Case Number:	Criminal Appeal 155 of 2018
Date Delivered:	22 Jul 2019
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Francis Gikonyo
Citation:	Harriet Kanorio & another v Republic [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	H. N. Ndungu C. M
County:	Meru
Docket Number:	-
History Docket Number:	CR. No. 1557 of 2012
Case Outcome:	Appeal allowed
History County:	Meru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL APPEAL NO. 155 OF 2018

(CORAM: F. GIKONYO J.)

HARRIET KANORIO.....1ST APPELLANT

WILSON GICHOHI WANJOHI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by H. N. Ndungu C. M

in Meru CR. No. 1557 of 2012 on 3.12.2018)

JUDGMENT

The charge they faced

[1] **HARRIET KANORIO** and **WILSON GICHUHI WANJOHI** the appellants were charged with stealing by servant contrary to section 281 of the Penal Code. The particulars of the offence were that on diverse dates between 2nd and 3rd day of November 2012 at Co-Operative bank of Kenya Makutano Branch in Imenti north District within Meru county, jointly with others not before court, being servants to co-operative bank of Kenya stole Kshs. 13,000,000, 1120 Canadian Dollars, British Sterling Pounds 660 and 60 US Dollars all totaling to Kshs. 13,599,000 the property of co-operative bank of Kenya which came into their possession by virtue of their employment.

[2] They were tried for the offence, convicted and sentenced to pay a fine of Kshs. 1,000,000 in default each to serve 15 months imprisonment

[3] They were dissatisfied with the conviction and sentence and they filed this appeal. The appeal carries the following grounds of appeal;

a) That the learned trail magistrate erred in law and in fact by failing to carefully and diligently analyze the evidence on record and in analyzing the evidence via partisan matter and in reaching a finding of guilt against the appellants that was/is contrary to the weight of evidence in record

b) That the learned trial Magistrate erred in law in proceeding to convict the appellants without setting the issues for determination in her judgment.

c) That the learned magistrate erred in law and in fact in convicting and sentencing the appellants on a charge that had not been proved beyond reasonable doubt as required by law

d) That the learned trial magistrate erred in law and in fact in giving a blind eye to the prosecutions grave omissions among them that the charge(s) before court had not been investigated and crucial prosecution witnesses had not been called to link

the appellant to the commission of the charge.

e) That the learned trial magistrate erred in law and fact in basing her judgment on mere assumptions, unreliable, irrelevant and remote circumstantial considerations in lieu of documentary evidence

f) That the learned magistrate erred in law and in fact in ignoring the evidence on record as well as the appellants submissions

g) That the learned trial magistrate erred in law and fact in flouting the rules of evidence and the mandatory requirements for judgment writing

h) **That the learned trial magistrate erred in law and fact in disregarding and rubbishing the appellants defence and submissions.**

Appellants Submissions

[4] This appeal was canvassed by way of written submissions. The Appellant argued that the prosecution failed to fully disclose the truth because the main reason this case was investigated in Nairobi was because the stolen money was traced to Standard Charted Bank, Yaya centre branch A/C no. 0101721838500 a person who purportedly paid cash bail for the third accused person, a fact that was ignored. Officers from CID Meru and CID Nairobi also confirmed to the court that they did not do any investigations. PW3 confirmed under oath that he arrested several staff members from Co-op Bank but failed to explain why he was only left with three. PW4 also stated that he had never seen any of the accused persons before the court and did not do any investigations. He additionally stated that he perused the file and decided that it was an inside job.

[5] It was also highlighted that the prosecution failed to establish how the 3rd accused locked the bank when he left and how he gained entry as the first person the following morning. The 1st appellant, an operations manager, had the key to the ATM room only, a door that was within another room. She could not access the ATM without the key to the computer room. The prosecution failed to establish who had the key to the computer room and the controls of the CCTV cameras which were conveniently not working on the said date. Additionally, the magistrate erred by holding that the operations manager had the key to the computer room as the CCTV server room and computer room key were kept by the systems administrator. Furthermore, the prosecution failed to call the security guards who were on 24hr shifts as witnesses making their evidence incomplete. The prosecution therefore did not present direct evidence connecting the appellant and the stolen money.

Respondents Submissions

[6] The state in their submissions opposed the appeal stating that the prosecution through their evidence proved beyond all reasonable doubt that the appellant was guilty of the offence of stealing by servant.

