Lazarus v Republic (Criminal Appeal E028 of 2021) [2022] KEHC 17192 (KLR) (19 December 2022) (Judgment)

Neutral citation: [2022] KEHC 17192 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E028 OF 2021

WA OKWANY, J

DECEMBER 19, 2022

BETWEEN

MERCY KWAMBOKA LAZARUS .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal against the Judgment of Hon. B. M. Kimutai (Mr.) – PM Keroka dated and delivered on the 24th day of September 2021 at Keroka in the original Keroka Principal Magistrate's Court Criminal Case No. 283 of 201)

JUDGMENT

1. The appellant herein, Mercy Kwamboka Lazarus, was charged with the offence of possession of illicit alcoholic drink contrary to Section 27(1) (b) of the *Alcoholic Drinks Control Act*, 2010.
2. The particulars of the offence were that on March 23, 2019 at Mwongori village in Borabu Sub-county within Nyamira County, jointly with others not before the court, using a motor vehicle Registration Number KCR 248Q Toyota Probox white in colour, were found in possession of alcoholic drinks namely chang'aa to wit 525 litres without liquor licence.
3. The appellant denied the charge after the case proceeded to trial.
4. A summary of the evidence tendered before the trial court was that on March 23, 2019 at 3.30am, PW1, a Chief at Mogusii placed an ambush at the A home, after receiving information that the accused herein was to receive chang'aa at 3.30am. A probox vehicle registration KCR 248Q was driven to accused person's compound. PW1 and PW2 followed it but on stopping some occupants took off leaving accused behind. She was arrested and escorted to Matutu Police Station where was charged. The accused on the other hand gave a sworn defence and called one witness in her defence. She denied having been found in possession of the said alcohol and stated that she was on her normal day preparing to take her bananas to the market when she was arrested.

5. At the end of the trial, the appellant was found guilty of the charge and sentenced to pay a fine of Kshs. 525,000/= and in default, to serve two (2) years imprisonment.

6. Aggrieved by the conviction and sentence, the appellant filed the instant appeal and listed the following grounds of appeal in her petition of appeal: -

    1. The learned magistrate erred in both law and fact in convicting the accused person whereof the ingredients of the charge were not proved by the prosecution beyond reasonable doubt in the face that the appellant was not accorded a fair trial in violation of his fundamental rights.

    2. The learned magistrate erred in both law and fact in admitting the government Analyst report yet no Notice of intention to produce the report had been given seven (7) days before trial by the prosecution contrary to section 64(3) of the *alcoholic drinks control Act*. No. 4 of 2016 - laws of Kenya.

    3. The learned magistrate erred in law and fact in by admitting the Government Analyst report without supplying the report to the appellant seven (7) days prior to the trial in contravention of section 64(3) of the *Alcoholic Drinks Control Act*, *No 4 of 2016* — Laws of Kenya.

    4. The learned magistrate erred in law and fact by neglecting and/or failing to inform the accused of his right to call the Government analyst for cross-examination and choose whether to seek leave of the court for him to be summoned for cross-examination in violation of section 64(4) of the *Alcoholic Drinks Act* which prejudiced his right to a fair trial.

    5. The learned magistrate erred in law and fact by admitting the Government analyst report through its production by the investigating officer who was not an expert witness and especially skilled contrary to section 48 of the *evidence Act*.

    6. The learned magistrate erred [n law and fact by considering and admitting the government analyst report without the oral evidence and testimony of the Government Analyst who is purported to have authored the report to prove that the spirituous liquor/co/ Chang' aa did not conform to the provisions/standards of the *Alcoholic drinks control Act* in accordance to section 27(3) of the *Act*.

    7. The learned magistrate erred in law and fact by admitting the evidence of the Government report without any reasonable reason tendered by the prosecution as to why he could not come to court to produce the report and be examined in court contrary to Section 64(2) d of the *Alcoholic Drinks Control Act* No 4 of 2016.

    8. The learned magistrate erred in law and fact by disregarding the appellant’s defense of alibi and supporting evidence of the defense witnesses which was not contradicted /contested by the prosecutions.

