John v Republic (Criminal Appeal E001 of 2021)
[2022] KEHC 12592 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12592 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E001 OF 2021

LW GITARI, J

JULY 28, 2022

BETWEEN

PATRICK MICHENI JOHN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of Stealing contrary to Section 268 as read with Section 275 of the Penal Code in Chuka C.M. Criminal Case No. 233 of 2019. It was alleged that on 25th February 2019 at Kibumbu in Chuka Township, Meru South sub county, within Tharaka Nithi County, the Appellant, jointly with others not before court, stole 160 bags of Pembe Feeds valued at Kshs. 224,000/-, the property of Martin Lawrence Kariuki.

2. After full trial, the Appellant was found to be guilty of the offence as charged and sentenced to serve three (3) years imprisonment or pay a fine of Kshs. 400,000/=.

3. Being dissatisfied by his conviction and sentence, the Appellant filed the instant appeal vide the Petition of Appeal dated 24th February 2021.

The Appeal

4. The Appellant raised the 7 grounds of appeal which I reproduce verbatim hereunder:

    a. That the learned trial magistrate erred in law in making a finding that the prosecution had proved its case beyond reasonable doubt in an instance where the ingredients of stealing as envisaged under Section 268(1) of the Penal Code were not established.

b. That the learned trial magistrate erred in law and fact in failing to find that the evidence of PW1, PW2, and PW3 which was crucial to the prosecution case completely exonerated the Appellant herein.

c. That the learned trial magistrate erred in law and fact in making presumptive conclusions devoid of any supportive evidence particularly that the Appellant deliberately avoided meeting PW2 and PW3 during the delivery of the load so as to conceal his identity.

d. That the learned trial magistrate erred in law and fact in failing to find that the failure by the prosecution to call Dr. Kiragu as a witness was fatal to the prosecution case and that such failure created the inference that his evidence could have been adverse to the prosecution case.

e. That the learned trial magistrate erred in law and fact in convicting the Appellant upon the weight of evidence that was in principle weak, inconsistent, disbelievable and unreliable.

f. That the learned trial magistrate erred in law in failing to consider the elaborate submissions filed by the Appellant.

g. Thatthe learned trial magistrate erred in law in meting out a sentence that was harsh and inordinate in the circumstances.

5. The appeal was disposed of by way of written submissions. Below is a summary of the respective submissions by the parties.

Appellant's Submissions

6. The Appellant filed his submissions dated 18th March 2022 on 21st March 2022. It was his submission that his submission that the evidence of PW1, PW2 and PW3 completely exonerated the Appellant of any wrongdoing.

7. According to the Appellant, one Dr. Kiragu was a crucial witness in the case and the prosecution's failure to call him created the impression that his testimony would have been adverse to the prosecution's case. To buttress this position, he relied on the case of *Republic vs. Cliff Macharia Njeri* [2017] eKLR 2 which was quoted in the case of *Bukenya and others vs Uganda* [1972] EA 549.

8. The Appellant stated that whereas the charge sheet indicated that one Martin Lawrence Kariuki was the owner of the stolen goods, the prosecution led evidence that showed that the alleged stolen goods belonged to Karamuh Logistics Limited. He thus submitted that proof of ownership of the thing stolen is a critical ingredient to establish the offence of stealing.

9. Finally, the appellant faulted the trial court for finding that the Appellant avoided meeting PW2 and PW3 during the delivery of the goods. According to the Appellant, that finding was erroneous as it was not supported by evidence.

10. On the issue of the sentence meted out against him, the Appellant submitted that the same was excessive harsh and excessive.

11. The Appellant thus urged this court to allow the appeal by quashing the conviction and setting aside the sentence.

The Respondent's Submissions

12. The Respondent filed their submissions on 21st April 2022. They submitted that the prosecution established the elements of the offence of stealing beyond reasonable doubt.

Issues for determination

13. From the Appellant's grounds of appeal highlighted above and the respective submissions of the parties, the main issues for determination by this court are:

    a. Whether the prosecution proved to the required standard all the ingredients of stealing in its case against the Appellant;

    b. Whether the trial court unfairly made presumptuous findings at the expense of the Appellant;

    c. Whether the failure by the prosecution to call one Dr. Kiragu was fatal to the prosecution's case;

    d. Whether the sentence meted against the Appellant was harsh or excessive in the circumstances.

