



REPUBLIC OF KENYA



KENYA LAW
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**Karisa v Republic (Criminal Appeal E024 of 2021)
[2022] KEHC 17167 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E024 OF 2021
SM GITHINJI, J
DECEMBER 20, 2022**

BETWEEN

EDWARD KITSAO KARISA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 407 of 2018 of the Senior Principal Magistrate's Court at Mariakani-Hon. S.K Ngii, dated 24th December 2020)

JUDGMENT

- 1 The Appellant was convicted of, and sentenced to serve five (5) years imprisonment for the offence of stealing goods on transit contrary to section 279 (a) of the [Penal Code](#).
- 2 The particulars of the offence are that between 7th and 8th May 2018, at Kwa Magongo Rabai in Kaloleni Sub-County within Kilifi County, along the Mombasa-Nairobi highway; the Appellant together with others stole 121 cartons of assorted electric kettle, 1349 cartons of assorted energy saving lamps, 52 cartons of vacuum flasks and 360 cartons of ceramic floor tiles all valued at Kshs. 11, 533, 400/-, the property of Keyun Hauliers Limited from a motor vehicle registration No. KCH 314N ZF4552; while the said property was on transit from Mombasa to Nairobi.
- 3 The Appellant was charged alongside three others who were notably acquitted.
- 4 Aggrieved by the conviction and the sentence of the trial court, the Appellant lodged the petition of appeal dated 7th January 2021 on the following supplementary grounds:
 1. That the trial court erred in law and fact by failing to find that the offence of stealing goods on transit was not proved beyond reasonable doubt.



2. That the trial court erred in law by failing to find that the charge sheet was defective.
3. That the trial court erred in law when it admitted a confession and/or admission of a fact contrary to sections 25A (1), 26 and 29 of the Evidence Act Cap 80 Laws of Kenya.
4. That the trial court meted out a sentence that was extremely punitive, harsh and excessive.
5. That the trial court erred in law and fact by failing to conduct a sentence hearing.

The Evidence

5 The prosecution called a total of 6 witnesses:

Bernard Wafula Simiyu [PW1] a driver working at Keyun Hauliers Limited [the complainant company] testified that together with the Appellant and other three drivers, they collected goods from a place he identified as Multiple on 5th May 2018 for transportation. That the five drivers had five different lorries with the Appellant driving vehicle registration no. KCH 314N.

As procedure would require, they took the said lorries to Dunross for weighing where his lorry and the Appellant's were found to be excessively loaded. Their transport manager then ordered them to offload the excess load at the National Cereals Board depot which they later found out was closed for the weekend. Pw1 returned to the depot on Monday 7th May 2018. He received a call from the Appellant who asked him to deliver fuel for him at Mariakani Barracks. The Appellant then drove ahead while he [pw1] took a rest at Meli.

Later on that night at 2.00am, the witness received a call from the transport manager who informed him of the Appellant's allegations that his lorry was involved in an accident somewhere between Masimba and Emali. On arrival, Pw1 found the Appellant's lorry at the scene with the trailer turned side way. The container was open but the Appellant was not at the scene. He informed police officers at Emali Police Station and stayed guard until 5am when the complainant company officers arrived.

Pw1 told the court on cross-examination that at the accident scene, the Appellant's vehicle had gotten into a ditch but had not overturned. To him, the Appellant was involved in the said accident as he had reported to the company, and that he was not aware that the Appellant had stolen the goods.

6 Maulana Mumbai Kamau [PW2] a workshop manager at the Complainant Company, testified that he was called to attend to the vehicle Registration No. KCH 314N assigned to the Appellant and which was involved in an accident. He described that there were scattered bulbs at the scene and that the container was open. Together with a mechanic, they fixed the vehicle which could not start. They then visited the Appellant at Kilome Hospital.

On cross-examination, Pw2 stated that he had no proof that the Appellant had stolen any goods.