    9. The learned magistrate erred in law and fact by unlawfully misdirecting himself by grant unprocedurally releasing exhibits and more especially the motor vehicle without lawful proceedings before the conclusion of the case hence prejudicing the defense case.

    10. The learned magistrate erred in law and fact by holding that the appellant was in possession of the said motor vehicle and hence the alcohol yet the prosecution did not tender any evidence to the effect of ownership and/physical possession of the motor vehicle thus the ingredients of possession were not proved to meet the legal threshold.

11. The learned magistrate erred in law and fact in handing a sentence which was excessive in the circumstances of the case, not adequately considering the accused's mitigation and declining/ failing to call for a probation officers report before sentencing the appellant to a harsh sentence.

12. The learned trial magistrate erred in law and fact by allowing to trial to proceed without the appellant's advocate though she had one on record thereby violating and/contravening the accused's fundamental right to a fair trial contrary to provisions of *the Constitution Of Kenya,2010*.

13. The learned magistrate erred in law and fact in passing sentence and convicting the appellant by finding him guilty without reading to the accused the evidence adduced during the trial even a summary of the same and the reasons for his conviction when delivering the judgment choosing to read " that I find the prosecution has proved this case beyond reasonable doubt and proceed to convict and sentence the accused accordingly" in contravention of the provisions of the Criminal Procedure Code and the *Evidence Act* with regard to delivery of judgments.

7. The appeal was canvassed by way of written submissions which I have considered. As the first appellate court, the evidence presented before lower court afresh in order to draw my own conclusions while bearing in mind the fact that I did not see or hear the witnesses testify.

8. In *Okeno vs. Republic* [1972] EA 32 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 vs. 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 Vs. 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 vs. Sunday Post [1958] E.A 424."

9. A summary of the prosecution's case was that on March 23, 2019 at about 3.30am, the Senior Acting Chief of Mogusii Sub-location Mr. Joshua Momanyi (PW1) in the company of PW2 (PC Weldon Kabireri and PW3 Cpl. Willy Mwangi Kuria laid an ambush at the Appellant's home when motor vehicle Registration Number KCR 248 Q drove into the compound. The officers asked the driver of the said motor vehicle to stop after which all its occupants escaped except the Appellant. They recovered several jerricans of alleged illicit brew, chang'aa. The officers arrested the Appellant. The jerricans of the alleged chang'aa, a report by the Government Analyst and the motor vehicle were produced as exhibits by PW3.

10. When placed on her defence, the appellant in a sworn testimony denied the charge and explained that she was on the material day preparing to go to the market when a vehicle entered her compound. She stated that the area Chief (Pw1) found her in the compound and arrested her. She further testified that she was not the owner of the motor vehicle in question.

11. DW2, Catherine Mogeni, testified that she was to accompany the Appellant to the market on the material day but later learn that she had been arrested.

12. DW3, Samuel Ogaro, the Appellant's father-in-law, testified that the motor vehicle that was allegedly ferrying the illicit alcohol drove into his homestead.

13. The Appellant's submitted that the prosecution did not prove its case against the Appellant to the required standards. The Appellant argued that the prosecution did not adduce evidence to prove that the spirituous liquor alleged to be chang'aa was confirmed to be so by a Government Analyst as provided for under Section 57 of the *Alcoholic Drinks Control Act*, 2010.

14. The appellant faulted the trial court for failing to inform her of her right to require the attendance of government analyst for purposes of cross examination and her right to be represented, at all times during the hearing, by an advocate of her choice.

15. It was submitted that the trial court relied on an inadmissible expert report. The appellant maintained that the prosecution did not establish that she was in actual possession of the alleged alcoholic drink.

16. The State, on the other hand, submitted that all the ingredients of the charge were proved beyond reasonable doubt. Regarding the appellant's claim that the exhibits were not produced to prove the substance of the charge, the state submitted that PW3 produced exhibits which included the jerricans containing the chang'aa and a report from the government analyst. It was further submitted that the production of the report by the Government Analyst by PW3 was not fatal as Section 77 of the *Evidence Act* allows the admission of such a report without necessarily calling the maker.

