REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

THIKA HIGH COURT CRIMINAL APPEAL NO 59 OF 2023

(FORMERLY KIAMBU HCCRA NO 59 OF 2019)

REPUBLIC…….
……..APPELLANT

VERSUS

LISPER KANANU MUCHIRI…….
RESPONDENT

(Being an appeal against the Ruling of Hon. J. M. Nang'ea Chief Magistrate emanating from Thika Magistrates Court Criminal Case No. 2581 of 2011 delivered on 18th July 2019)

JUDGEMENT

1. The Respondent herein was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. The Particulars of the charge were that on the 14th day of May 2017 in Kahawa Sukari area in Ruiru Sub County within Kiambu County, being a servant to Quick Mart Limited, stole Ksh. 1,404,000.00 (One Million, four hundred and for thousand shillings) the property of Quick Mart Limited which came into her possession by virtue of her employment.

2. The Respondent denied the charges and the matter proceeded to trial. On 6th June 2019 when the matter came up for further hearing of the Prosecution case, learned counsel for the Respondent objected to admission of prosecution exhibits PMFI 5,8,9,10&11 which were tendered by a document examiner. The documentary exhibits are an undated loan request purportedly written by the Respondent for KShs. 160,000.00; a document allegedly written by the

Respondent in apparent admission of indebtedness in respect of the sum subject of this case; a letter dated 17/05/2017 by the Respondent seeking renewal of employment contract; an expert report dated 21/11/2017 and an exhibit memo form respectively.

3. The objection was on the basis that producing the said documentary exhibits contravened Section 50 (2) (i) & (l) of the Constitution of Kenya 2010 and Section 25 A of the Evidence Act as they would amount to self-incrimination on the part of the Respondent. It was argued that the contents of the documents amount to a confession not recorded as required by law.

4. The Appellant on the other hand contended that the exhibits are sought to be produced by an expert who is not concerned with their contents. Moreover, the exhibits are not intended to be produced as a confession within the meaning of Section 25 and 25A of the Evidence Act. In any case, production of the documents did not infringe on Article 50 of the Constitution as alleged by the counsel for the Respondent.

5. The trial court found PMFI 5,9,10 and 11 admissible while PMFI8 was rejected on the basis that it had been written by the Respondent in apparent admission of indebtedness in respect of the sum subject of the case before the trial court, yet no lawful confession was recorded.

6. Aggrieved and dissatisfied with the decision of the trial court, the Appellant filed the instant appeal on grounds that:
   i. ***The learned magistrate erred both in law and fact to exclude and declare document***

marked MFI8 inadmissible in evidence but allow MF1 10 (the document examiner's report) yet it is the said document MFI8 that the document examiner had used to compare with MFI 5 and MFI 9 to derive his said report;

ii. ***The learned trial Magistrate erred both in law and fact by disregarding the prosecution's grounds of opposition dated 18th June 2019, to the defence's oral application for the exclusion of documents marked for identification as MFI 5,8,9,10 and 11 hence arriving at a wrong decision of excluding and not admitting MFI 8 as evidence yet the said document forms part of the document examiner's report which is an admissible evidence under section 48 of the Evidence Act, Cap 80 Laws of Kenya.***

iii. ***The learned trial Magistrate erred both in law and fact by failing to appreciate that the excluded document (s) was/ were not being produced to prove that the accused had confessed to the offence charged or is/ are being produced as a confession under Section 25 and 25A of the Evidence Act Cap 80 Laws of Kenya but its being offered to prove that the accused person had participated in the commission of the offence.***

iv. ***The learned trial magistrate erred both in law and fact by failing to appreciate the finding and the principles enunciated by the High Court. In Kiambu Criminal Revision No. 1 of 2016, Republic versus Mark Lloyd Stevenson, which case had been cited and highlighted to the court.***

v. ***The Learned trial Magistrate erred both in law and fact when he excluded the production and admission in evidence the said document that had been marked as MFI 8 yet its relevance in the case had been clearly indicated and the foundation of its production had been properly laid out.***

7. By direction of court, the Appeal was canvassed through written submissions. The Respondent did not file any submissions.

8. It was submitted on behalf of the Appellant under the tenet of Fair hearing that the documents in question were not obtained from the Respondent but from her place of work. Therefore, the Respondent was not being asked to give certain information documents or otherwise which, if it were the case, the Respondent would have a right to refuse to give such evidence. Reliance was placed on the case of ***Republic versus Fatma Okoth Criminal Case No. 9 of 2017*** where the court observed that Article 50 applies to the trial process. Therefore, it is the accused herself who has the right not to give self-incriminating evidence directly and not through proxy.

9. Accordingly, the evidence sought to be produced was not independent of the will of the accused. There was no statutory power under which the accused could have been compelled or required to give the evidence sought. Hence, the law allows for production of the exhibit in question. In any case, Section 48 of the Evidence Act allows for the admission of an expert opinion. Therefore, the issue of confession does not arise as the documents in question were obtained from the Respondent's place of work and not from her.

