



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, M' INOTI & ODEK, J.J.A)

CRIMINAL APPEAL No. 57 of 2015

BETWEEN

ONG'ARE MOGUCHE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal against the judgment and sentence of the High Court of Kenya at Kisii (Sitati, .J) dated 11<sup>th</sup> October 2011*

in

*Kisii H.C. Cr. A. No. 177 of 2010)*

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JUDGMENT OF THE COURT

1. The appellant, **Ong'are Moguche**, was arraigned and charged before the Chief Magistrate's Court at Kisii with the offence of stealing by agent contrary to **Section 283** of the **Penal Code**. The particulars were that on the 7<sup>th</sup> day of April (sic) at Rongo Township in Nyanza Province, he stole Ksh.281,000/= which had been entrusted to him by Ali Noor Ali Sheto to purchase maize.
2. The prosecution case was founded on the testimony of the complainant, **Ali Noor Ali Sheto** (PW1) who testified as follows:

*I am a businessman at Rongo. On 7<sup>th</sup> April 2009 at 8.00 am I was within Rongo at my place of work. We were talking business with the accused. I gave the accused Ksh. 281,000/= to bring maize. The accused is my friend. We were together with Ms Mostata at that time. I gave the accused money. He went with Mostata in the accused motor vehicle. They went to Langata area at the border of Maasai. They came and informed me that they had bought 100 bags of maize.*

*On 9<sup>th</sup> April 2009, the accused went back alone to Langata. He came back without the maize. He told me he had sold the maize but he did not give me money.*

*After selling, he went back on 14<sup>th</sup> April 2009 alone. He called me and informed me he got 110 sacks of maize and he wanted me to send him a vehicle. I sent him a vehicle and told him to bring the maize. He came and told me he had sold the maize. Later he disappeared and I came to find him on 26<sup>th</sup> November 2009. He told me he had sold the maize and was to bring the money on 27<sup>th</sup> April 2009. From that date he switched off his phone. On 26<sup>th</sup> April 2009 he wrote a letter. I went and reported to the police. When he saw me he ran away and I arrested him. On 7<sup>th</sup> May 2009 I met the accused. He promised to bring the money on 10<sup>th</sup> May 2009. He wrote a letter dated 7<sup>th</sup> May 2009. He ran away. I searched for him and found him sleeping on 16<sup>th</sup> May 2009 in his house. He came to my office and wrote a letter that he would pay me on 31<sup>st</sup> May 2009. He later disappeared. I took police officers and we arrested him.*

*My core business is petroleum. I had not entered into any business with the accused. When I gave him Ksh. 281,000/= we did not write anywhere. I sent the accused to buy maize. I was giving him a commission. I sent the accused to buy me maize. What I want is the money I gave him. I had not employed the accused. I was giving him commission."*

3. On the other hand, **Mostata Ario Man** (PW2), swore and testified as follows:

***“On 7<sup>th</sup> April 2009..., I was at the complainant’s offices. The accused came, they discussed about maize business. The accused calculated and was given Ksh 281,000/=. The complainant told me to accompany the accused. We went to Langata and we bought 100 sacks of maize. We came to Rongo to look for a vehicle. The following day the accused went to Langata. The accused came the following day and told us he had sold the maize. I was informed by the complainant the accused had not paid him the money and he did not bring the maize.”***

4. **Richard Odhiambo Owino**, (PW3), also testified that he is a driver at Rongo. That on 7<sup>th</sup> April 2009 he was called by the complainant who hired his vehicle to go and carry maize at Langata Maasai. He went to Langata and when he arrived he met the accused. They carried the maize and proceeded to Jogoo area of Kisii where they kept the maize. He was given Ksh. 14,000/= by the complainant, as transport charges.

5. Finally, **Edwin Nyongesa**, (PW4), testified that on 31<sup>st</sup> May 2009, the complainant led him and **PC Wenje** to arrest the appellant. The complainant had three letters which showed that the appellant had undertaken to pay him money and he had refused to pay. That he arrested the appellant, booked him and charged him with the loss of Ksh. 281,000/=. **PW4** produced in evidence the three letters written by the appellant showing that the appellant had promised to pay the complainant the money. The letters did not indicate the amount due.

