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Atei v Republic (Criminal Appeal E060 of 2021)
[2022] KEHC 10073 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEHC 10073 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E060 OF 2021

GV ODUNGA, J

JULY 26, 2022

BETWEEN

DANIEL NYABERO ATEI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment and sentence of the Magistrate's Court at Mavoko, Hon. H. Onkwani given on the 6th day of October, 2021 and in Traffic Case No. 408 of 2019)

JUDGMENT

1. The Appellant was charged with two Counts before the Mavoko Law Court in Traffic Case No 408 of 2019, Count I being the offence of using a motor vehicle with a load greater than the load specified contrary to Section 55(2) as read with Section 58(1) of the *Traffic Act* Cap. 403 of the Laws of Kenya and Count II, the offence of destroying evidence contrary to Section 116 as read with Section 117(c) of the *Penal Code*.

2. The particulars of the offence for Count I, were that on 6/2/19 at about 1325 hrs along Magadi-Kiserian Road at Kiserian in Kajiado County, Accused 1 being the Driver of motor vehicle registration number KCC 088F make Isuzu Class 3A and Accused 2 being the owner of the said motor vehicle, used the motor vehicle on the road with a load greater than the specified load by carrying 32,200Kgs instead of legal limits of 26,000Kgs an overload of 6,200Kgs per the attached KENHA ticket and prohibition Order.

3. The particulars of the offence for Count II, were that on 6th February, 2019 at unknown time at Ongata Rongai Police station in Kajiado County, knowing that motor vehicle Reg. No KCC 088F was carrying excess load of blocks that was required in evidence in a judicial proceeding, wilfully reduced them by off-loading with intent to prevent it being used in evidence.

4. The Appellant herein was the 1st accused while James Magara was the 2nd accused. On 18th March, 2019, the Accused persons pleaded not guilty and at the trial, the Prosecution called 6 witnesses.

5. According toPW1, Bunny Kalumbe on 6th February, 2019 at 8 a.m. at Mlolongo Weighbridge, they intercepted motor vehicle registration number KCC 088F carrying building blocks with an overload of 6200 Kgs. Its permitted weight load was 22,600Kgs. Upon stopping the truck, they weighed it using their mobile weigh bridge and issued a weight Bridge ticket. They also issued a prohibition order 1051 to confirm that the truck had been intercepted and weighed. They then escorted the motor vehicle to Kiserian police station. However, the driver refused to park the motor vehicle at said the police station causing them to escort the motor vehicle to Ongata Rongai police station where they removed its number plate and the motor vehicle was parked from 6th February, 2019 to 27th February, 2019.

6. It was PW1's testimony that on 11th February, 2019 they were instructed to escort the motor vehicle to Mlolongo and have it reweighed but it was not escorted as they found that the cargo had been reduced or tampered with. However, they had taken photographs of the cargo on 6th February, 2019. Later when they got a court order for reweighing it was established that the cargo had an excess of 1900 Kgs.

7. In cross-examination by Mr. Odhiambo, PW1 denied that their weighing machine was faulty and confirmed that from the 1st photograph, the registration number could not be seen and one could see that the level of cargo was not the same. He agreed that they did not have measurement showing the drop of load. He disclosed that they reported to the OCS that the cargo had been interfered with as per their OB Numbers. While agreeing that KENHA has agreements with some Sacco to carry additional weight that goes up to 2000Kgs, he stated that a permit has to be issued. In this case he stated that there was no permit for the overload. In his evidence, the number plate was removed to make sure that the truck does not disappear.

8. PW2, PC Jonathan Kangola, testified that on 11th February, 2019, he was instructed to accompany PW1 to Ongata Rongai police station to reweigh a vehicle and on arrival at the police station, he sought to get permission from the OCS but the OCS was not in. However, a Senior Sergeant granted them permission and escorted them to the motor vehicle. According to PW2, PW1 climbed onto KCC 088F, checked the cargo and told PW2 that the cargo had been tampered with. According to PW2, saw small pieces of stones which had broken from the blocks. He stated that they were instructed to take photos for comparison.

9. According to him at Ongata Rongai police station there are civilians who stay there and that the station could be accessed by other people even without permission. In his evidence, the order for reweighing of 11th February, 2019 came from Weighbridge management.

