



REPUBLIC OF KENYA



KENYA LAW
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**Ngere v Republic (Criminal Appeal E098 of 2021)
[2023] KEHC 3601 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E098 OF 2021
LN MUGAMBI, J
APRIL 25, 2023**

BETWEEN

PETER KARIUKI NGERE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of the Senior Principal Magistrate's Court at Githunguri, Honourable Barbara Ojoo (SPM) dated 29th October, 2021 in Traffic Case No. 187 of 2019)

JUDGMENT

1. The Appellant was charged with two counts: the first count was causing obstruction on a public road contrary to section 3(1) as read with section 53(4)(a) of the *Traffic Act*. The particulars of the offence were that: on the 5th of November, 2019 at about 1600hours at Magomano Junction along Kiambu-Githunguri road in Githunguri sub-county within Kiambu County being driver of motor vehicle Reg. No. KBP 458P Toyota Matatu c/o Kaka Sacco did stop the said motor vehicle in the middle of the road thereby causing obstruction to other motorists.
2. The second count was picking and setting down passengers at a place other than authorized place as a place as a bus stop contrary to Rule 64(d) as read Rule 69 of the Traffic Rules CAP 403 Laws of Kenya. The particulars of the offence were: on the 5th day of November, 2019 at around Magomano Junction along Kiambu-Githunguri road in Githunguri sub-county within Kiambu County being driver of motor vehicle Reg. No. KBP 458P Toyota Matatu c/o Kaka Sacco did drive the said motor vehicle on the said road and did pick and set down passengers at a place not authorized to be a bus stop.

The Prosecution's Case

3. On the 16th of November, 2016, the Appellant was arraigned and he pleaded not guilty to both counts. The prosecution called two witnesses.



4. The OCS Ikinu Police Station, No. 237268, IP Mbaisi Madahana testified as PW1. He testified that at the date of the incident he was the Deputy OCS Githunguri Police Station and together with the sub county commander and their driver PC (D) Nyaga and while approaching Magomano Junction towards Githunguri Town, a motor vehicle KBP 458P belonging to Kaka Sacco Limited stopped in the middle of the road to pick up a passenger. That while approaching the town near Beta Healthcare Hospital, the driver stopped and dropped a passenger, the OCPD then ordered the driver to head to the Police Station but he drove into a Total Petrol Station and abandoned the vehicle. PW1 testified further that he called another driver to drive the vehicle to the police station and they detained the conductor of the vehicle until the driver appeared. He concluded by testifying that he was aware that the driver of the vehicle eventually showed up and was charged with the offence of obstruction and driving without due care for other road users. He stated that he did not know the driver.
5. Upon cross-examination, PW1 stated that incident took place at 4.00pm and that the motor vehicle was travelling ahead of them and it had some passengers that it was dropping and picking. He reiterated that the sub county commander shouted to the driver to head to the police station but he defied the instructions and drove into a petrol station and jumped out of the vehicle and disappeared. He stated in cross-examination that both the conductor and the driver were culpable and he did not know how he was released without being charged. He stated that the accused was not to him before the incident and that he was sitting in the middle seat between the OCPD and the Driver.
6. Julius Nyaga, No. 70697 PC testified as PW2. He testified that on the 5th of November, 2019 he was assigned to take the sub county commander to a meeting in motor vehicle KCU 441P. That they were in the company of Deputy OCS Mr. Mbaisi. He continued to state that while driving from Kiambu to Githunguri at Magomano area they came across motor vehicle registration number KBP 458P a matatu with Kaka Sacco which was ahead of them. That the matatu stopped suddenly on the road to pick passengers and the regional commander asked the driver to take the vehicle to the Police Station. That the driver instead stopped around Beta Healthcare Hospital to drop a passenger and he drove into Total Petrol Station and fled from the scene. That the vehicle and the conductor were detained at the police station until further action. That he was not aware that the driver showed up but he never saw his face.
7. During cross-examination, PW2 reiterated that the Accused made two stops and it was the OCPD who addressed the accused and told him to drive the vehicle to the station. He clarified that the OCPD did not alight from the vehicle contrary to what he had stated in his statement. He stated further that the Accused drove into the petrol station but he did not see the accused alight from the vehicle. He concluded by stating that he did not see the face of the accused as he was driving.

