



**Mahugo v Republic (Criminal Appeal 4 of 2020)
[2023] KEHC 26058 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 4 OF 2020
RN NYAKUNDI, J
NOVEMBER 29, 2023**

BETWEEN

MILAN SIMBA MAHUGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction on sentence of 7th February, 2020 by the Resident Magistrate, the Honorable J M Wekesa in Kakuma Law court in criminal case No.40 of 2019)

JUDGMENT

Before Hon. Justice R. Nyakundi

Mr. Kakoi for the State

1. The Appellant was charged with the offence of issuing false information regarding a terrorism Act, contrary to section 26 of the *prevention of Terrorism Act* 2012 and another count of stealing contrary to section 268 as read with section 275 of the *penal Code*. The Appellant pleaded not guilty and the matter proceeded to full hearing. The prosecution presented six witnesses in support of its case against the Appellant.
2. PW1 testified that on 19th January 2019 she received a message from PW2 that was to the effect that people who had bombed Dusit hotel in Nairobi were in Kakuma 'intending to bomb international office of Immigration (IOM) and also attack a plane. This was after PW2 had given her phone to PW3 to take it to PW4 for repairs. PW4 shared a shop with the accused where he does repairs and he was not able to repair it. He left the phone in the shop and upon investigations, it was discovered that the accused took the sim card from the phone and used it to send the above message.
3. Upon considering the evidence and the testimonies of the witnesses the court found the Appellant guilty of the main count and the alternative count.



4. The Appellant, being aggrieved with the sentence and conviction, instituted the present appeal vide a petition of appeal filed on 20th February 2020 premised on the following grounds;
 1. That the learned trial magistrate erred in both law and facts when she convicted the accused person without observing that there was a grudge between the accused person and PW2, PW3 and PW4 who are members of the same family.
 2. That the learned trial magistrate erred in both law and facts when she convicted the accused person without knowing that there was mistaken identity.
 3. That the learned trial magistrate erred in law and in facts when she convicted the accused person without essential witnesses.
 4. That the learned trial magistrate erred in law and in facts when she convicted the accused person without corroboration of evidence.
5. The parties prosecuted the appeal vide written submissions.

Appellant's Case

6. The Appellant filed submissions dated 7th July 2023. The Appellant submitted that this being a serious crime which attracted a heavy penalty, not would have called for both the prosecution and the trial court to exercise the powers granted unto it to take and call further evidence either before close of prosecution case or before conviction and sentence to unearth core material factors which go to the root of this matter as per section 329 of the *CPC* just as it were before plea taking. Further, that the evidence of the prosecution witness appears faulty, orchestrated and just aimed at fixing the Appellant.
7. The Appellant submitted that one principle in sentencing is proportionality while objectives would include rehabilitation of the offender and protecting the community at large. Further, that it is not lost that a first offender if fair should not suffer a maximum sentence. The proportionality of a sentence weighs the circumstances while to rehabilitate does not necessarily call for a hefty penalty. If the sentence meted is so harsh in comparison to the circumstances then its unjust and unfair as in this scenario. He urged that staying in prison for 10 years is unfair and unjust and called upon the court to re-evaluate its circumstances against the mitigation and as such interfere with the sentence, and consider the Appellant as worthy benefiting a least severe form of punishment as prescribed in Article 50[2][p] of the *Constitution of Kenya* .
8. The Appellant urged the court to consider the time spent in custody as part of the sentence. That the Appellant spent one year in custody and the same should be considered. He urged the court to allow the appeal.

Respondent's Case

9. The respondent filed submissions through State Counsel Edward Kakoi. He urged that the court having found the Appellant guilty of the main charge, it was not available to the court to make any finding on the alternative count. He urged the court to vacate the finding in the alternative charge. Further, he urged the court not to interfere with the sentences both in count one and two.



Analysis & Determination

10. This being an appellate court, it is imperative that I state the duty of the court as was set out in *Kiilu & Another vs. Republic* [2005] 1KLR 174 where the Court of Appeal stated that:

- “1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.
2. 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. 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 also *Okeno vs. Republic* [1972] EA 32 on the same subject.

11. Upon considering the pleadings and submissions by both parties, the following issues arise for determination;

1. Whether the prosecution proved its case to the required standard
2. Whether the sentence was harsh and excessive

Whether The Prosecution Proved Its Case To The Required Standard

12. The Appellant was convicted of offence of issuing false information regarding a terrorism Act, contrary to section 26 of the *prevention of Terrorism Act* 2012 and an alternative count of stealing contrary to section 268 as read with section 275 of the Penal Code.

13. Section 275 of the *Penal Code* states;

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

14. From the evidence on record, it is clear that the accused person was sharing a premises for business with the Benjamin Milanda Kanyonge as he was an electronics repairer. The phone in question, which belonged to PW2, Mwamini Riziki, was brought for repairs by Hamisi Pierre who was her son. The phone was left in the shop by Benjamin Milanda Kanyonge as he was tired and could not immediately repair it. Upon investigations, the police found that the sim card that was in the phone belonging to Pierre’s mother which he had brought for repair was missing. The police were able to establish that the accused was in possession of said sim card. I am in agreement with the finding of the trial court that the accused person had stolen said sim card.

15. Section 26 of the *Prevention of Terrorism Act* provides as follows;

A person who issues any information that a terrorist act has been or is likely to be committed, knowing that the information is false, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years.



16. It follows that the elements of the offence are that the offender;
 1. Must issue information that a terrorist act has or is likely to be committed
 2. Must have knowledge that the information is false

Whether The Appellant Issued Information That A Terrorist Act Has Or Is Likely To Be Committed

15. The investigations rightfully found that the Appellant was in possession of the sim card that was used to send the messages as he was found with it in his phone. PW5, PC Yvonne Mulobi held brief for Charles Mango, who they worked with at ATPU cybercrime laboratory. She testified that they subjected the phone to the Celebrite machine and extracted information that aided the investigations. She produced the examination report in court as evidence. The accused was found in possession of the sim card which was used to send the messages, the content of which talked about bombs and the identified targets of said bombs which were consistent with terrorist acts. The messages had been sent to one Sarah Atabo, an employee of the Refugee Affairs Secretariat. As the Appellant was found in possession of the sim card, albeit through handling of stolen goods, it was proved that he indeed sent the messages. Further, it is clear that the messages were false and he had knowledge of the same.
16. In the premises, I find that the prosecution proved its case to the required standard of beyond reasonable doubt. It is pertinent to state that the appeal seemed to invite the court to the effect that reasonable doubt created by the prosecution was never considered by the trial court. To me the doubt been touted by the appellant must be a reasonable one. That is one which is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. What the appeal hinges is of unsatisfactory character to conscientiously to move this court to deprive the prosecution proof of beyond reasonable doubt applied to secure judgment before the trial court.

Whether The Sentence Was Harsh/excessive

17. The punishment provided for under the law for the first count is a maximum of twenty years whereas for the alternative count, one is liable to be imprisoned for three years. The trial magistrate sentenced the Appellant to ten years for the first count and three years for the second count, both counts to run concurrently.
18. I find no reason to interfere with the sentence and the same is commensurate with the offence committed. In the premises, the appeal is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT LODWAR ON THIS 29TH DAY OF NOVEMBER, 2023

And in the presence of;

Mr. Kakoi for the state

Appellant in person

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R. NYAKUNDI

JUDGE

