



REPUBLIC OF KENYA



**Ngangai v Republic (Criminal Appeal E038 of 2020)
[2023] KEHC 17859 (KLR) (Crim) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E038 OF 2020**

K KIMONDO, J

MAY 30, 2023

BETWEEN

PANITO BERA NGANGAI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment in Criminal Case No. 154 of 2014 in the Chief Magistrates Court at Nairobi by F. Andayi, Chief Magistrate, dated 3rd November 2020)

JUDGMENT

1. The appellant and three co-accused were charged with two counts of kidnapping persons from Kenya contrary to section 254 as read with 257 of the [Penal Code](#) (hereafter the Code); two other counts for abuse of office contrary to section 101 as read with 102A of the Code; and another count of giving false information contrary to section 129 (a) of the [Code](#).
2. The appellant was adjudged guilty on all the five counts. One of his co-accused died in the course of the trial while the other two were acquitted. He was sentenced to a fine of Kshs 300,000 in default to serve 1 year in prison on each of counts I and II; Kshs 200,000 in default 1 year imprisonment on each of counts III and IV; and Kshs 100,000 in default 1 year imprisonment on count V. The sentences were to run consecutively.
3. The particulars of counts I and II were that on 26th January 2014 at Upper Hill within Nairobi County, he jointly with others conveyed Ali Ahmed Hussein and Sulub Abdi Ahmed from Nairobi to Moyale, Ethiopia beyond the limit of Kenya without their consent.
4. He lodged an appeal on 30th March 2022 raising eight grounds but which can be condensed into three: Firstly, that the totality of the evidence was contradictory, uncorroborated, doubtful and did



not establish the principal ingredients of the offence; secondly, that the learned trial magistrate failed to properly analyze the evidence and thus reached an erroneous finding; and, lastly, that the sentence meted out was unlawful.

5. Learned counsel for the appellant, Mr. Manyara, filed submissions dated 30th September 2022 together with a list of authorities. He contends that that the prosecution's case was riddled with inconsistencies; and, that the learned trial magistrate misapprehended the evidence. In a synopsis, he argued that charges were not proved to the required standard.
6. The appeal is contested by the Republic through grounds of opposition dated 25th January 2023 and written submissions of even date. In a nutshell, the State submitted that all the elements of the offence were established beyond any reasonable doubt.
7. On 26th April 2023, I heard further arguments from both learned counsel for the appellant and respondent.
8. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA. 32.
9. The State called 18 witnesses. Although they gave lengthy evidence, I can isolate the following salient facts. The appellant was an Inspector of Police. He jointly with others caused Ali Ahmed Hussein and Sulub Abdi Ahmed to be forcibly abducted from Nairobi and taken across the border at Moyale into Ethiopia. The victims were Ethiopian nationals residing in Kenya as refugees. They had alien registration cards and UN mandate cards, although some of the documents may have expired.
10. According to Mohamed Noor (PW3), the Chairman of the Community Policing in Eastleigh, the two were also active political members of the OLF Party which had sought self-determination from Ethiopia and which may underpin the kidnapping.
11. In the afternoon of Sunday, 26th of January 2014 the two were forcibly abducted by some men from their green Land Rover Discovery into a black Prado. The Prado had blocked the other car; and, the men who were being removed from their car were screaming. This is clear evidence that they were taken unwillingly. The kidnapping was in broad daylight at Upper Hill, Kilimanjaro Road, Nairobi and was witnessed by Richard Oketo (PW6) a security guard at Securex Agencies and Raphael Musila (PW7) another G4S Security guard who were guarding nearby bank premises.
12. According to the wives of the victims (PW1 and PW2) their husbands were invited by someone to the city centre on the morning of 26th January 2014 but never returned. They made reports to the police. Like their husbands, they were also Ethiopian refugees in Kenya living in Eastleigh and Komorock respectively.
13. According to PC Ben Keter (PW11), the appellant brought three prisoners in a black Prado to Nairobi Area Police Headquarters and ordered that they be taken to Kasarani Police Station. The time was about 5:30 p.m. on 26th January 2014. PW11 escorted them to Kasarani in the Prado. He sat with the appellant and PC Sipiti (2nd accused). Apparently, the appellant had sought permission from Sergeant Arusei (PW12) to allow PC Sipiti to work with him on some assignment. She was surprised to learn later that PC Sipiti had been arrested over the incident.
14. PW11 also said that the appellant sought arrangements to tow the Land Rover Discovery. PW11 advised him to get a breakdown vehicle. The appellant then approached Julius Njuguna (PW9), a breakdown operator at Yaya Centre and asked him to tow the green Land Rover Discovery to Kilimani



