



**Karamuki v Republic (Criminal Appeal E015 of 2021)  
[2023] KEHC 3772 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3772 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E015 OF 2021  
WM MUSYOKA, J  
APRIL 28, 2023**

**BETWEEN**

**JOSPAT MWANGI KARAMUKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from judgment by Hon. Eric Malesi, Principal Magistrate,  
PM, in Kakamega CMCCRC No. 2858 of 2018, of 28th April 2021)*

**JUDGMENT**

1. The appellant, Josphat Mwangi Karamuki, had been charged before the trial court on 4 counts, of obtaining money by false pretences. He pleaded not guilty, a trial was conducted, and 5 witnesses testified. At the end of the prosecution's case, he was acquitted of 2 of the counts, and was put on his defence with regard to the other 2, of conspiracy to commit a felony, contrary to section 393 of the *Penal Code*, Cap 63, Laws of Kenya, and of giving false information to a person employed in the public service, contrary to section 129(a) of the *Penal Code*.
2. Regarding conspiracy to commit a felony, it is alleged that on 2<sup>nd</sup> and November 5, 2018, at Kakamega and Nairobi Counties, within the Republic of Kenya, he jointly with others not in court, conspired to commit a felony, namely, to steal money from Titus Masungu Wanyama. I note that the appellant is charged alone, yet conspiracy is an offence involving several accused persons. A person cannot conspire alone, and cannot be charged alone of conspiracy. See *Ronald Kiptoo Yator vs Republic* [2019] eKLR (Kimaru, J). The charge was effectively bad from the go. He should not have been charged alone, and he should not have been put on his defence.
3. There is authority, though, in *R v Anthony* [1965] 2 QB 189 (Lord Parker CJ, Marshall & Widgery JJA) and *Ongodia and Erima v Uganda* [1967] EA 137 (Bennett, Sheridan JJA & Russell Ag J), that an accused person may be convicted even where the co-conspirators are unknown. That is rare and



exceptional, given that conspiracy is an offence whose commission involves more than one person, and for a single individual to be charged and convicted, there must be overwhelming evidence that that person was part of the agreement to commit the offence planned. The evidence on record did not establish the appellant to be at heart of the affair. The complainant, PW1, did not see him at all, or deal with him. The only person who said he saw him drive the vehicle to a meeting point was PW2, but the appellant was not introduced, and there is no certainty that the person that PW2 saw then, was the same person in court, as he was meeting that person for the first time on that occasion. There was the matter of money being sent to a mobile telephone line alleged to be that of the appellant, but no evidence, by way of a statement from the mobile telephone provider, was adduced that that telephone line was registered in the name of the appellant.

4. Secondly, conspiracy is an inchoate offence. It is not a completed offence. It is in the same league with attempt. The accused are effectively stopped in their tracks before they complete that which they were conspiring to do, and in the case of attempt, what they had set out to do. It is an offence still at the preparatory or conception stage. Where the unlawful act that the conspirators were planning or preparing to commit is in fact done, then the offence ceases to be a conspiracy, and becomes the completed offence that was being planned or the subject of the agreement; and the actors cease to be conspirators, but perpetrators of the completed offence, and ought to be charged with the completed offence. A distinction ought to be made between “conspiracy” in the ordinary sense, and “conspiracy” in the legal sense. In the ordinary sense, it refers to “a secret agreement to carry out an illegal plan” and “the act of making such plans.” See *Collins English Dictionary*, Harper Collins, Glasgow, 6<sup>th</sup> edition, 2009. That definition would hold even where the plan is carried out, for most joint illegal acts are usually preceded by a secret agreement, the conspiracy, to commit the unlawful act. In the legal sense, conspiracy is used in a limited sense, to mean a plan or agreement, to commit a crime or a tort, that is not carried through.
5. In the instant case, the offence, the subject of the alleged conspiracy, was theft from a known person, Titus Masungu Wanyama, the complainant, PW1. The offence of theft was actually committed. Theft constitutes the taking of property from someone with the intention of permanently depriving the person of it. In the instant case, the intention was to take money from PW1, by duping him to buy the vehicle in question. That happened. PW1 was duped. He gave his money to the persons who were conspiring to steal from him. The money was taken, and the commission of the offence of theft was complete. The conduct of the conspirators had moved from conspiracy to theft, from preparation/conception to actualisation. The proper charge to bring against the appellant, if at all, should not have been conspiracy, but theft, or some other theft related offence. I note that the appellant had been charged with the offence of obtaining money by false pretences. That was proper. However, it was improper to charge him, at the same time, with the offence of conspiracy, for the two counts cannot stand together for the reasons that I have given above. Once money was obtained by false pretences, from PW1, a charge of conspiracy could no longer hold against the persons alleged to be behind the offence of obtaining.
6. Regarding the count of giving false information to a person employed in the public service, the allegation was that the appellant had, on 20<sup>th</sup> and November 23, 2018, at Nairobi and Kakamega Counties, informed a police officer, Inspector of Police Mosonik Kiprono, that he had hired his motor vehicle KBV 956E, a Toyota Fielder, in a contractual agreement, which information he knew to be false, intending to cause the police officer to use his lawful powers to locate and detain the said motor vehicle as stolen, to the annoyance of Titus Masungu Wanyama.
7. The trial court, in the judgment, found that a prima facie case was established against the appellant with respect to that, for he made a report to PW6, which, upon investigation, turned out to be false.



