REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 14 OF 2019

GLADYS WANJIKU KANYOTU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the sentence of Hon. D.N Sure (RM) of the Subordinate Court sitting at Wang'uru Law Courts in Criminal Case No. 475 of 2017, delivered on 3rd August 2018.)

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J U D G M E N T

1. The Appellant was convicted of the offences of stealing of a motor vehicle contrary to **Section 278 A** of the **Penal Code** and sentenced to five years in imprisonment and Stealing Goods in Transit contrary to **Section 279 (c)** of the **Penal Code** and sentenced to three years imprisonment in ***Criminal Case No. 475/2017 before the Resident Magistrate's Court at Wang'uru***. The sentence was ordered to run consecutively.

The Appellant was dissatisfied with both conviction and sentence and lodged this appeal which had initially raised twelve grounds. The appellant later filed amended grounds of appeal and the submissions. She raised the following grounds:-

1. That the honourable trial magistrate erred in matters of law and fact by failing to find that the appellant was not identified conclusively to be one of the persons(s) that committed the alleged offence charged with.

2. That the honourable trial magistrate erred in matters of law and fact by failing to find there were material contradictions and inconsistences which went to the root of the whole of prosecution's case.

3. That the honourable trial magistrate erred in matters of law and fact by failing to find that part of the evidence as adduced by the prosecution failed for non-compliance with Section 106 of the Evidence Cap 80.

4. That the honourable trial magistrate erred in matters of law and fact by failing to find the medical report that was to corroborate the prosecution's case was not produced in accordance with Section 77 of the Evidence Act Cap 80.

5. That the honourable trial magistrate erred in matters of law and fact by failing to find that my mode of arrest was greatly unjustified by evidence.

6. That the honourable trial magistrate erred in matters of law and fact by failing to find that an essential witness needed to corroborate the prosecution's case was not called upon to give evidence.

7. That the honourable trial magistrate erred in matters of law and fact by no giving regard to the cogent defence case.

8. That the honourable trial magistrate erred in matters of law and fact by meeting out a sentence that was both harsh and excessive in the circumstances underlying.

She prays that the conviction be quashed, the sentence be set aside and she be set at liberty. The brief facts of the case are that the appellant was jointly charged with another before the Resident Magistrate's Court at Wang'uru with the aforementioned charges. The complainant Linus Kinyua Nyaga (PW2) is a businessman who does transport business using lorries. He was the registered owner of motor vehicle KBN 726 make Mitshubish which he bought in July 2015 at Ksh.3.3 million. He had hired a driver by name Angelo Gitonga Njagi in 2016 to drive the said lorry. On 17th March 2017 PW1 sent his driver Angelo Gitonga (PW3) to go to Molo and carry some timbers which he was

supposed to deliver at Athi River. The driver dropped the timber at Athi River on 18th March 2017 and proceeded to Ruiru where he was supposed to collect some metals, Y10-30 pieces and hoop iron 4. After that he was supposed to collect 750 pieces of stones at Ndarugo. The value of the goods which the driver was supposed to load in the lorry was Kshs.40,783/. The vehicle was fitted with a car track device which PW2 kept checking to monitor the movement of the vehicle. At 950-10. 00pm the vehicle was at Mwea and on asking the driver why he had stopped, he said he had stopped to stretch himself. He later received a report that his driver had stopped at Mugumo and was with other people at the bar and when he went out for a short call he found the car keys which were on the table missing and after that he could not remember what happened as he found himself in a lodging locked from outside.

According to the driver, Angelo Gitonga Njagi as he was during from Nairobi before this incident he was stopped by two people at Makutano a man and a woman called Gladys who requested him for a lift and he accepted. He dropped them at Mwea. Gladys who was the 1st accused informed him that she does business of selling rice and they exchange phone numbers. He kept communicating with the appellant and on 17th March 2017 Gladys called him and she said she was in Juja and wanted a lift. PW3 said he had loaded the items which PW2- had sent him to buy. He met the appellant at Witeithie and gave her a list upto Mwea. PW3 decided to have a meal and entered a hotel. The appellant followed him and said she was meeting her friends at the hotel. The appellant met two people at a table and introduced one of them as Agnes and another woman. PW3 sat with them. There was electricity light in the bar and he was therefore able to see the appellant. PW3 decided to make a phone call and went outside. He left the car keys on the table. When he returned, he continued drinking abut after that he did not know what happened because he found himself in the lodging the next day and the room was locked from outside. His phone, car keys and driving licence were missing. The manager of the lodging opened for him. He then telephoned PW2-and told him what had happened. The vehicle was also missing from where he had parked it. He went to Wang'uru Police Station and reported the matter. Police conducted investigations and managed to arrest the appellant. They also recovered mobile data from Safaricom which showed that the appellant had communicated with the 2nd appellant on the material day and they were together at Mugumo bar at Wang'uru. The appellant was identified by the driver and the barmaid as the one of those who was with the driver at Mugumo bar where he was drugged and locked up in a lodging room. The appellant was then charged.

