



**Keizi v Republic (Criminal Appeal E012 of 2022)
[2024] KEHC 14917 (KLR) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E012 OF 2022
JN KAMAU, J
NOVEMBER 26, 2024**

BETWEEN

CLEMENT KEIZI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon S. Manyura (RM) delivered at Hamisi in Principal Magistrate's Court in Criminal Case No E162 of 2021 on 26th August 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged with two (2) counts of the offence of stealing motorcycles contrary to Section 278A of the Penal Code, Cap 63 (Laws of Kenya).
2. He was convicted by the Learned Trial Magistrate, Hon S. Manyura (RM), on the said charges and sentenced to three (3) years imprisonment. This sentence was to run consecutively with the sentences he was also given in Cr Case No E13 of 2022 and Cr Case No E162 of 2022.
3. Being dissatisfied with the said Judgment, on 6th October 2022, he lodged the Appeal herein. His Petition of Appeal was dated 3rd October 2022. He set out eight (8) grounds of appeal.
4. He filed two (2) sets of Written Submissions. The first one was dated and filed on 9th April 2024 while the second was undated and filed on 19th September 2024.
5. On 9th July 2024, the court directed the Respondent to file and serve its Written Submissions by 9th August 2024. It did not file the same within that period. As at the time of writing the Judgment herein, there were the Written Submissions by the Respondent dated 7th November 2024. As the same were



filed out of time and no leave was sought to admit the same and deem them as having been duly filed and properly on record, the court did not consider the same.

6. The Judgment herein is therefore based on the said Appellant's Written Submissions only.

Legal Analysis

7. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
8. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
9. Having looked at the Appellant's Grounds of Appeal, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Charge Sheet was defective;
 - b. Whether or not the Appellant's right to fair trial was infringed upon;
 - c. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - d. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
10. The court dealt with the said issues under the following distinct and separate heads.

I. Charge Sheet

11. Although the Appellant did not raise a ground of appeal on this issue, he submitted on the same. As he was a layperson, this court deemed it fit to pronounce itself on the issue.
12. He submitted that the Trial Court erred in its findings by relying on a defective charge sheet to convict him. He argued that the evidence on record did not tally with the charge. He asserted that the statements of Kelvin Kigali (hereinafter referred to as "PW 1") and Maxwel Majera (hereinafter referred to as "PW 2") pointed to the offence of cheating contrary to Section 315 of the Penal Code while the evidence of No 237011 PC Tatemo (hereinafter referred to as "PW 4") suggested he had committed an offence of obtaining property (sic) contrary to Section 313 and 315 of the Penal Code.
13. He referred to Sections 134 and 214(1) of the Criminal Procedure Code and argued that no amendment was made to the charge during trial hence the same was defective contrary to Section 214 (1) and (2) of the Criminal Procedure Code. He asserted that the error or mistake in the charge was a substantial one and could not be cured by Section 382 of the Criminal Procedure Code as it occasioned failure to justice against him.
14. In that regard, he relied on the case of *Yongo vs Republic* (1983) KLR where it was held that a charge was defective under Section 214(1) of the Criminal Procedure Code where it did not accord with evidence given on trial.



15. Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

16. Notably, the said Section 214 (1)(i) of Criminal Procedure Code stipulates that:-

“Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

- i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge”

17. Section 313 of the Penal Code Cap 63 (Laws of Kenya) provides as follows:

“Obtaining by false pretences Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

18. Further, Section 315 of the Penal Code provides as follows:

“Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour and is liable to imprisonment for three years.”

19. A perusal of the Amended Charge Sheet dated 4th April 2022, indicated a statement of the specific offence with which the Appellant was charged, together with particulars as to the nature of the offence charged. The proceedings during trial were clear that the evidence that was tendered showed that the particulars of the offence he committed tallied with the offence that he was charged with.

20. The Charge Sheet was amended on 17th June 2022. The Trial Court proceedings showed that the Charges and the particulars thereof were read over and explained to him and he responded to the same.