10. The appellant submitted that the trial court arrived at the wrong decision of excluding and not admitting MFI8 as evidence yet the said document forms part of document examiner report. The excluded document was not being produced to prove that the accused had confessed to the offence charged or is being produced as a confession under Section 25 and 25A of the Evidence Act. Instead, it is being offered to prove that the accused person had participated in the commission of the crime. MFI 8 was marked and its relevance in the case had been clearly indicated and the foundation of its production properly laid out.

11. Therefore, the Appellant prayed that the appeal be allowed and lower court ruling dated 18th July 2019 be set aside. Instead, the court do direct that the excluded document PMFI 8 be produced and be admissible in court as evidence.

12. This is a first appeal and our role is to re-evaluate the evidence afresh and to draw our own conclusions having regard to the fact that, unlike the trial court, we have not seen or heard the witnesses testify and due allowance must be given for that handicap. See **Okeno vs. Republic [1972] EA 32.**

13. Upon considering the pleadings, the evidence and the submissions, the issues that commend themselves for determination are, ***Whether this honourable court has jurisdiction to handle this matter and Whether PMFI8 was rightly excluded, as a confession, by the trial court.***

14. There is no provision in both the Constitution and the CPC for interlocutory criminal appeals.

The Constitution under article 50(q) provides that every accused person has the right, 'if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.' Similarly, the CPC under sections 347 and 379(1) only allows appeals by persons who have been convicted of an offence. However, pre-constitution 2010, the Court of Appeal did allow an interlocutory appeal in ***Thomas Patrick Gilbert Cholmondeley v Republic, Criminal Appeal No 116 of 2007 [2008] eKLR*** but cautioned against an unfettered right of appeal.

15. The High Court in ***John Njenga Kamau v Republic*, Criminal Appeal No 63 of 2014 [2014] eKLR** observed thus:

> ***"The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court's considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case."***

16. The Supreme Court set the position on interlocutory appeals in ***Waswa v Republic (Petition 23 of 2019) [2020] KESC 23 (KLR)*** by observing thus:

> ***…, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred,***

and await the final determination by the trial court. A person seeking to appeal against an interlocutory decision must file their intended notice of appeal within 14 days of the trial court's judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly allowed. These include:

a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;

b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;

c. Where the decision entails the recusal of the trial court to hear the cause.

17. From the above analysis it is clear that interlocutory criminal appeals can be filed for determination by an appellate court where it revolves around the exceptions set out by the Supreme Court in the **Waswa case (Supra*).***

18. The Appellant's case falls squarely within the exceptions for it is challenging the trial court's decision to exclude PMFI8 on the basis that it had been written by the Respondent in apparent admission of indebtedness in respect of the sum subject of the case before the trial court. Therefore, this court has jurisdiction to entertain this interlocutory appeal.

19. Regarding the question whether PMFI 8 was properly excluded on the basis that it is an admission in respect of the sum subject of the case before the trial court.

20. Section *17* of the Evidence Act defines an admission as

An admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned.

21. The circumstances under which an admission might be admissible are spelt out in Section 26 of the Evidence Act which provides:

26. Confessions and admissions caused by inducement, threat or promise. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

22. Therefore, in order to ascertain whether PMFI8 was properly excluded, it is important to establish the circumstances under which the admission was made.

23. The Court of Appeal in **Kanini Muli v Republic [2014] KECA 870 (KLR)** stated that,

Section 26 requires that for a confession to be inadmissible, the inducement, threat or promise upon which the confession is procured

must proceed from "a person in authority". In Rex Vs Todd (1901) 13 Man LR 364 Bain, J stated thus:

"A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason it is a rule of law that confessions made as a result of inducement held out by persons in authority are inadmissible is clearly this, that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both animates his hopes of favour on the one hand and on the other to inspire him with awe."

24. This therefore means that threats, inducement or coercion vitiates the admissibility of admissions under Section 26 of the Evidence Act. The onus of proving that the admission was not obtained through threat, coercion or inducements rests on the prosecution.

25. In the **Kanini case (supra**) the Court of Appeal further remarked:

"We need only add that the onus of proving that a statement by an accused person is voluntarily made and not obtained by improper or unlawful methods is upon the prosecution and where there is doubt as to whether the confession was voluntary, the prosecution has not discharged the onus upon it."

26. Flowing from the above, the Appellant had the burden of demonstrating that PMFI8, was not obtained through coercion, threat or undue influence by a person in authority. I have noted from the record that the

Appellant contends that PMFI8 was not intended to be produced as a confession under Section 25 of the Evidence Act, instead, it was to be produced to demonstrate that the Appellant participated in the offence.

27. Once an exhibit is produced in court, the prosecution lacks the power to control over the weight that the court will attach it. It would be unconscionable for an exhibit to be produced and then the court be directed on how it should be applied. The court reserves the power to ascertain the weight attached to any exhibit or piece of evidence in accordance with the law. This explains why the law has provided extensive rules on admissibility of evidence.

