REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO: 13 OF 2018

ERASTUS MAINA KARANJA.....APPELLANT

VERSUS

MACHAKOS COUNTY GOVERNMENT.....RESPONDENT

(Being an appeal against the judgment delivered on 25th day of January, 2018 by Hon. C.K. KISIANGANI Resident Magistrate being Machakos County Government, Traffic Case No: 8 of 2017)

BETWEEN

MACHAKOS COUNTY GOVERNMENT.....PROSECUTOR

VERSUS

ERASTUS MAINA KARANJA.....ACCUSED

JUDGEMENT

1. The Appellant herein, **Erastus Maina Karanja**, was charged under the ***Machakos County Commuter Vehicles Act, 2015*** with three Counts. Of relevance to this appeal is Counts III thereof since the appellant was acquitted in Counts I and II under sections 215 and 210 of the ***Criminal Procedure Code*** respectively.

2. In the said Count III, the Appellant faced the charge of:

> ***Obstruction of County Officers contrary to section 18(1)(a) of the Machakos County Commuter Vehicles Act 2015 and punishable under section 2 of this Act.***

3. After the hearing the Appellant was convicted of the said offence and was fined Kshs 5,000.00 and in default to serve 2 months imprisonment.

4. Before the trial court two witnesses testified on behalf of the Respondent. According to PW1, **George Kiamba Madegu**, who was employed by the County Government of Machakos in the Enforcement Department, on 1st February, 2017 he was on patrol with his colleagues on Ngei Road near Susu centre. While there they found motor vehicle KCK 876 E loading passengers at the place yet there is no stage there. When they followed the motor vehicle, it took off. They waited for it to come back but it never returned that day. They however impounded the vehicle on 3rd February, 2017 at the bus park the motor vehicle came.

5. According to PW1, he and **Martin Mumo** introduced themselves to the driver and told him he was under arrest for loading passengers at a place not permitted. According to PW1, being a passenger motor vehicle the driver ought to have loaded passengers at Machakos bus park not anywhere else. They arrested the driver, the Appellant herein, and charged him before court. According to PW1, he did not know the Appellant prior to this case and he had no grudge against him. He testified that at Susu centre the motor vehicle had blocked the road.

6. In cross-examination, PW1 stated that they were patrolling using their official motor vehicle KBX 550 which was being driven by **Caleb Muisyo Musyimi** and they were 3 people with him being seated in the front right side. When they saw motor vehicle KCK 876E, they were stationed on the opposite side of the road where they had parked about 5 metres from Susu centre. According to him, motor vehicle KCK

876E found them, stopped then picked passengers and took off at high speed after the driver saw their motor vehicle. Since the vehicle had passengers they did not pursue it as doing so could have caused an accident and they knew the vehicle would return. From where they were, they were able to see its registration number which all of them read.

7. It was his evidence that they saw accused driving the motor vehicle though he did not know him prior to this case. He stated that the owner was required pay the necessary charges amounting to Kshs 6,200/= to the County, before the vehicle could be released. It was to pay Kshs. 6,200/=.

8. In re-examination, PW1 stated that he clearly saw the registration number of the vehicle and wrote it down. According to him, they were in a red motor vehicle which was visible from far and when the Appellant saw it, he drove off.

9. PW2, **Martin Mumo**, a county enforcement officer, testified that 1st February, 2017 at around 4 pm he was on patrol on Ngei Road with PW1 using their official motor vehicle KBX 550, red in colour. While there they found motor vehicle KCK 876 E causing obstruction by picking passengers on the road at Susu centre. According to him, they tried to tell the driver of the motor vehicle to stop and tried to chase after it but the driver took off at high speed. They decided not to go after it because it was carrying passengers and just noted its registration number.

10. On 3rd February, 2017 they found the motor vehicle at the bus park and identified themselves to the driver by his work ID. He then told the driver that he was under arrest but he tried to resist the arrest. They called their colleagues for backup and compelled the driver to take the motor vehicle to their yard after which the driver, the Appellant herein, was charged with the offence of obstruction, resisting arrest and picking passengers in undesignated place. According to PW1, there is no stage at Susu centre though other motor vehicle pass through the centre. It was his evidence that he did not know the Appellant prior to this case and had no grudge against him.

11. In cross-examination, PW2 stated that they were on patrol with **George Matee** and the driver **Caleb Muisyo** in a vehicle which was assigned to them. According to him, before Ngei Road they were going round Kobil Petrol Station but they did not stop anywhere. Ii was his evidence that he was seated in front near the driver while PW1 was seated at the back. According to him, the accused's motor vehicle had stopped at Susu centre and they saw the motor vehicle in front of them from Kobil. While they were on the left side, the *matatu* was on their right facing Nairobi direction while they were driving towards Machakos. In his evidence when PW1 who was seated on the right side behind the driver told the driver to stop and park the vehicle on the side, the driver instead took off. They turned their vehicle and then went after it for about 4kms up to Machakos boys but the motor vehicle was at high speed and they decided to turn back after noting its registration number. It was his evidence that on 3rd February, 2017 when they impounded the vehicle it was with the Appellant who drove it after they compelled him to do so. He reiterated that they called 3 officers to assist in the arrest after which the Appellant accepted to drive when he saw other officers coming.

