Republic v Makori (Criminal Appeal E020 of 2021)
[2022] KEHC 12119 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12119 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E020 OF 2021

REA OUGO, J

JULY 28, 2022

BETWEEN

REPUBLIC ..... APPELLANT

AND

JOHN OMBOGA MAKORI ..... RESPONDENT

(Appeal from the conviction, judgment and sentence of D.O Mac'andere (RM) dated the 8{th} day of October, 2021 in the original Kisii CMCR case No. 2637 of 2019)

JUDGMENT

1. Illicit brew has grave effects not only on the health of many Kenyans but also a negative effect on the growth of a young nations such as Kenya. The government has employed a lot of resources in trying to curb the production, distribution and sale of illicit brew. Various government enforcement agencies have carried out raids which have resulted in arrest of the culprits and destruction of the illicit brew. The prosecution case before the trial magistrate was that the respondent, an assistant chief Rianyamwamu sub-location, on March 16, 2018 caused malicious damage to property during one of such raids. He also faced a second count of abuse of office. The respondent was charged with the following two counts:

Count 1: Malicious Damage to Property contrary to section 339 of the *Penal Code*

Particulars of the Offence

On the March 16, 2018at Rianyawamu area in Kisii central sub-county within Kisii county, with another not before court willfully and unlawfully damaged eleven wooden doors, and two wooden gates all valued at Kshs 58,000/-, the property of Mathew Nyangau Ogoro.

Count 2: Abuse of office contray Section 101 as read with section 102 of the *Penal Code*

Particulars of the Offence

On the 16th day of March 2018 at Rianyawamu area in Kisii central sub-county within Kisii county, being the person employed in the public service as the assistant chief Rianyamwamu sub location arbitrary (sic) act by pouring illicit alcohol namely busaa in the house of Mathew Nyangau Ogoro which prejudiced the rights of the said Mathew Nyangau Ogoro.

2. The respondent denied the charges and pleaded not guilty. The prosecution called 5 witnesses and the respondent gave sworn testimony. The trial magistrate after considering the evidence before her dismissed the case against the respondent and acquitted him.The appeal before the court is against the acquittal of the respondent and is premised on the following grounds:

    1. The learned trial magistrate erred in law and in fact in finding and/or holding that the appellant was innocent of the offences charged when the prosecution had established guilty beyond the required standard of proof.

    2. The Learned Magistrate erred in law and in fact in holding and/or finding that the ingredients of the offences that the accused was charged with had not been established on the required standard.

    3. The Learned Trial Magistrate erred in law and in fact when she solely relied upon the evidence of the defence which was not corroborated at all.

    4. The Learned Trial Magistrate erred in law and in fact by disregarding the prosecution case and or misapprehending the fact of the case.

    5. The Learned trial magistrate erred in law in acquitting the accused against the weight of evidence proved beyond reasonable doubt that the accused had not only abused his office but also had maliciously damaged he complainant's property.

    6. That the Learned Trial Magistrate erred in law and infact by disregarding the prosecution case and or misapprehending the facts of the case.

    7. That the learned magistrate erred in law and in fact by entering judgment against the weight of evidence.

Submissions

3. The appellant submitted that the prosecution discharged the burden of proof for the offence of malicious damage to the property by demonstrating that it is the appellant who willfully and lawfully damaged the identified property. It was submitted that the destruction occurred at Pw1's compound as the doors and wooden gates that were destroyed belonged to him. Photographs produced by the prosecution were indicative that Pw1's property was broken into and liquor poured on the floor. There was evidence from Pw2 who testified that he saw the respondent break the door and pour liquor in Pw1's house. Pw3 testified that the liquor was from Rodger's home.In regard to the second count, it was submitted that the offence of abuse of office, the prosecution presented evidence beyond reasonable doubt that indeed the accused's acts or omission were prejudicial to Pw1.

4. The respondent in opposing the appeal submitted that Pw2 who was the only eye witness did not see the respondent. It was also submitted that the respondent did not abuse his office as the operation was headed by the Assistant County Commissioner in an attempt to weed out local brews. They also contend that the prosecution failed to prove its case to the required standard as it failed to avail the damaged property and the value. The respondent while acting in a bid to eradicate the illicit brew dutifully discharged his official duties under the supervision of his superiors.

Analysis and Determination

5. This being a first Appeal, this Court is expected to re-evaluate the evidence tendered before the trial court and to come to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or demeanor. (See *Okeno v Republic* [1972] EA 32).