7 Jackson Ngua Nzaro [PW3] the director of the complainant company stated that the said vehicle was ferrying goods described in the charge sheet to Housemart Company Limited. The witness referred the court to the documents evidencing the importation and clearance of the said goods. When he received report of the said accident, he sent Pw2 to the accident scene but he himself went to the scene on 9th May 2018. He established at the scene that the container carrying the goods was open and the vehicle had suffered minor damages in the form of scratches. He was informed that the driver, Appellant herein, had been admitted at a nearby hospital and so he visited him.



The Appellant told him that he lost control of the vehicle after another vehicle distracted him with full lights. Thereafter, he went to Emali Police Station where the police officers informed him of their view that the accident could have been staged. When the Appellant was discharged, he beseeched him to give a true account of what had transpired. The Appellant obliged and told them that he offloaded the goods at Mazeras and even led them to the storage house where the said goods were stored in Mazeras.

The witness added that they recovered 136 cartons of energy saving lamps and 4 cartons of a different type of energy saving lamps from the said storage and 4 cartons of energy saving lamps from the shop of one Kimani, the owner of the said storage premises.

On cross-examination, Pw3 testified that he was aware that some excess load had been offloaded from two vehicles and that the Appellant left Mombasa on 7th May 2018. He added that at the accident scene, the vehicle was on its wheels and that it had not overturned but only leaning on one side. He reiterated that excess load is normally offloaded by the clearing agent under the instructions of the client, and in the presence of KRA officers, after which the container is sealed and released. According to this witness, the Appellant's vehicle did not have any excess load.

- 8 Police Constable Anthony Gitonga [PW4] stated that he went to the scene of accident together with Pw3 and the owners of the complainant company on 9th May 2018, where he established that the vehicle had not overturned and the cabin was facing the road. Inside the container were few goods and there were scattered bulbs on the ground.

They were informed that the driver, the Appellant herein, had been taken to Kilome Hospital. On arrival at the hospital, the doctor informed them that the Appellant was in good condition and about to be discharged.

It was Pw4's testimony that the Appellant told them that in the company of other two people he stole the goods. The Appellant then led them to the house where the goods were hidden where they recovered 12 cartons of electric kettles; 28 cartons of vacuum flasks, 176 cartons of sun best, 24 energy saving lamps; and 6 cartons of sun best, 34 energy saving lamps.

They also recovered from a store in Mazeras town, 136 cartons of energy saving lamps 2u and 4 cartons of energy saving lamps 3u.

The witness produced as evidence a parking list showing the goods that were in the container-PEXH 1; bill of lading- PEXH2; commercial invoice-PEXH3; discharge summary from Kilome Hospital-PEXH5; and a weighing ticket from Danros dated 5th and 7th May 2018, showing the weight of the load as 40260kg- PEXH6a and 6b; another ticket from Mariakani weighbridge dated 7th May 2018 showing the weight as 41317kg- PEXH 6c.

On cross-examination, Pw4 told the court that the accident report was made on 8th May 2018 by one Isunza George. That when the Emali officers went to the scene, they found the vehicle doors wide open with goods scattered on the ground and that some of the goods were stolen at the scene. To him, the Appellant's account of the accident was doubtful since there were rails along the road and that it appeared that the vehicle was reversed off the road.

- 9 Chief Inspector of Police Kelin Kunlichia [PW5] and officer in charge of crime scenes coast region, produced as evidence a report certificate, photographs and photographs certificate thereto relating to the accident scene and the house where the goods were recovered from.
- 10 Similarly, Moses Ndirangu Kiiru [PW6] a driver at the complainant company, testified that he arrived at the accident scene on 8th May 2018 where he found the vehicle KCH 314N on its wheels but off the



road. There were goods littered on the ground and the container was open. That the reverse gear was engaged and his efforts to ignite the vehicle were in vain until the mechanic stepped in.

On cross examination, the witness stated that the vehicle was pulled from the spot by a breakdown.