10. PW3, SGT George Odhiambo, a gazette scene crime officer, recalled that on 6th March, 2019 that he received 7 photographs and an Exhibit Memo Form from Cpl. Obare who requested him to process the same. He was informed that the photographs had been taken at the police station. He did so and prepared a Certificate which he exhibited. It was his evidence that the photographs which he dated of 6th March, 2019 were processed from a CD. However, he stated that it was not clear when they were taken.

11. PW4, Michael Karanja, a driver working for SGS, testified that on 6th February, 2019 at 8 a.m. they proceeded for a mobile operation at Ongata Rongai with the police officers whereby they weighed two trucks KCR 101L and KCC 088F. According to PW4, KCR 101L weighed 20,300Kg instead of 18,000Kg while KCC 088F weighed 32,300Kg instead of 26,000Kgs. They then issued tickets and a Prohibition Order and directed the driver to take the vehicle to Kiserian Police Station. However, the driver parked the truck outside the police station claiming that it was steep and the vehicle was instead

taken to Ongata Rongai police station where they removed the number plates. He however admitted that he was not trained in weighing but only assisted in setting up the scale. According to PW4, he did not see the vehicle being offloaded but the weight before and after did not tally.

12. PW5, Bernard Mwangi stated that on 21st September, 2018 they had their scales adjusted and calibrated.

13. PW6, Cpl Teddy Kubai, the Investigating Officer, testified that he was based at Isinya Weighbridge. It was his evidence that they intercepted motor vehicle KCC 088F at their weighbridge, weighed it and found that it had been overloaded. They issued a weighbridge ticket and he wrote a Prohibition Order. When the drivers requested to be escorted to Ongata Rongai police station, they obliged.

14. He further testified that when the owner of the motor vehicle requested for reweighing, KENHA officers realized that the cargo had been tampered with and cancelled the reweighing. He prepared an Exhibit Memo forwarding the photographs taken and a Certificate Form of the scene of crime. When an order for reweighing was issued by the Court, on 27th February, 2019 at 1700 hours, the vehicle was reweighed and found to have 1900 Kgs overload when the initial weight load was 6200 Kgs and a re-weighing ticket was issued. According to him, the cargo had been interfered with and in his opinion there was a collusion between the driver and the police officers at Rongai as a result of which a complaint was made and booked on the O.B.

15. He disclosed that he was aware that the KENHA exemptions permits of 2000Kgs overload to some Saccos and that one was issued to motor vehicle registration number KCC 088F. According to PW6, the gross weight was 28,000Kgs but after reweighing, it was 27,900 Kgs. He stated that the mobile weigh bridge shows 2 axles but they weigh axle by axle at the static weighbridge, it is done as a whole. It was PW6 testimony that there was variance between the mobile and static weight tickets.

16. According to PW6, tampering took place at Rongai police station but he did not have the names of the police officers who colluded. He stated that there was an inquiry since the incident was booked.

17. The appellant herein who testified as DW1, stated that he is a driver of a lorry motor vehicle registration number KCC 088F. It was his testimony that at Kiserian he was intercepted by police officers at the road block and ordered to alight from the lorry. After that the motor vehicle was weighed though he did not see the measurements machine. The Police Officers then removed the lorry front number plate and ordered him to drive to Kiserian police station. However, the gate to the police station was inaccessible and one of the officer, Mr. Kubai, directed him drive to Rongai police station where he was shown where to park the motor vehicle.

18. It was his evidence, the owner of the lorry told him to request for motor vehicle to be reweighed but the police officers said that it had been weighed. He then proceeded home and never went back to the station. However, 10 days later, he was called after 10 days by Mr. Kubai who told him that the vehicle was to be reweighed. In the company of Mr. Kubai and other officers they proceeded to Rongai police station where it was said that the blocks on board the lorry had been reduced. According to the Appellant, he did not see the person who removed the blocks. He stated that ½ feet had been offloaded as a result of which the lorry was not weighed.

19. When the matter went to court, the court ordered the reweighing be done and though he was present, he did not see the weight. They left the lorry parked at the weighbridge and was later released. According to the Appellant, the blocks were there as he had carried them from the quarry.

