



**Wabwile v Director of Public Prosecutions (Criminal Appeal
17 of 2020) [2023] KEHC 115 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 17 OF 2020
WM MUSYOKA, J
JANUARY 20, 2023**

BETWEEN

PATRICK SIKHUMWA WABWILE APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Being an appeal from the judgment of Hon. TA Odera, Senior Principal
Magistrate, in Mumias SPMCCRC No. 94 of 2018, delivered on 14th May 2020)*

JUDGMENT

1. The appellant had been charged before the trial court of the offence of stealing, contrary to section 278(a) of the *Penal Code*, Cap 63, Laws of Kenya. The particulars were that on 22nd December 2017, at Mumias Sugar Factory, Mumias Sub-County of Kakamega County, he stole a motorcycle registration mark and number KMEA xxxx Chassis No. xxxx, valued at Kshs. 89, 000.00, the property of James Ombi Opanda. He pleaded not guilty, and a trial was conducted.
2. Five witnesses testified. PW1, James Ombi Opanda, the complainant, testified that he owned the subject motorcycle, having bought it from Meena Collections. He produced a sale agreement dated 14th February 2017. He gave it to his brother, Boniface Kweyu Opanda, on 22nd December 2017, to use it to travel to Shianda. He later called him from Bookers to say that he could not trace the motorcycle at Bookers where he had left it. A report was then made to the police at Mumias. He identified the registration details of his motorcycle as KMEA xxxx . PW2, Moses Lumbasi Luhani, was a security officer at the Mumias Sugar Company. He testified that on 22nd December 2017, Boniface Opanda complained to him, at 10.47 AM, that his motorcycle was missing from the parking lot where he had left it. He produced video footage showing the entry into the premises by Boniface Opanda and of the person who took his motorcycle. He said that he was party to the preparation of the clips, and that he prepared the certificate, dated 1st February 2018, which was put in evidence. Boniface Opanda



- identified his motorcycle in the footage. From the available security records, the person who took the motorcycle was identified as Patrick Shikhuma Wabwire, the appellant. He stated that the footage only showed the motorcycle, but not the registration details.
3. PW3, Boniface Kweyu Opanda, testified next. He stated that he borrowed motorcycle registration KMEA xxxx from PW1 to travel to Mumias Sugar Factory. He got a gate pass, but the details of his motorcycle were not noted. He parked it somewhere, but when he finished his business at the factory he did not find it. He made a report at the Bookers Police Post, and went home. He later viewed CCTV footage, which showed a person seated on the motorcycle, and then he left with it. The footage showed him enter the premises without a motorcycle, and then leaving with one. His details matched those of the appellant. He said that the face he saw on the CCTV footage was that of the person who was subsequently arrested, the appellant herein. He said that he did not participate in the arrest of the appellant.
 4. PW4, Douglas Omwai Opaina, was the guard on duty at the gate at Mumias Sugar Company, on the material day. He detailed how PW3 came in and parked his motorcycle. After sometime he came out and said that his motorcycle was not at the parking spot where he had left it. He assisted him to try trace the said motorcycle and various parking lots, to no avail. He reported to his superiors, and was advised to request him to go home and come back at a later date. He later reviewed CCTV footage which showed someone stealing the motorcycle. He identified that person as the appellant. He stated that the registry indicated when he entered the premises, but not when he left. He also stated that his identity card was not in their custody, which meant that he had left, as he had surrendered the gate pass that had been issued to him. He stated that they did not keep proper records on 22nd December 2017 due to pressure of work as there was an annual general meeting of the company. He said that he did not identify the appellant at an identification parade. He asserted that had he been given that chance he would have identified him. He said that he did not record the registration details of the motorcycle in the gate pass nor in the register. He said that the registration details of the motorcycle were also not visible from the CCTV footage. He stated that the appellant entered the premises ahead of PW3. PW5, No. 255196 Police Constable George Mwai, was the investigating officer. He detailed what he did in the investigation of the matter.
 5. After reviewing the prosecution evidence, the trial court put the appellant on his defence. Upon being put on his defence, the appellant gave a sworn statement, in which he stated that he did not know how to ride a motorcycle, and that he did not ride one. He also stated that he did not have a licence for riding motorcycles. He said that his left hand was deformed and he could therefore not ride a motorcycle. He conceded that he was at the factory premises on the material date, but he did not enter at the time indicated. He said that his mission was to follow his wife's dues. He called one witness, his wife, Rose Nasimiyu Sikhumwa, who stated that they visited the factory together.
 6. The appellant was aggrieved of his conviction and sentence, and filed the instant appeal. He raises issues around the evidence tendered not being adequate to sustain a conviction, convicting on video evidence which did not show the appellant at all, the CCTV footage had error and was faulty, the police did not conduct any investigations and relied solely on evidence gathered by civilians, the entire CCTV footage was not availed, an identification parade was not carried out, there was no evidence that PW3 entered the premises with a motorcycle, the electronic evidence was not properly produced, the appellant had a disability and could not ride a motorcycle and had no licence allowing him to, the conviction was against the weight of the evidence, the trial court was biased and the sentence imposed was manifestly excessive. He filed supplementary grounds, where he largely repeated the same grounds, save that he added that a crucial witness was not called, his arrest was illegal, an inventory or list of the recovered items was not produced, and the case was not proved beyond reasonable doubt.