The Defence Case

8. The Appellant was put on his defence and he opted to give sworn testimony while calling one witness.
9. The Appellant testified as DW1 and stated that he is a PSV driver for hire but he drove matatu registration number KBP 458P under Kaka Sacco. That on the day of the accident, he had taken his wife to Kiambu District Hospital and he was not on duty. That the following day, he was informed by his employer that the vehicle had been detained and he went to the Police Station to follow up. DW1 continued to testify that he was the permanent driver of the vehicle, with his details being in the vehicle hence the reason why Police called him. He explained that his off days are Tuesday and Wednesday and on the said day there was a reliever driver who fled.
10. Upon cross-examination, DW1 reiterated that he was attending to his sick wife on the said date and that the vehicle was being driven by a reliever driver. He explained that when he is not in the office,



the vehicle is parked at the Sacco and given to any available driver. He concluded by stating that his employer did not know who the reliever driver was on the day the incident occurred.

11. James Wachira Nyaga testified as DW2. He stated that he is conductor with Kaka Travellers Sacco with motor vehicle KBP 458P. He stated that on the date of the incident he was off duty and that his driver called him the following day to inform him that the vehicle had been detained for an offence of obstruction. He stated further that the vehicle had been given to a reliever driver because Tuesday and Wednesdays are their off days.
12. DW2 was cross-examined by the Respondent where he reiterated that he was off on the 5th of November, 2019 and the vehicle was operated by a reliever crew. Like DW1, he stated that he could not tell who was relieving that day because it is the vehicle owner that assigns the reliever crew. This marked the close of the defence case.

The Judgement

13. The Trial Court in its judgement held that:

“I have considered the defence of the accused. He alluded to the defence of mistaken identity and claimed that he was off duty on the material day. He explained that the vehicle was driven by a temporary or reliever driver for the day only known to their Sacco officials. In my view, this defence as an afterthought and it flies in the face of the steadfast prosecution evidence. Nothing would have been easier for the Sacco to send the same person who had been assigned the vehicle the previous day to go and collect it from the Police. In find it unbelievable that the Accused would be willing to take the blame for a person who he does not know out of the goodness of his heart. I dismiss the accused’s defence in its entirety. It is therefore a finding of this Court that the prosecution proved the charges against the Accused as in law required. I find the accused guilty as charged in both counts herein and convict him accordingly under section 215 CPC.”

14. The sentence read thus:

“I have noted the mitigation.

On count I, Accused fined K.Shs. 15,000 in default 6 months imprisonment.

On count II, Accused fined K.Shs. 5,000 in default one month imprisonment.

Right of appeal 14 days.”

The Appeal

15. The Appellant was aggrieved by the conviction and sentence, and brought this appeal vide a petition of appeal filed on the 8th of October, 2021 and relied on the following grounds of appeal:
 - a. That, the Learned Magistrate erred in law and fact by disregarding the evidence adduced by the accused person and his witnesses were unable to identify the perpetrator of the alleged offence and therefore failed to corroborate the allegations of the prosecution and its witnesses.
 - b. That, the learned Magistrate erred in law and fact by convicting the accused person yet the prosecution was unable to place the accused person at the scene of the alleged offence;



- c. That, the learned Magistrate erred in law and in fact by convicting and sentencing the Appellant to a fine of K.Shs. 20,000 despite the fact that threshold for reasonable doubt was reached by the Accused person and his witness;
 - d. That, the learned Magistrate misconceived herself by failing to appreciate the unchallenged evidence of the accused person;
 - e. That, the learned Magistrate erred in law and in fact by shifting the burden of investigation to the accused person;
 - f. That, the learned Magistrate erred in law and in fact by not considering mitigation made on behalf of the appellant and gave him a high amount of fine in the circumstances.
16. The Appellant prayed that the appeal be allowed, the conviction be set aside and the sentence quashed.
17. The appeal was admitted to hearing on the 13th of July, 2022 and on the 27th of January, 2023 the Court directed that the appeal be canvassed by way of submissions.