20. It was the Appellant's evidence that he was inside the motor vehicle when the weighing was done and he was not told that he had overloaded and was not given a ticket. It was his testimony that he did not weigh the blocks before transporting and according to him, he carried the normal load. In his evidence

he could only carry the correct weight as the owner does not pay for excess stones. He denied returning back to the police station and colluding with Rongai Police Officers for some stones to be offloaded.

21. DW2, Omingo Magara, stated that he usually paid for quarry access fees for the value of stones. According to DW2, 850 feet is what he had paid for which was 9x9 feet hence he doubted the overweight and sent his farm manager, Wilfred Okero to witness. He stated that Okero requested for reweighing of the motor vehicle but it was declined. According to DW2, he later made an application for reweighing since he still doubted the weight. He stated that he has an exemption permit for motor vehicle KCC 088F which is a KENHA Exemption as he is strong member of Kajiado Motto Transporters Sacco as evidenced by the Sacco as member number 45.

22. It was DW2's testimony, that when court ordered for reweighing, he was issued with a ticket and the gross weight was 27,900 Kgs, 2000 Kg less than the one allowed by KENHA. According to DW2, he did not have excess weight and was within the limit. He stated that he did not access the police station to tamper with the evidence and that no police officer was arrested or charged.

23. It was his evidence that though he had paid for 850 feet, the invoice was not in court. According to DW2, measuring is done at the scene and not at the police station. Though the weighing was done but he doubted the weight and insisted for reweighing at the police station. It was his evidence that there were instances when the scales are faulty. He therefore he sought for reweighing 6 days later in court. It was his evidence that, going by the charge sheet, the weight was over 32,000Kgs but he is allowed to carry 28,000Kgs.

24. According to him, since the stones were not stolen, receipts are of no use. He was not aware of anyone charged with tampering of evidence.

25. In her judgment, the Trial Magistrate found that motor vehicle registration number KCC 088F driven by the Appellant had an overload of 6,200 Kgs against the recommended weight allowed on the road. It was her considered view that based on the investigation report, the Applicant colluded with the police from Ongata Rongai station by knowingly parking at that police station to tamper with the motor vehicle load before reweighing.

26. In the end, the Trial Magistrate found the Applicant guilty of the two offences and convicted him. The 2nd accused person, the owner of the motor vehicle was acquitted on the basis that his defence was reasonable as no evidence was tendered to show that he permitted the Appellant to carry an extra load.

27. While sentencing the Appellant, the Trial Magistrate considered the Probation Officers report dated 20/9/2021 and mitigation. The Trial Magistrate sentenced the Appellant herein as follows;

    a. Count I: Accused person to pay fine of Kshs. 100,000/- in default, to serve one year imprisonment

    b. Count II: Accused person is to serve 8 months imprisonment.

28. Aggrieved by the Trial Magistrate judgment, the Appellant appealed to this Court against the conviction and sentence citing 29 Grounds of appeal and the Applicant has urged this court to allow the appeal by quashing the conviction and setting aside the sentence imposed by the trial court on the Applicant.

Applicant's Submissions

29. On behalf of the Applicant, it is submitted that the Prosecution case had the following gaps;

I. The Prosecution witnesses did not tell court why they declined to reweigh the motor vehicle in the presence of Wilfred Osiemo who is alleged to have been sent by DW2 as a witness but was sent away by the police. That the police on their own motion and in suspicion that they used a faulty weighing machine or misreported the reading, on 11th February, 2019 they decided to reweigh the vehicle and called DW1 to witness the same.

II. None of the photos show any reduced number of blocks fall in level of the height of the load. Some photos did not show the load while others left out the registration number of the motor vehicle. That the 3rd to 6th photos do not clearly show any difference in the height of the load hence this court as well as the witness could not possibly tell the exact height of the load before and after the alleged tampering. PW1 could not tell when the photos were taken and did not produce a certificate of Electronic evidence hence the Trail Magistrate erred in admitting and relying on the photos.

III. PW2 confirmed that no one could access the motor vehicle detained by the police without the permission of the OCS. It was submitted that there was no evidence of permission being sought by the accused person or that he went back at the police station for whatever reasons. That there is no evidence that the tampering was reported or the investigations were commenced on the same.

IV. PW6 stated that the mobile weighing machine and the static one at Mlolongo where the reweighing was done have variances and the court was not told which of the two is accurate and which was faulty.