7. Directions were given on 12th May 2022, for disposal of the matter by way of written submissions. The appellant filed written submissions, dated 26th March 2022. Most of them raise factual issues, except on the question of investigations and electronic evidence. On investigations, it is argued that criminal investigations are the preserve of the police, and Petition No. 109 of 2016 Okiya Omutata Okoita vs. AG & 4 others eKLR is cited. On electronic evidence Kisumu HC Election Petition No. 2 William Odhiambo Oduor vs. IEBC 2013 eKLR is cited, to make the point, that the guidelines set out in that case were not met, in terms of disclosing who took the video, the serial number of the CCTV camera or equipment that recorded the footage, the details of the DVR, the downloading and editing process, custody, among others. The authorities cited are not attached.
8. I will consider the grounds of appeal sequentially.
9. The first ground is that the appellant was found guilty when there was not enough evidence for the court to reach that decision. In his written submissions the appellant has argued this ground together with the second and eighth. The second ground is that the video footage relied upon did not show the appellant at all, and the eighth is that trial court did not establish whether the complainant entered the compound of the Mumias Sugar Company on the material day with a motorcycle, as the visitor's pass given to him did not show that he had a motorcycle.
10. There are two elements to those grounds. The first is whether the appellant entered the grounds of the Mumias Sugar Company premises on the material day and at the material time, as the video footage did not pick him out. The second is whether the complainant, PW3, entered the compound with a motorcycle. On the first issue, about the video footage not showing the appellant at all, is, in my view, a non-issue. It is not disputed that the appellant entered the compound on the material day. PW4, one of the guards at the gate, produced a register which showed that the appellant did enter the premises. The appellant himself testified that he had entered the premises on the material day, and his witness, DW2, confirmed the same. Whether he was captured in the CCTV footage played in court did not take away from the fact that he was within the compound from where the motorcycle was allegedly stolen.
11. The next consideration is whether his image was captured by the CCTV cameras, and whether he appeared in the footage played in court. PW2, the control room operator, responsible for the CCTV cameras, testified to seeing the appellant in the footage. The trial records captured him as saying:

“The next clip was taken on the same day at 10.30 hours. It shows the accused coming in the main hall where he joins the other people at 10. 33 am he walks towards the garden gate to register clip taken at 10.31 am (PMFI 5c). There is another clip taken on the same date showing him leaving with the motorcycle at 11.05 am.

The next clip faces inside Mumias Sugar and shows accused leaving the motor cycle, he first parked it and then went to pick his card and left.

Clip taken at 11.05 showing Mumias Sugar and outside (PMFI 5d). There is another footage showing accused inside the factory at 10.39 am walking inside the footage (PMFI 5a)...

Complainant identified his motorcycle in the CCTV and we went to our book and found that the man who went with his motorcycle was Patrick Shikhuma Wabwire.”



12. The footage was also reviewed by PW4, the man who was manning the gate. He said that he was invited to the control room, by PW2, after the loss of the motorcycle was reported, in an effort to establish whether he could identify the person who might have stolen the motorcycle. He is recorded as saying:

“I saw someone on camera leaving with the stolen motorcycle registration No. KMEA xxxx TVs star. He is the man in the dock. He was wearing a black coat. Accused entered the premises between 10.30 am to 10.50 am ... I knew he left upon seeing the CCTV ... I saw Patrick and served him and so I can see him in the CCTV.”
13. The appellant submits that his image did not appear in the footage. I did not have the benefit of viewing the footage, and, therefore, I cannot with, any certainly at all, determine whether or not the same bore his image. The trial court, however, viewed the footage, and noted:

