Mutunga v Republic (Criminal Appeal E094 of 2021)
[2022] KEHC 11219 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11219 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E094 OF 2021

GMA DULU, J

JULY 28, 2022

BETWEEN

HENRY MUTUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J. Mwaniki in Makueni Chief Magistrate's Court EACC Case No.E107 of 2021 pronounced on 1st October, 2021)

JUDGMENT

1. The appellant was charged in the magistrates' court with three (3) counts.

2. Count I was for abuse of office contrary to section 101 of the Penal Code. The particulars of offence were that on September 14, 2020 within Mukuyuni Police Station being OCS, ordered for the arrest and detention of one Joseph Kioko Mutuku without any justification. Further within Mukuyuni Police knowingly preferred false criminal charges against the said Joseph Kioko Mutuku of (i) stealing of motorcycle contrary to section 278(A) of the Penal Code, particulars being that on 16th day of September 2020 at around 10:36 hours, at Mukuyuni Police Station, Mukuyuni Sub-Location, Ukia Location in Makueni Sub-County, within Makueni County stole a motorcycle Registration No. KMDE 626F make Skygo, red in colour from Mukuyuni Police Station parking yard valued at Kshs.85,000/= which was detained at the station parking yard as exhibit and (ii) being in possession of cannabis sativa contrary to section 3(1) and 2(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994, particulars being that on 16th day of September 2020 at around 10:36 hours at Mukuyuni Police Station, Mukuyuni Sub-Location, Ukia Location, in Makueni Sub-County within Makueni County he was unlawfully found in possession of 10 rolls of cannabis sativa (bhang) which was not medically prepared with street value of Kshs.1,000/=.

3. Under count II he was charged with requesting and receiving a bribe contrary to section 6(1) (a) as read with section 18(1) of the *Bribery Act* No. 47 of 2016. The particulars of the offence were that on the September 14, 2020 at 19:50hrs being the OCS Mukuyuni, Mukuyuni Sub Location, Ukia Location in Makueni Sub-County requested and received a bribe of Kshs.5,000/= from Gideon Ndambuki mobile No. 0725xxxxxx which he sent via mobile No. 0796xxxxxx he provided him via SMS and belonged to one Francis Mutua to facilitate the release of one Jeremiah Mutuku who was arrested and detained at Mukuyuni Police Station for the offence of impersonation.

4. Under count III, he was charged with destroying evidence contrary to section 116 as read with section 36 of the Penal Code. The particulars of offence were that on September 16, 2020 between 09:00 hours and 05:00 hours being OCS Mukuyui, Mukuyuni Sub-County, Ukia Location in Makueni Sub-County within Makueni County knowing that a recorded conversation contained in Ethics and Anti-Corruption Commission (EACC) gadget make Sony IC Recorder serial Number 1713570 would be used in judicial proceedings in any court of competent jurisdiction, willfully deleted the said conversation with intent thereby to prevent it from being used as evidence against him.

5. He denied all the three charges. After a full trial, he was convicted of count (I) for abuse of office and count (II) for requesting and receiving a bribe. He was acquitted of count (III). He was sentenced to pay a fine of Kshs.100,000/= on count (i) and in default to serve 2 years imprisonment, and to pay a fine of Kshs.100,000/= in count (ii) and in default to serve 2 years imprisonment. The sentences to run consecutively.

6. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal through counsel on several grounds as follows –

    1. The learned magistrate erred in law and in fact by convicting the appellant on the charge of abuse of office contrary to section 101 of the Penal Code that was not proved to the required standard in law thus lowering the standard of proof in criminal cases and convicting the appellant on the basis of conjuncture devoid of proof.

    2. The learned trial magistrate erred in law and in fact by convicting the appellant on the charge of abuse of office contrary to section 101 of the Penal Code and by so doing ignored the preponderance of evidence available before court including the admission from Pw1 on his criminal liability that prompted the impugned action taken by the appellant directing his (Pw1) charging and prosecution.

    3. The learned trial magistrate erred in law and in fact by convicting the appellant on the charge of abuse of office contrary to section 101 of the Penal Code on the defective charge based on a misguided factual accusation that the appellant ordered the arrest and detention of one of Joseph Kioko yet still recognizing that the appellant was absent during the arrest and detention of one Joseph Kioko.

    4. The learned trial magistrate erred in law and in fact by convicting the appellant on the charge of abuse of office contrary to section 101 of the Penal Code by holding that the appellant deliberately failed to call one sergeant Kautu as his witness and consequently drawing an adverse inference as against the appellant while ignoring that the said sergeant Kautu, Dw2 and Dw3 had actually been lined up as prosecution witness.