V. PW5 produced a Certificate purportedly to show that the mobile weighing machine was in good shape and condition yet he could not explain during his cross-examination who prepared the certificate and why its serial number 697816977 did not match with the serial number in weighbridge ticket 37366. That the weighbridge ticket does not identify the machine used.

30. Regarding Ground 1-11 of the appeal in respect of Count I, it was submitted that the Trial Magistrate disregarded DW2 evidence of membership of a SACCO with an exemption to carry excess load of 2,000 Kgs. According to the Appellant, the SACCO had been permitted to carry upto 28,000 Kgs and when reweighed pursuant to a court order issued on 26th February, 2019, the weight was found to be 27,900Kgs hence the weight load was within the permissible limit.

31. According to the Appellant, it is the role of the prosecution to prove the motor vehicle was not one of those that are exempted by KenHA and not on the weakness of the defence. Reliance was placed on the case of Philip Muiruri Ndaruga v Republic [2016] eKLR and it was submitted that it is strange that the Trial Court having been convinced of the evidence tabled by the defence acquitted the 2nd accused person of the charge of permitting a motor vehicle with excess load on the road but convicted the Appellant herein.

32. It was submitted that the charge under Count I was lacking vital information hence defective. According to the Appellant, there was no information on the law that the specified load for the motor vehicle in question is 26,000Kgs. It was submitted that the Charge made reference to the KENHA ticket and prohibition Order but the documents did not state how the police arrived at the said weight

or which law prescribes it. The Appellant assert that this prejudiced the Appellant who did not know the charging law and could thus not prepare his defence effectively.

33. Regarding Grounds 12-25 of the appeal, it was submitted that Count II offence of destroying evidence contrary to Section 116 as read with Section 117(c) of the *Penal Code* was a duplex charge having combined two offences of destroying evidence and conspiracy to defeat justice in the same count. According to the Appellant, it is a misdemeanour and a felony respectively. Reliance was placed on the case of *Fransisca Kiboru v Republic* [2017] eKLR that it is well established that a count which charges two offences is bad for duplicity and that a conviction under it cannot stand.

34. The Appellant urged the court to find the conviction and sentence on Count II could stand on the basis of the fact that it was a duplex charge.

35. Regarding the photographic evidence stated to have been taken by PW1, it was submitted that they did not have the dates when they were taken or printed making it impossible to tell which photograph was taken on 6th February, 2019 and 11th February, 2019 or whether they are the photographs of the motor vehicle. It was submitted that PW3 stated that date written on the back of the photographs was the date when he received the photographs from PW6. However, all the photographs taken before and after had the same date written on the back making it impossible for one to differentiate one photograph from another.

36. According to the Appellant, production of the photographs did not comply with Section 106B and 78 of the *Evidence Act* that they should be supported by a Certificate of Digital Photography. Reliance was placed on the case of *Republic v Jackson Ngara Nderitu* [2018] eKLR on the proposition that the photographic evidence must be accompanied by his certificate in the prescribed Form. It was submitted that without a certificate of photographic evidence, the photographs produced in this court were inadmissible and ought not to have been relied upon.

37. Regarding the destruction of the evidence which were the blocks on board motor vehicle KCC 088F, it was submitted that the prosecution witnesses could not tell the different levels of the load as seen in the photographs taken by PW1.

38. It was noted that according to the investigating officer, no charges were preferred against the police officers alleged to have colluded with the Appellant to tamper with the load. However, when asked in court, the investigating officer stated that investigations were still ongoing yet the investigations against the Appellant were completed and the charges of destruction of evidence preferred against him with full particulars. According to the Appellant, the investigating Officer evidence clearly demonstrates the ill motive in preferring the charge of destroying evidence against him. It was submitted that the Prosecution failed to produce an OB Number used to book the offence of destruction of evidence if at all the complaint was made at Ongata Rongai Police station as alleged by PW2. The Appellant asserted that the Prosecution failed to put him at the scene of crime when the evidence under the police custody was allegedly destroyed. According to the Appellant, no witness has testified in court that he saw the Appellant destroy the evidence.

39. Based on the above facts, it is submitted that the Prosecution failed to prove the charge of destruction of evidence beyond reasonable doubt as both mens rea and actus rea were not demonstrated.