6. In his defence, the appellant gave an unsworn statement. He stated that on 7<sup>th</sup> April 2009, he was at Erdo Maasai in Transmara District. That he stayed there for three days buying maize. That on the 3<sup>rd</sup> day he called **Mostata** at Rongo to arrange for transport. That the vehicle came and he loaded the maize and sold the whole load. That early on, he had entered into agreement with the complainant to do business as partners. That they were three partners, himself, the complainant and **Mostata**. That later the complainant started demanding his money. That he arranged and paid the complainant Ksh.100,000/=. That he wrote the three letters/agreements and agreed to repay the complainant. The amount of money to be paid was not indicated in the letters/agreement.

7. Upon hearing and considering the prosecution and defence evidence, the trial magistrate convicted the appellant and sentenced him to two (2) years imprisonment with effect from 2<sup>nd</sup> September 2010. In convicting the appellant, the trial magistrate stated:

***“The evidence of the acknowledgment letters of the debt was produced as Exhibits 1-3... The court has looked at the defence and notes that the accused admits having been in partnership with the complainant and Mostata. That he went and purchased maize and that he sold the whole load. The question is where did he take the proceeds of the maize sold?.....***

***The evidence is supported by the evidence of PW2 Mostata Ario Mamo who was present when the money of Ksh. 281,000/= (sic) was given to the accused and he accompanied the accused to Maasai Langata....***

***The defence case is not reasonable. It is clear from the prosecution case that the accused was given Ksh. 281,000/=. Failing to state the amount in Exhibits 1-3 was on itself demonstrates the conclusion (sic).***

***I find the prosecution case proved beyond reasonable doubt. The accused is convicted as charged.”***

8. Aggrieved by the conviction and sentence by the trial court, the appellant lodged a first appeal to the High Court. The appeal was dismissed. The learned Judge held that the prosecution had proved its case to the requisite standard. On sentence, the Judge held that the sentence of two (2) years was neither harsh nor excessive in the circumstances of the case. In upholding the appellant’s conviction, the Judge expressed herself thus:

***“...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. In the instant case, it is on record the appellant was the expert in buying and selling of maize and it was for that reason that Sheto entered into the arrangement with him where the appellant could buy the maize, sell it and then bring back the principal plus profits less his commission.***

***The appellant said he had done a similar assignment for Sheto on three other occasions. I find the agency relationship between the appellant and Sheto was well established.”***

9. Further aggrieved by the dismissal of his appeal, the appellant has lodged the instant second appeal to this Court. The grounds of appeal as stated in his memorandum are that:

***“(i) The judge erred and misdirected herself in upholding the appellant’s conviction on insufficient evidence.***

***(ii) The judge erred in failing to find the prosecution had not proved its case beyond reasonable doubt.***

***(iii) The judge erred in not considering the grounds of appeal.***

***(iv) The judge erred in failing to find that the particulars of the charge sheet were not sufficiently proved and/or did not disclose the offence as charged.”***

10. At the hearing of the appeal, the appellant was represented by learned counsel **Miss Ondeyo** holding brief for Mr. Bosire. The respondent was represented by **Ms. Lubanga** holding brief for the Prosecution Counsel Mr. Mule. Both parties filed written submissions and cited authorities which they entirely relied upon.

## APPELLANT'S SUBMISSIONS

11. The appellant submitted that the learned Judge erred in failing to find that the particulars of the charge sheet were not sufficiently proved. The charge sheet did not contain the year in which the offence was committed. The charge sheet simply stated "On 7<sup>th</sup> day of April" without specifying the year of the alleged offence. The two courts below erred by inserting the year 2009 in the charge sheet. Counsel cited the case of **Yongo vs. Republic [1983] KLR 139** and submitted that the charge sheet as drawn did not disclose any offence. The said charge sheet was defective and failure or omission to insert the year of offence in the charge sheet occasioned a failure of justice to the appellant.