14. Below is an analysis of the above issues.

Analysis

15. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to access their demeanour. In *Kiilu & Another vs. Republic* [2005] 1KLR 174 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; 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.

16. The trial magistrate in this case found that the prosecution had proved the charges against the Appellant to the requisite standard of beyond any reasonable doubt. This court is therefore called upon to consider afresh the evidence on record while considering the issues raised in this appeal. Below is analysis of the evidence that was adduced before the trial court against the grounds of appeal raised by the Appellant.

    a. Proof of prosecution's case to the requisite standard

    1. Section 268(1) of the Penal Code provides for the definition of theft as follows:

    (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."

On the other hand Section 275 of the Penal Code provides:

> " 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."

It provides for the general punishment of stealing.

18. A brief summary of the evidence tendered before the trial court was as follows:

19. PW1 was Martin Lawrence Kariuki, the manager of Karamuh Logistics Ltd which deals with distribution of animal feeds. He recalled receiving a call from one Dr. Kiragu on 24th February 2019 who made an order of 400 bags of Dairy meal and 200 bags of wheat Pollard. The order was to be delivered in Chuka Town. On 25th February 2019, Dr. Kiragu called PW1 again and informed him that the customer for the order was waiting for delivery. He gave PW1 the customer's mobile number. PW1 directed that 160 bags of 50kgs Pembe Dairy meal be loaded in an Isuzu NPR white cabin, blue body lorry registration number KBZ 129J. He then prepared the invoices and instructed Titus Muturi (PW2), a driver, to deliver the goods to Chuka Town. PW2 was accompanied by Shem Rugendo Ireri (PW3) and one Wilfred Gitonga who were loaders/conductors.

20. It was PW2's testimony that on reaching Chuka Town, he called the number of the customer that he had been given by PW1. The customer sent a young man who told him that he had been sent by Dr. Kiragu. The young man took them to a shop called Bedcris where they offloaded 50 bags of Pembe feeds. The young man then took them to a homestead along Kimbumbu where the offloaded the remaining 110 bags. The homestead was around 2kms from the Bedcris shop. PW2's testimony was corroborated by that of PW3.

    PW3 was Shem Rugendo Ireri an employee of Karamuh Logistics Limited. He testified that on 25/2/2019 he accompanied PW2- to deliver 160 Bags of Pembe Feeds Daily Meal at Chuka Town. The goods were to be delivered to one Dr. Kiragu. On arrival at Chuka Town he went to a shop called Bedcris where they off-loaded fifty (50) bags. They were led to a home where they off-loaded the remaining 110 bags. According to him the customer died not pay for the feeds. In cross-examination he told the court that he never met Dr Kiragu and did not know who he was. He further told the court that he had not met the accused before.

21. PW4, Bedford Mureithi, testified that he was at his shop called Bedcris Stores on 21st February 2019. The shop deals with animal feeds and products. On the said day, the Appellant went to PW4's shop at around 2.00 p.m. He offered to sell him 50kgs Dairy meal at a discounted cost of Ksh. 1,200/=. The normal price was Kshs. 1,350/=. PW4 agreed to buy the products and on 25th February 2019, the Appellant took 50 bags to him. PW4 paid for the products. On 26th February 2019, PW4 received a call from one Kariuki who informed him that the animal feeds that had been delivered in his shop had been stolen. He went to Chuka Police Station the following day to record his statement. His attempt to reach the Appellant on phone were unsuccessful as the Appellant did not receive his calls. The 50 bags of animal feeds were then taken by the police and to date, the Appellant has never refunded PW4 the money he spent purchasing the said animal feeds.

22. PW5 was corporal Benjamin. He recalled that on 26th February 2019, he went to Kibumbu with PW1 after receiving a report that there was a case of theft. They proceeded to PW4's shop where they recovered 50 bags of Pembe Feeds. They then proceeded to a nearby homestead which they were directed to by PW1. The neighbours informed them that the homestead belonged to the Appellant. In the said homestead, they found traces of feed dust. No bags of animals feeds were however found in

the homestead. On 4th March 2019, PW5 and Chief Inspector Mwangi went to the home of Gitonga Mwaniki (PW7) in Ndiruni area where they recovered 49 bags of Pembe Feeds. In total, 99 bags of Pembe Feeds each weighing 50kgs were recovered and produced as P.Exhibit 11.