40. Regarding the sentence, it was submitted that the sentence for Count II was harsh since the Trial Magistrate gave no option of a fine.

41. In the end, it was submitted that noting the defects in the prosecution case, the prosecution witnesses evidence did not establish the Appellant's guilt beyond reasonable doubt. As to what amounts to proof

beyond reasonable doubt reliance was placed on the definition by Supreme Court of Canada in *R v Lifchus* [1997]3 SCR 320 quoted with approval in *Philip Muiruri Ndaruga v Republic* [2016] eKLR.

42. No submissions were made on behalf of the Respondent.

Determination

43. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* [1957] EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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 *Peters v Sunday Post* [1958] E.A 424."

44. Similarly, in *Kiilu & another v Republic* [2005] 1 KLR 174, the Court of Appeal stated thus:

> "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."

45. It was however, held in *David Njuguna Wairimu v Republic* [2010] eKLR by the Court of Appeal as follows:-

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

46. I have considered the grounds of appeal, both documentary and oral evidence and submissions filed. I find the following to be the issues falling for determination.

    a. Whether or not the Prosecution proved its case beyond reasonable doubt.

b. Whether the charge sheet was defective for duplicity for combining two offences under Count II.

c. Whether the Sentence meted against the Appellant was illegal and harsh.

47. The Trial Magistrate found that motor vehicle registration number KCC 088F had an overload of 6200Kgs against the recommended weight allowed. It was her finding that DW1 who was the driver of the motor vehicle did not demonstrate that the weighbridge ticket issued was a forgery. According to PW1, a manager at Mlolongo Weighbridge testified that the motor vehicle was loaded with 32,200 Kgs instead of 22,600Kgs.

48. Section 55(2) of the *Traffic Act* provides that:

> No motor vehicle the weight or dimensions of which laden or unladen exceeds the maximum weight or dimensions provided for such vehicles by rules made under this Act shall be used on a road."

49. Section 58(1) of the same Act provides that:

> Any person who drives or uses on a road a vehicle in contravention of the provisions of section 55 or section 56 shall be guilty of an offence and liable to a fine not exceeding four hundred thousand or to imprisonment for a term not exceeding two years or to both:
>
> Provided that rules under this Act may provide that a person who is guilty of an offence under section 55 or 56 shall be liable to pay a fine according to a prescribed scale, and different scales may be prescribed for first offenders, and for second or subsequent offenders, within a prescribed period, but so that no person shall thereby be liable to pay a fine greater than the maximum provided by this subsection; and for the avoidance of doubt it is declared that liability of a person to pay a fine on a prescribed scale shall not affect that person's liability to imprisonment under this subsection as an alternative to, in addition to, or in default of, the payment of a fine.

50. In *Kenya Transport Association & 3 others v Attorney General & another* [2012] eKLR Majanja J. while determining the constitutionality of Rule 41(2) of the *Traffic Rules* held that:-

> " 22. The purpose of the provisions of sections 55 and 58 of the *Traffic Act* and rule 41(2) of the Traffic Rules is to prevent overloading which damages roads. The weight of the vehicle is transferred to the road by the two or more wheels connected to a given axle and in designing the road, due consideration is given to the axle load and vehicle. According to the report, which I cited above, the use control of vehicle weight through limiting axel load regulations is now common not only in Europe and America but also in African countries. Indeed, as pointed out by counsel for KENHA, such regulations as contained in the Traffic Rules and the Twelfth Schedule are now accepted world over."

51. In *Joram Nyaga Mutegi v Kenya National highway Authority* [2017] eKLR the learned Judge pointed out that;-

> " Whether or not the truck was over loaded is a question of fact. The Respondent's officers did not weigh the truck and cannot therefore state with certainty that it was over loaded. An assumption per se cannot, in law, be a basis for determining one's culpability in a traffic offence. There was no evidence therefore that the truck was overloaded and what police

officers did was to assume that the vehicle was over loaded and proceeded as though the driver was guilty. The documents attached to the replying affidavit are not of any evidential value in the Respondent's attempt to show that the vehicle was overloaded contrary to law given the circumstances of this case."

