



**Republic v Waiganjo (Criminal Appeal 13 of 2020)
[2024] KEHC 14899 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 13 OF 2020
HI ONG'UDI, J
NOVEMBER 27, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

JOSHUA KARANJA WAIGANJO RESPONDENT

*(Being an appeal from the Ruling of Hon. J.M Omido – Principal
Magistrate in Nakuru CMCR 3195 OF 2014, delivered on 8th May, 2020)*

JUDGMENT

1. Joshua Karanja Waiganjo the respondent herein was charged with three (3) counts of the offence of personating a public officer contrary to section 105 (b) of the Penal Code. The particulars being that the respondent on 14th September, 2012 at Kenya Forestry College Londiani in Kipkelion District within Kericho County, falsely presented himself to be a person employed in the public service as a police officer, and assumed the rank of senior superintendent of police and presided over the graduation ceremony by way of inspecting a guard of honour mounted by forest guards.
2. The particulars of count 2 are that on 8th December 2012 at Njoro Rhino Safari Hotel in Njoro within Nakuru county, falsely presented himself to be a person employed in the public service as a police officer, and assumed the rank of Senior Superintendent of police and lawfully arrested two employees of the said hotel namely Dauglas Obwocha and Lilian Akinyi.
3. The particulars of count 3 are that on 8th December 2012 at Farmers Inn hotel in Njoro within Nakuru County, falsely presented himself to be a person employed in the public service as a police officer, and assumed the rank of senior superintendent of police and unlawfully arrested two employees of the said hotel namely Ann Wambui and Virginia Wanjiku.
4. From the trial court's record, it is not clear when the respondent was first arraigned in court, when the charges were read out to him and his plea taken. The matter proceeded to full hearing and the



prosecution called forty (40) witnesses. At the close of the prosecution case, the learned trial Magistrate in the ruling for case to answer acquitted the respondent together with his co-accused under section 210 of the Criminal Procedure Code Cap 75 Laws of Kenya.

5. Being dissatisfied the appellant filed this amended petition of Appeal dated 9th November 2023 challenging the acquittal on the following grounds:
 - i. That the learned trial magistrate erred in fact and in law by acquitting the respondent when there was more than sufficient evidence to place him on his defence thereby occasioning a miscarriage of justice.
 - ii. That the learned trial magistrate erred in law by misapplying and or incorrectly applying the principles relating to a prima facie case as clearly enunciated in the case Ramanlal Trambaklal Bhatt vs. Republic [1957] E.A. 332 thereby arriving at the erroneous finding.
 - iii. That the learned trial magistrate erred in law by irregularly locking cut prosecution's exhibits that had been marked for identification by unreasonably shutting the opportunity to avail witnesses.
 - iv. That the learned trial magistrate erred in law by finding that a prima facie case would not suffice since the arresting officer and the investigating officer had not testified in the case.
 - v. That the learned trial magistrate erred in law when he found that counts 1, 2, 3 and 4 were defective as drawn.
 - vi. That the learned trial magistrate erred in law and fact when he openly expressed bias and prejudice by suggesting that the prosecution was only entitled to ten (10) minutes to present the investigating officer's evidence, and over emphasized the fact of likely hood of unfairness to the accused persons, and without due regard to all relevant circumstances surrounding the case.
 - vii. That the learned trial magistrate erred in law by descending into the arena and appearing to make a defence for the respondents instead of allowing them to do so by themselves.
 - viii. That the learned trial magistrate erred in law by misapplying the burden of proof and by applying the wrong standard of proof of putting an accused person on his defence under section 210 of the Criminal Procedure Code, Cap 75 Laws of Kenya.
6. The appeal was canvassed by way of written submissions.

Appellant's submissions

7. Learned counsel James Kihara for the ODPP filed submissions and the same are dated 20th December 2023. He summarized the grounds of appeal into four issues and submitted on them.
8. The first issue is, the trial magistrate erred in law by misapplying and or incorrectly applying the principles relating to prima facie case. Counsel submitted that the prosecution through the evidence by PW2, PW29, PW30 and PW38 the prosecution had laid a basis and tendered evidence sufficient enough to place the accused on his defence.
9. Therefore, that the trial magistrate erred in law and misconstrued the tests and principles relating to the prima facie case and occasioned a miscarriage of justice by acquitting the accused under section 210 of the Criminal Procedure Code. He placed reliance on the judicial decisions in Bhatt v Republic [1957] E.A. 332 and Republic v Ndege (Criminal Appeal 60 of 2019) [2020] KEHC 11930 KLR.