“I have seen the CCTV footage and I also saw accused in court during the proceedings herein ... I saw the CCTV footage when it was played in court and compared the face of the accused herein to the one who entered the premises without a motorcycle and noted that the same was wearing the same black coat in both instances ... it is clear to me that the man taking the motorcycle in the CCTV and the man who entered the company without a motorcycle and accused herein that is one and the same person that is the accused herein.”
14. So, the trial court viewed the footage, and interacted with the appellant, and it would appear it was satisfied that the person it saw in the footage was indeed the appellant. Going by the testimonies by PW2 and PW4, and the comments by the trial court, which had the benefit of reviewing the CCTV footage and to see the appellant in person, there was sufficient evidence that the image of the appellant was in the video clip in question.
15. The second issue is as to whether the complainant, PW3, entered the compound with a motorcycle. The appellant argues that there was no proof that he had a motorcycle when he entered the premises, as the visitor’s pass issued to him did not indicate whether he had one. PW4, who was manning the gate, and who was booking the particulars of the persons getting into the premises, and issuing them with visitors’ passes, testified that the pass did not have a column for recording whether the person had a vehicle or not. PW4 also testified that he maintained a register that recorded the vehicles that came in and out, but said that on that day he did not record the motorcycle in question as he was overwhelmed. So, in terms of the records maintained by the security system at the premises, there was nothing to show that PW3 entered the premises with a motorcycle. However, PW4 testified that PW3 came in to the compound with a motorcycle, he parked it near their office and he issued him with a pass, after which he moved to the finance office and parked the motorcycle near that office. He later went to the latter to complain that he could not find his motorcycle where he had parked. PW2 stated that the CCTV footage showed PW3 entering the premises through the gate at 10.47 AM, and he was seen in the footage parking a motorcycle at that particular time. That is also echoed in the testimony of PW4, who after viewing the footage, said that he saw, in the footage, PW3 come with a motorcycle and park it near the reception, and came for the gate pass.
16. It would appear from the above that there is ample evidence that PW3 did indeed enter the premises with a motorcycle. The question then is whether the motorcycle that he had was the one the subject of the criminal proceedings, that is to say registration mark and number KMEA xxxx . Both PW2 and PW4 referred to that registration number, KMEA xxxx . PW4 testified that those details were not captured in the register that he maintained at the gate. I note that when he testified PW4 narrated about how PW3 came in with a motorcycle and parked it near their office. He did not divulge the details of the registration of the said motorcycle. When he testified about the CCTV footage, PW2 said the



registration particulars of the motorcycle that was captured on the footage, being handled by PW3 and the appellant, were not visible, as the cameras were mounted in a manner that would have made it difficult to capture the motorcycle from an angle where the registration plates could be captured. So, the motorcycle that PW3 and the appellant were captured handling did not have a number plate, and it was difficult to say whether the said motorcycle was the same as KMEA xxxx .

17. The issue then should be whether that was crucial. Yes, it would be. The motorcycle that the appellant stood accused of stealing bore the said registration details. Where the thing alleged to be stolen, such a motor vehicle, is subject to registration, or has a serial number, then the registration mark or serial number must be brought out in evidence as part of the identification process of the item allegedly stolen. So, to connect or link the appellant to the stolen motorcycle, it would have been critical for the CCTV footage, and the records kept by the security system manned by PW2 and PW4 to bring out the registration details of the alleged motorcycle. Footage showing the appellant on top of a motorcycle bearing those registration details would be proof beyond doubt that he stole it, and so would be evidence that a motorcycle bearing those registration details entered the premises, and it disappeared, and CCTV footage showing the appellant riding away a motorcycle out of the premises bearing that number.
18. As it is there is material that shows that PW3 entered the premises with a motorcycle, but there is nothing to show that the said motorcycle bore the registration particulars set out in the charge sheet, that is to say KMEA xxxx . Was that fatal to the charge? The complainant testified that that was the motorcycle that he had at the said premises. He identified the same in the CCTV footage, on the basis of its colour and other features, as the motorcycle that the appellant was reflected in the footage as riding away on. The trial court saw the images and believed the parties, and I would have no basis, not having heard the parties nor viewed the footage, to fault that.
19. The third ground is about the CCTV camera or system being faulty, and, therefore, affecting the quality of the evidence tendered. The law on production of electronic evidence is section 106B of the [Evidence Act](#). It provides as follows:

“ Admissibility of electronic records.

- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
- (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so



contained is derived was regularly fed into the computer in the ordinary course of the said activities;

- c. throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
- d. the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

- (a) by combination of computers operating in succession over that period; or
- (b) by different computers operating in succession over that period; or
- (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied



directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

20. The appellant did not, in his written submissions, elaborate on the submission that the electronic device bearing the evidence relied on being faulty. In the written submissions filed at trial, was stated that PW5 had alluded to the CCTV system being faulty, and, therefore, unable, to download the video footage immediately, and yet the certificate was silent about that fault. The trial court did not address itself to that submission. The provision that the appellant has in mind is section 106B(2) of the *Evidence Act*, on the conditions that must be met before electronic evidence is relied upon. The provision on faulty operation is section 106B(2)(c), which provides:

“throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content...”

21. The computer, for the purposes of the subject proceedings, was the CCTV system. The question would be whether it was operating properly on 22nd December 2017, when both PW3 and the appellant were at the subject premises. The relevant operation, for the purpose of the said proceedings, would be the recording or taking of images and storing them. Was it operating properly in that respect? It would appear that it was. The problem that PW5 alluded to had nothing to do with the recording or taking of images, but rather the transfer or copying or downloading of the recorded material from the CCTV system to an optical media, such a compact disc or flash disc. The issue should have been whether that fault affected the electronic record or the accuracy of the content. It does not appear, from the testimonies, that the fault affected the electronic record or the accuracy of the content. At the trial, the appellant, in his final submissions, argued that the video footage did not have clear features of him, did not show footage of him, among other things. He did not make any attempt to link those issues to the faulty operation that he was pointing out.

22. The other issue that has come up is with respect to whether the conditions set out in section 106B (2) of the *Evidence Act* were fully met. The appellant has cited *William Odhiambo Oduol vs. Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR (Machelule, J), with regard to the contents of the certificate envisaged in section 106B(4) of the *Evidence Act*, with respect to identification of the electronic record containing the statement, description of the manner the electronic record is produced, disclosure of the particulars of any devices involved in the production of the electronic record, other information relating to the conditions specified in section 106B(2) and execution of the certificate by a person in a responsible position. The rationale for the information that goes into the certificate were given in *William Odhiambo Oduol vs. Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR (Machelule, J), where it was said:

“The reason why the particulars of the computers used in the production of the CD had to be given (and such particulars would include the make and the serial numbers) is so that, if it becomes necessary, one can trace the device for audit purposes.”

23. A certificate, in terms of sections 78A and 106B (4) of the *Evidence Act*, was placed on record by PW2, the security control room operator for Mumias Sugar Company Limited, and was signed by him, on



- 1st February 2018. It fully complies with the requirements of section 106B (4) of the *Evidence Act*, and was properly placed on record, and relied on.
24. The other ground is that the matter was largely investigated by civilians rather than by the police, and the police merely took over the matter from where the civilians had reached, and that they merely confirmed what the civilians had done. The investigating officer, PW5, detailed the steps he took in the matter. He explained that the matter had been initially been reported at the Booker Police Post, and he took over from there. He recorded a statement from the complainant, PW3. He visited the Mumias Sugar Company premises, and interacted with PW2 and PW4, viewed the CCTV footage for 22nd December 2017, recorded statements from them. He requested them to extract the CCTV footage of PW3 getting in, and complaining, and when the suspect was seen entering and leaving the premises with the motorcycle. He also got certified copies of the gate passes for PW3 and the suspect, and of the register or visitors' book. With the information extracted from the register, PW5 was then tracked the appellant and arrested him. From that testimony, it is not correct, as alleged by the appellant, that PW2 and PW4 investigated the matter and handed it over to Mumias Police Station, who merely confirmed what the civilians had done, and only arrested and arraigned the appellant in court.
25. In the first place, Booker Police Post is not a full-fledged police station. A police post is only a sub-station, performing only elementary functions of the police, it has no investigative functions. Secondly, PW5 stated that the CCTV footage was extracted by PW2 only after he requested for it. It was not the case that PW2 extracted the same and forwarded it to the police on his own motion, as submitted.
26. Overall, the evidence available is largely circumstantial, for no one saw the appellant take the motorcycle in question, but the same is strong enough, for it to lead to a conclusion that the inculpatory facts were not incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis other than that of guilt. See *Nyakundi vs. Republic* [2003] KLR 700 (Omolo, Githinji JJA, & Otieno-Onyango, Ag JA) and *Sawe vs. Republic* [2003] KLR 364 (Kwach, Lakha & O'Kubasu, JJ).
27. Consequently, I find no merit in the appeal herein, and I accordingly dismiss it. The conviction is affirmed, and the sentence confirmed.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
20th DAY OF JANUARY 2023**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Namatsi, instructed by Namatsi & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