The report was about a stolen motor vehicle. The reasoning by the court was that the motor vehicle was not stolen, for it had been sold to Titus Masungu Wanyama by persons who posed as owners, and the appellant, the legal owner of the said vehicle, was part of a plan to dupe or con him. Whether the offence of making a false report to an officer of the law amounts to an offence, in this case, would be dependent on whether the appellant was part of the scheme to con or dupe Titus Masungu Wanyama.

8. Was the appellant part of such a scheme? Titus Masungu Wanyama, the complainant, testified as PW1. He was shopping for a vehicle, when he saw a newspaper advertisement of the sale of KBV 956E. He got in touch with the contact, a Bethwell Macharia. PW1 sent an agent, Joel Chanja to meet the contact. They agreed on a price, and money was sent to Bethwell Macharia. The contact arranged for a meeting between PW1, and the owner, a woman, said to be Jane Wanjiru Mukami. He met her, and a mechanic instructed by PW1 checked out the vehicle. He was also shown the registration papers, which indicated the owner to be Josephat Mwangi Karamuki. The woman said she had bought the car from the registered owner, and he was shown a sale agreement between the registered owner and the woman. After he paid the sale price money in cash, the woman handed over to him the relevant documents, but retained the original logbook. On November 10, 2018, he got a phone call from a Josephat Mwangi Karamuki, asking for money for the transfer, and the money was sent to him, via MPesa. After 5 days, PW1 was unable to reach the said Josephat Mwangi Karamuki, the woman or the contact person. After 2 days the bishop of their church, for whom the vehicle was being bought, informed him that he had been arrested, for being suspected of having a stolen car. They produced their documents. After 2 days the police showed them the appellant, who was claiming to be the owner of the car.
9. PW1's agent, Joel Wanjala Chanja, testified as PW2. PW1 asked him to act as his agent with respect to the said sale. He got in touch with Bethwell Macharia, and they arranged to meet so that he could check out the car. They were to meet on November 5, 2018. Macharia excused himself and sent someone else to bring the vehicle for PW2 to check it out. He said that he could not recall the name of the person, but insisted that it was the appellant. He said that he was meeting the appellant for the second time in court.
10. PW3, Job Wekesa Wanjala, was the mechanic that PW2 contacted on November 5, 2018, to check out the vehicle that their church was buying for their bishop. He joined up with PW1 and a pastor on November 9, 2018, and the vehicle was handed over to them, by Jane Wanjiru Mukami, and another person whose name he did not know. He said the driver was not the appellant. He said that he did not know the appellant. He said that he had also been shown a sale agreement between Jane Wanjiru Mukami and Josephat Mwangi Karamuki. He said that they did not take the logbook as they wanted Jane Wanjiru Mukami, to facilitate the transfer.
11. PW4, Justus Ambani Amukoa, was the pastor who accompanied PW1 and PW3, on November 9, 2018, when the vehicle was handed over to them, by Jane Wanjiru Mukami, in the presence of a man who was not introduced. Jane Wanjiru Mukami informed them that she had bought the vehicle from Josephat Mwangi Karamuki the previous year, and the logbook was still in his name. She showed them the sale agreement between her and the said Josephat Mwangi Karamuki. She also had copy of the national identity card for the said Josephat Mwangi Karamuki. She handed over the car keys and copy of the logbook, after they paid her the purchase price. He said that he came to know the appellant at Kakamega Police Station.
12. PW5, Livingstone Nandwa Shiteera, was the bishop for which the vehicle was being bought. He averred that he was informed, on November 20, 2018, that he was in possession of a stolen vehicle. He said that he met the appellant for the first time at the police station.
13. PW6, No 23xxx IP Mosonik Kiprono, received information, from Nairobi, that a lost motor vehicle had been tracked in his area of jurisdiction. The car was traced in the Eshisiru area. It was taken to



