



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 13 OF 2020

PAULINE AUMA MWAYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.632 of 2015

of the Chief Magistrate's Court at Busia by Hon. Lucy Ambasi-Chief Magistrate)

JUDGMENT

1. Pauline Auma Mwayi, the appellant herein, was convicted for the offence of uttering a false document contrary to section 353 of the Penal Code.

2. The particulars of the offences were that on the 11th day of April 2015 at Equity Bank, Busia Branch, Busia Township, within Busia County, she knowingly and fraudulently uttered an ATM card for account Number [...] and a National identity card both bearing the name of Christine Rosa Reuben intending to withdraw cash Kshs. 70,000/= purporting to be the said Christine Rosa Reuben.

3. The appellant was sentenced to serve three years imprisonment. She has appealed against both conviction and sentence.

4. She raised grounds of appeal that can be summarized as follows:

a) That the learned trial magistrate erred in law and in facts by convicting her on uncorroborated evidence.

b) That the learned trial magistrate erred in law and in fact in not taking into account her mitigation.

c) That the learned trial magistrate erred in law and in facts by committing her to prison while she was a first offender.

5. At the time of hearing of the appeal, the appellant raised the issue of non-compliance with section 200 (3) of the Criminal Procedure Code. The state opposed this contention on grounds that it was not part of the grounds for appeal.

6. The appeal was opposed by the state through Mr. Mayaba, learned counsel who contended that the evidence on record was sufficient.

7. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

8. Section 200 (3) of the Criminal Procedure Code provides:

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

9. This is a mandatory provision where the succeeding magistrate has an obligation to inform an accused person of the right created under the subsection. Failure to comply with this provision, results in a mistrial. The Court of Appeal while emphasizing the import of non-compliance with the section in the case of **Henry Kailutha Nkarichia & another vs. Republic [2015] eKLR** stated as follows:

As to the contested consequence of the learned Judge's failure to inform the appellants of their right to call any or all of the

witnesses who had testified before his predecessor, we cannot agree that the need to comply with Section 200 (3) is lessened by the fact that all the witnesses had already testified by the time the case was taken over by Emukule J. If anything, we would opine that the more the witnesses who had testified, the greater the possibility of prejudice and therefore the more the need for the accused person to be informed and availed of the right of recall. At any rate, the provision applies to all cases of takeover of a partly or fully heard case by a succeeding judicial officer; because whether such officer acts on the evidence of his predecessor or recommences the trial *de novo*, it is always subject to the accused person's right of recall.

10. When this matter was taken over for hearing by Hon. Mrs. Ambasi, the learned chief magistrate, at the defence stage, the court did not comply with section 200(3) of the Criminal Procedure Code. The prosecution case had previously been handled by Hon. Washika Wachira, SRM.

11. The appellant's trial therefore amounted to a mistrial.

12. I have perused the record and although this trial took long to be concluded, it was the conduct of the appellant that contributed to the delay.

13. I therefore quash the conviction and set aside the sentence. The appellant to be availed on 15th October 2020 at Busia Chief Magistrate's Court for retrial by any other officer of competent jurisdiction other than Hon. Ambasi.

14. In the interest of justice the matter ought to be heard on a priority basis and where practicable, on a day-to-day basis.

DELIVERED and SIGNED at BUSIA this 8th Day of October, 2020

KIARIE WAWERU KIARIE

JUDGE