



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 3 OF 2019

BETWEEN

EVANS WAWERU MAINA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Conviction and Sentence of the High Court of Kenya at Voi

(Farah Amin, J.) delivered on 23rd January, 2019 *in H.C. CRA. No. 87 of 2019.*)

JUDGMENT OF THE COURT

1. The appellant, *Evans Waweru Maina*, and one *Peter Muendo* were charged with conspiracy to commit a felony contrary to **section 393** of the *Penal Code*, making a document without authority contrary to **section 357 (a)** of the *Penal Code*, and stealing contrary to **section 268 (1)** as read with **section 275** of the *Penal Code*.
2. In the first count, it was alleged that on 5th May, 2016 at Voi Law Courts in Taita Taveta County, jointly with others not before the court, they conspired to steal from *Beatrice Mkanyika Mwabili* Kshs.70,450.
3. In the second count, the appellant and his co-accused were charged with making a document without authority, the particulars being that on the same day and place, they made a court receipt serial No. 6369559 of Kshs.70,450 for Civil Case No.100 of 2016 without lawful authority or excuse.
4. In the third count, the two were charged with stealing Kshs.70,450 from Beatrice Mkanyika Mwabili, the complainant. All the offences were committed on the same day, 5th May, 2016.
5. After a full trial, where the prosecution called six prosecution witnesses, the appellant's co-accused was acquitted of all charges but the appellant was convicted of all the charges and sentenced to 2 years' imprisonment. The sentence was however suspended.
6. Being dissatisfied with the conviction and sentence, the appellant preferred an appeal to the High Court. The appeal was unsuccessful, hence a second appeal to this Court.
7. This being a second appeal, the jurisdiction of the Court is limited by dint of **section 361** of the *Criminal Procedure Code* to consider only matters of law. See *Karani v Republic [2010] 1KLR 73*.
8. The brief facts of the case that led to the appellant's conviction and sentence were as follows: On the material day, the complainant, who wanted to file a civil case against Taita Taveta County Government in a claim of Kshs.3,690,924, went to Voi Law Courts in the company of Peter Muendo Keli (the first accused before the trial court), who was then an employee of a law firm. The complainant gave a sum of Kshs.70,450 to the said Peter Keli to pay as court filing fees for the plaint.
9. The plaint and the court filing fees were given to the appellant. The first accused was issued with a receipt for the payment, which was subsequently proved to be a false one. The money that was received by the appellant was also not deposited into the Judiciary bank account.
10. In his self-drawn memorandum of appeal, the appellant faulted the High Court (*Farah Amin, J.*) for failing to properly analyse the evidence that was tendered before the trial court; for failing to find that the offence of conspiracy cannot be committed to a single person; for affirming the conviction on insufficient evidence; and for failing to consider his submissions.

11. As this is a second appeal, where the two courts below have made concurrent findings of fact, we are obliged to respect those findings of facts unless we are satisfied that those findings are not supported by the evidence or are based on perversion of evidence. See ***Karingo v Republic [1982] KLR 213***.

12. We shall therefore bear this principle in mind as we consider the submissions made by the appellant and the respondent's counsel, ***Mr. Evans Ketoo***.

13. The appellant, who was unrepresented, submitted that since the trial court acquitted the 1st accused of all the three counts, the learned judge erred by affirming his conviction for conspiracy. He submitted that the offence of conspiracy cannot be committed by an individual, there has to be at least two people.

14. Mr. Ketoo for the respondent opposed that ground of appeal, and indeed the entire appeal. He submitted that the offence of conspiracy had been proved against the appellant; that the trial court held that the appellant "*in corroboration (sic) with other people who are not in court committed the offence.*"

15. **Section 393** of the **Penal Code** defines the offence of conspiracy as follows:

"393. Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment."

16. The charge of conspiracy in Count 1 indicated that the appellant, his co-accused (Peter Muendo), jointly with others not before court, conspired to steal Kshs.70,450 from the complainant. As earlier indicated, the appellant's co-accused was acquitted of all the counts. The prosecution did not prove that there was anyone else who was part of the conspiracy. The question that arises is whether the appellant was lawfully convicted of this offence. The first appellate court did not consider the ingredients of the offence of conspiracy.

17. In ***Mulama v Republic [1975] KLR 24***, it was held that if on a charge of conspiracy all the accused but one is acquitted, that one has to be acquitted as well, unless it is charged and proved that someone else not named in the charge has been part of the conspiracy. In ***Archibold: Writing on Criminal Pleadings, Evidence and Practice***, pages 2589 and 2590, the learned authors state as follows: -

"The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons... so long as a design rests in intention only, it is not indictable; there must be agreement... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."

18. In the circumstances, since the prosecution did not demonstrate the involvement of any other person, we find and hold that the learned judge erred in law in affirming the appellant's conviction for the offence of conspiracy. Consequently, we allow that ground of appeal.

19. We now turn to the evidence that was adduced regarding the charge of making a document without authority (a court receipt) and the charge of stealing of Kshs.70,450.

20. PW3, the Accountant at Voi Law Courts, testified that that the receipt serial No.6369559 of Kshs.70,040 that was issued by the appellant to the 1st accused was not from the booklet that had been issued to the Court.

21. It is only the appellant who knew the source of the receipt book. Under **section 357** of the **Penal Code**, the offence of making a false document without authority is committed by the making, signing or executing a document, electronic or in writing, for or in the name or account of another person. The appellant wanted to pass off the receipt as a genuine one, lawfully issued by Voi Law Courts.

22. In our view, this count was sufficiently proved and the learned judge did not err in law in affirming the conviction for the offence of making a false document without authority.

23. We now turn to the count of stealing. The 1st accused testified that he gave the sum of Kshs.70,450 to the appellant. No genuine receipt was issued for that payment. The said sum was not banked in the Judiciary's account. That money was actually stolen. The High Court did not err in affirming the appellant's conviction by the trial court for the offence of stealing as charged, we so find and hold.

24. Save for the count of conspiracy which we have found was not proved, we dismiss all the other grounds regarding conviction.

25. As for the sentence, all we can say is that the trial court was extremely lenient in passing a two years' jail term and suspending it at the same time, with a warning to the appellant to keep off crime for the period of the sentence! To say the least, this was a slap on the wrist for such serious offences. But since the respondent did not appeal against the sentence, the High Court could not vary the same. We must therefore dismiss the appeal against sentence.

26. All in all, this appeal is dismissed, save for the first count of conspiracy. It is so held.

Dated and delivered at Nairobi this 24th day of April, 2020

D.K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPTY REGISTRAR