



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mundia v Republic (Criminal Appeal E063 of 2022)
[2023] KEHC 27620 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E063 OF 2022
DO CHEPKWONY, J
NOVEMBER 30, 2023**

BETWEEN

PATRICK MWANGI MUNDIA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Being an appeal against the conviction and sentence by Hon. G. Omodho, Senior Resident Magistrate in Kiambu Chief Magistrate’s Case No. 1986 of 2014 on 31st August, 2022).

1. The Appellant, Patrick Mwangi Mundia, was charged with two counts namely:
 - a. Count I: Stealing Motor Vehicle Contrary to Section 278A of the Penal Code.

The particulars of the offence were that:

“On 3rd October, 2013 in Nairobi, the appellant stole Motor Vehicle Registration No. KBM 603E Toyota Nze White in colour valued at Kshs. 700,000.00, the property of Joshua Mutinda Mutisya”.

- b. Count II: Obtaining by False Pretences Contrary to Section 313 of the Penal Code.

The particulars of the offence were that:

“On 7th October, 2013 at Co-operative Bank Kiambu Branch within Kiambu County with the intent to defraud the Appellant obtained from Antony Njoroge Mburu, the sum of Kshs. 505,000/= by falsely pretending that he was selling his Motor Vehicle Registration Number KBM 603E Toyota Nze white in colour while knowing very well that it did not belong to the Accused”.



2. The matter proceeded for hearing whereby the Prosecution called six (6) witnesses in support of their case while the appellant offered to give a sworn defence and called no witness.
3. Upon analyzing all the evidence placed before it, the trial Magistrate found the prosecution had proved their case against the appellant on both counts whereby he was convicted and sentenced to serve Five (5) years imprisonment in Count I and three (3) years imprisonment in Count II, which sentence to run concurrently.
4. Being aggrieved with the conviction and sentence, the appellant has lodged an appeal vide a Petition of Appeal on 4th November, 2022 wherein he cited the following grounds of appeal:
 - i. That, the trial court convicted and sentenced the appellant of the offence charged notwithstanding, the prosecution failed to prove its case beyond peradventure, as the subject matter was in the hands of the complainant.
 - ii. That, the trial court convicted and sentenced the appellant of the offence charged notwithstanding, there was not corroboration in the prosecution case Contrary to Section 62 as read with Section 63 of the Evidence Act.
 - iii. That, the trial court convicted and sentenced the appellant of the offence charged notwithstanding, the evidence of PW4 was inadmissible as the defense of the appellant was plausible enough to rebut the claims.
 - iv. That, the trial court convicted and sentenced the appellant of the offence charged withstanding, Article 50 of the Constitution was not appreciated the trial court.
 - v. That, I pray to be furnished with copy of the trial record judgment to be able to raise more reasonable grounds during the hearing of this appeal. this is pursuant to Section 170 of the CPC.
5. The Appellant seeks to have the convictions granted and sentence meted against him set aside.
6. On 14th June, 2023, the appeal was admitted for hearing and parties directed to canvass the same by way of written submissions. The Respondent filed their submissions on 14th July, 2023 while the Appellant filed his submissions on 18th July, 2023. The arguments raised by either party in the said submissions will be taken into consideration in the court's determination of the Appeal.
7. This being a first appeal, it is the duty of this court as a 1st appellate court to review and re-evaluate the evidence that was adduced before the trial court afresh so as to reach its own independent conclusion as to whether to uphold or quash the appellant's conviction while bearing in mind that it neither heard nor saw the outcome totally, and this gives due allowance for that.
8. In the case of *Peters v Sunday Post Ltd* [1958] EA 424, the court held that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the directions of the trial Judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had gone wrong, the appellate court will not hesitate so as to decide”.



9. Also, in the case of *Gitobu Imanyara And 2 Others v Attorney General* [2016] eKLR, the Court of Appeal stated that:

“An appeal to this court from a trial by the High Court is by way of re-trial and the principles upon which the court acts in such an appeal are well settled. Briefly that, they are with this court must resurrender that evidence, evaluate it itself and draw its own conclusion, thought it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect”

10. In considering the grounds of appeal set out by the appellant, I have read through the original record of proceedings of the trial court, the written submissions filed by the parties alongside the cited authorities. Firstly, I wish to briefly set out the evidence that was adduced before the trial court and the judgment arrived at by it upon analyzing the said evidence.

11. The prosecution (herein after referred to as “The Respondent”) called evidence of six (6) witnesses, being Pw1, Antony Njoroge Mburu, PW2, Michael Kipkemoi Mutai, PW3, Nelson Ndali Imbiti, PW4, Daniel Kyalo Mwangeli, PW5, Chief Inspector Abel Onyapigi and PW6, Muiruri Karuiki. On the other hand, upon being placed on its defence, the Appellant offered to give a sworn statement in defence and he called no witness.

