



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 6 OF 2018

FERDINARD OKOTH KAGERA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. M. M. Wachira.

Senior Resident Magistrate in Migori Chief Magistrate's Court

Criminal Case No. 452 of 2016 delivered on 20/02/2018)

JUDGMENT

1. The Appellant herein, **Ferdinand Okoth Kagera**, was employed by Teita Estates Limited as a Turn Boy and at all material times to this appeal he was attached to Motor vehicle registration number KBZ 710E make Man which hauled Trailer registration number ZD 5874. I will henceforth refer to the same as '**the Motor Vehicle**' and to Teita Estates Limited as '**the Company**'. A co-accused who was also found guilty and convicted one **Kennedy Odhialo Sewe alias Owino** was the designated driver of the motor vehicle. I will refer to him as '**the driver**'.

2. The background of this appeal has that the Company's Transport Manager (PW5) tasked the appellant and the driver to deliver some cement in Homa Bay County on 03/06/2016 and thereafter stay thereat until 06/06/2016 when they were to proceed to Sony Sugar Company Limited factory at Awendo in Migori County and load some bags of sugar for delivery to a client, KP Investments, at Nanyuki. PW5 however could not get the appellant and the driver over their phones on 06/06/2016 until 08/06/2016 when the appellant called and informed him that they had been hijacked on their way to Nanyuki after loading the sugar. PW5 immediately asked his counterpart, the Human Resources Manager (PW1) to switch off the motor vehicle which PW1 spontaneously did so using the motor vehicle tracking system.

3. The matter was reported to the police and upon completion of investigations the appellant, the driver and one **Adrew Mokaya Manoti alias George** were jointly charged with the offence of **Stealing Goods in Transit** contrary to **Section 279(c)** of the **Penal Code**, Cap. 63 of the Laws of Kenya. The appellant and the driver jointly faced an alternative charge of **Neglect to Prevent a Felony** contrary to **Section 392** of the **Penal Code** whereas the appellant faced another charge of **Giving False Information to a Person Employed in the Public Service** contrary to **Section 129(A)** of the **Penal Code**.

4. Resulting from denying the charges, a trial was held where the prosecution availed 8 witnesses in support of its case. The witnesses were the Company's Human Resource Manager one **Oscar Idambo Bokak (PW1)**, **George Ngugi** an employee of Leighton Tracking Company who installed a tracking device on the motor vehicle who testified as **PW2**, whereas **William Yego**, also employed at Leighton Tracking Company and who prepared a report of the movement of the motor vehicle testified as **PW3**. **PW4** was the Warehouse Manager at Sony Sugar Company Limited one **Samuel Ndumbe Akila**. The Company's Transport Manager one **Mohammed Hosman** testified as **PW5**. **No. 232549 Insp. John Njiguna Warui** the in-charge of the CID at Isebania DCI office and who conducted an identification parade was **PW6**. An officer from the Scenes of Crime Support Services attached to Migori DCI offices one **No. 80072 Corp. Benson Ingosi** was **PW7** and the investigating officer one **No. 59061 PC Elvis Marete** from Kamagambo Police Station was **PW8**.

5. **Adrew Mokaya Manoti alias George** (hereafter referred to as '**George**') was found to have no case to answer and discharged under **Section 210** of the **Criminal Procedure Code**, Cap. 75 of the Laws of Kenya. The appellant and the driver after tendering their defenses were found guilty and convicted as charged. The appellant was sentenced to 5 years imprisonment in the first count and to 1-year imprisonment in the second count which sentences were to run concurrently. That was pursuant to the judgment rendered on 20/02/2018.

6. Being dissatisfied with the twin convictions and sentences, the appellant timeously lodged an appeal and filed his Petition of Appeal filed on 27/02/2018 and preferred the following grounds of appeal: -

1. THAT the learned Senior Resident Magistrate erred in law and in fact, by failing to consider first why the Appellant herein was not arraigned in court within 24 hours as envisaged in the constitution, the appellant was held in-commucado for one week.

2. THAT the learned Senior Resident magistrate, erred in law and in fact just relying on circumstantial evidence without considering fundamental and procedural steps that the appellant played in the case before being charged.

3. THAT the learned Senior Resident Magistrate erred in law and in fact without considering that the Investigating Officers report was contradicting and or conflicting.

4. THAT learned Senior resident Magistrate ought to would have exercised discreet and wisdom not to discharge 3rd Accused because by discharging him made the entire charge moot and defective, hence convicting the 2nd accused was tantamount to miscarriage of justice.

5. THAT learned senior Resident Magistrate erred in law and in fact by failing to properly interpret Section 279 © of the Penal Code vis-à-vis evidence adduced.

6. THAT learned Senior Resident magistrate would have advised the prosecution that the appellant was the best of being a witness the case, considering his manner of sincerity and even reporting the incident to the Police.

7. Alongside the Petition of Appeal, the appellant filed an application dated 26/02/2018 for bail pending the hearing and determination of the appeal. The application was however abandoned in favour of hearing the main appeal.