17. It was further submitted that Section 64 of the *Alcoholic Drinks Control Act* permits the court to admit the Government Analyst's report in the absence of the evidence to the contrary.

18. I have carefully considered the record of appeal and the parties' respective submissions. The most notable ground of appeal is the failure by the prosecution to call the government analyst to testify on the contents of his report.

19. According to the appellant, the government analyst's report should have been produced by its maker and not PW3 Cpl. Willy Kuria. Courts have taken the position that the Government Analyst's report falls under the category of expert opinion evidence which is generally admissible to assist the court determine matters that are outside its experience or understanding. (See Folkes v Chadd (1782) 3 Doug KB 157; R v Turner [1975] QB 834, 60 Cr App Rep 80, CA).

20. In this case, the reason for sending the alcoholic drink allegedly recovered from the motor vehicle in the Appellant's home was to establish if the same was chang'aa which is an illicit drink.

21. In my considered view, allowing the production of an expert witness evidence by a non-expert not only deprived the Appellant of the opportunity to cross examine the maker of the document thereby violating her right to a fair hearing, but also created an undesirable precedent where the expert's evidence is produced in a casual manner ends up being the basis of a conviction. I find that the expert's report, produced by a person who was not its maker, lacked evidential value expected in a criminal case where the burden of proof is beyond reasonable doubt.

22. In *Maina Thiongo vs Republic* [2017] eKLR the court held as follows over the importance of production of the government analysts report by its maker: -

> It follows that failure to call an expert whose report was not only the foundation of the charge against the appellant but was also the basis of the appellant's conviction was a blatant and serious miscarriage of justice; it was a miscarriage of justice because first, by concluding the trial without the evidence of the expert the court deprived itself of the opportunity to

interrogate and satisfy itself of his opinion and, second, the appellant was also denied the opportunity to test the accuracy of the expert's opinion by way of cross-examination.

Section 48 of the *Evidence Act*, Cap 80 under which opinion of experts is catered for contemplates that the expert must testify; that section provides as follows:

48. Opinions of experts

(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts."

23. The Court of Appeal explained the application of Section 48 of the *Evidence Act* in Mutonyi vs Republic (1982) KLR 203 at 210 where Potter JA said:

Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters.

In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scenting the functions of expert witnesses:

"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence."

So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.
2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."

24. From the above cited cases, it is clear that by accepting the experts report without calling the expert to testify, the trial court could not have satisfied itself on the special skills of competence of the investigations officer on the matter at hand. It is clear to me that the investigations officer who purported to produce the report was, for lack of expertise in the area, ill-equipped to do adduce evidence of facts which he had not ascertained.

25. In addition to the failure to present the evidence of the Government Analyst, I also note that when the case came up for hearing on 5th April 2021, the trial court proceeded with the hearing in the absence of the Appellant's Advocate despite having been notified that the said Advocate was engaged before another court. I find that proceeding with the case, in the absence of the accused's Advocate, further denied her the right to a fair trial more so considering that the witness who testified on that day (PW3) produced crucial exhibits without being subjected to cross examination.

26. Furthermore, considering that it was not disputed that the Appellant was alleged to have been a passenger in the vehicle where the illicit liquor was found, I find that no tangible evidence was presented to establish that the Appellant owned the said vehicle or the goods inside it for that matter. I therefore find that the nexus between the Appellant and the alleged alcohol was not established to the required standards.

27. Having found that the trial court erred in admitting the Government Analyst's report without calling the maker in contravention of Sections 48, 62 and 63 of the *Evidence Act* and further and having found that the Appellant was prejudiced when the trial proceeded in the absence of her Lawyer, I find that the Appellant's conviction was not safe.

28. In the circumstances of this case, it cannot be said that the Appellant was accorded a fair trial.

29. Consequently, I allow the appeal, quash the conviction and set aside the sentence.

30. The Appellant shall be set at liberty unless she is otherwise and for any other reason, lawfully held.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 19TH DAY OF DECEMBER 2022.

W. A. OKWANY

JUDGE