23. PW6 was Fredrick Mweni, a driver employed by Digital Point Chuka. He received a call from the Appellant on 25th May 2019. The Appellant told him that he had animal feeds at his home in Kimbumbu which he wanted to distribute to customers at Ituguru and Ndironi area. He agreed to provide transport and charged him Kshs. 3,500/=. They proceeded to the Appellant's home where there were animal feeds outside the house. They then loaded 100 50kg sacks into PW6's lorry. They delivered 50 bags of the animal feeds to the homestead of Gitonga and the remaining 50 bags were to be delivered the following day to a customer at Itugururu. On the day that followed, the 50 bags were offloaded at Mesaco Sacco as PW6 had somewhere else to go. PW6 was then paid and he left. On 4th March 2019 he received a call from the police. He took them to Ndironi area where they had offloaded 50 bags of animal feeds. They police recovered 49 bags of the animal feeds.

24. PW7 was Patrick Gitonga. He recalled receiving a call from one Felix Mawira in 25th February 2019 who told him that he knew the Appellant who was selling animal feeds at a cheap price. The said Felix gave him phone numbers of the people who would deliver the animal feeds to his home. At around 7.00 p.m. the animal feeds were delivered by a driver, a lady and a young man. PW7 bought 50 bags of the animal feeds which were offloaded into his compound. A bag of 50kgs of the animal feeds was being sold at Kshs. 1,200/= but he bargained and they agreed that each bag would go for Ksh. 1,100/=.

25. PW8 was Corporal Reuben Kibet. On 26th February 2019 he received a theft report from PW1. He investigated the case and recorded statements from the witnesses.

26. PW9 was corporal Henry Kiboma, a scene of crime officer. On 17th September 2019, he photographed motor vehicle KBZ 129J which was at Chuka Law Courts and which contained animal feeds as exhibits. He produced the photographs as P.Exhibit 14 (a)-(f).

27. The prosecution then closed its case and the Appellant was put on his defence.

28. The Appellant gave a sworn statement. He denied committing the offence and alleged that he was travelling from Malindi on 26th February 2019 and reached Chuka at night. He denied knowing or ever meeting the person named Dr. Kiragu. He also denied dealing with animal feeds or doing any business with PW1's company. According to him, he first met PW1 when he was arrested.

29. The essential element in a charge of theft is that the person accused fraudulently converts a property which is capable of being stolen so as to deprive the owner of such property. In this case, it was clear that from the evidence adduced by the prosecution witnesses that the Appellant stole bags of animal feeds from PW1's company and fraudulently converted them for his own use by selling them to third parties. All the ingredients of theft were established by the testimonies of the prosecution witnesses which were well corroborated. In my view, therefore, the trial court was justified in convicting the Appellant for the offence of stealing. Upon a careful evaluation of the evidence, I find that the prosecution adduced sufficient evidence which proceed proved the charge against the appellant to the required standard.

b. Effect of presumption made by the trial court

30. Section 119 of the *Evidence Act* provides that:

> " The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

31. It was PW4 testimony that the Appellant was at his store during the offloading of the 50 bags of animal feeds. On the other hand, PW2 and PW3 testified that they did not know the Appellant and neither did they see him at the material time. The appellant has faulted the trial magistrate for making the finding that the appellant avoided meeting the PW2 &3 during off- loading of the goods at PW4's store. The trial magistrate found as a fact that PW4 knew the accused very well. The evidence tendered shows the order was placed through a phone call. By the time the PW2 & 3 reached Chuka the appellant had contacted PW4- and told him he had feeds. The evidence show that the appellant was involved in a fraudulent scheme to steal from the complainant. Unlike the appellant, PW2-3 did not know there was fraudulent scheme. The appellant delivered the feeds to PW4 while PW6 testified that the appellant hired his vehicle to supply animal feeds. The trial magistrate found that PW2 and 3 were not being used by police to implicate the accused. Based on the evidence adduced before the trial magistrate, the finding by the trial magistrate cannot be faulted. It is not unusual for criminals to hide their identity. Some cover their faces or use other means to conceal their identities. It is therefore not a wonder that the appellant made sure that PW2 and 3 did not see him. PW4- never stated that he knew PW1, 2 and 3 as submitted by the appellant. I find that the presumption by the trial magistrate was proper in the circumstances based on the evidence.