12. In re-examination, PW2 stated that their motor vehicle windows were not tinted and he saw the motor vehicle clearly. According to him, though he talked to the driver normally he refused to stop.

13. In his sworn evidence the Appellant stated that he was a PSV driver operating in Machakos. On 3rd February, 2017 he was driving motor vehicle reg. no. KCL 876E from Nairobi to Machakos and at around 8.30 am. he was offloading passengers at the Bus Park when 2 men went to him, introduced themselves as county officers and informed him that he was under arrest without disclosing the reason for his arrest. Two of them got inside the vehicle and told him to take the motor vehicle to the county offices which he did. According to him, he was with the conductor, one **Mwangi**. He denied that he refused to the county offices. According to him, the two officers informed him that two days before that he had carried passengers from an undesignated place. It was however his evidence that on 1st March, 2017, he was not at work as it was his off day and he was not carrying passengers that day.

14. According to the Appellant, he was informed that the motor vehicle could not be released since it was an exhibit. He was however, released on cash bail of Kshs. 10,000/=. He disclosed that the witnesses who testified are the ones that arrested him and he did not know who was driving on 1st March, 2017 since they work on contracts.

15. In cross-examination, the Appellant stated that he was arrested on 1st March, 2017 and was later told why he had been arrested. According to him, on 1st March, 2017 was the first time he was driving that motor vehicle but he had worked in Machakos for 2 months. According to him, he was a casual worker and was not paid monthly.

16. In re-examination, he stated that the day he was arrested was his first time of seeing the officers.

17. The Appellant called **John Gachiri Nganga** as DW2, whose testimony was that he was the driver of Motor Vehicle Reg. No. KCL 876 E on 1st February 2017 and that on that day he drove the motor vehicle from Thika, used the Bypass to Cabanas and then proceeded to Kitui and latter drove the motor vehicle to Thika and at no stage did he drive to Machakos.

18. DW3, **Ann Waichungo**, stated that she is the Owner of the Motor Vehicle Reg. No. KCL 876E and that on 1st February 2017 the said moto vehicle was driven by DW2 and not the accused person. She stated that the accused person is not her permanent employee and she hires drivers on a need to basis. She stated that the motor vehicle did not go to Machakos on that day but was driven from Thika, used the Bypass to Cabanas and then proceeded to Kitui and latter to Thika.

19. In her Judgement, the learned trial magistrate's findings in respect of count III was that the prosecution's witnesses were consistent and clear in that the Appellant resisted impoundment and that they had to call for reinforcement and that it was after the Appellant saw the other officers that he agreed to drive the vehicle to the county offices. For that reason, she found that the defence had not created doubts in that evidence and found that the prosecution had proved its case beyond reasonable doubt.

Determination

20. I have considered the evidence on record as I am duty bound to do. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I have also considered the submissions made by the parties herein.

21. In the case before the trial court, it is clear that the only evidence with respect to Count III came from PW2 since PW1 said nothing about the Appellant obstructing them. In his judgement, the learned trial magistrate seems to have believed that both PW1 and PW2 gave evidence in respect of this count since according to her, the prosecution's witnesses were consistent and clear in that the Appellant resisted impoundment and that they had to call for reinforcement and that it was after the Appellant saw the other officers that he agreed to drive the vehicle to the county offices. This was clearly a misdirection since only one witness, PW2, testified along those lines. The other officers who were called to reinforce PW1 and PW2 never testified in the case. Accordingly, it was the evidence of PW2 against the evidence of the Appellant. Apart from the finding that the evidence the prosecution's witnesses were consistent and clear, there was no other reason given by the learned trial magistrate as to why she preferred the evidence of PW2 to that of the Appellant.

22. In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

23. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."***

24. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated that:-

> **"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

25. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation: -

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."**

26. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

27. **Mativo, J** in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."**

28. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated: -

> **"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."**

29. In this case the prosecution's evidence was clearly at par with that of the Appellant since it was simply an assertion by one witness and denial by the other. Even if this was a civil case, the prosecution's case would not have met the threshold since as was held by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

30. Having considered the evidence adduced by the prosecution in this case, it is my finding that the Prosecution failed to prove its case beyond reasonable doubt.

31. Consequently, the Appellant ought not to have been convicted in Count III. I therefore find merit in this appeal which I hereby allow, set aside the Appellant's conviction and quash his sentence. He is at liberty unless otherwise lawfully held.

32. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 25th day of February, 2020.

G. V. ODUNGA

JUDGE

In the absence of the parties.

CA Geoffrey