Orata v Republic (Criminal Appeal 73 of 2021)
[2023] KEHC 21972 (KLR) (23 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21972 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL 73 OF 2021

RPV WENDOH, J

AUGUST 23, 2023

BETWEEN

BENARD OGOLA ORATA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. P. N. Areri – Principal Magistrate in Migori Chief Magistrate's Criminal Case No. E292 OF 2021 delivered on 22/11/2021)

JUDGMENT

1. Benard Ogola Orata, the appellant, is dissatisfied with the judgment of Hon. P. N. Areri, Principal Magistrate Migori, in which he was convicted for the offence of cutting down trees contrary Section 334(c) of the Penal Code.

2. The particulars of the charge are that on 18/2/2021 at 9:00 hours, in Sori Township, Nyatike Sub County, cut down a tree valued at Kshs. 32,146/=, the property of Wycliffe Odhiambo Ganda. After conviction, he was placed on probation for three years.

   The appeal was filed on behalf of the appellant by Ongoso Advocate.

3. The appellant has raised eight grounds of appeal which can be summarised as follows:-

   1) The trial court erred by relying on a report, photographs and documents which were marked for identification but not produced as exhibits;

   2) That crucial witnesses were not called to testify;

   3) That there was not sufficient evidence adduced on which to base a conviction;

   4) That the judgment was unconstitutional and a nullity in law.

4. The appellant therefore prays that the said judgment be reversed.

5. The appellant also filed written submissions in support of the grounds of appeal.

6. The prosecution counsel, Ms. Kosgei opposed the appeal and also filed submissions.

7. This being a first appeal, this court is required to examine all the evidence tendered in the trial court afresh, analyse and evaluate it and arrive at its own independent conclusions. The court must however make allowance for the fact that it neither saw nor heard the witnesses testify. See Okeno vs. Republic (1972) E.A.32.

8. The prosecution called a total of five (5) witnesses. PW1 Wycliffe Ganda identified the appellant as his tenant in one of his houses at Sori, on Parcel Migori / Kachieng A/7611; that there are trees planted on the said land and five houses; that there were four flower trees and were huge trees and had been there for many years; that on 17/2/2021, he got information that the appellant was chasing away other tenants because he wanted to cut trees to develop the land. PW1 the appellant to wait for him to come. PW1 he travelled to Sori on 18/2/2021. While on the way, he received a call that the appellant was already cutting trees. PW1 called the appellant and told him to stop but he said they were his property and he could not stop. PW1 arrived at home and went to the land and found one tree already cut into pieces and his mother had already reported to the Chief and police arrested the appellant. They went to the Chiefs office next day with his mother, grandfather, and found the appellant and Tom Owiso; that the appellant claimed that Tom Owiso had sent him to cut the tree and Tom claimed that the land was his; that both the appellant and Tom Owiso failed to produce any document as proof of ownership of the land. PW1 reported the matter to police and a forester assessed the damage done vide his report of 2/3/2021.

8. PW2 Sophia Odero Ganda Orata, PW1's mother recalled the 18/2/2021; that the appellant cut PW1's tree; that she told him to stop but he refused and she reported to the Chief and the Chief and ward administrator went to stop him. They went to the Chief where PW1 produced his land ownership documents but the appellant did not have any. The damage was assessed by the forester and the appellant was asked to compensate PW1 but he failed. The forester prepared a report and assessed the damage at Kshs. 32,146. PW2 identified photographs of the cut up tree.

9. PW3 Barnabas Majiwa Otieno, the Chief Sori Location, recalled that on 18/2/2021, he received information from Assistant County Commissioner (ACC) Karungu. He went to the office and he was told of a report of trespass to land and a tree that had been cut. He visited the scene and found the appellant had cut a tree. They went to the Accused's office to try to resolve the matter. When the appellant claimed the land on which the tree was his, he was asked to bring title documents. The complainant did produce documents but the appellant never did. He referred them to the Forester'S office to assess the damage after which the matter was referred to the police.

10. PW4 Oluoch Sarock Ocholla, the ward administrator, Kochieng ward, recalled having been called by the Assistant County Commissioner Nyatike's Office, where he found a lady alleging that somebody had encroached on her land and cut a tree. He accompanied the Chief to the scene, where they found the appellant had cut the tree and he was told to go to the Chief's office to resolve the matter.

11. PW5 Emilly Achieng Odhiambo, who lives at Sori recalled that on 18/2/2021, he was in the saloon when he heard something falling on the roof. She got out and found it was the appellant cutting a tree next to Sophia Ganda's house. He saw the appellant cutting the tree.

12. When called upon to defend himself, the appellant testified on oath that on 18/2/2021, he was on his usual errands and at 8:00a.m he took tea at a hotel, then went with a friend to gamble. At noon,

the area Chief came and told him to go to the office. He was asked for the owner of the plot where his wife operates a hotel and was told it was Tom Owiso. He was told to tell Tom Owiso to go to the police station. On 6/3/2021 and was asked for documents and was arrested for cutting down a tree. He denied having cut any tree as alleged and has never seen the alleged tree. He denied having talked about the tree while at Chiefs Office.

13. DW2 Caroline Adhiambo Ogolla of Sori, the appellant's wife recalled 18/2/2021 and stated that she was in a hotel when the Appellant and Tom Owiso went there for breakfast; then they started gambling and at noon the Chief went there to call him. In cross examination, she said that she was aware of a tree which fell on its own near her hotel and that even the appellant saw it.

14. DW3 Tom Mboya Owiso also testified that on 18/3/2021, he was at Sori and at 7:35 a.m. He went to a hotel with the appellant had breakfast and went to gamble; that the area Chief went there with three others, and called the appellant; that the appellant came back later and told him that the Chief wanted to see him. DW3 went to the Chief's office and was asked about the ownership of plot No. 646.