10. The second issue is that the trial magistrate erred in law by finding that a prima facie case would not suffice since the arresting and investigating officers had not testified in the case. Counsel submitted that failure to call the arresting and/or the investigating officer was not fatal to the prosecution's case. He placed reliance on the case of *Kenneth Kimngetchi Soi v Republic* (2014) eKLR, where the Court held as follows:

“Courts have over the years held that whereas it is important to call the investigating officer or the arresting officer, failure to call them is not fatal to the prosecution's case but it depends on the circumstances of each case.”
11. Counsel submitted that the testimony by PW38 was enough to establish the accused's impersonation offence. He however argued that the trial Magistrate disregarded this crucial evidence and attached unnecessary weight to the absence of the investigating officer or arresting officer when the testimonies of the said witnesses were neither crucial nor fatal to the prosecution's case.
12. The third issue is that the trial Magistrate erred in law by misapplying the burden of proof and applying the wrong standard of proof of putting an accused person on his defence under section 210 of CPC. Counsel submitted that the learned trial Magistrate fell into the error of law and applied the wrong standard of proof when he held on page 81 of the ruling, as follows:

“There is no sufficient evidence to prove that any of the accused persons committed any of the acts/alleged offences in any of the seven (7) counts.”
13. The fourth issue is the trial magistrate erred in law and showed open bias and prejudice by shutting the prosecution's opportunity to avail witnesses by giving it only ten 10 minutes to present the investigator's evidence and appear to make a defence. Counsel submitted that in shutting the prosecution's opportunity to introduce new witnesses as well as capping the prosecution witness's time to present evidence to ten (10) minutes, the trial court appeared to make a defence for the accused. He urged the court to set aside the ruling of the trial court.

Respondent's submissions

14. These were filed by the firm of Gordon Ogola, Kipkoech & Company Advocates and are dated 21st June, 2024. Counsel identified three issues for determination.
15. The first issue is whether or not the prosecution established a prima facie case. Counsel submitted on what entailed a prima facie case while relying on the decisions in *Republic v Abdi Ibrahim Owi* [2013] eKLR and *Republic v Juma* [2024] eKLR quoted with approval in *Ramanlal Trambaklal Bhatt v R* [1957] E. A 332 at 335.
16. He reiterated the evidence by PW2, PW3, PW10, PW22, PW27 and PW38 and submitted that the prosecution failed to prove that on the dates of the alleged crimes the respondent was not a police officer. Further, that police uniform allegedly found in the respondent's possession upon his arrest was not produced in court as an exhibit.
17. The second issue is whether the burden of proof was met by the prosecution. Counsel submitted that there was no evidence against the respondent and all the marked exhibits were fabrications geared towards derailing the court into attaining a conviction. Further, that mere mentioning of these exhibits



could not help prove the case of the prosecution. Reliance was placed on the case of Republic v Amani David Dena [2001] eKLR where the court held that;

“The law is that unless items are properly produced as exhibits in court, they do not form part of the evidence to be considered by the court”

18. On the third issue, as to whether the conditions for retrial have been met, counsel submitted that the prosecution had not satisfied the conditions set in the case of Jeremiah v Republic [2004] eKLR where Lessit J. agreed with the court in Pius Lima & Another v Resublic C.A. No. 110 of 1991, which observed as follows:

“Our attention was drawn to authority (sic) that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are: Ahmed Sumar Vs, Republic 1964 Ea 481; Manji Vs, Republic 1966 Ea 343; Muyimba & Others Vs. Uganda 1969 Ea 433 And Merali & Others Vs, Republic [1971] EA 221. The principle s that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interest of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particulars facts and circumstances of each case,”

19. In conclusion, counsel urged the court to uphold the decision of the trial court in its entirety and consequently dismiss the entire appeal.

Analysis and determination

20. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence afresh and arrive at its own decision while bearing in mind that it did not see nor hear the witnesses. In Kiilu & another V Republic [2005] 1 KLR the Court of Appeal held:
- i. The appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
 - ii. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence so support the lower courts’ 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.
21. I have carefully considered the evidence on record, grounds of Appeal, submissions and the law. The main issue I find falling for determination is whether the trial Magistrate erred by concluding that no prima facie case was established against the respondent.
22. The appellant in its submissions argued that the trial Magistrate erred in law by misapplying and or incorrectly applying the principles relating to a prima facie case. Further, that through the evidence of PW2, PW29, PW30 and PW38 the prosecution had laid a basis and tendered evidence sufficient enough to place the accused on his defence.
23. On the other hand, counsel for the respondent argued that with the evidence adduced by PW2, PW3, PW10, PW22, PW27 and PW38 the prosecution failed to prove that on the dates of the alleged crimes the respondent was not a police officer. Further, that there was no evidence against the respondent and the marked exhibits were fabrications geared towards derailing the court into attaining a conviction.