The appellant gave unsworn defence and denied the charges.

The trial magistrate found that the prosecution had proved the case against the appellant beyond any reasonable doubts and convicted her. The appellant filed submissions. For the State, it was submitted that the Appellant was properly convicted. The court was urged to dismiss the appeal.

I have considered the appeal. This being the 1st appellate court, I have a duty to evaluate the evidence which was tendered before the trial court and come up with any own independent finding while bearing in mind that the trial magistrate had an opportunity to see the witnesses when they testified and leave room for that. This was the holding in ***Okeno-v- Republic (1972) EA 32.*** I will first consider the issues raised in the submissions by the appellant. The appellant submits that she was not properly identified. She contends that the witnesses did not give her description to the police and no identification parade was conducted. That the trial magistrate did not interrogate whether the circumstances favoured positive identification. I have considered the ground and the submissions. I find that the testimony of PW3 was that there was electricity light in the bar and he conversed with the appellant. The appellant was also identified by PW7. Serina Wambui the bar maid in the bar who was serving them. They had been in the bar for sometime and PW3& 7 could not have failed to see her and identify her. To crown it all, there was corroboration from the mobile phone data tendered by PW6 Daniel Hamisi which showed that the appellant was at Mugumo Bar that night. The issue of her identification is a none issue as PW3 was familiar with the appellant having seen her previously before that day.

The Court of Appeal in the case of ***Peter Musau Mwanzia -v- Republic (2008) eKLR*** stated as follows in the issue of recognition:

> ***" In the well known case of Republic – v- Turnbull (1976) 3 All E. R 549 at page 552 it was stated;***
>
> ***" Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***
>
> ***We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger to him and thus to put a defence between recognition and identification of a stranger…….. such knowledge need not be for a long time but must***
>
> ***be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."***

The circumstances must be such that the possibility of mistakes is eliminated. In this case the PW2 had met the appellant the previous day. She followed her to the hotel. Phone data confirmed that they had communicated severally. There was no possibility of mistake.

The 2nd issue is that there were contradictions in the evidence. The law on this ground is that the court will consider grave contradictions which tend to cast doubt on the testimony of the witnesses. On the other hand the court will ignore minor contradictions and inconsistences. The Court of Appeal in the case of ***Erick Onyango Odeny -vs- Republic (2014) eKLR*** stated;

> ***" Nor do we think much turns on the alleged contradictions for the time of the commission of the offence. The trial court after hearing all the evidence accepted that the offence was committed at about 7 pm in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in Twehangane Alfred -v- Uganda, Criminal Application No. 139/2001 (2003) UGCA 6 it is not every contradiction that warrants rejection of evidence. As the court put it:***

With regard to contradiction in the prosecutions case the law as set out in numerous authorities in that grave contradictions unless satisfactory explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

The appellant submits that there were contradictions on the time PW3 had worked for PW2. According to PW2 he had hired PW3 in June 2016. As for PW3 he said he had worked for PW2 for nine months. There is clearly no contradictions. The offence was committed in March 2017 and if PW3 was hired in June 2016 at the time the offence was committed PW3 had worked for PW2 for nine months. There are no material contradictions in the evidence adduced by the witnesses.

The case of ***John Mutua Musyoki -vs- Republic (2017) Criminal 11/2016*** is not relevant. There are no material contradictions which have cast doubts in the prosecution case. The test of as to whether the contradictions and inconsistencies if any are fatal to the prosecution case is whether they have cast doubts

in the prosecution case to the extent that the reasonable conclusion is that the witnesses were not telling the truth. If they show that the witnesses were deliberately not telling the truth, doubts in their evidence will be given to the accused.