8. The appeal was heard by way of oral submissions where the appellant was represented by **Mr. Agure Odera**. Counsel for appellant submitted that the appellant ought to benefit by way of acquittal from the provisions of **Article 49(1)(f)** of the **Constitution** since he was arraigned before court well past 24 hours from the time of his arrest. It was also submitted that by finding that George had no case to answer then the charges against the appellant could not stand as the charge sheet was rendered defective. That was because the appellant stated that they had been hijacked and took the police to the warehouse owned by George where truly traces of sugar were found although the haul was missing and that the appellant picked George in an identification parade hence he was best suited as a witness instead. Counsel also submitted that the evidence of PW5 and PW8 were contradictory and ought to have been reconciled in favour of the appellant. It was also submitted that the trial contravened **Article 50(1)** and **(4)** of the **Constitution**. This Court was urged to allow the appeal accordingly.

9. The appeal was opposed. Counsel for the State, **Miss Monica Owenga** Senior Principal Prosecution Counsel urged the Court to note that there was no violation of **Article 49(1)(f)** of the **Constitution** since the appellant was arrested on a Friday and he was arraigned before court on the following Monday. Counsel also submitted that the discharge of George could not render the charge sheet defective at any rate since defectivity of the charge sheet is based on the contents of the charge sheet and not on the evidence adduced. It was further submitted that there was no evidence which was contradictory as the court reconciled the entire body of evidence and came up with the right findings including a finding that the appellant was not truthful and was indeed covering his misdeeds. Counsel urged this Court to dismiss the appeal.

10. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

5. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences of **Stealing Goods in Transit** contrary to **Section 279(c)** of the **Penal Code** and **Giving False Information to a Person Employed in the Public Service** contrary to **Section 129(A)** of the **Penal Code** were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

6. There is no doubt that the motor vehicle was loaded with some 560 bags of sugar at the Sony Sugar Company factory on 06/06/2016. It is also not in doubt that the sugar which was destined for Nanyuki did not safely reach the destination. It is further not contested that the motor vehicle had been fitted with a tracking device. The question which the trial court was hence to settle was what exactly happened to the sugar. According to the prosecution, the appellant and the driver were responsible for the theft of the sugar. On the other hand, the appellant contended that the sugar was stolen when the motor vehicle was hijacked.

7. Since the motor vehicle was loaded with the sugar aforesaid, it is imperative that its movement be first looked at until recovery. For purposes of this appeal the starting point is the loading of the sugar at the Sony Sugar Company factory on 06/06/2016. That so occurred, and the exercise was supervised by PW4. At around 12:24 pm the motor vehicle was weighed at the factory's machine and allowed to leave. A Certificate was issued to that effect which was produced as an exhibit. The contents of the Certificate were confirmed by the motor vehicle tracking history produced as Exhibit 4. According to the tracking history the motor vehicle left the factory at around 1721 hours and proceeded along the main road to Ranen where it stopped from 1732 hrs. to 1739 hrs. It then moved for 4 minutes between the speed of 43km/hr. and 9km/hr. and again stopped from 1745hrs to 1950 hrs. That was a period of about 2 hours.

8. The motor vehicle was then driven from Ranen to Isebania town which is a border town with Tanzania. It reached Isebania on the Kenyan side at 2229hrs. It then crossed the border to Isebania in Tanzania where it was parked from 2234hrs to 0117hrs and it crossed over to the Kenyan side. That was a period of about 3 hours. The motor vehicle then left Isebania at 0126hrs and was driven along the main road to Ranen where it stopped for around 17 minutes. It was thereafter driven along the main road through Rongo and Kisii towns and it stopped along Kaplong – Narok - Maai Mahiu road at 0510hrs. That was the place the motor vehicle was eventually recovered.

9. To understand the appellant's version of what happened I will first consider the unsworn defence tendered by the driver. According to the driver, he left Sony at 5:00pm and drove the motor vehicle to Kokuro where he encountered demonstrators and parked the motor vehicle

aside. He then drove to Ranen where he also found demonstrators and was forced to stay there until 9:00pm when he left and drove to Rakwaro where he again encountered demonstrators and slowed down. That, some people entered the motor vehicle through the appellant's side and took him to a nearby sugarcane plantation where they tied him. That, he stayed there for 3 days and was untied at night. He learnt that he was at Kabuoch. That, he was later arrested by the police and taken to Isebania.

10. According to the appellant in his unsworn defence, they left Sony at 5:00pm and on reaching Kokuro they encountered demonstrators who had blocked the road. That, they waited and then passed. That, they drove straight to Rakwaro where they again encountered demonstrators who had blocked the road. That, some two people opened the cabin of the motor vehicle and took him into the boot of a waiting car where he spent the night therein. That, he was let free the following morning and on enquiry he found that he was on the road towards Kehancha. That, he boarded a matatu to Awendo and asked the driver, who assisted him with his phone and he called and informed PW5 of what had happened. That, PW5 told him to go to Nairobi and as he was at Narok he met his father whom he had called earlier, and he was advised by his father to report the matter to the police. That, he returned to Rongo and reported the matter at the Kamagambo Police Station at around 08:00pm where he was arrested and placed in cells for one week.

