REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 164 OF 2002

MUTUKU MWANZA…………………………………APPELLANT

VERSUS

REPUBLIC…………………………………………RESPONDENT

J U D G E M E N T

The appellant was charged with the offence of stealing by agent contrary to section 283 of the penal code before Principal Magistrate's court Kitui.

He denied the offence which proceeded to full hearing. He was convicted of the charge on 15th July, 2002 and he was discharged under section 35 of the penal code on condition that he pays the count Kshs.3,500/=. He paid the said money. He was dissatisfied with the conviction and sentence against which he appeals. There are five grounds of appeal raised in his petition of appeal.

Brief facts of the case are that PW1 wanted to sent a parcel to brother PW3 in Nairobi. He found the appellant at Kitui Bus park and gave him the parcel to deliver to his brother at Kitui Base ……at Machakos country bus in Nairobi. PW 1 said that the money was not received by PW3. PW1 and 2 went to enquire from appellant what had happened and he said he had delivered it at the Kiosk as instructed. The appellant did accept having been given a parcel to deliver to Nairobi which he did. He denied being given any money to deliver.

The first ground of appeal is that the Magistrate misdirected himself in law and facts when he found that the appellant was given 3,500/= to deliver to PW3 as the evidence on record does not support that finding. PW1 who gave out a parcel tot he appellant in evidence that he gave the appellant an envelope and Kshs.3,500/=. According to PW1 both the letter and the cash were from his sister which were to be sent to her brother in Nairobi. He said he did not seal the letter meaning it was not written by him. He never stated anywhere that it was in a sealed envelope as submitted by counsel. PW2 the owner of the money however says he only gave PW1 3,500/=. She did not say whether it was in an envelope or not. PW2 never talked of having written a letter to PW3 as alleged by PW1. According to PW3, the message he got from PW1 was that he had sent him money and a present in a sealed envelope. PW2 denied that she sent any letter save for cash. The wonders where this present came from. It is appellants defence that he opened the parcel and there was a card and note. PW5 the eye witness said he saw PW1 put money in an envelope and give to the appellant.

It is not clear from PW1's evidence how he gave the parcel to appellant wherein an envelope, whether open or sealed. PW1 and PW2's evidence are also at vestance as to what PW2 gave to PW1 to sent to Nairobi and PW1 never explained to the court how the letter and envelope came to be in the picture. There are real doubts raised in the prosecution case as to what PW2 actually gasve to the appellant to deliver.

Was there an agency relationship between the appellant and PW3. It is true that the two had never had dealings but section 283b&c provides that if the……………………stole is properly which has been entrusted to the offender to retain unsafe custody or to apply, pay or deliver for any purpose or to any person the same or any part thereof or any proceeds thereof or © property received by the offender is for or can account of any person.

This section is very clear. There need not be any dealings with the person provided one holds himself out to court for another. There need not be any monetary gain or otherwise from the said relationship. The appellant was an agent of PW1 as envisaged under section 283 of the penal code.

Another ground raised is that the court shifted the burden of proof on the appellant. In his defence the appellant said that he delivered the parcel to Kitui base Kiosk as instructed as he did not know the person to whom he was to deliver the parcel to. In his judgement in the 3rd last paragraph of the judgement the Magistrate observed that the appellant ought to have called the kiosk owner to prove or support his allegations that he indeed left the parcel there. This was an error on the part of the magistrate. All along the appellant had claimed to have left the parcel with somebody at Kitui Base Kiosk in Machakos bus stop. The prosecution never bothered to carry any investigations at the kiosk, or from the owner of the said kiosk. Having heard what the appellants allegations was it was upto the Investigating Officer to call the owner of the kiosk or workers to rebut the allegations of the appellant. This was the prosecutions case, to prove their case beyond any reasonable doubt. It was not for appellant to prove his innocence. Since the magistrate made that finding it means that there was indeed still a doubt in the prosecution evidence that the court wanted the appellant to fill which was not burden of the appellant so to do.

The last ground raised on appeal is that the sentence meted on appellant was illegal. The magistrate discharged the appellant under section 35 of the penal code on condition that Kshs.3,500/= was paid to the respondent within a week. I find nothing illegal about the sentence. The only problem with the sentence was not there was no default clause and state the period within which the condition was to operate. As regards issue of restitution of the respondent's money the court has a wide discretion in ordering compensation or restitution.

The court having found that it was not established beyond any doubt what PW1 gave to the appellant and whether any money passed hands from PW1 to appellant and the fact that the court shifted burden of prove on the appellant to prove his innocence, the court does find that the charge was not proved beyond any doubt. It is possible that PW 1 never passed on any money to appellant and this doubts should have been resolved in favour of the appellant and I find the conviction was unsafe and it is hereby quashed. The sentence here is set aside and the cash Kshs.3,500/= should be refunded to the appellant.

Dated, read and delivered at Machakos this……………………day of………………………..,2004.

R. WENDOH

JUDGE

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