In these case there are no material contradictions nor is there anything which suggests that the witnesses were not telling the truth. Minor contradictions must be ignored. The ground lacks merits. The appellant has argued ground 3&4 together. The grounds touch on admission of electronic evidence under **Section 106 of the Evidence Act** (Cap 80 of the Laws of Kenya) and **Section 77 of the Act**. The applicant submits that the mobile data communication that was relied on by the prosecution to base the conviction was ***"not inadmissible"*** (sic) for none compliance with the **Evidence Act**. She may have wanted to argue that the evidence was not admissible. The appellant has relied on **Section 106B (4) of the Evidence Act**. The appellant has referred to the evidence of PW6 Daniel Hamisi. The witness stated that –

" I did a certificate dated 13th February 2018 confirming that reports have been generated by way of printing from a computer which was and still is under my control."

She submits that the witness did not comply with **Section 106** of the **Evidence Act** as he was required to show the particulars i.e the make and serial number of the computer from which he generated the information to enable tracing if need arose and its working condition.

Section 106 of the Evidence Act is elaborate on the manner the electronic evidence has to be adduced in court.

Section 106B (4) provides:-

" In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following–

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it."

In this case the witness Daniel Hamisi (PW6) testified that he works with Safaricom Security Department and his duties are to process requests for law enforcement agencies. He produced a letter from Safaricom dated 13th February 2018 showing that he was authorized to appear in court. He produced a certificate dated 13th February 2018 confirming that the reports had been generated by way of printing from computer which was and still under his control.

2. The requirements for admission of electronic record which are printed on paper are provided under **Section 106 B (1) and 2;**

" (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible."

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following–

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities."

I have perused the certificate which was produced by PW6 and I find that it has complied with requirements under **Section 106 B (2)** and **(4)** of the Act which I have quoted above. The certificate produced as exhibits 12 says as follows;-

1. The computer printout containing the documents above were produced by computer during the period in which the computer was regularly used to store or process information for the purposes of activities regularly carried on over that period by me and I am duly authorized to extract and print such documents from the computer and was generated by way of printing from a computer which was under the remained under my control throughout the process. I am also duly authorized to produce these documents in any judicial proceedings within and outside Kenya.

2. The computer -**DTS FH04E015** was, during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived.

3. The computer was operating properly, or if not, any respect in which it was not operating property was not such as to affect the production of the documents or the accuracy of their content.

4. The information contained in the documents is reproduced or derived from data supplied to the computer in the ordinary course of business.

5. The records presented are true copies whose soft copies are available.

I find that there was full compliance with the law on production of electronic evidence. The certificate meets the conditions set out under **Section 106 B (2)a & b and (4).** The evidence was admissible. There was no err by the trial magistrate reliance on the evidence of PW6. The authorities cited by the appellant are not relevant.

3. On non- Compliance with **Section 77 of the Evidence Act,** the Appellant has taken issue with failure to call the person who filled the treatment notes of the PW3. The treatment notes were produced by the investigating officer. The appellant who was ably represented by defence counsel Ms Magara did not object to the production of the treatment notes and the discharge summary from Ngurubani Medical Center.

Section 77 of the Evidence Act provides:-

(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."

The Section gives court discretion to summon the document examiner. Medical officer etc for cross-examination. There is no requirement that the witnesses who produces the report on behalf of another be conversant with handwriting of the maker of the report. The section refers to a report under the hand of a medical practitioner. These are reports like Postmortem Forms and other medical reports containing the opinion of the medical practioner like in a postmortem report giving an opinion on the cause of death or in a medical report forming an opinion on the nature of the injury and/or the cause of the injury. My view is that treatment notes do not fall in the category of a report envisaged under **Section 77(1) of the Evidence Act.** The notes are used when the report is being filled. The treatment notes were produced to prove that PW3 was treated. No analysis or medical investigation was done to ascertain the nature of the drug that he may have taken.

Be this as it may, **Section 77 of the Evidence Act** allows the production of a medical practitioner's report in criminal proceedings without the requirement that the witness be conversant with the handwriting of the maker of the report. The **Section, 77(1)** is broad as it states, "***may be used in evidence"***, this means that it may be produced by the investigating officer in a case, a person who was given the report by the practitioner where the practitioner worked or the person who maintains the records at the hospital. The court is given discretion to summon the maker. This gives the accused an opportunity to make an application for the maker to be called for examination. This ensures the protection of the right of the accused person to challenge evidence as provided under **Article 50(2) K** of the **Constitution**. The Court of Appeal in the case of ***Ogeto -V- Republic (2004) 2 KLR 14 at 17*** where at the trial the postmortem form was produced by a police corporal under the section court states:

"The appellant was represented by counsel at the trial who did not object to the act and the court did not see it fit to summon Dr. Ondungo Steven for cross-examination. In our view the postmortem report was properly admitted in evidence in accordance with the law."