52. It is therefore a question of fact whether the motor vehicle was overloaded. In this case, PW1 produced a weight bridge ticket dated 6th February, 2019 that show the Gross vehicle weight overload was 6200Kgs and the contents of the ticket were not challenged by the Appellant's counsel during cross-examination. PW1 further placed reliance on the Prohibition Order No1051 by KENHA against motor vehicle registration KCC 088F showing the overload weight of 6200Kgs. It contents were also not challenged by the Appellants counsel. PW1, PW4 and PW6 stated that they weighed motor vehicle registration KCC 088F and found an overload of 6200Kgs.

53. In his defence, DW2 stated when reweighing was done, the Gross Vehicle Weight was found to be 27,900 Kgs which was 2000Kgs less than the one allowed by KENHA. However, the Appellant stated that he did not weigh the blocks before transporting and did not know the weight but that was the load normally. DW2 denied that his motor vehicle had carried excess load but he was not present when the motor vehicle was being loaded with the stones. It was his testimony that he was called by his driver, the Appellant herein, who informed him of the arrest and impounding of the motor vehicle.

54. Based on the above evidence, I find no reason to fault the Trial Magistrate that motor vehicle registration number KCC 088F had an overload of 6200Kgs against the recommended weight allowed on the road. However, there was evidence that the said vehicle was permitted to enjoy excess load exemption up to a maximum of 2000kgs above the gross weight. In this case, it was stated that the vehicle weighed 32,300Kg instead of 26,000Kgs. In other words, with the exemption, the vehicle could only carry up to 28,000kgs. It follows that the learned trial magistrate's finding that the vehicle was overloaded cannot be faulted.

55. The Appellant was also found by the Trial Magistrate to have destroyed evidence contrary to Section 116 as read with Section 117 of the *Penal Code*. According to the Trial Magistrate, the Appellant being in physical possession of the motor vehicle orchestrated the scheme to tamper with the evidence. It was the view of the Trail Magistrate that the Appellant knowingly parked the motor vehicle at Ongata Rongai Police Station to commit an offence.

56. Section 116 of the *Penal Code* provides that:

> Any person who, knowing that any book, document or thing of any kind whatsoever is or may be required in evidence in a judicial proceeding, wilfully removes or destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour.

57. Section 117 of the *Penal Code* provides that:-

Any person who—

> (a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or
>
> (b) in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or

(c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal, is guilty of an offence and is liable to imprisonment for five years.

58. To constitute the commission of an offence 'knowingly' according to *Black's Law Dictionary*, it must be proved that act was done:

> "With knowledge; consciously; intelligently. The use of this word in an indictment is equivalent to an averment that the defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged...."

59. 'Wilful' on the other hand is defined in the *Black Law Dictionary*, 8th Edition as:-

> "Voluntary and intentional but not necessarily malicious."

60. In this case, no one saw the Appellant tampering with the load. According to him, after parking the vehicle he went home and did not return to the police station. He did not collude with the police officers at the station to tamper with the load. There was evidence of the suspicion that some police officers at the station might have been complicit in the said action and that a complaint had been lodged against them. However, no evidence as led linking the Appellant to their action.

61. In the premises, I find that the prosecution failed to prove that the Appellant was guilty of Count II. Accordingly, the grounds of appeal in respect of that count must succeed. Having so found, it is nolonger necessary for me to deal with the other issues raised against the findings in respect of Count II.

62. According to the Appellant the sentences meted against him were harsh. The Trial Magistrate in Count I sentenced the Appellant to pay a fine of Kshs.100, 000/- or face 1 year in jail. Section 58(1) of the *Traffic Act* provides that a person is liable to a fine not exceeding four hundred thousand or to imprisonment for a term not exceeding two years or to both.

63. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

64. Similarly, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court.

In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

65. The predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

66. The Court of Appeal, on its part, in *Bernard Kimani Gacheru v 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 states is shown to exist."

67. Having considered the evidence availed before the trial court, I find that the sentence as regards Count I was within the prescribed parameters and was not harsh.

68. Accordingly, the appeal partly succeeds. The conviction of the Appellant in respect of Count II is hereby set aside and the sentence quashed.

69. Judgment accordingly.

JUDGMENT READ AND SIGNED AT MACHAKOS THIS 26TH DAY OF JULY, 2022.

G.V ODUNGA

JUDGE

Delivered in the presence of:

Mr Moturi for Mr Odhiambo for the Appellant

Mr Jamsumba for the Respondent

CA Susan