REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO 78 OF 2020

LUCY NYAMBURA WARORUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence arising from Criminal Case No 3473 of 2014 Makadara Law courts)

JUDGEMENT

1. The appellant was tried and convicted and sentenced to serve five (5) years imprisonment with effect from 24th January 2020, on the charge of theft of motor vehicle contrary to Section 268 of the Penal Code, the particulars of which were that on the 18th day of July 2014 at Kitengela within Nairobi County jointly with others not before the court, stole motor vehicle Reg. No. KBE 653L Toyota Shark valued at Ksh.1.1 million the property of Joseph Kago.

2. By a chamber summons dated 17th January, 2020 but filed in court on 27th May, 2020 in Misc. Appl. No. 159 of 2020 the appellant applied for and was granted leave to file an appeal against the said conviction and sentence.

3. The appellant on 2nd June, 2020 filed this appeal and raised the following grounds of appeal:

a. The trial Magistrate erred in law and in fact in failing to find that the prosecution failed to establish and build a prima facie case as required in law.

b. The Honourable trial magistrate erred in law and fact by not finding that the elements and components of the offense alleged against her were not proved at all.

c. The trial magistrate erred by relying on misinterpreted evidence in convicting and sentencing her based on distorted evidence which was not on record.

4. When the appeal came up for hearing before me, the appellant who was unrepresented made oral submissions in support of her grounds of appeal, while Ms Ndombi for the state opposed the appeal and supported the conviction and sentence.

SUBMISSIONS

5. It was submitted by the appellant that there was contradiction on the date of the alleged commission of the offense as the key prosecution witness one ANN NDUTA stated that it was on 19th while other witnesses stated that it was on 18th July 2014. She submitted further that there was no documentary evidence tender to show that PW1 had been drug nor that PW2 took him to the hospital. It was submitted that one crucial prosecution witness, Joseph Amanda who reported the case to the police station was not called to testify.

6. It was submitted further that there was contradiction between the evidence of **PW1 PATRICK MACHARIA** and PW4 on the number of beers they took and further on the person who ordered meat and whether PW1 was drugged while eating the said meat. It was her contention that there was contraction on how the identification parade was conducted, neither was there any documentary evidence to prove that PW1 had been drugged. She finally submitted that no call data records were produced to show the numbers that had called PW1.

7. On behalf of the State Ms. Ndombi submitted that the appellant was properly identified by PW1 as the person who had contacted him on

18th July, 2014 and whom he met with at ROYSAMBU before proceeding with her to Kitengele. It was submitted that he had sufficient time with her to enable him identify her. It was submitted that the identification parade was properly done at which the appellant was positively identified.

8. It was contended that all the elements of the offense were proved as the motor vehicle was in the possession of PW1 who was employed by PW2 who made a report to the police on 20th when the same was not returned to him. It was submitted that the appellant and other two people had intended to defraud the driver and the owner of the motor vehicle.

9. It was submitted that the trial court properly analysed the issue of identification and the elements of the offense and that the prosecution only called the witnesses who were relevant to its case. It was stated further that there were no contradictions as regards the dates with the appellant being properly identified by PW1 at Tea room and at an identification pared conducted thereafter.

10. In a rejoinder, the appellant offered her mitigation to the effect that she was a single mother of three girls to whom she was the sole bread winner. She stated that she suffers from high blood pressure and was pregnant at the time of arrest which pregnancy she lost, she was a first offender who had not been in conflict with the law before and therefore sought to be given a second chance, having undergone training while in prison.

11. Ms Ndombi on her mitigation stated that the sentence of five years was within the law and therefore lawful considering the offense and how it was carried out.