Similarly in the case of **Soki- V- Republic (2004) 2 KLR 21** the Court of Appeal stated that-

" Section 77(1) allows any document purporting to be a report under the hand of a government analyst medical practitioner or any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer as was done in this case provided the accused does not object."

The Court of Appeal has settled the law on the production of reports under **Section 77(1) of the Evidence Act.**

I find that the appellant did not suffer any prejudice. The document was produced without any objection. The document was admissible in evidence. The ground is without merits.

4. The appellant submits that the mode of arrest was unjustified. Her contention is that the stolen property was not recovered. The appellant was not charged with handling stolen goods. The case of ***Joseph Kisilu Mulinge -V- Republic (2014) eKLR*** which the appellant has cited is not relevant. The evidence by the prosecution was that the appellant lured the PW3 by be-friending him and finally drugging him after which she and others stole the lorry together with goods which it was ferrying. The evidence tendered proved the charge against the appellant to the required standard, that of beyond any reasonable doubts. It was immaterial that the lorry and the goods were not recovered from the appellant.

The appellant has submitted that vital witnesses were not called. It is trite that no particular number of witnesses are required for the proof of a fact in the absence of requirement of the law. **Section 143** of the **Evidence Act** provides:-

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

The is nothing to show that the said ***'soldier'*** who was not called would have given adverse evidence to the prosecution case. The prosecution tendered sufficient evidence to prove the charges. Failure to call the said ***'soldier'*** was not fatal to the prosecution case.

5. The appellant gave a statutory statement of defence which was not given on oath. The defence was a mere denial. The trial magistrate considered the defence and rejected it.

6. Having evaluated all the evidence which was tendered before the trial magistrate, I find that the conviction was based on cogent and credible evidence. I find that that the appeal on conviction is without merits.

On sentence, the appellant submits that the sentence was harsh and excessive. She takes issue with the fact that the trial magistrate passed a sentence to run a consecutively and yet the offences were committed in the same transaction. She has relied on **Section 14 of the Criminal Procedure Code** and the holding in the case of ***Ogolla S/o Owuor -V- Republic 1954 E.A.C.A.***

I have considered the submission. It is trite law that sentencing is the discretion of the trial magistrate or Judge and an appellate court will not normally interfere with the sentence unless that sentence is manifestly excessive, or that the trial court overlooked some material factors or took into account some irrelevant matters or acted on a wrong principle.

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

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."

The appellant was charged under **Section 278 A of the Penal Code**. It provides:-

" If the thing stolen is a motor vehicle within the meaning of the Traffic Act the offender is liable to imprisonment for seven years."

On the 2nd count, the appellant was charged with Stealing Goods in Transit contrary to **Section 279 (c) of the Penal Code.** It provides:-

" If the offence is committed under any of the circumstances following that is to say-

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, the offender is liable to imprisonment for fourteen years."

The sentence passed was in accordance with what is provided for the offences the appellant was charged with.

1. The question that the court should determine is whether the trial court erred in principle. On the application of consecutive as opposed to concurrent sentencing In ***Peter Mbugua Kabui vs Republic [2016] eKLR*** the Court of Appeal stated as follows:

> ***"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."***

Section 14 of the Criminal Procedure Code provides as follows:

> (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

The Sentencing Policy Guidelines provide as follows:

> ***7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.***
>
> ***7.14 The discretion to impose concurrent or consecutive sentences lies in the court."***

There is nothing to suggest that the consecutive sentence was unlawful but bearing in mind the general principle as espoused in *Peter Mbugua Kabui vs Republic [2016] eKLR* the offences were part of one transaction, as it is said the appellant committed the second offence on the same date as the first offence, and, the second offence was committed while they were in the act of stealing the motor vehicle.

My view is that the trial magistrate exercised her discretion fairly. The sentence in the second count was lenient and not excessive. I however find that a concurrent sentence would have been appropriate as the offences were committed in the same transaction.

I will exercise discretion and interfere with sentence only to the extent of ordering the sentences to run concurrently.

In conclusion:-

The appeal on conviction is without merits and is dismissed.

On the appeal on the sentence, I allow the appeal and set aside the order of the trial magistrate that the sentence to run consecutively. I replace it with an order that the sentence imposed shall run concurrently.

Dated, signed and delivered at Kerugoya this 12th day of Day of November 2020.

L.W. GITARI

JUDGE