    5. That the learned magistrate erred in law and fact by convicting the appellant of abuse of office contrary to section 101 of the Penal Code and ignored exculpatory evidence from the prosecution witness exonerating the appellant from guilt or blame, but instead, abdicated

its role as a central arbiter, descended into the arena of conflict, took sides and returned a conviction that was unsafe and without legal or factual basis.

6. The learned trial magistrate erred in law and in fact by convicting the appellant of the charge of abuse of office contrary to section 101 of the Penal Code on the basis of the weakness of the defence case other than proof of the offence by the prosecution beyond reasonable doubt.

7. The learned magistrate erred in law and in fact by convicting the appellant on the charge of requesting and receiving a bribe contrary to section 6(1) (a) as read together with section 18(1) of the *Bribery Act* No. 47 of 2016 as the charge was not proved to the required standard in law thus lowering the standard of proof in criminal cases and convicting the appellant on the basis of conjuncture devoid of proof and unsupported by the available evidence.

8. The learned trial magistrate erred in law and in fact by convicting the appellant on the charge of requesting and receiving a bribe contrary to section 6(1) (a) as read together with section 8(1) of the *Bribery Act* No. 47 of 2016 as the charge and the evidence of Pw2 was uncorroborated inconsistent and at cross purpose with the testimony of Pw4.

9. The learned trial magistrate erred in law and in fact by convicting the appellant on the charge of requesting and receiving a bribe contrary to section 6(1) (a) as read together with section 18(1) of the *Bribery Act* No. 47 of 2016 while consciously knowing that on the basis of the testimony of Pw4 the said Kshs.5,000/= was neither requested, received by the appellant nor was it subsequently passed over to the appellant.

10. The learned trial magistrate erred in law and infact by convicting the appellant on the charge of requesting and receiving a bribe contrary to section 60(1) (a) as read together with section 18(1) of the *Bribery Act* No. 47 of 2016 by holding that the Kshs.5,000/= in question which was sent to Pw4 on September 14, 2020 at 19:15 hours by Pw2 was meant to bribe and/or cash bail to secure the release of one Jeremiah Mutuku whilst the evidence on record showed that the said Jeremiah Mutuku was released from lawful custody on September 14, 2020 at 1807 hours.

11. That the trial court erred in law and fact by convicting the appellant on the charge of requesting and receiving a bribe contrary to section 6(1) (a) as read with section 18(1) of the *Bribery Act* No. 47 of 2016 and ignored exculpatory evidence and testimony from the prosecution witnesses exonerating the appellant from guilt or blame but instead abdicated its role as a neutral arbitrator, descended into the arena of conflict, took sides becoming selective in the analysis of the evidence before court and returned a conviction that was unsafe and without legal or factual basis.

12. The learned trial magistrate erred in law and in fact by convicting the appellant on the charge of requesting and receiving a bribe contrary to section 6(1) (a) as read together with section 18(1) of the *Bribery Act* No. 47 of 2016 on the basis of the weakness of the defence case other than a proof of the offence by the prosecution beyond a reasonable doubt.

13. The learned trial magistrate erred in law and in fact by convicting the appellant on two impugned counts of abuse of office contrary to section 101 of the Penal Code and the charge of requesting and receiving a bribe contrary to section 6(1) (a) as read together with section 18(1) of the *Bribery Act* No. 47 of 2016 and by so doing neglected section 107 of the *Evidence Act* and Article 25 and 50 of *the Constitution*.

14. The learned trial magistrate erred in law by denying the accused/appellant his right to the benefit of doubt.

15. The learned trial magistrate erred in law and in fact in failing to find that there were reasonable doubts in the evidence tendered by the prosecution which doubts ought to have been resolved in favour of the appellant.

16. The learned trial magistrate erred in law and in fact by delving into extraneous matters not before court by directing that Sargent Salim Kautu, Shem Maragia and Joseph Okome be arraigned in court to answer charges relating to abuse of office thus reasonably denying them an opportunity and/or their right to fair administrative action that is procedurally fair as guaranteed under Article 47 of *the Constitution*.

7. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the Director of Public Prosecutions herein. Though the appellant's counsel said that they had filed submissions, I have not seen any.

8. This being a first appeal, I am, as a first appellate court, required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences, but bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor. See Okeno –vs- Republic [1972] E.A 32.

9. I have considered the evidence on record. In proving their case, the prosecution called 14 witnesses. On his part, the appellant tendered sworn defence testimony and called 4 witnesses.

10. The offences for which the appellant was convicted were two, that is abuse of office, and requesting and receiving a bribe.

11. I will first deal with the technical ground. There is a contention in this appeal that the charges were defective. Section 134 of the Criminal Procedure Code (Cap. 75) describes the way charges should be framed and what they should contain. A charge should thus be framed in such a way that from the contents, an accused person should easily understand the complaint laid out against him or her, so that he can answer to the charge and defend himself/herself.