6. Musa Machogu Koina (Pw3) testified that the respondent found him working and asked for his jembe. While at Rodger's home, Kiama unearthed a jerrican of Kangara (illicit brew) poured part of it in a bucket and destroyed the jerrican completely. Pw3 testified that Kiama returned his jembe and the respondent asked Kiama to carry the bucket with illicit brew to Mathew Nyangau Ogoro's (Pw1) home. On cross examination he explained that Rodgers was the grandfather to Pw1. David Momanyi Ogega (Pw2) testified that at around 10:00 a.m. while standing at the fence, he saw the respondent in the company of police officers at Pw1's compound and that his gate was broken. He testified that he saw the respondent breaking the kitchen door and that the respondent and Kiama poured illicit brew. He then called Pw1 and informed him that there were government personnel in his compound. On cross examination he testified that he saw the respondent break the door with his leg but did not see him carry or pour the illicit brew. However when pressed on cross examination he testified that he could not tell whether the respondent was part of the raiding operation.

7. Pw1 testified that he received a call from Pw2 that the respondent was in his home. When he got home he fund liquor smelling as it had been poured in the kitchen and the padlocks were missing. He testified that the property that was stolen was worth Kshs 50,000/-.

8. Robert Okalo (Pw4) testified that he is a retired sergeant of police and that before his retirement he as attached at crime scene support services Kisii and tasked with the duty of taking photographs, collecting exhibits, submitting the same to government analyst. On March 23, 2018he was requested to take photographs of the scene and he took 8 photographs of Pw1's damaged gates and 2 damages wooden gates. In the kitchen there was some liquid on the floor. He collected the liquid in form of soil, packed and labeled it. He prepared an exhibit memo form for the soil and sent it to the government chemist in Kisumu. He also took photographs of the tea farm, the boundary and the neighboring school. Josephat Kinyua Njeru No. 33978 (Pw5) testified that he was deployed in Kisii prior to his retirement. The complainant had reported the case that the respondent in the company of others forcefully entered his residential house and stole his personal property worth Kshs 112,000/-. The respondent was carrying Kangara brew and poured it in the kitchen and main house. When Pw5 visited the scene, Pw1 alleged that his parcel of land had been taken by the management of Rianyamwamu DEB primary school and that he filed a civil case before the Kisii Magistrates Courts. He also received the government analyst report and forwarded the file to the office of the Director of Public Prosecution. On cross examination, Pw5 testified that the government chemist confirmed that the exhibit collected from the house of the complainant was busaa.

9. When the respondent was put in his defence he gave sworn testimony. He testified that on March 16, 2018 the Assistant County Commissioner Kiogoro called the chiefs and assistant chiefs for a meeting and informed them that he had intelligence that there was rampant brewing of busaa and kangara. They then went to Rianyamwamu, the Assistant County Commissioner and the other chiefs went to the home of the complainant. He denied going to the home of Pw1. He defended the operation by the Assistant County Commissioner as legal and if busaa was found in Pw1's home it meant that he was brewing it. He testified that a similar case had been filed in Criminal Miscellaneous No 761 of 2019 Republic v John Ombogo Makori but it was withdrawn under section 87 (a) of the *Criminal Procedure Code*. He had been interdicted but his interdiction had been since lifted.

Analysis and Determination

10. One of the grounds raised by the appeal is that the trial magistrate erred in finding the respondent innocent when the prosecution had established his guilt beyond the required standard of proof. In case of *Miller v Ministry of Pensions*, [1947] 2 All E R 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

11. It is the prosecution's case that the respondent was responsible for maliciously damaging Pw1's property. According to section 339(1) of the *Penal Code* the offence of malicious damage to property has been defined as follows:

> "Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years."

12. The court in *Wilson Gathungu Chuchu v Republic* [2018] eKLR held that the elements of the offence under section 339 can be dissected to include proof of ownership of the property, that the property was destroyed or damaged, the destruction or damage was occasioned by the accused and that the destruction was willful and unlawful.