28. It is alleged that PMFI8 was written to the Respondent's employer. Therefore, it amounts to an admission to a private citizen within the meaning of Section 26 of the Evidence Act. The Court of Appeal in addressing itself to confessions to private citizens in **Owuor v Republic (Criminal Appeal 120 of 2017) [2023] KECA 364 (KLR)** remarked thus:

> ***"14.The requirement that for a confession to be admissible it has to be voluntary and not procured by inducement, threat or promise remains in regard to a confession made to a private citizen as it is to a person in authority. Yet because a confession made to a private person, unlike that made to a person in authority, need not be in the presence of a third party of the person's choice, there is another layer of safeguard in regard to a confession made to a private person for it to be admissible. The confession must have the ring***

of truth. The ring of truth is dependent on the overall evidence led by the prosecution."

29. Since the prosecution has the onus of proving that the admission was obtained in accordance with the law. The proper procedure would have been to undertake a trial within a trial to establish the circumstances under which the admission was obtained.

30. In **Lakhani V. Republic, [1962] EA 644)** the appellant had not objected to the admission of his confession of theft made to his branch manager and as a result the confession was admitted without a trial within trial being held. Later in his defence, the appellant denied making the confession. On appeal the Court of Appeal for Eastern Africa held that the trial court ought to have asked the appellant at the time when the evidence of his confession was about to be given, whether he wished to repudiate or retract it or whether he agreed to its admission in evidence, and that as soon as the appellant repudiated his confession, a trial within trial ought to have been held.

31. There is no evidence that a trial within a trial was conducted to ascertain the manner in which PMFI8 was obtained, once the Respondent objected to its production in evidence. The trial court simply dealt with the objection as a normal objection in law and in his ruling observed that, *"since no lawful confession was recorded, admission of this document is rejected."*

32. Flowing from the **Lakhani case (Supra,)** a trial within a trial would have been the best forum for both the Appellant to determine whether PMFI8 was obtained within the confines of the law, hence rendering it either admissible or inadmissible. Failure by the trial court to

order a trial within a trial denied the Appellant an opportunity to demonstrate whether the circumstances espoused under Section 26 of the Evidence Act were indeed fulfilled.

33. It appears, PMFI8 was prematurely excluded as it had not yet been ascertained whether the Respondent is indeed the one who had authored it. The authorship of PMFI8 could only have been ascertained by an expert pursuant to Section 48 of the Evidence Act. The record shows that while PW5 was on his feet, presenting the outcome of his forensic report into PMFI8 and PMFI9 an objection was raised that ultimately barred the production of PMFI8.

34. This approach rendered the testimony of PW5 otiose since there was no way of linking the document under inquiry to the Respondent. The better approach would have been to allow the report by PW5, and upon establishing that PMFI8 was authored by the Respondent, then the court would conduct a trial within a trial to establish whether it was obtained as per the law. The evidence of PW5 in so far as PMI8 was concerned has to do with its authorship and not necessarily its contents.

35. In the persuasive decision of **Republic v Fatma Mohammed Okoth 2018KEHC5368(KLR)**, Lesiit J, as she then was stated thus:

"10. The general rule on admissions applies that any statement allegedly made by the accused to PW3 tending towards an admission is not proof that the statement was correct or proof that the accused committed an offence. Such statement will be tested against the rest of the evidence adduced before the court. The

prosecution will still have to prove the charge against the accused on the required standard of law.

11. I must add a rider that in case the accused wishes she still has a right to re-visit the admission of the evidence of PW3 in her case, if the court places her to her defence. This is well illustrated in the case of Kanini Muli V. Republic, Cr. App. No. 238 of 2007, where the court of appeal held that even after the trial court has ruled a confession is admissible, the accused person is still entitled to call evidence to show that the confession cannot be acted upon."

36. Flowing from the above, it is not sufficient for the trial court to exclude PMFI8 merely on the basis that the admission was made outside the law on confessions. The mere production of PMFI8 is not proof that its contents are correct, or proof that the Respondent committed the offence in question. The ring of truth, from the totality of the evidence adduced by the prosecution, must prove the charge against the Respondent beyond reasonable doubt. I therefore find that PMFI8 was prematurely excluded.

37. The upshot of the matter is that the Learned Trial Court erred in prematurely excluding PMFI8 before conducting a trial within a trial to ascertain the circumstances under which it was obtained; which could have demonstrated whether it is inadmissible admission or not.

38. ***Resultantly, the appeal succeeds and the decision of the trial court is hereby set aside.***

39. ***In view of the inordinate delay of the trial, Kiambu Criminal Case No. 2581 of 2011 occasioned by the interlocutory appeal I direct that the substantive matter be heard and determined on a priority basis***.

DATED, SIGNED AND **DELIVERED** ELECTRONICALLY THIS **16TH OCTOBER,** 2025.

HON. T. W. Ouya
JUDGE