- Police Station. He was paid Kshs 4,500 by the appellant. In cross-examination, he said he found it a little strange as the towed vehicle had not been involved in any accident.
15. On 25th January 2014, a black Prado Registration KBS 533S (exhibits 5 a, b, c & d) had been hired by three of the accused from Victor Safaris & Tours at the Mall, Westlands. According to the proprietor, Solomon Kiuma (PW5) and her employee Agnes Murage (PW8) the new customers were introduced by an old customer, Mumin Mohamed, and who had accompanied them to the office. The contract was signed by the appellant and his co-accused, Mohamed. It is the appellant who paid the hire charges of Kshs 54,000 in cash. She released the vehicle to them at around 5:00 p.m.
 16. When asked by the witness why they needed the vehicle, the appellant lied that they were going to ferry their boss for a political meeting to Moyale. They were to return the vehicle on 28th January 2014 at 5:00 p.m. They did not return the vehicle on that day. PW8 took copies of the appellant's driving licence and his corresponding Kenya Police ID card (exhibit 2). In the course of the transaction, she also took photos of the three accused persons and a video recording (exhibit 3).
 17. PW8 was later to see a story in the newspapers of the kidnapping and photographs of the car. Police officers also came to their offices to investigate the matter. That is when she learnt that the vehicle had been detained at Marsabit Police Station.
 18. In the meantime, and according to the testimony of a border police officer at Moyale, PC Lang'at (PW10), the black Prado KBS 533S arrived at the border at 6:00 a.m. on 26th January 2014 from the direction of Marsabit heading towards Moyale. It joined the queue for inspection. The driver lied to him that one of the passengers was the incoming DCIO. He informed his supervisor and went on with his duties.
 19. PC Samwel Mate (PW13) and PC Tirus Gitonga (PW14) were manning the border. PW13 overheard PW10 telling their supervisor that one of the passengers was the new DCIO. He proceeded to check the insurance as PW10 inspected the rear of the vehicle. The Deputy DCIO Chief Inspector Jared Nyausi (PW16) then approached the vehicle, saluted and authorized it to proceed on. PW13 did not see its occupants. Later in the evening, he learnt that same vehicle had been detained at the Moyale DCIO's offices by the OCS and Deputy OCS.
 20. PW15 was Police Commissioner Moses Dindi. He received an alert from a civilian that the two persons were being transported across the border. The informer was seeking assistance to prevent the men from being taken to Moyale. PW14 instructed the OCS Isiolo to intervene. He also got instructions from the Director of CID on the matter. PW 15 instructed the head of CID, Marsabit County to take appropriate action. Despite all these efforts, the kidnapped persons were taken to Moyale and onwards to a military camp.
 21. Later he got information that the culprits were on their way back to Nairobi. He gave further instructions to SP Benedict Kigen (PW17) who was the DCIO Isiolo. They intercepted a public bus, Moyale Star, on 28th January, 2014 at around 5.00 p.m. along the Moyale-Isiolo road and arrested the appellant PC Sipiti. They also recovered from the appellant a Ceska pistol and ammunition.
 22. When the appellant was placed on his defence, he protested his innocence. he conceded that he was involved in an operation to gather intelligence on human trafficking involving refugees who entered through Moyale, Marsabit, Isiolo, Nairobi and onwards to South Africa. This followed the terrorist attack at Westgate. He however denied visiting Moyale between the 25th and 27th January 2014.
 23. In a synopsis, he claimed that he was the victim of machinations by his superiors including one Police Commissioners Nicholas Kamwende and Ndidi (PW15) to deny him promotions. He said that after