12. The appellant further submitted that the charge sheet was defective as it failed to specify the sub-section under which the appellant was charged. That the appellant was charged with stealing by agent contrary to **Section 283** of the **Penal Code**. That **Section 283** has several sub-sections. That the appellant could not possibly have been charged under every provision of **Section 283** of the **Penal Code**. That failure to specify the sub-section under which the appellant was charged rendered the charge sheet incurably defective. Counsel cited the case of **Sigilani vs. R [2004] 2 KLR 480**, where it was held that an accused person should be charged with an offence known in law. That in the instant matter, the offence was neither disclosed nor stated in clear and unambiguous manner to enable the appellant plead to a specific charge in **Section 283** of the Penal Code.

13. Counsel further submitted that the Judge erred in failing to find that the prosecution had not proved the case of stealing by agent as alleged in the charge sheet. That there was no evidence to back up the assertion that the complainant gave the appellant the sum of Ksh. 281,000/=; that the complainant's evidence that he gave Ksh. 281,000/= was not credible; that the acknowledgment letters produced in evidence cannot sustain the offence as the admitted debt could well have been a personal debt; that the appellant admitted he owed the complainant Ksh. 100,000/= and this may well have been a personal debt not connected to the offence as charged.

14. The appellant concluded his submissions by asserting that there were inconsistencies in the testimony of **PW1** and **PW2** whereby **PW2** testified that the appellant bought 100 bags of maize yet **PW1** testified that the appellant did not deliver the maize. That there is a lack of nexus between the charge sheet as drawn and the evidence on record. Based on the foregoing reasons, we were urged to allow the appeal.

## RESPONDENT'S SUBMISSIONS

15. The respondent in opposing the appeal submitted that the grounds of appeal could aptly be summarized into two namely: that the prosecution case was not proved beyond reasonable doubt; and that the judge erred in failing to consider the grounds of appeal.

16. The respondent submitted that all the ingredients of the offence as charged were proved beyond reasonable doubt. That evidence was led through the testimony of **PW1** that the appellant was given the sum of Ksh. 281,000/= to buy maize. That the said sum of Ksh. 281,000/= was entrusted to the appellant and he disappeared without bringing the maize or returning the money. That the appellant severally promised and acknowledged in writing by way of letters to repay the money and he did not honour his promise. That **PW2 Mostata Ario** was present when the appellant was given the sum of Ksh. 281,000/=. That the evidence of **PW2** corroborates that the sum of Ksh. 281,000/= was paid to the appellant.

17. On the defective charge sheet, it was submitted that **Section 382** of the **Criminal Procedure Code** cures any defect in the charge sheet. That the discrepancy in the charge sheet was minor and did not cast doubt on the prosecution case. That no prejudice or failure of justice was occasioned to the appellant. Counsel cited the case of **John Mwangi Wachira vs. R, Criminal Appeal No. 35 of 2015** where it was held that minor discrepancies and inconsistencies are curable under **Section 382** of the **Criminal Procedure Code**.

## ANALYSIS and DETERMINATION

18. The appellant was charged and convicted by the magistrate's court for the offence of stealing by agent contrary to **Section 283** of the **Penal Code**. His first appeal to the High Court was dismissed. This is a second appeal and by *dint* of **Section 361 (1)** of the **Criminal Procedure Code**, this Court's jurisdiction is limited to matters of law only. In **Chemagong vs. Republic (1984) KLR 213** at page 219 this Court held:

***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)".***

19. A central ground urged in this appeal is that the charge sheet was defective. Two alleged defects have been pointed out by the appellant. First is that the charge as drafted did not indicate the year in which the offence was committed. More specifically, that the charge sheet states the offence was committed on "7<sup>th</sup> April" and that the year in which the offence was committed was not stated. That the two courts below erred in inserting the year "2009" as the year the offence was committed when the same was neither indicated nor particularized in the charge sheet. The second defect is that the appellant was charged with stealing by agent contrary to **Section 283** of the Penal Code. That the said **Section 283** contains several sub-sections each being a stand-alone provision with distinct and separate offences under each sub-section. That the charge against the appellant did not specify under which sub-section he was charged. That the practical effect is that the charge sheet did not disclose a specific offence and sub-section to which the appellant could understand and plead to.