The Appellant's Submissions

18. The Appellant filed his submissions on the 26th of January, 2023. He reiterated the facts that were adduced during trial and submitted that the Investigation Officer did not attend Court to adduce his testimony and explain why he charged him with the offence and that his scope of investigations and who was a crucial witness in this matter but never carried out the investigation. That the mandate of an investigation officer in a case is to carry out investigations before preferring charges on an accused person and he failed in his mandate and the prosecution expected the Accused person to perform such mandate by producing or giving information to the police on the identity of the reliever driver of the motor vehicle on 5th November, 2019. That the failure by the investigation officer to take his mandate seriously resulted in charging the accused person despite him having not been in control of the vehicle.
19. The Appellant submitted further that it was unjust for the Trial Court to convict the accused person despite the fact that there was no certainty in identification of the accused person as having control of the vehicle on 5th November, 2019. That none of the prosecution witnesses saw the driver in the process of abandoning the vehicle. The Appellant relied on section 107 (1) and (2) of the *Evidence Act* which provided that the burden of proof lay squarely on the prosecution who alleged that the Accused person had committed the offence of obstruction. He relied on the case of *Woolmington vs. DPP* (1935) A.C 462 pp 481 which was quoted in the case of *Peter Wafula Juma & 2 Others vs. Republic* (2014) eKLR where it stated that:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C; the prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shift the legal burden of proof is unconstitutional except in so far as it creates only evidential burden....”



20. The Appellant concluded by submitting that the conviction against him by the Trial Court was based on contradicting evidence between the prosecution and the defence and it was up to the prosecution to prove the commission of the offence. He urged that the conviction and sentence be quashed.

Prosecution's Submissions

21. The Respondent filed its submissions on the 23rd of January, 2023. They opposed the appeal in its entirety and submitted that the prosecution had established all the requisite elements of the offence committed by the Accused during trial. That the Appellant conceded to being the designated driver of the motor vehicle and as such the issue is not contested. They submitted that the allegation that there was a reliever driver was an afterthought and that the Appellant failed to provide any evidence to corroborate the fact that he was escorting an ill family member to the hospital on the day of the incident.
22. On the issue of the identification, the Respondent submitted that the identification was proper and that it met the required legal threshold.
23. The Respondent submitted that the sentence meted out was fair and was within the judicial discretion of the trial magistrate. They urged this Court to uphold the sentence and dismiss the present appeal.

Determination

24. The Appellant seeks an acquittal while the Respondent wants the conviction to be upheld. From the pleadings and submissions before this Court it is evident that these are the issues for determination:
- a. whether the Appellant was correctly identified as the driver for the suit motor vehicle;
 - b. Whether the failure to call the Investigation Officer impacted the prosecution's case;
 - c. whether the conviction should be upheld.
25. This being a first appeal, this Court has the duty to re-evaluate the evidence and reach an independent conclusion. This was the holding in the case of *Okeno v Republic* [1972] EA 32 where the East Africa Court of Appeal stated the duty of the Court on a first appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's 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, see *Peters v. Sunday Post*, [1958] E.A. 424.”

26. The first issue forms the basis of this appeal. The Appellant contends that he was not the one driving the motor vehicle on the date of the incident. He stated during his defence that, that day was his day off and he was in Kiambu District Hospital where he had taken his wife. This evidence was corroborated by DW2 who is the Appellant's conductor that they normally have off days on Tuesdays and Wednesdays



and that a reliever crew is assigned the motor vehicle. Both defence witnesses stated that they were not in a position to say who the reliever crew was as the responsibility of assigning the crew fell squarely on the Sacco.

27. The Prosecution witnesses on the other hand testified that the driver of the vehicle fled after parking the vehicle at the petrol station before they got an opportunity to see his face. During cross-examination, both witnesses stated that they did not catch a glimpse of the motor vehicle's driver. The prosecution's case however was that the said motor vehicle was detained at the police station together with the conductor after the driver fled. The driver resurfaced afterwards and was thus charged with the offences. PW 2 explained in his evidence in chief-

"...The driver drove to Total Petrol Station and fled from the scene. That prompted my seniors to instruct another driver to take the vehicle to the Station. The vehicle and conductor were detained for further action. I was later informed the driver was tracked down and arrested. He was brought to court. He is not known to me. I did not see his face..."

On his part, PW 1 said:

"...The driver went to the Total Petrol Station and abandoned the vehicle. We went there and found only the conductor. We asked him to call the driver and he declined. We asked another driver to take the vehicle to the Station. Later the conductor was released and the driver appeared. I was informed by the Investigating officer the driver was charged..."