1. This court was not satisfied that the Appellant was prejudiced in the manner the Charge Sheet was drafted. Without belabouring the point, this court was not persuaded that the provisions under which he was charged did not match the particulars and facts of the offence herein as he argued.

II. Right To Fair Trial

22. Ground of Appeal No (1) of the Petition of Appeal was dealt with under this head.



23. The Appellant submitted that his constitutional rights were violated contrary to Articles 50(2)(c) and (j) of *the Constitution* of Kenya, 2010. He argued that the Trial Court erred in failing to note that the Prosecution did not disclose to him all the evidence it intended to rely upon during trial. He pointed out that the said evidence included a contract forms, Delivery Notes and Invoices issued to Kevin Kigali and Maxwell Mujera by Watu Credit. He contended that he was only furnished with the Charge Sheet and two (2) witnesses' statements.
24. He urged the court to consider the fact that he was a layman and placed reliance on the case of Thomas Patrick Cholmondeleys vs Republic Criminal Appeal No 116 of 2007 (eKLR citation not given) where it was held that it was imposed upon the prosecution a duty of practical disclosure requiring that all statements and exhibits intended to be used by the prosecution be availed to the defendant whether requested for or not.
25. He also relied on the case of Deward vs Republic [1993] All ER where the appellant was set free on appeal where her main ground was that the prosecution failed to disclose the relevant evidence to be used against her on trial.
26. Article 50(2)(c) of *the Constitution* of Kenya, 2010 provides that:-

“ Every accused person has the right to have adequate time and facilities to prepare a defence.”
27. Article 50(2)(j) of *the Constitution* of Kenya provides that: -

“ Every accused person has to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”
28. A perusal of the proceedings of the lower court showed that indeed on several occasions, the Appellant informed the Trial Court that he was ready to proceed with the hearings. He took plea on 7th April 2022 and matter was fixed for hearing on 16th May 2022. When the matter came up on 16th May 2022, he indicated that he was ready for the hearing. The Trial Court therefore proceeded to hear the case.
29. Going further, when the Ruling on a case to answer was delivered on 17th June 2022, the case was fixed for defence hearing on 6th July 2022. When the same came up for hearing on the said date, the Prosecutor was away on official duties and the matter was postponed to 22nd July 2022. On 22nd July 2022, he informed the Trial Court that he was ready to proceed with his defence case.
30. There was nothing in the proceedings of the lower court to suggest that he had not received the said documents by the time he testified. If he had not been furnished with any document, he ought to have informed the Trial Court before the trial and his defence commenced. He did not do so.
31. In the absence of proof of his assertions that his right to fair trial had been infringed upon and/or violated, this court was not persuaded that it should find that the trial was rendered a nullity necessitating a retrial.
32. In the premises foregoing, Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

III. Proof Of The Prosecution's Case

33. Grounds of Appeal Nos (2), (3), (4), (5) and (8) were dealt with under this head.
34. The Appellant submitted that the right to liberty was fundamental and guaranteed by *the Constitution* and by the various international legal instruments that Kenya was party to. He was emphatic that the



same could not be taken away by the State unless there was legal justification. He contended that it was for that reason the criminal charge ought to be proved beyond reasonable doubt to justify taking away the liberty of any person. He therefore argued that those charged with prosecuting suspected offenders had to justify the criminal charges by bringing credible evidence.