The witness was convinced that some goods were missing from the container since it was not full.

- 11 At close of the prosecution case, the Appellant herein was put on his defense. He gave a sworn statement. He stated that he received a call on 5th May 2018 to load some goods at Multiple Hauliers for transit to Housemart Nairobi. That the goods involved were ceramic floor tiles as per the exhibited delivery note No. 877 and entry custom form dated 4th May 2018, all valued at Kshs. 1,400,000/-.
- 12 He then proceeded to Danros weighbridge where the load was positively checked. Thereafter, he drove to Bonje Petrol Station for fueling and parked the vehicle there until Sunday when he started his journey to Nairobi. Somewhere along the highway, around Emali town, an oncoming bus while overtaking, made him veer off the road causing the vehicle he was driving to fall on its side. He became unconscious only to wake up at Kilome Hospital. He denied stealing the goods.
- 13 On cross examination, the Appellant confirmed that he worked for the complainant company as a driver assigned to the vehicle KCH 314N. He also confirmed that he didn't suffer a fracture in the accident but bruises and soft tissue injuries. He added that he neither spoke to the investigating officer nor was he interrogated.
- 14 The other defense witness was Peter Wang'ondou Maina, also the 4th accused person at the trial court. He confirmed that on the day that he was arrested, he had been sent by his uncle, one Kimani Mugo, to open the gate for some people at his house. On arrival, he found two police officers and two vehicles. He also identified one Victor Macharia previously known to him, and the Appellant herein unknown to him at that point.
- 15 The police officers informed him that they needed to get into the house but there was no one to usher them in. He jumped over the gate and opened it. The officers proceeded to speak to his aunt who was all along inside the house but sickly. She gave out the keys to the store where they recovered some goods packed in cartons.
- 16 On cross examination, the witness confirmed that his uncle's house was in Mazeras and what was recovered were bulbs and thermos flasks.
- 17 This appeal was canvassed by way of written submissions which I have read and understood. I find that the following issues arise for determination:
 1. Whether the charge sheet is defective.
 2. Whether the offence was proved to the required standard.
 3. Whether the sentence meted out was extremely punitive, harsh and excessive.

Analysis and Determination

- 18 This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh. See *Okeno v. R* [1972] EA. 32.



Whether the charge sheet is defective

19 The Appellant contends that the charge sheet relied on by the trial court to convict him is incurably defective as it does not disclose sufficient details or particulars to enable him answer to the charge. Those details, he argued are such as the container number, and serial numbers of the cartons and goods.

20 In determining whether a charge sheet is defective or not, the Court of Appeal in *Sigilani -v- Republic* (2004) 2 KLR, 480 held as follows: -

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

21 Section 134 of the *Criminal Procedure Code* provides for the information a charge sheet should contain as follows: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

22 Looking at the charge sheet in question, it is clear that the Appellant was charged with stealing goods on transit contrary to section 279 C of the *Penal Code*. This was clearly captured in line with section 279 C aforementioned which provides as follows: -

279. Stealing from the person; stealing goods in transit, etc.

If the theft is committed under any of the circumstances following, that is to say—

(c) if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;

23 The charge sheet also contains the particulars of the offence as captured hereinbefore. It is clear to me that the charge and particulars were well captured with no ambiguity. The information or particulars given on the said charge sheet is in my view reasonable as to the nature of the offence as envisaged under section 134 of the Criminal Procedure Code.

24 The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR cited the case of *Peter Sabem Leitu v R*, Cr. App No. 482 of 2007 (UR) where the Court held that:

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”



25 In the same breath, I find that the details left out in the charge sheet did not in any way prejudice the Appellant. It cannot therefore rightly be said that the charge sheet is incurably defective.

Whether the offence was proved to the required standard

26 In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. The burden of proof rests solely on the prosecution throughout the trial. The degree being beyond reasonable doubt.

27 In the case of *Miller v Ministry of Pensions*, [1947] 2 All ER 372, Lord Denning stated as follows 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.”