12. PW1, testified that he was recording a Sunday Newspaper when he saw an advert on sale of Motor Vehicle Registration Number KBM 603W Toyota NZE (herein referred to as “the Motor – Vehicle”). He called the seller through the cellphone number 0718503813 which was indicated in the advert and requested to see the said vehicle. That a person who identified himself as Peter then came and brought the motor vehicle to him which was marked Exhibit 1 and with the help of his mechanic, Joseph Ng’oyo Wanjiku, they h..... the vehicle and did a test drive to Kiringiti after which they agreed the purchase price Kshs. 505,000/-. PW1 was informed her the seller owned the vehicle but had not formally transferred if form its previous owner one Nelson Ndali Imbuti, PW2. It was also stated that a search was conducted and it showed that the information on Number plate matched so well with the chasis number 120-3029431, engine number 2NZ-27494132 YoM2003 with the information on the National Identity Card the KRA Pin Certificate of the said Nelson Ndati Imbuti transfer Form as ordered by the seller.

13. PW1 stated that he went to his bank at Cooperative and withdrew Kshs. 505,000/- as per his receipt and paid accused in cash. He stated that they also did a sale agreement for the sale of the motor vehicle. It was PW1’s testimony that sent his friend Lawrence Kibe to process the transfer of the motor vehicle’s log book of KRA into the said documents were detained on account of forgery with instructions that theKRA. PW1 then reported the matter to the police and the vehicle was surrendered to the police as a suspected stolen property where it was established that the Insurance sticker had been named to one Joshua Mutinda Mutisya who claimed he had bought if from Nelson Nduli (PW3). According to the insured, the vehicle had been hired out by a Mr. Mutai who had presented himself as Andrew Njiri but neither was he nor Peter Theuri traced.

14. PW1 went on to state that through an online platform “Buyer Beware” he was able to identify one Patrick Mwangi Mutinda who had been arrested at Lang’ata, and had a case at Kibera Law Courts. He informed the Investigating officer of the same and he went to Kibera where he found one Patrick Mutinda who they later learnt was Patrick Mwangi Mundia and not Peter Theuri Ndirangu. PW1 confirmed him to be the person who had sold the vehicle to him.

15. PW2, Michael Kipkurui Muthi testified that he used to work as a marketer in Orez Tours and Travel which would hire out motor vehicles. He recalled receiving a call from a client who wanted to have



a vehicle from the 3rd October, 2013. That the client introduced herself as Njiiri Kamau. That since all their vehicles were out on duty, he requested a friendly company by the name Bailiff to hire the vehicle. He asked the client to go for the vehicle but he was he was busy and asked her tothe vehicleat Ruaka. That the client then sent the payment for three days via Mpesa and he took the vehicle to him. The client signed the document and he left her with the White Toyota NZE vehicle which had a tracking system. PW2 saw her the following day, he learnt that the vehicle had been stolen and sold to a 3rd party. According to PW2, efforts to teach Kamau Njiiri were in vain but he confirmed it was the appellant in the dock.

16. PW3, Nelson Ndali testified that he was the initial owner of the motor vehicle registration number KBM603W make Toyota Nze which he later sold to Joshua Mutinda Mutisya at Kshs. 250,000/- in 2011 and gave him the logbook, Copy of ID and KRA Pin Certificate and Transfer Forms.
17. PW4, Daniel Kyalo Mwangela confirmed that he worked with Orez Tours and Travel and that the motor vehicle registration No. KBM603W, Toyota Nze was hired to a customer by the name of Kamau Njiiri.
18. PW5, was the Chief Inspector Abel Onyapigi from DCI, Kisumu and he testified that he proceeded the photographs in a CD forwarded via Exhibit memo of Phillys Osodo of motor vehicle KBM603W. He produced the certificate of producing the Exhibit memo from the photographs of Exhibit 6, 7 and 8.
19. PW6, P.C Muiruri Kariuki the investigating officer testified and gave a summary of the evidence of PW1 which will not be replicated to avoid repetition. He produced all the exhibits in the matter including the ID and PIN of the registered owner of the motor vehicle Registration No. KBM603, Nelson Ndali Imbuti, the transaction receipt form Cooperative Bank, Car sale agreement, Car hire contract, Transfer documents, photographs, fake documents that were detained, various correspondences, driving license of the accused person and Search certificate for the said Motor vehicle.
20. According to PW6, from the Investigations, the accused had been using different identity cards to sell the motor vehicle which led to him to being charged with the offences he faced.
21. On cross examination, he stated that he did not know how and where the accused had been arrested as he had never met him. He told court that he only took over the investigation and hence relied on the information in the file. He stated that the signatures were not verified by a document examiner.
22. Upon analyzing the prosecution's evidence, the trial court found the accused had a case to answer and placed him on his defence. Accordingly, to the accused in his sworn evidence, was a case of mistaken identity. He stated that he was brought to court on a production order and charged with the present offence. He denied the offence, nor receiving Kshs. 505,000/- and stated that witnesses such as the mechanic were called to confirm the evidence against him. He also stated that PW1 did not bring any evidence from the "Buyer Beware" platform and denied any involvement in the case. He further stated that the prosecution's witnesses were contradictory in their testimonies.
23. The trial court considered the evidence and held that it could not have been a coincidence that a motor vehicle is hired on 3rd October, 2013 and after three days, the same is found having been sold to PW1 by the Appellant. The trial court then reached a conclusion that it was the Appellant who hired the motor vehicle and later sold it to PW1 without any authority which amount to stealing and therefore found the appellant guilty. Convicted him for the offence of stealing a motor vehicle and obtaining by false pretenses.
24. From the Appellant's grounds of appeal, the trial court proceedings and submissions filed by the parties herein, the key issues that arise for determination by this court are as follows;