Kakamega Police Station, and the occupants explained that they had bought it. On November 23, 2018, the appellant came to the police station, with the original logbook, and a sale agreement. PW6 obtained an MPesa statement for line 070xxxx, in the name of Joseph Mwangi Karamuki. He said the vehicle had been hired to a person, whose details were given. He said that he established that there was a syndicate involving the appellant to defraud persons who were out to buy vehicles. He said that the report made in Nairobi by the appellant was that his vehicle was hired out, but was never returned. The complainant was Joseph Mwangi Karamuki. He said that the number 070xxxx was for Josephat Mwangi Karamuki, although he did not establish for how long it had been in operation. He said that he did not obtain the national identity card for the appellant, saying that he went to the national registration bureau, but found that the appellant had never lost his national identity card. He said that it was possible that a lost identity card could be used by wrong elements for bad intentions. He said that there was a systematic collusion between the appellant and other persons at large. He said that no identification parade was conducted.

14. When put on his defence, the appellant stated that he did not know PW1. He said that the vehicle in question was his, and that he used to rent it out. He said that he never advertised it for sale. He said that on November 2, 2018, he hired it out to one Moses Kimani, who used it and returned it to him. On November 5, 2018, the said Moses Kimani came back, and he hired out the vehicle to him for a second time. He came back again, on November 7, 2018, and asked for the vehicle for 4 days. He never returned the vehicle. When he called him, he said that he was in Kakamega, and had no money for fuel, and he asked for more time. He was not able to get in touch with him, thereafter, hence he made a report to the police. The vehicle had a tracking system, which showed that it was in the Eshisuru area of Kakamega. He said he travelled to Kakamega, after he was informed that it had been recovered. He was arrested. He said that he did not know Bethwell Macharia. He also said that he did not know Jane Wanjiru Mukami. He also said that he did not go to the places mentioned by the witnesses. When shown the sale agreement allegedly between him and Jane Wanjiru Mukami, dated June 5, 2018, he said that he did not enter into any such agreement. He said that the national identity card details and name were his, but the rest were not his details. He said that he did not give his national identity card to anyone. He said that he had lost his national identity card 5 years prior to that date. He said that the number on the MPesa statement was not his, and that he never received any money from PW1. He said that he had his own MPesa statements. He called a number of witnesses. I believe the most critical was DW5, No 11xxxx Police Constable Joseph Kanyara, of Embakasi Police Station. He said that a report had been made there on November 20, 2018, in respect of misuse of a motor vehicle by Moses Kimani Nginge. The complaint was that the vehicle had been hired for use within Nairobi, but was being used outside Nairobi. He stated that they acted on the information given, and traced the motor vehicle to Kakamega. When they came for it, they found that the appellant had been arrested. He said that the report made was of misuse of the vehicle, and not its theft.
15. I have already concluded that the appellant was wrongly charged with conspiracy, for he could not have conspired alone, and he should not have been charged alone. His co-conspirators were not charged. None of the persons that the prosecution witnesses dealt with were ever arrested or interrogated by the police. Without charging them with conspiracy, or even taking statements from them, it was premature to conclude that there was a syndicate or scheme involving the appellant to defraud unsuspecting individuals.
16. The charge he faced was of giving false information to the police. The initial report was made in Nairobi. From the record before me, the prosecution did not try to call police officers from the station where that report was made, to bring out information on what the report was about. PW6 was acting on that Nairobi report, before the vehicle was intercepted in Kakamega, and then the appellant came to Kakamega to follow up. The appellant did not make any report to PW6. He only came into contact