Courts rendition

[7] The court is under a duty to evaluate to evidence recorded by the trial court come to own findings and conclusions, except however, I should make an allowance for the fact that I neither saw nor heard the witnesses. See: **OKENO V REPUBLIC (1973) E.A 32**. where it was held;

"**An appellant on first appeal is entitled to except the evidence as a whole to be submitted to a fresh and exhaustive examination Pandya vs. Republic (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala V Republic (1957) E.A 570.). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (see Peters v. Sunday Post, (1958) E.A 424)"**

[8] I have considered the appeal and all the rival arguments by parties and emerging therefrom are the following issues for determination:

a) Whether the prosecution proved its case on required standard and in particular the essential ingredients of the charge of stealing by servant"

b) **Whether the trial court made a finding that was not supported by evidence"**

[9] It was submitted by the appellants that the prosecution did not present evidence that directly connected the appellant with the theft as they relied solely on circumstantial evidence. For circumstantial evidence to form the sole basis of conviction, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This is the threshold. See the case of **BENSON LIMANTEES LESIMIR & ANO. VS. REPUBLIC CRIMINAL APPEAL NO. 102 &103 OF 2002** where the court of appeal stated:-

"In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of R. vs Kipkering Arap Koske & Another 16 EACA 135 where it was inter alia held that:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

[10] It is important to state that suspicion alone does not suffice in making an inference of guilt. The Court of Appeal in the case **JOAN CHEBICHII SAWE – V- REPUBLIC CRIM. APP. NO. 2 OF 2002** had this say about suspicion in a criminal case:

"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998(unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence."

[11] From the record, the prosecution case was based on the fact that because the appellant had access to the strong room where the money was kept and the fact that there was no physical evidence of a break in she must have been involved in the theft. Again, it was argued that the fact that the 1st and 2nd appellant left their keys in their drawers inferred they knew that the theft was going to occur. On the other hand the appellants felt that the evidence that was produced could not directly link the appellant to the theft as the CCTV cameras were coincidentally not working and that the prosecution failed to call the security guards who were on duty on that fateful night making them critical witnesses.

[12] These arguments throws me to **MWALIMU KALAMA FONDO VS REPUBLIC[2009] eKLR** where it was stated that:

"I think the decision in Bukenya and 5 others v Uganda has been misapprehended. The principle advanced in that case is that failure to call as witnesses, persons who have been mentioned in a hearing does not automatically mean it's because their evidence would have been fatal to prosecution case and therefore call for an automatic acquittal. It is when the evidence called is inadequate as to leave loopholes which could have been filled by the testimony of the person mentioned but not called, that the same becomes fatal and gives room for the court to infer that had such a person been called, he would have given evidence adverse to the prosecution."

[13] I have carefully examined the evidence that was presented. I find that there were serious gaps in the prosecution case that needed to be filled in order to prove that the appellant was indeed behind the theft at Co-operative Bank. There were crucial witnesses that the prosecution needed to call upon in order to ascertain that the theft was an inside job. Additionally, the investigation officers in their testimonies confessed that they pre-determined that it was an inside job and therefore did not investigate further; something that greatly diminished the evidentiary value as well as probity of the case against the appellant. In this case, I am forced to state that shot cuts are not to be entertained in investigation of crimes because investigative process may lead to trial or loss of liberty or life or property of the accused. In addition, investigations are part of fair trial and that is why it is governed by rules of fair trial. Investigations should always afford fair administrative action to the suspect through carrying out of proper investigations on every allegation made so that the prosecutor will have reasonable reasons or grounds upon which to mount a criminal charge against a person.

[14] When I place the circumstantial evidence adduced, the prosecution did not prove their case beyond reasonable doubt. Evidence

was barely adequate and as such, vital witnesses such as the security guards or other personnel concerned with security, surveillance and CCTV monitoring could have offered crucial evidence in this case. Their omission would justify an adverse inference against the prosecution. Consequently, I find this appeal to be merited and is hereby allowed. I set aside the conviction and sentence. The appellant shall be released immediately unless lawfully held. It is so ordered.

Dated signed and delivered in open court this 22nd day of July, 2019.

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F. GIKONYO

JUDGE

In presence of

Olao for 1st appellant

1st appellant – present

Namiti for respondent

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F. GIKONYO

JUDGE