome open cheques on January 16, 1978. This was against his normal practice since he did not usually give dependants open cheques. What happened to Salome's cheque is not known; but in Pauline's case, at some stage she endorsed the cheque over to the appellant. Having done so the appellant paid the cheque into her own bank account on January 17, 1978, which was the only course she could follow after the cheque had been endorsed. What the appellant was to do after that, depended on what instructions Pauline gave the appellant. Pauline might wish the appellant to open an account in Pauline's name with the Kshs 100,000; or she might want the appellant to withdraw the whole sum in cash at once, and hand it over to Pauline; or Pauline might decide to leave the money in the appellant's account and direct the appellant what to do with the money from time to time. Unfortunately, Pauline's instructions to the appellant after the appellant had banked the cheque were never clarified in the evidence, and although Pauline said that she expected to have cash, at one stage she said that she endorsed the cheque to the appellant as a sister-in-law.

The charge was laid on the basis of a theft of the Kshs 100,000 on January 17, 1978, on the assumption that the cheque for that figure was equivalent to money, which the appellant fraudulently converted on depositing the cheque into the appellant's own account, without taking any further steps. At any rate, it was the understanding of the trial court that the complainant "surrendered the cheque on the understanding that the appellant opened a bank account for her."

On the other hand, the High Court inferred that the complainant either wanted an account opened in her name or for the proceeds of the cheque to be paid to her. But the evidence does not disclose whether there were specific or alternative instructions given to the appellant. No doubt the money was the property of Pauline and that she would want to use it at some time; but the question is how and when did Pauline wish to use the money. Without the evidence on this point, it cannot be certain that there was a fraudulent conversion on January 17, 1978, the date on which the appellant banked the cheque in her own account. Furthermore, it is not clear on what date, if at all, the fraudulent conversion took place. That is supported by the fact that it took five years for Pauline to bring her complaint against the appellant, although during this time she had had the opportunity to complain, but did not complain to Mr Gitau, when Pauline withdrew trust money from her daughter's account in 1980; and while many family arrangements took place including Pauline's levirate marriage to Mbogo, the younger brother of Njue. It is clear that the great problem in this case is that Pauline changed her mind. First she wanted an open cheque from which she could have obtained cash directly, then she endorsed the cheque over to the appellant, which the appellant had to bank in her own account. It is this change of mind which necessitated instructions to clarify what the appellant was to do next, in order to make sure that there was no basis for a defence of colour of right as the years went on. As can be seen from the different ways in which the lower courts viewed this aspect of the evidence of Pauline and the appellant, Pauline's instructions were never clear. That is the main complaint of counsel in this appeal.

While the situation on the present charge is thus uncertain, we notice the appellant's statement that she had brought a civil suit against Pauline which is apparently still pending in the resident magistrate's court at Embu. If this is still so, then it may be best that Pauline should take advice as to whether she can counterclaim against the appellant for what sum she considers that the appellant owes her.

As matters stand on this appeal, it must be allowed, the conviction quashed and sentence set aside, and the appellant's bail is discharged and she is to be at liberty forthwith.

Dated and Delivered in Nairobi this 13th day of February 1986.

A.A.KNELLER

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

I certify that this is a true
copy of the original

DEPUTY REGISTRAR