with PW6 after the latter had traced and recovered the vehicle. The tracing of the vehicle was not on the basis of any information that PW6 got from the appellant, but on information he received from a report made to the police at Nairobi. He acted on that information to intercept that vehicle. The officer from Nairobi, who was investigating the matter ought to have been called, for if any false information was given to anyone, it was to the officers in Nairobi. Secondly, PW6 did not indicate whether he took over from his colleagues in Nairobi, from where the matter originated. More importantly, the appellant called DW5, an officer at the police station where the report had been made by the appellant. He was not challenged on his status. He said that it was them who called the Kakamega Police Station, and the vehicle was intercepted, but when he and the officer who was investigating the matter came to Kakamega to collect the vehicle, they found that the appellant had been arrested over the vehicle. As the initial information had been given to Nairobi, and the vehicle was intercepted by the police from Kakamega, on the basis of that information, one would have expected that the police at Kakamega would have handed the matter over to the police station which had originated it. It appears that it took over a matter that was being investigated by another police station. The officers who should have complained about false information being given to them should have been from the police station in Nairobi, on whose information PW6 was acting upon. From the testimony of DW5, they were still investigating the matter, before action was taken by PW6, without reference to them.

17. Was the information that PW6 acted upon false? That should take me back to what I have discussed above. PW6 intercepted the vehicle on information from his colleagues in Nairobi, and not from the appellant. His Nairobi colleagues were investigating the matter, and had asked him to intercept the vehicle. The information that PW6 acted upon to intercept the vehicle was not given to him by the appellant, and, therefore, he cannot be held liable for misleading PW6. PW6 did not testify on what steps he took to verify the complaint that the appellant had placed before the police, about his motor vehicle being misused by Moses Kimani Ngine. He did not indicate whether he sought to verify that information, by reaching out to the said Moses Kimani Ngine. He did not indicate whether he sought the said Moses Kimani Ngine out, and what the outcome of that was. He did not tell the court whether or not he had established that the said Moses Kimani Ngine existed. It appears that PW6 opened a new investigation, based on the complaint by PW1, after the vehicle was intercepted, and decided to charge the appellant based on that complaint. There was no evidence from him, or, at least, he gave no details of the inquiries that he made founded on the report that had been made in Nairobi, before he concluded that the report was false. He did not disclose whether he got in touch with any of the persons that the appellant said he had hired the motor vehicle out to before he concluded that the vehicle had been hired out were false. The police at Nairobi were not given a chance to state what they had established from their investigations after they got the report from the appellant.
18. From the material on record, I find and hold that there was no sufficient evidence upon which the trial court could convict the appellant for giving false information to the police, and specifically to PW6. The burden of proof was on the prosecution, to prove that the information was false. That burden was not discharged. In fact, the burden of proof was shifted to the appellant, to prove that the information was true.
19. The final thing that I will say, is that the trial court decided the matter on the basis of the complaint made by PW1, that they had bought the vehicle, and had documents to support it, and that it appeared as if there was fraud, rather than on the charge that was before the court, regarding false information made to PW6. The appellant had given no false information to PW6 on November 20, 2018, for he was yet to interact with PW6. The detention of the vehicle by PW6, was not based on any information that the appellant had given to PW6. He interacted with PW6, on November 23, 2018, after the vehicle had been detained, and whatever information the appellant gave to PW6, could not have been the basis for the detention, for the information came post facto.



20. In the end, I am persuaded that the appeal is merited. I, accordingly, allow it. The conviction is quashed. The sentence is hereby set aside. Orders accordingly.

**JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL 2023**

**W MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

Mr. Muchiri Kahoro, instructed by Mwaniki Gachoka & Company, Advocates for the appellant.

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

Ms. Aligula, instructed by Akwala & Company, Advocates for the complainant