15. Mr. Ongoso, counsel for the appellant submitted at length on the value of the documents which were marked for identification but not produced as exhibits that they do not amount to evidence at all. Counsel relied on the decision of Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others (2015) eKLR and Justus Musau Wambua & Another vs. Republic 2020 where the court held that failure to formally produce the documents relied on for identification was fatal to the Respondent's case. Counsel also urged that failure to call crucial witnesses was fatal to the prosecution case.

16. On their part the Respondent submitted that the ingredients of the offence were proved; that the appellant was seen cutting the tree and the evidence is sufficiently corroborated; that failure to call the forest officer or arresting officer were not fatal to the case.

Failure to produced exhibits

17. I have considered the grounds of appeal, the submissions of counsel. The defence case basically rests on the fact that the documents marked for identification were not produced in evidence, save for the Chief's letter which was produced by the Chief himself (PW3).

18. I have perused the judgment of the trial court, and at no time did the court rely on the documents that were marked for identification and not produced in evidence in determining the case. The court seems to have avoided them all together. In the Justus Wambua case, that was cited by the defence, the court actually relied on the documents marked for identification but not produced, in arriving at its verdict which is not the case here. This case is distinguishable from the Justus Wambua case (supra).

19. The question that remains to be answered is whether there was sufficient evidence on record to convict the appellant, in absence of the marked documents.

20. The appellant was charged under Section 334 (c) of the Penal Code which reads as follows:-

> " Any person who willfully and unlawfully sets fire or, cuts down, destroys or seriously or permanently injures
>
> (c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation is guilty of a felony and is liable to imprisonment for fourteen years."

The key words were are 'wilfully' and 'intentionally'.

21. No doubt the complainants' tree was felled and the evidence of PW1 to PW5 confirms that fact. Even DW2, the appellant's wife admitted that she saw the tree though she does not know who felled it: DW2 even said that the appellant saw it. PW2. PW3 all claim to have seen the appellant cutting the tree. However, the appellant raised an alibi defence and claimed to have been at DW2's hotel with DW3 between 7:00 – 8:00 a.m to midday when the Chief found him.

22. The law is settled, as regards alibi defence. The legal burden of proof beyond reasonable doubt does not shift to the accused when he raised the alibi defence. The burden remains with the prosecution to prove the falsity or otherwise of the alibi. In SSentale v Uganda [1968 -365], the court stated that when an accused sets up an alibi defence, he does not assume the burden of proving its truth so as to raise a doubt in the prosecution case. The burden to disprove the alibi and prove an accused's guilt therefore lies on the prosecution. See also Wangombe v Republic [1980] KLR 149.

23. The appellant raised an alibi defence for the first time during his testimony in the dock. He claims to have been with DW2 and DW3 at DW2's hotel. The prosecution did not get an opportunity to rebut the said alibi raised during the testimony of the defence witnesses. It is a principle of law that has been long accepted that an accused person who wishes to rely on a alibi defence must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi .

24. In R vs. Sukha Singh s/o Wazir Singh and others (1939) 6EACA 14, the then East African Court of Appeal upheld the High Court decision when it stated:-

> " "If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

25. Again in Festo Androa Asenua v Uganda Criminal Appeal No. 1 of 1998, the Court stated as follows:-

> " We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

26. Guide by the above decisions and in light of the overwhelming evidence tendered by PW2, PW3 PW4 and PW5, this court is satisfied that the alibi defence is an afterthought and does not in any way dislodge the prosecution evidence. The appellant was arraigned in court on 15/3/23 and it was not until November, seven months later, that he raised the alibi for the first time. The appellant was seen cutting down the tree in question and has not given a plausible explanation for so doing. The act was voluntary and unlawful.

27. Whether failure to call the Forester and arresting officer was fatal to the prosecution case.

28. Section 143 of the *Evidence Act* provides that a fact may be proved by the evidence of a single witness unless in exceptional circumstances where the law requires more witnesses. It is the duty of the prosecutions to call all relevant witnesses to the in case to assist the court arrive at a fair determination.

29. In Julius Kelewe Mutunga v Republic Criminal Appeal No. 31 of 2005, the Court of Appeal held as follows:-

> "....As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

See also Keter v Republic [2007] EA 137.

> "....the prosecution is not obliged to call a superfluity of witnesses, but only such witness as are sufficient to establish the charge beyond reasonable doubt."

In Bukenya v Uganda [1972] EA 549 the court held that:-

30. The prosecution should not call a superfluity of witnesses. In this case, though the Forester was involved in assessing of the damage caused, he was not called as a witness for unknown reason and his report was not produced. However, the fact remains that the appellant was seen cutting the complainant's tree even if the value is not ascertained. Lack of the Foresters evidence did not vitiate the prosecution case.

31. As to failure to call the arresting officer, the law is settled. 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. In Kiriungi v Republic [2009] KLR 638, the Court said:-

> "..... the effect of failure to call police officers involved a criminal trial including the investigation officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrated. 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."

32. As regards this case, I come to the conclusion as above. It was unnecessary to call the arresting officer because even the Chief of the area (P3) was involved in the investigation and report to police station.

33. In the end, though the trial court did not analyse the evidence as required of the court under Section 169 of the Criminal Procedure Code, this court has analysed the evidence and come to the conclusion that the trial court arrived at the correct verdict. I affirm the conviction.

34. As for the sentence, the appellant was lucky to get a probation sentence. Under Section 334 (c), he should have been jailed for fourteen (14) years. He got a slap on the wrist. The appeal lacks merit and is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 23RD DAY OF AUGUST, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Kaino for the state

Appellant Present

Ms. Emma –Court Assistant