24. The trial Magistrate in his ruling dated 8th May 2020 faulted the appellant for not availing sufficient evidence to enable the court determine whether the respondent was a police officer on the various dates of the alleged offences. Further, that no evidence was adduced to prove that the arrests conducted on 9th December 2012 were at Njoro Rhino Safari Hotel and Farmers Inn Hotel were effected by the respondent.
25. In the charge sheet, the respondent was charged with three counts of the offence of personating a public officer on various dates contrary to section 105 (b) of the Penal Code. The said section provides as follows;
- “ 105. Personating persons employed in the public service
Any person who—
- (a) personates any person employed in the public service on an occasion when the latter is required to do any act or attend in any place by virtue of his employment; or
- (b) falsely represents himself to be a person employed in the public service, and assumes to do any act or to attend in any place for the purpose of doing any act by virtue of such employment, is guilty of a misdemeanour and is liable to imprisonment for three years.”
26. Article 50 (2) (a) of *the Constitution* provides that an accused person is presumed to be innocent until the contrary is proved. Further, the *Evidence Act* Cap 80 of the Laws of Kenya at section 107 (1) provides thus:
- “ whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”
27. *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373 on what constitutes the burden of proof beyond reasonable doubt states as follows: -
- “ That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”
28. In light of the authority cited above, the burden of proof of an accused’s guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. Therefore, at the close of the prosecution case under Section 211 of the Criminal Procedure Code the prosecution must satisfy by way of the evidence presented so far that a prima facie case exists to warrant the accused person to be called upon to make his defence.
29. Having examined the testimonies of the forty (40) prosecution witnesses and without delving into the depths of their testimonies, I note that Pw1, Pw3, Pw4, Pw10, PW12, PW13, PW15, PW22, PW27, PW30, PW31, PW32, PW34 and PW38 majorly testified on the offences that the respondent was charged with under the three counts as listed in the charge sheet.



30. PW1 No. 218xxx Mr. Peter Njeru, testified that they did a raid at Farmer's Inn and Rhino under the directions of the PPO (accused 2) and they arrested some suspects who were later charged for being drunk and disorderly. Further, that 2nd accused asked him to swear an affidavit to have the said bars closed. He added that the 2nd accused had introduced the respondent as a Kenya Police Reservist (KPR).
31. PW3 No. 69xxx PC Boniface Mathenge Ndungu testified that he drove the respondent to Londiani for the Kenya Forest Service Officers pass out parade and he remained in the vehicle while the respondent sat throughout the parade. In cross-examination, he stated that a Major from Mavoko was the guest of honour and was the one who inspected the guard of honour.
32. PW4 No. 218xxx CIP Harun Mozere, testified that in the evening of 27th November 2012 PW1 asked him to close down 5 social places that closed after 11pm namely; Njoro Rhino Lodge, Friends Corner Restaurant, Rumors Restaurant and Farmer's Inn Restaurant. He went to the said premises and found that they were all lawfully licensed to operate after 11 pm. He took copies of their licenses to the PW1 but he told him that he was protecting them and ordered him to shut them down.
33. PW10 David Ngige Kimani a retired teacher, testified that on 14th September 2012, he received an invitation to KFS Training School in Londiani by bishop Ephraim Waiganjo who had been invited by his son (the respondent). Pastor Karanja joined them and together they travelled to Londiani in a private vehicle belonging to the respondent. He added that there was a pass out parade for Forest guards and the respondent had left ahead of them in a Landrover. At the graduation the respondent sat in front of them in police uniform and did not address the occasion.
34. PW12 No. 2006061xxx AP Corporal Martin Mureithi, testified that on 8th December 2012 him and his civilian friends were at Rhino Bar at around 11.30 pm when PW1 and another man who he did not know asked for licenses for alcoholic drinks at the counter. That the other man told them to assist him arrest people and take exhibits to the vehicle. The two sellers were arrested, and thereafter, they proceeded to Farmers Inn where many people were arrested. He later learnt through media that the man who was with PW1 was the respondent.
35. PW13 No. 20000065xxx CPL Reviel Gitu Kamau, testified that on 8th December 2012 while at Farmers' Inn Njoro together with his in-laws, police officers arrived among them the respondent who came and arrested people at around 11pm and 12 midnight. On cross examination he admitted to been very drunk on that day but he was able to recognize the respondent.
36. PW15 No. 231xxx Shamda Bakari, testified that the journey to Londiani was on 14th September 2012 and Pw3 told him that the work ticket had been signed by the respondent who was a senior officer at the office of the 2nd accused. The work ticket was marked as MF15.
37. PW22 John Francis Waweru, testified that on 14th September 2012, he invited guests and the mayor of Mavoko Mr. Patrick Makau was the chief guest in the graduation at Kenya Forest Service Londiani where he was a commandant. After the normal parade the chief guest joined them for lunch and the respondent attended as an ordinary guest. He was dressed in uniform which was not procedural and he sat at the back with other invited guests.
38. PW27 Jod Ihugo Karanja formerly No. 10xxx, testified that the PPO (accused 2) used to appoint KPR officers and he had 24 officers under his command. Further, the respondent's name was not in the copy of the inventory of KPR before 2012. The said list had 18 names and the same was marked as MFI11. He added that he learnt about the respondent over the radio. On cross-examination, he confirmed that the appointment letter from the PPO's office looked genuine.