- a. Whether the failure to call some witnesses as submitted by the Appellant was fatal to the prosecution's case.
- b. Whether the contradictions in the evidence adduced by the prosecution's witness were substantial to the extent of rendering the prosecution's case incredible.
- c. Whether the sentence meted out against the appellant was lawful and appropriate.

Whether the failure to call the witnesses stated by the Appellant was fatal to the prosecution case.

25. On the issue of witnesses, the starting point is Section 143 of the *Evidence Act* which provides that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

26. In the instant case, the appellant submitted that the Prosecution did not call key witnesses such as the mechanic and the friend mentioned by PW1, who witnesses the sell agreement to testify. It was at thethat the prosecution did not produce the CCTV footage to show that he was at the Cooperative Bank on the material day. On the other hand, the prosecution submitted that it availed sufficient evidence through its witness and exhibit produced to justify the conviction of the appellant.

27. It is trite law that the prosecution has discretion to determine the witness to call in support of its case and hence this cannot interfere with such discretionulterior motive is established on its part. In the case of *Mwangi v R.* [1984] KLR 595, the Court of Appeal held that:

“whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

28. The principles to consider in determining the issue of crucial witnesses was also discussed in the case of *Bukenya and Others v Uganda* [1972] EA 549, where Lutta,Ag. Vice President held that:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution....

The prosecution's burden in regard to witnesses is to all witnesses who are sufficient to establish a fact. However, it is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favorable to the prosecution or not.”

29. Having read through the proceedings and judgment of the trial court, finds that the prosecution witness called were sufficient to establish that the offence was committed and that the Appellant herein committed the offences. When the trial magistrate held that it was not a coincident for him to have spotted the alleged motor vehicle three days after he had hired it.

Whether the contradictions raised by the Appellant on the Prosecution case were substantial

30. It was the Appellant's argument that there were many contradictions in the evidence the witnesses adduced by the prosecution's witnesses. For instance, the appellant submitted that PW4 testified that he met him in town and Kshs. 15,000/- was paid which is contrary to PW2's evidence that he met him in Ruaka and he paid Ksh. 9,000/-. It is worth noting that while contradictions and inconsistencies in



the prosecution's evidence favour the appellant/accused's case, it does not apply in all circumstances. In the case of *Richard Munene v. Republic* [2018] eKLR, the Court of Appeal, with regard to contradictions or inconsistencies in the evidence of the prosecution witness, stated this;

“Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

31. In this case, the court finds that the contradictions and or inconsistencies raised are not as fundamental or substantive since PW2 and PW4 in their evidence confirmed that the Appellant is the one who hired out the motor vehicle and which motor vehicle was sold to PW1 and was reported stolen within the same period. Therefore, as correctly stated the nature of events surrounding the motor vehicle could not have been coincidental. In view of this, the court finds that there was no error in principle to warrant any interference of the trial court's finding by this court and proceeds to uphold the conviction of the appellant in both counts.

Whether the sentence meted out against the Appellant was lawful and appropriate.

32. On the issue of sentencing, under Count 1, the appellant was charged with an offence under Section 278a of the Penal Code where the prescribed sentence is seven (7) years imprisonment. It states;

If the thing stolen is a motor vehicle within the meaning of the *Traffic Act* Cap.403), the offender is liable to imprisonment for seven years.

33. On the second count, the appellant was charged with an offence under Section 313 of the Penal Code, where the prescribed sentence is a period of three years imprisonment and it states;

“Any person who by any false pretense, and with intent to defraud, obtained from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.”

34. The trial court sentenced the Appellant to serve Five (5) years imprisonment for the offence, under Count 1 and three (3) years imprisonment under count 2, which sentences are lawful. It is also noted that the trial court considered the period the appellant had stayed in custody during the trial. In the end, the court finds that the trial court did not make any error to warrant any interference by this court and proceeds to uphold the conviction and the sentences meted against the appellant. And as ordered by the trial court, these sentences run concurrently.

It is so ordered.

JUDGMENT, DATED AND DELIVERED VIRTUALLY ON THIS 30TH DAY OF NOVEMBER, 2023.

D.O. CHEPKWONY

JUDGE



In the presence of:

Martin - Court Assistant

M/s Ngesa Counsel for the Respondent