- their bus was intercepted, the police returned his ID card and certificate of appointment but remained with the other items. He then boarded a public vehicle from Isiolo to Nairobi.
24. On 30th January, 2014 he met Mr. Commissioner Kamwende in a flag meeting who assured him that all was well and he should continue with his normal duties. On 2nd February 2014 he visited Kilimani Police Station to check whether the Land Rover Discovery had been claimed by anyone. He was arrested and spent the night in the cells.
 25. He lamented that neither an inquiry file was opened nor any Orderly Room Proceedings under the Forces Standing Orders were conducted on his case. He contended that the criminal proceedings were stage-managed to destroy his career and to bury misconduct by his seniors that he had uncovered.
 26. I take the following view of the matter. It is a truism that the legal and evidential burden rested squarely on the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] EA. 332. I am unable, on the totality of the evidence to say that the burden was shifted to the appellant.
 27. From my re-appraisal of the above evidence, I concur with the learned trial magistrate on the following findings: Firstly, on the totality of all the evidence, the appellant, who was an Inspector of Police, was one of the men who abducted Ali Ahmed Hussein and Sulub Abdi Ahmed at Upper Hill Nairobi and transported them by road in the black Prado KBS 533S into Ethiopia without their consent.
 28. Secondly, his identification was not in doubt from the following series of events: He was positively identified by PW5 and PW8 as one of the three persons who hired out the vehicle at Westlands, Nairobi on 25th January 2014. He is the one who left copies of his Police Identification, driver's licence and paid Kshs 54,000 in cash. The appellant admitted in his defence that he hired the vehicle and had a budget of Kshs 70,000 for it allegedly received from his senior, Kamwende, the County Criminal Investigations Officer.
 29. He was also identified by PW11 on the same date at about 5:30 p.m. when he drove into Police Headquarters Nairobi in the same vehicle to deliver three prisoners. In fact, PW11 rode in the same vehicle with the appellant to convey the prisoners to Kasarani Police Station.
 30. Thirdly, the same vehicle carrying a number of occupants approached the border at Moyale from the direction of Marsabit on 26th January 2014. The driver lied to PW10 that one of the passengers (the appellant) was the incoming DCIO at Moyale. The appellant gave the same lie to PW16. It ensured easy passage across the border without any thorough inspection of the vehicle. This is evident from the testimonies of the border guards PW10, PW13, PW14 and their Deputy DCIO (PW16). The appellant knew that the information was false. I find that count V on giving false information contrary to section 129(a) of the *Code* was thus well laid.
 31. Fourthly, I believe the evidence of Police Commissioner Moses Dindi (PW17) that belated efforts at the border to stop the offence did not bear fruit and that the two kidnapped persons were taken to Moyale and onwards to Ethiopia. Once the vehicle crossed the border point, the conveyance of the two persons into Ethiopia became complete. Like I stated earlier, and from the evidence of PW1, PW2, PW6 and PW7 they were so conveyed without their consent.
 32. It follows that all the ingredients of the offence of kidnapping persons from Kenya contrary to section 254 as read with 257 of the *Penal Code* were thus established beyond any reasonable doubt. Counts I and II were thus proved beyond reasonable doubt.
 33. Sixth, the appellant was an Inspector of Police. His conduct was arbitrary; clearly an abuse of power; and, fell outside the law. He unlawfully held the victims in his custody throughout. They were never booked formally at either the Nairobi Area Police Headquarters or at Kasarani Police Station. I thus



readily find that counts III and IV on abuse of office contrary to section 101 as read with 102A of the Code were also proved beyond reasonable doubt.

34. Lastly, the defence tendered by the appellant was completely bogus. He claimed that he had not set foot in Moyale between 25th and 27th January 2014. He claimed, against overwhelming evidence, that he remained in Marsabit; and, that it is his driver who proceeded on a private matter to Moyale. The appellant was in fact arrested together with PC Sipiti en-route back from Moyale to Nairobi in a public bus, Moyale Star, on 28th January, 2014 at around 5.00 p.m. along the Moyale-lsiolo road. He did not deny it or that a Ceska pistol and ammunition were recovered from him. The vehicle used to transport the kidnapped persons had been at first detained in Moyale and eventually brought to Marsabit Police Station.
35. The appellant's other limb of defence was that he was set up for a fall by his seniors to either block his promotion or to bury transgressions by senior police officers which he had unearthed. I find it to be extraneous and a red herring.
36. The appellant also lied to the trial court that before he left Nairobi

“he had received a call from an anonymous caller that a suspicious motor vehicle had been abandoned at Nairobi Club behind the KNLS building. He proceeded there and found the vehicle KAD 166S, Land Rover Discovery green in colour. He got a breakdown vehicle which then towed it to Kilimani police station for custody”.
37. The truth is that he was one of the men who earlier blocked the green Land Rover Discovery at Upper Hill area using the hired black Prado. He and his accomplices forcibly abducted the two victims, took them to the Nairobi Area Police Headquarters and eventually to Kasarani Police Station. He then organized to have the Land Rover towed by PW9, a breakdown operator at Yaya Centre, to Kilimani Police Station.
38. I agree partly with learned counsel for the appellant that there were some discrepancies and inconsistencies between the evidence of some of the witnesses, for instance on the make of the car (one witness had said it was a Pajero), its colour or number of passengers when it passed the border. My finding is that those incongruities were immaterial. I have also considered that a large number of witnesses testified in this case; and, as correctly held by the Court of Appeal, in any trial there are bound to be such discrepancies. Joseph Maina Mwangi v Republic, Criminal Appeal No. 73 of 1993.
39. The upshot is that the conviction on all the five counts was safe and I uphold it.
40. I will now turn to the sentence. Section 354 (3) of Criminal Procedure Code empowers this court to review the sentence. The trial court considered that the appellant was a long serving police officer and that a custodial sentence was inappropriate. But since the sentences were to run consecutively and the amounts of fines imposed, the appellant is still languishing in custody. I have considered that he is a first offender and remorseful. In addition, the offences occurred in the course of the same transaction. The appropriate sentence is that the sentences shall run concurrently. Furthermore, the appellant has been in jail for over 2 years now. He has no doubt had sufficient time to reflect and introspect on his conduct.
41. I will accordingly reduce his sentence to the period already served. The appellant shall be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2023.

KANYI KIMONDO



JUDGE

Judgment read virtually on Microsoft Teams in the presence of-
Appellant.

Mr. P. Muchiri holding brief for Mr. Shadrack Wambui for the Appellant instructed by Musyoki Mogaka & Company Advocates.

Mr. Otieno for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