20. The State in responding to the submissions on defective charge sheet urged that **Section 382** of the **Criminal Procedure Code** cures any defect in the charge sheet. That no prejudice was occasioned to the appellant by failure to indicate the year in which the offence was committed.

21. We have considered the submissions by both parties on the issue of defective charge sheet. It is trite law that an accused person is convicted on the strength of the Prosecution case, and not on the weakness of the defence as had been held in **Israel Epuku S/O Achutu vs. R. [1934] EACA 166**. This Court while addressing itself to the question of a defective charge stated as follows in the case of **Obedi Kilonzo**

*“The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellant’s conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the Appellant. In the case of J.M.A v R [2009] KLR 671, it was held inter alia that:*

*“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the Appellant is not discernible.”*

22. Further, this Court observed in *Samuel Kilonzo Musau vs. Republic, Cr. App No. 153 of 2013 (Ur)*, that **Section 382** of the **Criminal Procedure Code** insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. (See also *George Njuguna Wamae vs. Republic, Cr. App. No. 417 of 2009*).

23. **Section 382 of the Criminal Procedure Code** provides as follows:

**“382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**

**Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”**

24. In the instant appeal, the evidence on record shows that when both **PW1** and **PW2** testified, they expressly stated that the offence was committed on 7<sup>th</sup> April 2009. Both these witnesses stated that the complainant, **PW1**, gave money to the appellant on 7<sup>th</sup> April 2009. From the testimonies of these two witnesses, it is clear that the year in which the offence was committed was 2009. In his own defence, the appellant referred to 7<sup>th</sup> April, 2009 as the date of the transaction. In addition, there is no scintilla of evidence that the appellant was prejudiced by the omission to indicate the year in which the offence was committed. We are therefore satisfied that there was no prejudice or miscarriage of justice occasioned to the appellant by the omission in the charge sheet to indicate 2009 as the year when the offence was committed. For this reason, we find that **Section 382** of the **Criminal Procedure Code** was properly invoked to cure the omission.

25. Another ground urged in this appeal is that the two courts below erred in failing to find that the prosecution case was not proved to the requisite standard. That there was no evidence on record to prove that the complainant gave the appellant the sum of Ksh. 281,000/=. That the evidence of **PW1** is not credible and that the letters produced in evidence acknowledging the appellant’s indebtedness to the complainant have no link to the offence as charged. That the said acknowledgment of debt could as well be acknowledgment of a personal debt. That in any event, the letters do not indicate the amount due and owing to the complainant.

26. We have considered the appellant’s and respondent’s submissions as to whether there is sufficient evidence on record linking the appellant to the offence as charged. We have also considered the submission that the learned Judge did not consider the grounds of appeal urged before the High Court.

27. We have perused and analyzed the impugned judgment of the High Court. The Judge identified two issues for determination namely whether the appellant was an agent of the complainant and whether the prosecution proved its case beyond reasonable doubt. The Judge also considered the effect of the civil suit by the complainant against the appellant in **Kisii CMCC No. 357 of 2008** (sic) for recovery of the sum of Ksh. 281,000/=.

28. A reading of the impugned judgment shows that having considered the issues of fact that were germane, the learned Judge upon re-evaluating the evidence on record agreed with the findings of the trial magistrate. On our part, we are satisfied that the learned Judge considered and evaluated all the grounds of appeal urged before the court and made findings and determinations on the grounds of appeal as urged by the appellant.