12. This being a first appeal, the court is under legal duty to re-evaluate the evidence tendered before the trial court to come to its own decision, though giving an allowance to the fact that it did not have the benefit of seeing and hearing witnesses as was stated in the case of **OKENO v REPUBLIC [1974] EA** and as applied with approval by the Superior Courts in Kenya. **PROCEEDINGS**

13. The prosecution case was that PW1 Patrick Macharia was on 17/7/2014 called by the accused who stated that she had been given his number by a friend and wanted to hire the subject motor vehicle. The following day the appellant went to him together with a man she identified as her brother and they agreed on the hire to ferry her family to Machakos. While enroute to pick the family, the accused gave her alleged brother one orbit and one to the witness. At kitengela they entered into an hotel to wait for the family members where he took one bottle of pilsner at 1.00pm only to be woken up at the hotel room at 8.00pm when he found the motor vehicle missing. He later reported to the police station and through a friendly police officer, the appellant was called and he was able to identify her when they met. It was his evidence that the said officer told him that he had earlier arrested the appellant on drug related offense.

14. PW2 BETH WANJA THOITHI stated that on 18/7/2014 her husband Joseph Kamande Kago called her and informed her that their matatu had not been returned for the day and that PW1 had earlier text him that he was taking passengers to mlolongo as was his practise to do so. she called him but his phone was off. On 20th they found the driver who was badly injured and they reported the matter to the police. She later on accompanied the driver when he went to identify the appellant and that their motor vehicle had not been recovered. In cross examination she stated that the officer who arrested the appellant came from Nanyuki and had earlier arrested the appellant whose contact he had, on a related offense.

15. PW3 PC HENRY GITHIGA corroborated the evidence of PW1 and2 and stated that on the very day he had arrested the appellant having drugged someone else based on the description he gave him and that she was residing at Githurai, he called the lady and they agreed to meet at tea room where she was positively identified and arrested. In cross examination he stated that he got her number from another case where she had drugged a man and stole Ksh.15,000 from him.

16. PW4 ANN NDUTA MWANGI stated that she was at the material time working at Midas hotel in Kitengela when the appellant went there at 12.00 and placed an order, it was her evidence that the appellant was with two men. Later on PW1 was found in one of the rooms and when he woke up he asked where the rest were. she confirmed that she had earlier served him beer. She later on attended an identification parade and was able to identify the appellant, whom she could identify from her white teeth and voice. In cross examination she stated that the appellant went to the hotel on 19th and that she was not there when they booked for the room which was in PW1's name.

17. PW5. CORP. MICHAEL OTIENO on 20th received the report from PW2 and recorded her statement. On 26th she called him with information that the appellant had been positively identified, he interrogated her and she denied the allegations and stated that she had gone to her daughter's school which he confirmed was false when he visited the school. He later visited Midas hotel and recorded witness statements and found identification number of the accused who was still at large and confirmed that they had booked room No. 9 where PW1 was found when he lost conscious. The said room was in the name of one George Gichuki whom the accused said was her friend whereas PW1 said that he was her brother. He conducted an identification parade where the appellant was identified.

18. When put on her defence the appellant gave sworn statement and stated that she had a boyfriend called Gitonga who was living in Nanyuki whom she had gone to visit in the month of July who refused to give her money which she had requested from him. On 17th he called her to inquire her whereabouts and she told him that she had gone to visit her daughter. She stated that the following day her boyfriend whom she knew as "baba Caro" called her for a meeting and that is how she was arrested and taken to nanyuki and settled the matter with Gitonga and returned back to Nairobi. When she called baba Caro, he demanded sex from her but she declined. On 26th he called her again and that is where she was identified by PW1 and subsequently arrested.

19. DW2 RWI a minor confirmed that the police went to her school and asked her whether the appellant had visited her and she confirmed that she had visited on the academic date. **DW3 VICTORIA NDUGWA MULWA** stated that the appellant who was her friend, on 17th July, 2014 told her that she would be visiting her daughter in school and on 18th she informed her that she was on her way to school, the following day she informed her that she had been arrested.

DETERMINATION

20. From the submissions, proceedings and memorandum of appeal, I have identified the following issues for determination;

a. whether the appellant was positively identified.

b. whether the prosecution case against her was proved beyond any reasonable doubt.

c. whether the sentence mated out was just and appropriate.

d. what order should the court make on this appeal.

