



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 48 OF 2018

BENSON KYALO KISAVI.....APPELLANT

VERSUS

REPUBLIC.....1ST RESPONDENT

EXPORT CONSOLIDATION SERVICES LIMITED.....2ND RESPONDENT

(Being an Appeal against the ruling of Principal Magistrate's Court

at Kaloleni Hon. R. K. Ondieki (PM) delivered on 16th June 2016

in Criminal Case No. 74 of 2014)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

The appellant **Benson Kyalo Kisavi** now applies that the ruling of the Principal Magistrate Court at Kaloleni delivered by **Hon. Ondieki (PM)** on 16.6.2016 in **Criminal Case No. 74 of 2014 between Suleiman Dele Mwasura & 2 others** be set aside in its entirety on the following grounds:

- (1). The Learned Magistrate erred in law in failing to make a determination that under the provisions of the Companies Act as well by the celebrated case of Salomon vs Salomon the 2nd respondent herein is a separate entity from the complainant in this case.***
- (2). The Learned Magistrate erred in law and in fact in failing to make a determination that the evidence that was adduced during the hearing of the main trial was that a theft had occurred and property belonging to the complainant (M/s. African Resources Limited) and the complainant's (not the 2nd respondent's) goods were stolen.***
- (3). By coming to the decision to release the tyres to the 2nd respondent on the grounds that the appellant did not exhibit anything to show that he deals with tyre business leave alone running any related business the Learned Magistrate failed to appreciate the fact that witnesses during the main trial gave evidence that the tyres were removed from the appellant's shops and/or shops related to the appellant.***
- (4). Further by coming to the said decision to release the tyres to the 2nd respondent on the grounds on the grounds that the appellant herein did not exhibit anything to show that he deals with tyre business leave alone running any related business the Learned Magistrate failed to appreciate the un-rebutted averment in paragraphs 8, 9 and 15 of his affidavit sworn on 19th May 2016 that the police officers confiscated all the appellant's records and stock.***
- (5). The Learned Magistrate failed to take cognizance of the very important fact that though initially charged with robbery with violence, the charges against the appellant were withdrawn long before any of the witnesses gave evidence and the appellant was***

not charged with the offence of handling stolen property.

(6). The Learned Magistrate erred in law and in fact in relying on documents introduced to the court long after the main trial by persons who are not the makers thereof.

(7). The Learned Magistrate erred in law in relying on the authority of Kirpal Singh & Another –v- Republic {2006} eKLR wherein the respondent had been convicted as opposed to the instant case where charges against the appellant were withdrawn and the accused persons in the case were acquitted under Section 210 of the Criminal Procedure Code.

(8). The documents of alleged ownership adduced in evidence by the 2nd respondent are not absolute proof of ownership of the tyres.

(9). The Learned Magistrate erred in law in shifting the burden of proof of the ownership of the tyres to the appellant by reason of the appellant having been unlawfully arrested and his properties unlawfully confiscated.

(10). The Learned Magistrate erred in law in lowering the standard of proof required in criminal proceedings in a manner favourable to the 2nd respondent and prejudicial to the appellant.

Procedural history

On 6.3.2014, the appellant and two others were arraigned in court charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code with the following brief particulars: That on the night of 22nd and 23rd February 2014 at African Resources Limited, Mazeras Township Kaloleni Subcounty, within Kilifi county jointly with others not before court, being armed with dangerous weapons namely pangas, axes and iron bars robbed **Clinton Namonja Mukundi** assorted items, tyres, engine oil, spare parts, CCT cameras, desktop recorder, computers, golf kit, one engine lever, motor vehicle components. This charge was withdrawn on 21.5.2014. Initially he was charged with the alternative, the appellant was also charged with handling stolen goods contrary to Section 322 (2) of the Penal Code. On this the particulars were that on 4.3.2014, at Sega Market Majengo, otherwise in the course of stealing dishonestly retained twenty-nine (29) pieces of tyres size 315/80 x 22.5 knowingly or having reason to believe them to be stolen goods. Contrary to the initial indictment, before commencement of the trial, all charges against the appellant were withdrawn by the prosecution. He was therefore precluded in participating in the ensuing trial. Following a hearing before **Hon. Wewa** Principal Magistrate and upon considering the prosecution case she was satisfied that each of the other accused persons had no case to answer and therefore acquitting them under Section 210 of the Criminal Procedure Code.

What came up before **Hon. Ondieki** was the issue of the appellant and interested party seeking leave of the court for the tyres which formed part of the exhibits and evidence for the prosecution case to be released to him. In reference to the appellant application the Learned trial Magistrate considered a similar ruling argued and determined the issue of release of exhibits and preliminary objection on jurisdiction dated 6.3.2014.

Moving the court on the various grounds as formulated by the appellant was an attempt to re-open a shut case on identity of tyres which was part of the exhibits produced by the prosecution in support of the charge of robbery with violence contrary to Section 296 (2) of the Penal Code.

The real contention which brought the appellant to this court was to have a second bite of the cherry as a whole with regard to this contentious issue on the release of tyres to the complainant.