29. A further ground urged in this appeal is that the judge erred in failing to find that the particulars of the offence as stated in the charge sheet were not proved. The appellant was charged with stealing by agent contrary to **Section 283** of the **Penal Code**. In our considered view, a charge under **Section 283** of the **Penal Code** must be read together with the definition of theft in **Section 268** of the **Penal Code**. The ingredients of the offence of stealing by agent include:

*(i) There must be a property that is stolen within the definition and meaning of stealing as per Section 268 of the Penal Code.*

*(ii) There must be an agency relationship between an accused person and the complainant.*

*(iii) The property stolen must have been received by the accused person in any of the circumstances enumerated under paragraphs (a) to (e) of Section 283 of the Penal Code.*

30. Applying the foregoing criteria to the facts proved in the instant case, we are satisfied that the two courts below correctly held that the prosecution had proved its case beyond reasonable doubt. The record shows that the property alleged to be stolen is the sum of Ksh.

281,000/=. The payment of the said sum was proved by the testimonies of **PW1** and **PW2** which the trial court believed. The appellant neither challenged nor disputed the receipt of the sum of Ksh. 281,000/=. Both **PW1** and the appellant admitted that the relationship between them was not one of employer/employee. The appellant on his part stated that the arrangement was a partnership. There is no evidence on record of such partnership.

31. In this appeal, the appellant also challenges the credibility of **PW1** and other prosecution witnesses. The issue of credibility of a witness and the weight to be accorded to a witness's testimony are matters for the trial court. The appellant has not demonstrated to our satisfaction that the trial court did not properly assess the credibility of the prosecution witnesses. Time and again, it has often been stated that credibility of a witness is not a good ground of appeal in a second appeal.

32. The appellant in this appeal submitted that the letters produced in evidence acknowledging his indebtedness may well be proof of personal debt and have nothing to do with the offence as charged. We have considered this submission. We find that the submission is hypothetical and based on conjecture. The prosecution through the testimony of **PW1** was able to prove the link between the appellant's letters acknowledging indebtedness and the offence as charged. The complainant, **PW1**, testified on the circumstances that led to the appellant writing the letters. From **PW1's** evidence, the prosecution established that the letters were written by the appellant admitting liability to the complainant. We are satisfied that **PW1's** evidence linked the appellant's letters to the offence as charged.

33. Another ground urged in this appeal is that the prosecution evidence was riddled with inconsistencies. That the testimony of **PW1** and **PW2** contradicted each other. The appellant pointed out that **PW1** testified that he sent the appellant to buy maize and he did not bring the maize. That **PW2** contradicted this evidence by confirming that the maize had been bought.

34. We have considered the appellant's submissions on the alleged contradictions in the evidence of **PW1** and **PW2**. We find there is no material contradiction. The material fact as per the charge sheet is that **PW1** gave the appellant the sum of Ksh. 281,000/= to buy maize. That upon receipt of the money, the appellant neither delivered the maize to the complainant nor accounted for the proceeds of the maize that he had bought and sold. The trial magistrate captured this scenario by posing the question: where did he take the proceeds of the maize sold? It was not disputed the appellant received money from the complainant. It is also not disputed he has never bought the maize or accounted for the money. The conduct of the appellant running away and disappearing from the complainant is a tell-tale sign of a guilty mind.

35. If at all there is any contradiction in the evidence of **PW1** and **PW2**, the same is immaterial. As was persuasively stated in the Uganda case of **Alfred Tajar vs. Uganda Criminal Appeal No. 167 of 1969**, "*whereas minor inconsistencies and contradictions should be ignored, where they are deliberate untruths they may lead to rejection.*" In the instant matter, we are satisfied that any inconsistency or contradiction (if any) is minor and it contains no deliberate untruths that cast doubt on or dent the prosecution case.

36. The upshot is that we find this appeal has no merit and is hereby dismissed in its entirety. We affirm the conviction of the appellant and uphold the sentence of two years' imprisonment meted out to the appellant by the trial court and as upheld by the High Court. We note that the appellant was out on bond pending the outcome of this appeal. We cancel the bond and direct that the appellant be taken to prison immediately to serve the balance of the two-year term of imprisonment.

**Dated and delivered at Kisumu this 8<sup>th</sup> day of October, 2019.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**J. OTIENO ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**