39. PW30 Anne Wambui, testified that on 9th December 2012 while on duty at Farmers Inn hotel, police came in two land rovers. Among them was PW1 and the respondent who was in police uniform. The respondent ordered everyone in the bar to lie down. She locked herself in the counter and the respondent ordered them to open it or else he would shoot them. She later opened the counter and the respondent slapped her several times. He told the other police officers to take crates of beer. She was thereafter, arrested together with one Njoki and other customers.
40. PW31 Timothy Kamau Githongori, testified that on 9th December 2012 he was telephoned by two of his workers Damaris and PW30, who informed him that the police had raided his hotel (Farmers Inn). He went there and found the respondent together with PW1. PW30 had locked the counter and the respondent kept banging on it. When she opened it the respondent slapped her on the face four times and they entered and carried three (3) crates of beer.
41. Thereafter Pw30 and one Virginia were arrested together with four (4) or five (5) customers but the police officers who were drinking were released. His workers were charged the next day and when he presented the licences to the Magistrate, the customers who had been arrested were each fined kshs. 500/= for being drunk and disorderly while his workers were released.
42. PW32 Elizabeth Njeri, testified that on 9th December 2012 while at her hotel (Farmers Inn), at around 11.30pm she was called by one Timothy who informed that her staff had been arrested. They were taken to court and she presented the licenses to the Magistrate. They were told to go and see the PPO since the respondent had threatened to shoot them. The PPO welcomed them at his office and when she asked him who the respondent was, he informed them while raising his voice that he was a Police Reservist and that she should ask PW1, for more information.
43. PW34 No. 215xxx Francis Musembi Munyambu testified that he was the former PPO Rift Valley and had handed over to Mmbijiwe (accused 2). He further stated that they had a command structure within the KPR (Kenya Police Reservists) and the highest rank was chief inspector. He however could not remember the year when KPR was disbanded but the Commissioner of Police could delegate powers to the PPO to appoint KPR officers.
44. He went on to testify that the respondent was not one of his KPR officers, though he did not know how many KPR officers were under him. He added that KPR officers were currently appointed under the National Police Service and that the OCPD could recruit the said officers with the permission of the Commissioner of Police.
45. Finally, PW38 a former Commissioner of Police testified that there were two types of KPR officers, the urban KPR which was disbanded in April 2004 and those in banditry areas. The KPR worked under the PPO, though he was not aware of how many were stationed in Nakuru. He added that KPR officers upon appointment were issued with KPR 1 and 2 which were documents of appointment and upon discharge they were issued with a discharge letter.
46. He testified further that he was not aware of any graduation at Kenya Forest Service (KFS) in Londiani on 14th September 2012. That he got to know about the respondent in mid-December 2012 when information came out that he (the respondent) and another civilian had boarded a police helicopter to an operation in Baragoi.
47. He added that they had later discovered that the respondent was actually an inspector at KPR but had been discharged in 2004 and he was to return all police items as his services were no longer needed. The discharge letter was marked as MFI15.