    Under Section 111 of the *Evidence Act* (Cap 80 Laws of Kenya, in criminal cases an accused is legally duty bound to explain, of course not on a standard like the one placed on the prosecution, matters or facts which are peculiarly within his knowledge. The section is however silent on what would happen if he fails to do so but Section 119 (supra) entitles a court to raise a rebuttable presumption of fact from the circumstances of the case. The evidence by the prosecution witnesses PW4 and PW6 showed that there can be no doubt that the appellant was involved in the fraudulent scheme.

32. In my view, the trial court did not err in presuming that the Appellant deliberately avoided meeting PW2 & PW3 during the loading of the bags of animals feeds at PW4's store as well as the Appellant's homestead with sole purpose of concealing his identity.

    b. Effect of prosecution's failure to call one Dr. Kiragu as a witness

33. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of Bukenya and Others Vs. Uganda 1972 EA 549 LUTTA Ag. Vice Presidentheld:

> " 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."

34. The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. 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 favourable to the prosecution or not.

35. In this case, the prosecution did not call one Dr. Kiragu who is the one that recommended the Appellant as a customer to PW1. PW2 also testified that the man who directed them to PW4's shop and the Appellant's homestead to offload the animal feeds indicated that he had been sent by the said Dr. Kiragu. While his testimony would have provided the corroboration that the evidence of PW1 required, the evidence of PW2, PW3, PW4 and PW7 was adequate to establish the truth in this case. As such, the prosecution's failure to avail the said Dr. Kiragu as a witness was not fatal to its case.

In the case of Kelei-Republic (2007) (EA 135 the Court held that "The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubts."

In any case this was a fraudulent scheme PW1 testified that the phone number the said Dr. Kiragu was using to call PW1 was switched off thereafter and was never to be switched on. It is therefore possible that he was involved in the fraud. As such his evidence could not have added any value to the prosecution's case. I find that failure to call Dr. Kiragu as a witness was not fatal to the prosecution case.

b. Appropriateness of the sentence meted against the Appellant

36. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor vs R*, (1954) EACA 270 wherein the Court of Appeal stated as follows:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (*R - v- Shershowsky* (1912) CCA 28TLR 263)."

37. The Court of Appeal in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

38. So, what is the appropriate sentence in this case? The Appellant herein is charged under Section 275 of the *Penal Code* which provides:

> " 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."

39. The section states that the person is "liable... to imprisonment for three years". Where the phrase liable appears, it gives court discretion to impose a fine or other form of none custodial sentence. In this case, the trial magistrate opted to sentence the Appellant to three (3) years imprisonment with the alternative option of paying a fine of Kshs. 400,000/=. Where the trial magistrates opts to impose a fine the sentence of fine must comply with section 28 of the Penal Code. Under the section, when the trial magistrate opts to impose a fine, the court should specify a terms of imprisonment to be served in default. The term of imprisonment must within scale provided for under Section 28(2) (3) of the Penal Code. The Section provides:

> 28(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation

under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale.

Amount Maximum period Not exceeding Sh. 500 ... ... 14 days Exceeding Sh. 500 .

The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law."

The section couched in mandatory terms. If the default clause imposed exceeds the scale under this section, the sentence imposed is unlawful.

I find that the sentence imposed by the trial magistrate was unlawful. Such sentence invites this court to set it aside.

I therefore find that the appeal on the sentence succeeds. I therefore set aside the sentence imposed by the trial magistrate and substitute it with a sentence of a fine of Kshs.400,000/- in default twelve months imprisonment.

Conclusion:

I find that safe for the finding on the sentence, this appeal lacks merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 28TH DAY OF JULY 2022.

L.W. GITARI

JUDGE

28/7/2022

The ruling has been read out in open court.

L.W. GITARI

JUDGE