11. The foregone are the unsworn defenses of the driver and the appellant. By placing the twin defenses and the prosecution's evidence side by side several issues come to the fore. **One**, the statements of the driver and the appellant do not tally. Whereas both were in the motor vehicle from Sony, the driver stated that after Kokuro where they met some demonstrators he drove to Ranen and was forced to park the motor vehicle up to 9:00pm when he left for Rakwaro. However, the appellant stated that from Sony they went to Kokuro where they met the demonstrators and then they drove to Rakwaro. The appellant did not talk of the motor vehicle stopping at Ranen at any time whereas the driver stated that he parked the motor vehicle at Ranen until 9:00pm.

12. **Two**, the driver stated that he left Ranen at 9:00pm and proceeded to Rakwaro (which is well past Ranen on the way to Rongo township) before he encountered the attackers. According to the tracking history, the motor vehicle left Ranen at 2037hrs and was not driven towards Rakwaro but instead it was driven to the opposite direction towards Isebania where it reached at 2224hrs. **Three**, since the motor vehicle was in motion and in the possession and control of the driver at 9:00pm and it did not stop until well past 2220hrs, then it must have been the driver who drove the same to Isebania. **Four**, if it is true that the driver was tied by the attackers at Rakwaro (which is near Rongo township) and left in the nearby sugar plantation for three days until he was rescued, how come that he found himself in Kabuoch which is in Ndihiwa within Homa Bay County after the three days, several hundreds of kilometers away from Rakwaro? **Five**, the driver did not report the matter to the police immediately after being released by the hijackers.

13. **Six**, if it is true that the appellant was freed on a road to Kehancha, then why didn't he report the incident to the nearest Isebania Police Station or to any other police station along the way to Rongo being Migori Police Station or Uriri Police Station or Awendo Police Station or even Kamagambo Police Station or to any of the several Administration Police Camps between Isebania and Rongo. **Seven**, if the appellant was released by the hijackers in the morning of 07/06/2016 and as he was at Narok proceeding to Nairobi that day as directed by PW5 he was asked by his father to return to Rongo and report the incident to the police and he immediately returned to and reached Rongo that day, then how come that he spent a whole day until 8:00pm on 08/06/2016 when he went to report the matter to the police. It is however imperative to note that according to the copy of the OB No. 4 of 08/06/2016 the appellant reported the matter at 5:20am and not at 8:00pm as alleged. The appellant was hence untruthful in one of his versions.

14. **Eight**, the defenses were not tested in cross-examination. Without shifting the legal burden of proof which rests on the prosecution throughout, by admitting that they received the bags of sugar and left the factory premises with them, the evidential burden of proof shifted to the appellant and the driver to explain the whereabouts of the said 560 bags of sugar. They both chose to, and gave unsworn testimonies thereby denying the prosecution the opportunity to cross-examine them. Once the evidential burden of proof has shifted to an accused person, then unless such a person adequately rebuts and creates doubts in the prosecution evidence he/she runs the risk of being found guilty of the charge. And, that was the case herein; the appellant did not create any doubt in the prosecution's evidence by way of his unsworn defence.

15. **Nine**, given that the appellant did not mention any encounter with George before or even after the alleged hijacking, how come that he knew and identified George in an identification parade? How did the appellant know that the sugar had been taken into a go down owned by George and led the police there, yet he had been locked in a boot of a car until the next day? How come the appellant directed the police to a go down where traces of sugar were truly found although the actual bags were not found? **Ten**, the appellant's defence is contrary to the report he gave to the police at Kamagambo Police Station. It is the appellant who informed the police that the motor vehicle was stopped by two huge men who purported to ask for a lift at about 8:00pm and who hijacked him until the next day. However, the appellant did not raise the issue of having been stopped by two huge men in his defence before court. Further, if it is true that they were hijacked at 8:00pm how come that the driver was still driving the motor vehicle at 9:00pm?

16. From the above analysis and going by the tracking history, it is clear that the driver while in the company of the appellant drove the motor vehicle to Isebania township and offloaded the bags of sugar before he drove and abandoned the motor vehicle in Narok. I am therefore in tandem with the finding of the trial court in rejecting the defenses and holding that the offences were proved as required in law. It is hence true that the appellant gave false information to the police.

17. I now find and hold that the appellant was rightly found guilty and convicted of the twin charges. In so finding, I am satisfied that none of the grounds tendered by the appellant are holding in law. For avoidance of doubt, I hold the position that even in instances of infringement of **Article 49(1)(f)** of the **Constitution** an aggrieved party is not entitled to an acquittal. Such a party may pursue appropriate remedies as provided in the **Constitution**. Further, I find that the trial court analyzed the evidence properly and reconciled all alleged contradictions in favour of the prosecution. I am neither convinced that the charge sheet was defective nor that the appellant was a potential witness; he took part in the theft of the bags of sugar. He knew what happened to the bags of sugar which were not stolen by hijackers as he attempted to cook up a story.

18. In the end, I find that the appeal is not merited. It is hereby dismissed, and the decision of the trial court is affirmed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of April 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Agure Odero Counsel instructed by Messrs. Agure Odero & Company Advocates for the Appellant.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyn Nyauke – Court Assistant