12. I note that count (I) lists three incidents or actions of the appellant, to constitute one offence of abuse of office in the charge. It is obvious from the contents of the charge, that each of the three alleged actions listed therein, could stand alone as a separate act of abuse of office. In my view, each of the three acts that is the alleged arrest of someone without justification, preferring a charge of theft of motorcycle, and thirdly, possession of bhang should ideally have been made subject to a separate charge. The charge under count (I) was therefore drafted in error, and was thus defective.

13. That error or defect in my view however, did not render count (I) fatally defective, as in the circumstances of this case, the appellant understood the charge, and was represented by counsel at the trial and did not object to the charge. I find and hold that the defect on the charge in regard count (I) is curable under section 382 of the Criminal Procedure Code (Cap. 75), as no prejudice was visited upon the appellant.

14. I now go to the proof of count I, of abuse of office. The first element or allegation was that he ordered the arrest and detention of one Joseph Kioko Mutuku without justification. From the evidence on record, there is no evidence that he ordered the arrest and detention of Joseph Kioko Mutuku without justification. There was actually an issue of riding a motorcycle during curfew hours, and also riding a motor cycle without insurance cover, both of which could be a basis for arrest of a person suspected to have committed the offences. Thus such arrest of Mutuku if it occurred, cannot be said to be without justification.

15. I thus find that the prosecution did not prove that the appellant ordered the arrest and detention of Joseph Kioko Mutuku without justification.

16. On the second and third element or allegations of knowingly preferring false criminal charges against the said Joseph Kioko Mutuku of stealing a motor cycle, and being in possession of a cannabis sativa, the evidence on record was that he was the OCS Mukuyuni Police Station, and that any preliminary investigative action herein was done by the junior police officers, not by the appellant. His role was merely to recommend the charges to the Director of Public Prosecutions.

17. There is also no evidence on record that the appellant took any active part in conceiving and initialing the charges preferred. The fact that the Director of Public Prosecutions did not approve of the charges, was not proof that there was abuse of office by the appellant or any other Police Officer, but merely that the evidence presented by the police to the Director of Public Prosecutions might not have been sufficient to sustain a criminal conviction.

18. In my view, and from the evidence on record, this charge of abuse of office was merely pegged on the alleged standoff between the appellant and the EACC Officers. However, it should be noted that the Officers initially did not identify themselves at the police station, and when they did so, the appellant willingly welcomed them. In addition, the charge leveled against the appellant relating to the EACC gadget, which was said to have been used to record the incidences at the police station, was not proved. Thirdly, even the retrieved recordings in the EACC gadget, did not contain anything to implicate the appellant with wrong doing.

19. Thus, bearing in mind that in criminal cases, the burden is always on the prosecution to prove their case beyond any reasonable doubt, I find that the prosecution did not prove any of the three alleged acts of abuse of office against the appellant. I will thus quash the conviction for abuse of office.

20. Regarding the charge of requesting and receiving a bribe, is my view, again the prosecution did not prove the allegation beyond any reasonable doubt. This is because there is no evidence anywhere on record, that the appellant asked for a bribe to favour anybody or to influence him in his actions. The evidence on record is that the police asked for cash bail, which is a normal procedure. I am also aware that release from custody, by police can even be on free bond. This is the law, and it is so allowed even by *the Constitution*.

21. The only evidence on record regarding the Kshs.5,000/= which the appellant admitted, was that it related to his new house celebration, which he and the giver and receiver (not himself), knew about as old time friends and tribesmen. There is no indication anywhere in the evidence, that the amount was related to the arrest or release Jeremiah Mutuku. It was thus wrong for the court to infer that it was a bribe, because the evidence on record does not support that narrative. The second count was thus not proved. I will thus quash the conviction on count II and allow the appeal of the appellant on conviction. The sentence will also be set aside.

22. The appellant has asked, on appeal, that this court issues orders regarding the trial court's order for arraigning of other police officers in court. With regard to the order of the court to charge certain Police Officers in court, for abuse of office, I note that no such request appears to have been made by the Director of Public Prosecutions to the trial court. The trial court acted suo motu. However, in my view, those affected police officers will have their right to challenge that order appropriately, when confronted with the same. I decline to make a substantive decision on that aspect in the present appeal.

23. For the above reason, I allow the appeal, quash the conviction of the appellant herein and set aside the sentences imposed. If the appellant is in custody, I order that he be released forthwith unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 28TH DAY OF JULY 2022, IN OPEN COURT AT MAKUENI.

GEORGE DULU

JUDGE