This court has also perused the record and satisfied itself that the application on other various exhibits was made and appropriately considered by the trial court as required by the Criminal Procedure Code. The appellant now comes to this court with effect on the same ground to appeal the release. These other grounds are mainly proportions to engulf the court strictly speaking on an academic treatise.

Is this valid or helpful? In my view the answer is no. This view is espoused and reflected in the record that the trial was duly concluded, whereas the appellant was no longer an accused person of primary concern to him are the tyres that formed part of the physical exhibits produced at the trial.

Determination

The Law on the duty of the first appellate court is plain as declared by the decisions of the **Eastern Court of Appeal in Pandya v R {1957} 335 and Ruwala v R {1957} EA 570.**

“The aggregation of the principles for the court to hear the case and reconsider the materials before the Learned trial Magistrate with such other materials as it may have decided to admit, and to carefully, weighing and considering it to draw its own inferences and conclusions.”

According to these principles there are differences between trial courts and an appellate court. In all trial courts basically consist where all claims and litigation commences depending on the constitutional and systems of courts in each jurisdiction.

For instance, Magistrate courts form the bedrock of all trials where the evidence is presented from witnesses, exhibits and other documentary materials are admitted in support of the charge or a civil claim. This is in contrast with an appellate court save in exceptional cases which the legal policy has designated that they double up as trial courts to hear and determine disputes by the Judge or group of Judges, with or without

necessity of witnesses.

Basically, for the appellant he finds himself before this court on an interlocutory issue involving exhibits.

In the instant case it was held by the trial court that the questionable tyres exhibits were duly considered an application under Section 177 (2) of the Criminal Procedure Code.

From that this court is able to discern from the record the links of recovery and handling of the exhibits in question details as to the place, date, time and to whom they were recovered was conclusively settled by the trial court. The final act done in criminal trials is the production of the exhibits in court by the prosecution witnesses as a basis of the indictment against the accused persons. This particular stage is mainly for identification and establishment of ownership or the connecting factor with the person found in possession.

The appellant has argued and submitted to this court that prior to his arrest he was a tyre dealer of longstanding and the confiscated exhibits formed part of his stock which ought to be restored back, following an order of acquittal by the trial court. The appellant also complained that he was not even charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code or handling stolen property under Section 322 (2) of the same Penal Code.

In conclusion therefore, the appellant contention up to this stage was to have any recovered tyre exhibits released to him as the owner who has suffered prejudice and injustice for the loss and damages. If that be so, the episode concerning the appellant concerns in the aforesaid exhibits is redrawn from the ruling of the trial court. The context appreciated by this court reflects that the chain of custody and recovery of the tyres had a unique identifying features and serial numbers which the complainant presented to the court for purposes of restitution.

Having reviewed the evidence and the clearer minimum of precision in the appellants Memorandum and the record two relevant lessons are relevant. First the issue of tyres and other directions on admission as exhibits and subsequent release to rightful owners.

To my understanding that is a direct jurisdictional fact of the trial court. Secondly, from a procedural history perspective this statutory function was faithfully performed by the trial court that acknowledged to identify the right of ownership and ordered for release thereof the exhibits as deemed in the Criminal Procedure Code.

Third, and most important the discretion having been exercised the exhibits left the jurisdiction of the court and the court cannot continue its adjudicative function without the subject matter in quo.

Forth, several relevant generalizations were made in the appellants brief Memorandum in the celebrated case of **Salmon v Salmon**:

“With regard whether M/s. African Resources Limited was true complainant to the criminal case to warrant an order of release and confer a benefit of the goods. In my view, the basic structure of Company Law and of it being sued or capable of suing is a branch of Law may it be under Civil or Criminal Law remains intact today over fifty years after its enactment. Companies are legal person capable of suing and being sued, and capable of committing crimes under the doctrine of respondent superior.”

The adequacy as to whether African Resources Limited was the actual complainant in the Criminal Case must have been weighed by the prosecution and the trial court in retaining the charge against the accused persons. The appropriateness of the applicability of the principle in **Salmon v Salmon (supra)** is a collateral issue and no weight can be given to it having been determined by the trial court. The primary purpose of this appeal is to determine the release of the alleged exhibits. Whether or not the company was a proper complainant to me as considered resjudicata.

From the time our Framers of our constitution, it is a principle of first importance. That an appellate court jurisdiction on appeal is Limited when it comes to interference of the decision by the trial court as held in **Bernard Kimani Gacheri v R CR Appeal No. 188 of 2000**. There is ample and undisputed evidence that the Learned trial Magistrate in the circumstances of the case did not overlook some material factor or took into account some wrong material or acted on wrong principles.

There was no evidence indicative of all those grounds enumerated by the appellant to urge this court to enter into an exploration with an aim of re-opening a fresh trial on new fronts on appeal is an exercise in futility.

The appeal is otherwise dismissed. That is the order of this court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF DECEMBER, 2020

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R. NYAKUNDI

JUDGE