28. It is evident from the above that the culprit who the police observed picking and setting passengers on the road that day managed to successfully dodge by driving the motor vehicle to a Petrol Station and then disappeared.
29. However, the detention of the motor vehicle together with the conductor changed the course of events as the accused/appellant subsequently appeared to claim the impounded vehicle and was promptly charged.
30. The question then becomes, was the appellant the culprit who was driving the vehicle that day when the vehicle was seen committing the traffic offences?
31. The appellant though admitting he was employed as the permanent driver for motor vehicle KBP 458P denied in his defence that he was at work that day and claimed that he had spent the whole day at Kiambu Hospital where he had taken his sick wife. He said he was arrested and charged the following day when his employer asked him to follow up on the impounded vehicle on account that the police found his documents in the vehicle and assumed he was the one driving. He also stated that Tuesdays and Wednesdays were his off-days. His evidence was on the material date, the vehicle was being driven by a reliever driver. Similar evidence on the issue of off-days and reliever crew being in control of the vehicle that day was equally given by the conductor, DW 2.
32. On cross-examination, he stated that his employer did not know the reliever driver for that day. Equally, DW2 said reliever crew are assigned by the owner and did not know if the owner knew who the reliever crew were.
33. It is not in dispute, and the appellant readily admits that he presented himself to the police station to claim the vehicle which had been impounded after the its driver who was spotted committing traffic offences and directed to drive it to the police station defied those instructions and escaped. He claimed he was not the one driving it and affirms he was in hospital with his wife that day, secondly, it was his off-day. His defence thus suggests an alibi.



34. Under Section 111 (1) of the *Evidence Act* provides:

“...When a person is accused of any offence, the burden of proving existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact within the knowledge of such person is upon him...”

35. In the present case, the accused who had presented himself to the police and who acknowledges he is the driver employed to permanently drive the vehicle that was impounded for committing traffic offences said he was not driving the vehicle because that was his off day and secondly, he spent the day at Kiambu Hospital with his wife. Further, the vehicle was being driven by reliever driver. These were matters within his special knowledge which he affirmatively raised in his defence in answer to the charges against him.

36. The evidential burden/ or burden of adducing evidence (not legal burden) as to existence of a reasonable possibility of the affirmative fact raised by the appellant lay on him and it is upon presentation of such credible evidence of the said affirmative fact that then it could be weighed against the prosecution evidence for the court to decide if it creates a doubt in the prosecution case or not. The obligation was on him to adduce or point to some evidence in support of that assertion that he himself introduced by way of defence.

37. Nevertheless, no attempt was made to demonstrate that he was actually in hospital that day as stated. No records were presented from his employer in support of the fact that he was on off-duty on that day. No evidence was presented by his employer or records to show that the vehicle was under the control of a reliever driver or crew on that day as suggested in his own defence.

38. In any case, the defence was raised as an afterthought as during cross-examination, the issue of being in hospital was neither raised with the prosecution witnesses nor was the fact of there having been a reliever driver put to them.

39. In my view, the defence that the appellant was not in control of the vehicle yet he showed up to claim it at the police station knowing too well it had been impounded for committing traffic offences is not truthful and was properly rejected by the trial court.

40. Although the witnesses were unable to say that they recognized him as the driver that day, the appellant's subsequent conduct of presenting himself at the police station to claim the vehicle is itself without a proper explanation that extricates him from being incriminated as he admitted he was the vehicle's designated driver. It is thus my finding that circumstantially, there existed a substantial basis for drawing the inference that he was culpable.

41. On the second issue on failure of the Investigation Officer to testify, most cases have held that the failure of an investigation officer to give evidence does not in any way disqualify or wash down the evidence adduced. The courts have over the years held that whereas it is important to call the Investigation Officer or Arresting Officers, failure to call them is not fatal to the prosecution case but it depends on the circumstances of each case (see *Kenneth Kimngetich Soi v Republic* [2014] eKLR).

42. In the case of *Kiriungi v Rep* [2009] KLR 638, the court said:-

“...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have



been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged.”

43. The absence of the investigation officer’s testimony was in my view not fatal to the Prosecution case.
44. I have examined the rest of the record and I am satisfied that the evidence presented established the traffic offences charged beyond reasonable doubt and the sentences were equally imposed within the law.
45. I thus find no merit in this appeal and dismiss it both on conviction and sentence.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 25TH DAY OF APRIL 2023.

L.N MUGAMBI

JUDGE

In presence of:

Appellant- absent

State/Respondent- Gacharia

Court Assistant- Brian

Court

This Judgement be transmitted digitally by the Deputy Registrar.

L.N. MUGAMBI

JUDGE