21. On the identification of the appellant, from the evidence on record it is clear that the same was first identified by pw1 at Tea room in Nairobi having given her description to PW3 who confirmed that they matched those of a lady he had earlier arrest on a charge of drugging someone in Nanyuki. The appellant in her defence confirmed the Nanyuki case. The same was thereafter identified by PW4 who had served her at Midas Hotel at an identification parade organized by the investigating officer upon her arrest. I am therefore satisfied that the appellants identification was free and safe from error. Both prosecution identifying witnesses had been with the appellant for a reasonable period of time and PW1's description of the appellant was independently corroborated by PW3. The appellant alibi defence was disapproved by the prosecution evidence and therefore this ground of appeal also fails.

22. The appellant had in her defence raised an alibi defence that on the material day she had gone to visit her daughter DW2 in school but that defence was displaced by the evidence of the investigating officer who went to school and confirmed that there was no academic visit on the particular day, the appellants daughter stated that her mother had visited her in school on the academic day but did not give the day and the date of the visit while DW3 did not accompany her and therefore cannot confirm that she was not within the crime scene on the particular day.

23. As regards the ground of inconsistency of the prosecution witnesses, from the proceedings, the inconsistencies as regards the number of beers they took and the dates of the offence, were of very minor nature that did not go to the root of the prosecution case. In dismissing the same the trial court was guided by the case of **TWEHANGANE ALFRED V UGANDA CRIMINAL APPEAL NO 139 of 2001** reported in **[2003] UGCA6** and therefore find no fault with his determination thereon.

24. On proof of the prosecution case, in convicting the appellant the trial court had this to say **"the essential element in the charge is that the person accused fraudulently converts a property which is capable of being owned so as to deprive the owner of such property as was held in the case of THE REPUBLIC V JONES (1976) KLR1".** The appellant contacted PW1 on an alleged hire of the subject motor vehicle, they were placed together by PW3, PW1 confirmed the loss of the said motor vehicle which was last seen with their driver at Midas hotel where he was later on found in a room booked in the name of the man who was with him and the appellant. It is therefore clear that the prosecution case against the appellant was proved beyond reasonable doubt.

25. On the issue of failure to call the JOSEPH KAMENDE as a witness, it is clear that his evidence was covered by that of his wife PW2 with whom they made a report to the police and who produced document on ownership and loss and therefore his evidence would not have been material and no adverse inference can be made in favour of the appellant.

26. I therefore find no merit on the appeal against conviction which I hereby dismiss.

27. On the issues of sentence, as submitted by Ms Ndombi, sentencing is at the discretion of the trial court and the appellate court would only interfere with the same where there is material misdirection by the trial court as was well stated by Odunga J in the case of **SIMON KIPKURUI KAMORI V REPUBLIC [2019] eKLR** thus: -

"Since the appellant is only appealing against sentence, it is important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. 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"

6. Similarly, in Mokela vs. 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."

7. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. 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."

8. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

9. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. 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."

28. Was the sentence herein manifestly excessive so as to be interfered with? the sentence provided for under section 278A is an imprisonment of up to seven years, the appellant was sentenced to five years' imprisonment, the trial court having taken into account her alleged pregnancy and the fact that she had been out of bond throughout the period of trial. The court was alive to the fact that the owner of the motor vehicle lost his livelihood while his driver almost lost his life. The sentence herein can therefore not be said to be unlawful.

29. However I have looked at one aspect of the case which the trial court did not take into account, the evidence of PW3 that they had earlier arrested the appellant on a case where she had drugged a man in nanyuki which in her defence she tried to explain was as a result of love gone sour and therefore come to the conclusion that she is someone in need of rehabilitation in addition to sentence meted out which was retributive and restorative in nature, I would therefore retain the five years sentence subject to the last two being on probation so as to rehabilitate the appellant further and to integrate her in society and to teach her that crime does not pay, taking into account the fact that she is a single mother of three girls.

30. In the final analysis I hereby dismiss the appeal on conviction but allow the appeal on sentence as regards mode of serving the same and substitute the same as follows, five years to be served as follows; the first three (3) imprisonment and the next two (2) thereafter on probation. The sentence shall run from the date of conviction.

31. The parties herein have right of appeal and it is ordered.

Dated, delivered and signed at Nairobi this 16th day of September, 2020

Through Microsoft Google Teams.

…….

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the Respondnet

Appellant in person

Court assistant: Karwitha