28 It is also evident that the evidence linking the Appellant to the offence is circumstantial. I must therefore closely examine the evidence on record, not only as the normal duty as the first appellate court to arrive at my own conclusions, but also to ascertain whether the recorded evidence satisfies the requirements set out in the case of *GMI v Republic* [2013] eKLR as follows: -

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

29 It is also necessary that before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy that inference.

30 I will at this point turn to the evidence adduced at the trial court. It is not in dispute that the Appellant drove the vehicle KCH 314N on the material date and that the vehicle was involved in an accident. PW3 testified that the police officers suspected that the accident was staged. PW4 added that upon interrogation, the Appellant owned up to the offence and that he even led them to where his alleged accomplices lived and to a shop where part of the stolen goods were recovered from.

31 On these facts adduced by the prosecution witnesses, the trial magistrate found that the circumstantial evidence was amplified by the Appellant's own admission during the investigations and proved the prosecution case beyond reasonable doubt. He delivered himself as follows: -

“Be that as it may no sooner had the accused alleged the accident that he owned up to stealing the goods with others at Mazeras on 7th May 2018 on the same date he was dispatched for Nairobi. PW3; the director of the complainant company and PC Gitonga were categorical that besides owning up to the commission of the offence, the 1st accused offered to take them



to the place where (sic some of the goods had been stored at Mazeras and true to his offer, the investigating officer in the company of others were able to recover ...In those premises the accused person cannot be heard to say that the investigating officer never interrogated him or that he had not even seen him before.

All these circumstantial evidence points to the guilt of the 1st accused person and is beyond any reasonable doubt inconsistent with his innocence. The other persons to whom fingers may be pointed, for instance the owners of the home at Mazeras where he took police officers for recovery of the goods were in no doubt his accomplices in the commission of the offence charged and the court wonders loudly why the said people were not investigated. It leaves a lot to guess but the fact that they were not investigated and charged does not exonerate the 1st accused.”

- 32 It appears to me that one of the strongest consideration by the trial magistrate was the apparent statement under inquiry made by the Appellant, whereby he is alleged to have admitted the offence. The appellant however denied having done so.
- 33 The Prosecution failed to avail either as witness or co-accused, the said accomplice and owner of the house and shop in Mazeras where the goods were allegedly recovered from. Their evidence would have been vital to demystify the events that transpired on the material date. For instance, on or how the alleged recovered goods got to the shop and the alleged house. The big question is; why did the prosecution fail to call such crucial witnesses or charge the obvious accomplices?
- 34 I find that the circumstances of this case are fitting for the court to make an adverse inference against the prosecution that the reason why this crucial witnesses were not called was because their evidence if tendered would have been adverse to their prosecution case.
- 35 In *Bukenya and Others v Uganda* 1972 EA 549 the court explained: -
- “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.”
- 36 It’s evident that the investigations and the prosecution process were not done objectively and fairly, and the appellant herein was taken as the “fall guy”. Conviction becomes hard where the court finds that the investigations and the prosecution process were unfair to the accused person.
- 37 The sole fact that the Appellant was the designated driver of the said trailer, does not necessarily point irresistibly to his guilt.
- 38 In the circumstances, I find that the prosecution failed to prove the Appellant’s guilt beyond reasonable doubt. Failure to avail obvious crucial witnesses in this case creates reasonable doubt and raises questions as to the honesty and integrity of the investigations carried out, and the safety of the inferred guilt.
- 39 Having said so, I need not determine whether the sentence meted out is excessive. The outcome is that this appeal is merited and is allowed. The conviction and sentence by the trial court is set aside; the Appellant is hereby set at liberty, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF DECEMBER, 2022

S.M.GITHINJI



JUDGE

In the Presence of: -

Miss Aoko for the Appellant and the Prosecutor

Mr Mwangi for state

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S. M. GITHINJI

20/12/2022