13. The evidence from Pw1, Pw2 and Pw5 was that the house belonged to Pw1. There was evidence presented before the trial court by way of photographs reveal damage to the door and gate of Pw1. The trial magistrate found that a valuation report ought to have been prepared so as to ascertain the damage to Pw1's home. On the contrary, I find that there was sufficient evidence by way of photographs to show that Pw1's doors and gate were broken. Pw1 also testified that when he came home he found his doors and gate broken. The respondent in his defence testified that there was a crackdown against brewers of illicit brew by the assistant commissioner and other chiefs, however he was not part of the team. Pw2 testified to have seen government personnel dressed in uniforms at Pw1's home. Although chiefs may generally make arrests on persons who have committed offences within their jurisdiction, they are not expected to be the cause of mayhem in the community. The powers of chiefs are listed under section 8 of the *Chiefs' Act* to include:

Powers of chief in prevention of crime

(1) Any chief or assistant chief may interpose for the purpose of preventing, and shall to the best of his ability prevent, the commission of any offence by any person within the local limits of his jurisdiction.

(2) Any chief or assistant chief knowing of a design by any person to commit an offence within the local limits of his jurisdiction may, if it appears to such chief or assistant chief that the commission of the offence cannot be otherwise prevented, arrest or direct the arrest of such person; and any person arrested under the powers conferred by this subsection shall, without delay, be taken to the nearest police station.

(3) Every chief or assistant chief receiving information that any person who has committed a cognizable offence triable by any court or for whose arrest a warrant has been issued, is within the local limits of his jurisdiction shall cause such person to be arrested and to be taken forthwith before a court having jurisdiction in the matter.

(4) Every chief or assistant chief receiving information that any cattle or other livestock or other property of any description which has been stolen outside the local limits of his jurisdiction has been brought and is within such local limits shall cause such cattle or other livestock or other property to be seized and detained pending the orders of an administrative officer, and shall forthwith report such seizure and detention to an administrative officer.

14. Pw1's home was raided and his property destroyed and any chiefs and or assistant chiefs involved in the raid clearly had no power to force entry into his home and conduct a search in Pw1's home. Although there is need to curb down the production of illicit brew, the same has to be done in compliance with the law. The damaging of property in attempt to weed out those responsible for illicit brews is not how the law envisioned the chiefs to interpose for the purpose of preventing the commission of any offence by any person within the local limits of his jurisdiction (see section 8 (1) of the *Chiefs' Act*).

15. The most critical question in the appeal is whether the prosecution proved that it was the respondent who was responsible for destroying Pw1's gate and doors. The trial court found that there were major contradictions in the testimony of Pw2 and it was difficult to make a finding that the respondent was in Pw1's compound.

16. According to the evidence on record, the incident took place at 10:00 a.m. in the morning when there was proper lighting. Pw2 was the sole witness. He testified that he was not within the complainant's compound but stood outside by the fence. Pw2 testified that he saw the respondent kick Pw1's kitchen door. However Pw2's evidence on identification of the respondent was shaky on cross examination. Although Pw2's evidence in his examination in chief was that Pw1 destroyed the kitchen door, when pressed on cross examination he testified that he could not tell whether the respondent was in the operation. Pw2 was therefore not certain if the respondent was present in Pw1's home. The court in *Roria v Republic* [1967] EA 583, stated as follows when considering conviction on the evidence of a single identifying witness:

A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.

17. Pw2 stood at the fence of Pw1's home when the incident took place. It is not clear how far the fence was from Pw2's home. According to his evidence on cross examination he was not sure whether the respondent was part of the team that broke into Pw1's home. In the circumstances identification of the respondent at the scene of crime was shaky.

18. I also note that although the prosecution case against the respondent was the offence of malicious damage to property, the prosecution gave evidence that the complainant's items were stolen. Pw1 testified that his property worth 50,000/- was stolen while Pw5 testified that Pw1 alleged that his property worth Kshs 112,000/- was stolen. The evidence of Pw1 and Pw5 do not therefore support the particulars in the charge sheet. Pw2 in his cross examination testified that he did not see the respondent carry the unlicensed liquor. The second count equally was not proved.

19. The totality of the prosecution evidence reveal grave contradictions in the appellant's evidence that one can only arrive at the conclusion that it failed to prove its case to the required standard, beyond

reasonable doubt. Consequently, I find thatthe evidence presented against the Respondent fell short of the required standards. The learned trial magistrate was therefore justified in finding that the prosecution had failed to prove the respondent's guilt beyond reasonable doubt. The appeal is hereby dismissed. No order as to costs.

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

R.E. OUGO

JUDGE

In the presence of:

John Omboga Makori Appellant- Present

Mr. Miyienda For the Respondent

Mr. Mulati State Counsel ODPP

Ms. Aphline Court Assistant