48. Having considered the testimonies of the above prosecution witnesses, the question is whether the evidence tendered established a prima facie case against the respondent.
49. In *Republic v Abdi Ibrahim Owi* [2013] eKLR, the court defined a prima facie case as follows:
- “Prima facie’ is a latin word defined by Black’s Law Dictionary 8th Edition as, “sufficient to establish a fact or raise presumption unless disapproved or rebutted”. ‘Prima facie’ is defined by the same dictionary as “the establishment of a legally required rebuttable presumption.”
50. In *Ronald Nyaga Kiura v Republic* [2018] eKLR, the court held:
- “It is important to note that at the close of the Prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie case has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code...”
51. The testimonies of the prosecution witnesses summarized above, confirm that they interacted with the respondent in his capacity as a Police Reservist. Further, accused 2 who was the PPO on several occasions referred to the respondent as a senior officer in the KPR. Additionally, several witnesses confirmed that the respondent attended KFS graduation as a guest, sat all through and he did not inspect the parade or guard of honour.
52. The only document which showed that the respondent had been discharged as a Police Reservist was only marked for identification as MFI 15. It was never produced as an exhibit and so could not be considered as evidence. The attempts by the prosecution to avail the investigating officers to testify were futile. Eventually, when Inspector Fatuma Abdi came to court to testify the prosecution counsel told the court that she could not proceed since the said witness had stated she was not the investigating officer, and so could not produce the exhibits. Prior to this several summons and warrants had been issued by the court and adjournments granted to allow the prosecution avail all their witnesses in court including Inspector Fatuma Abdi, who declined to testify.
53. The respondent was charged with personating a police officer. From the evidence on record, it is clear that there was no evidence to show that the respondent inspected any guard of honour on 14th September, 2012. Even PW38 a former Commissioner of Police denied there having been any graduation for Kenya Forest Service in Londiani on 14/9/2012. On the alleged incidents of 8th December, 2012, the evidence is that the respondent was in the company of police officers. Does it mean he impersonated a police officer in the presence of police officers who had accompanied him? Why did they go with him if he was not known to be one of them?
54. PW32 told the court that when they went to the PPO’s office to inquire about the respondent he told them while raising his voice that the respondent was a Police Reservist and she should get more details from PW1 (the OCPD Njoro then). PW1 also told the court that the PPO (2nd accused) had introduced the respondent to them as a Kenya Police Reservist. If the PPO introduced him as such why would his acquittal stand and not that of the respondent?
55. The alleged letter of discharge of the respondent from the position of Inspector at Kenya Police Reservists (KPR) marked as MFI 15 was never produced as an exhibit. Therefore, there was no evidence adduced to confirm whether the respondent was or was not in the said service as at the time of the alleged offences.



56. The prosecution in this case was given all available opportunities to present all its remaining witnesses and evidence but it did not. The respondent had been incarcerated since 2013 and by May 2020 the prosecution still wanted more time to continue adjourning the case. When the trial court declined the unnecessary request, the prosecution moved to the High Court by way of Revision in Nakuru High Court Criminal Revision No. 12 of 2019. Justice Joel Ngugi (as he then was) dismissed the said application.
57. One of the reasons for dismissal of the application for review was the issue of the prolonged hearing which amounted to violation of the right to fair trial. The court thus declined to grant the orders sought by the prosecution which would have amounted to prolonging the trial and prejudicing the respondent and his co-accused.
58. The evidence presented by the prosecution touching on the respondent was that of: PW1, PW3, PW4, PW10, PW12, PW13, PW15, PW22, PW27, PW30, PW31, PW32, PW34 and PW38. Their evidence does not strongly support the charges against the respondent. The witnesses PW30, PW31, PW32 all refer to an incident that happened on 9/12/2012. None of the counts refers to an offence committed on the said date.
59. All in all, my finding is that the prosecution failed to establish a prima facie case as required against all the accused persons. It is not clear why the Appeal against the respondent's co-accused was withdrawn and not this one. Placing the respondent on his defence by the trial court would have been a pure academic exercise.
60. I am satisfied that the learned trial Magistrate (as he then was) arrived at the right decision which this court will not interfere with. The Appeal lacks merit and is hereby dismissed. The finding and ruling by the trial court dated 8th May, 2020 is upheld.
61. Orders accordingly.

DELIVERED, DATED AND SIGNED THE 27TH DAY OF NOVEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