35. He cited the cases of *Mwango vs Republic* (1983) KLR 327 and *Simon Musoke vs Republic* [1958] EA 715 where the common thread was that the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt.
36. He argued that the Prosecution did not marshal evidence that was justified to convict him. He submitted that the Prosecution's case was full of contradictions as to when the motorcycle was stolen.
37. He placed reliance on the case of *Abanga alias Onyango vs Republic* Criminal Appeal No 32 of 1990(UR) where the Court of Appeal set out the principles to apply in applying circumstantial evidence which included, circumstances from which an inference of guilt is sought to be drawn must be urgently and firmly established, the said circumstances taken cumulatively should form a chain so complete that proves that within all human probability the crime was committed by the accused and that the circumstances should be of definite tendency unerringly pointing towards the guilt of the accused.
38. Notably, PW 1 testified that on the material day of 10th March 2022 at around 0700hrs, he went with the Appellant herein to Watu Credit in Kisumu to buy a motor cycle. The purchase price was Kshs 141,600/= and Kshs 230,000/= if one purchased the same on loan. The Appellant was to pay for the same.
39. After the Appellant paid Kshs 15,000/=, they were given Motorcycle Registration Number KMFY 413Q make TVS HLX 150X (hereinafter referred to as "the first subject motorcycle"). When he asked the Appellant where the said first subject Motorcycle was, he told him that the same had been stolen.
40. On cross-examination, he stated that the Appellant was arrested with the said first subject Motorcycle which had been taken on credit.
41. PW 2 testified that on the material day of 10th March 2022 at around 9.00 am the Appellant called him on phone and asked him to meet him near the Church. They met and went to Kisumu at Watu Credit. The Appellant said he wanted to request for motorcycle on his behalf and that once they bought it, he would be the driver (sic). They did not purchase the motorcycle on the said date as the system had a problem.
42. When they went back on 11th March 2022, he paid Kshs 15,000/= for the Motorcycle registration number KMFY 684Z TVS 125 HLX (hereinafter referred to as "the second subject motorcycle") red in colour. The purchase price was Kshs 131, 690/= while hire purchase price was Kshs 230,000/= inclusive of interest.
43. They were given the said second subject Motorcycle and the Appellant drove the same until Gambogi. He took it and drove to Banja. On his way at Kapsoyi, he met the Appellant who was in company of another person and that they forcefully took away the said motor cycle and its documents. He pointed out that it was about 7.30p.m and he reported the same to Watu Credit and Serem Police Station. He said that when he went back to check the turn of events at Watu Credit, he was informed that the said second subject Motorcycle was in Kitale and the tracker had been removed.
44. Erick Sabai Kamonde (hereinafter referred to as "PW 3") testified that on the material day at around 0900hrs he was at home taking tea when his son , one Chemeli, said that he was going to buy a motorcycle on loan terms with the Appellant herein. He stated that he went to Kisumu with them



- where his son bought a motorcycle and gave it to the Appellant herein. He later heard that the motorcycle was lost by PW 1. He pointed out that he recorded his statement at Serem Police Station.
45. In his cross-examination, he explained that when the Appellant came to his house, he had a motorcycle but with a different person riding it. He added that he saw PW 1 giving the Appellant money for the purchase of the motorcycle and that PW 1 had told him that he had employed the Appellant to ride the motorcycle.
46. PW 4 was the Investigating Officer. He corroborated the evidence of PW 1, PW 2 and PW 3. He produced the contract for PW1 and PW 2 with Watu Credit, delivery notes and invoices as exhibits in this case.
47. In his defence, the Appellant denied having committed the offence and averred that he was framed due to a land dispute.
48. Stealing is defined by the Black's Law Dictionary as:-
“ To take (personal property) illegally with the intent to keep it unlawfully”
49. Section 268 of the Penal Code defines stealing as:-
“ A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”
50. This court had due regard to the case of Wycliffe Anyona Nyabuto vs Republic [2014] eKLR where it was held that the essential element in a charge of theft was that the person accused fraudulently converted a property which was capable of being owned so as to deprive the owner of such property.
51. Being a criminal case, the burden of proving that fact was upon the Prosecution. The standard proof was beyond reasonable doubt. Following investigations, the Appellant was arrested with the said first subject Motorcycle. He was in company of another when they forcefully took away PW 2's second subject motorcycle.
52. PW 1, PW 2 and PW 3 were all eye witnesses to the criminal transaction. PW 4 produced in evidence the contracts that PW 1 and PW 2 had entered with the Watu Credit towards the purchase of the first and second subject motorcycles together with delivery notes and invoices thereof.
53. The Appellant's defence was simply a denial. His evidence was not watertight enough to displace the Prosecution's inference of guilt on his part. His argument that the case was full of contradictions or that he was framed thus fell by the wayside. Any contradictions or inconsistency were insignificant and did not affect the inference of guilt on his part.
54. The Trial Court could not therefore have been faulted for having found that the Prosecution had proved its case against him beyond reasonable doubt.
55. In the premises foregoing, Grounds of Appeal Nos (2), (3), (4), (5) and (8) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

IV. Sentencing

56. Grounds of Appeal Nos (6) and (7) of the Petition of Appeal were dealt with under this head.



57. The Appellant submitted that he was charged with two (2) charges of similar nature and circumstances and that the files were not consolidated to allow a directive that his sentences run concurrently. In the premises, he argued that sentences imposed on him were harsh and excessive.
58. He invoked Clauses 2, 3, 24 and 25 of the Sentencing Policy Guidelines and pointed out that a concurrent sentence would normally be appropriate where the offences arose out of the same incident or facts whereas consecutive sentence was appropriate where offences arose out of unrelated facts or incidents. He pointed out that he had been charged in Criminal Case No 131 and 162 of 2022 where it was alleged that he had stolen three (3) motor cycles from Watu Credit. He asserted that the facts of the case were the same but the sentences were different. He urged the court to find that the Trial Court erred in not having awarded a similar sentence and direct that the same run concurrently.
59. He also relied on the provisions of Section 333(2) of the Criminal Procedure Code and the cases of *Bethwel Wilson Kibor vs Republic* [2009]eKLR and *Ahamed Abolfathi Mohammed & Another vs Republic*[2018]eKLR where the common thread was that courts must take into account the period spent in custody while sentencing offenders. In that regard, he argued that the Trial Court did not take into account the period he had spent in custody during trial while sentencing him.
60. The Appellant was sentenced pursuant to Section 278 A of the Penal Code Cap 63 (Laws of Kenya) which related to stealing a motor vehicle. The said Section provides that:-
- “If the thing stolen is a motor vehicle within the meaning of the *Traffic Act* (Cap. 403), the offender is liable to imprisonment for seven years.”
61. He was sentenced to three (3) years imprisonment for both counts. In the mind of this court, the Trial Court was very lenient as it had the option of sentencing him to seven (7) years imprisonment and/or to take judicial notice of the similar offences that he had been charged. This court did not therefore find any merit warranting this court to interfere with the discretion of the Trial Court in sentencing.
62. Turning to the issue of whether or not the Trial Court erred in directing that the sentence run consecutively, this court had due regard to Section 14 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-
- “1. Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
63. Having said so, if an accused person committed a series of offences at the same time in a single act and/or transaction, the sentences ought to run concurrently. If the sentences are in respect of different offences, the sentences ought to run consecutively.
64. From the record and the submissions of parties herein, this court noted that the Appellant had a previous record in Hamisi Criminal Case No 13 of 2022 where he was sentenced to five (5) years imprisonment. As the said case and the one subject of this appeal herein, were not subject of offences of a single transaction, this court could not fault the Trial Court for having held that the sentences in the two (2) case should run consecutively.



65. Going further, Section 333(2) of the Criminal Procedure Code provides that:

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis court)”.

66. This duty was also contained in the Judiciary Sentencing Policy Guidelines where it is provided that: -

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

67. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another vs Republic (Supra)*.

68. The Charge Sheet herein showed that the Appellant herein was arrested on 6th April 2022. He was sentenced on 20th September 2022. Although he was granted bond, he did not seem to have posted the same. He thus spent five (5) months and fourteen (14) days in custody before he was sentenced.

69. A reading of the Trial Court’s Sentence showed that it did not take into account the time that he spent in remand before sentencing him. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

70. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal dated 3rd October 2022 and filed on 6th October 2022 was not merited save for the prayer pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). His conviction and sentence be and are hereby upheld as it was safe to do so.

71. For the avoidance of doubt, it is hereby ordered and directed that the period the Applicant spent in custody between 6th April 2022 and 19th September 2022 be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

72. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF NOVEMBER 2024

J. KAMAU

JUDGE

