



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 230 of 2013**

**JAMES KARIUKI GITENE.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 1356 of 2011 delivered by Hon. K. W. Kiarie, CM on 29<sup>th</sup> November 2013.)*

**JUDGMENT**

**Background.**

James Kariuki Gitene, the Appellant herein was charged alongside six others with the offence of stealing contrary to Section 275 of the Penal Code. The particulars of the offence were that on 21<sup>st</sup> September, 2011 at Kenya Breweries Factory, along Ngumba Road in Ruaraka within Nairobi County, jointly with others not before the court, stole 720 crates of beer valued at Kshs. 2,195,848/- the property of Jane Wambui Mahungu.

The Appellant was also charged solely in Counts II and III with having suspected stolen property contrary to Section 323 of the Penal Code. The particulars of Count II were that on 30<sup>th</sup> September, 2011 at Juja trading centre in Thika District, within Kiambu County, jointly with others not before court, having been detained by number 32403 S/Sgt Muriuki Kamakia, number 64103 Corporal Alfred Ruto and number 63420 PC Patrick mugambi in exercise of powers conferred upon them under Section 26 of Criminal Procedure Code had in his possession one motor vehicle Reg. No. KAW 217T make Mitsubishi lorry white in colour which was reasonably suspected to have been stolen or unlawfully obtained.

The particulars of count III were that on 6<sup>th</sup> October, 2011 at Kimbo Trading Centre in Thika District within Kiambu County jointly with others not before the court having been detained by number 44325 PC Joseph Mucheru and Number 75403 PC Samson Mulinge in exercise of powers conferred upon them under Section 26 of CPC had in his possession one motor vehicle Reg. No. KAS 322J, Toyota Station Wagon green in colour which was reasonably suspected to have been stolen or unlawfully obtained.

The Appellant was found guilty for the offence of stealing in count I and acquitted on other offences. He was sentenced to a fine of Kshs. 3,000,000/- or serve 3 years imprisonment. He was dissatisfied with that court's judgment and has decided to file this appeal challenging both his conviction and sentence. He filed a Petition of Appeal setting out the grounds of appeal. They were that; the case was not proved to the required standard, the case was marred with contradictions in witnesses' evidence, his defence was not

considered and that the sentence imposed was harsh and excessive in the circumstances.

### **Submissions**

The Appellant was represented by Njiiri Kariu & Njau advocates while learned State Counsel, Ms. Aluda appeared for the Respondent. Both parties filed written submissions which they entirely relied on.

The Appellant submitted that the appeal was based purely on circumstantial evidence and mere suspicion. He submitted that PW1 testified that she never contacted the Appellant or saw his driver or even the truck in question. He submitted that there was no nexus between the Appellant and the 7<sup>th</sup> accused who was allegedly the driver of the truck that was used to commit the offence. Furthermore, the prosecution established that the Appellant's motor vehicle was registration number KAW 217T and not KBC 061G that was used in the commission of the offence. The Appellant did not also ferry the goods in question. The same were transported by one John Mwangi. Again, the evidence of PW3 was that the money paid for the transport was paid to one John Gichungo via M-Pesa and not to the Appellant. He submitted that the only reason the Appellant was arrested was because of suspicion that motor vehicle registration No. KAW 217T was stolen which was rebutted by PW10 who testified that it was a case of wrongful registration. He submitted that it was trite law that suspicion could not form the basis of a conviction. In this regard, counsel was of the view that the circumstantial evidence was too weak to link the Appellant to the offence. The conviction was thus not safe. On sentence, counsel submitted that the same was harsh and excessive in the circumstances.

Miss Aluda conceded to the appeal stating that the circumstantial evidence was not sufficient to found a conviction. She submitted that the key suspect, 7<sup>th</sup> accused, was acquitted. He was he was the link to the Appellant. The evidence against him having been found to be too weak meant that the Appellant ought to have benefitted from an acquittal. She submitted that the Appellant was convicted on the basis of his ownership of a lorry that was not proved to have ferried the beer in question.

She cited the cases of **Sawe v. Republic[2003] KLR 364** and **Abanga alias Onyango v. Republic, Criminal Appeal No. 32 of 1990(UR)** to demonstrate that the principles on which circumstantial evidence can be applied to arrive at a conviction were not satisfied.

### **Evidence.**

The prosecution's case was that **PW1 Jane Wambui Mahugu** worked as a beer distributor at Lokichogio in Turkana. At the material time there were heavy rains and she had to source for special trucks to transport beers from Kenya Breweries in Nairobi to Lokichogio as the same would easily maneuver the rough terrain. She sourced for a person by the name Kigecha who told him that his beer would be transported by motor vehicle Reg. numbers KAY 709A and KBC 061G. She accordingly made a down payment for the job. Motor vehicle Reg. No. KAY 709A was loaded with beers on 19<sup>th</sup> September, 2011 and it arrived in Lokichogio on 21<sup>st</sup> September, 2011. Each truck was loaded with 500 crates of Tusker beer and 200 crates of Guinness beer. PW1 kept communicating with the driver of motor Vehicle KBC 061G up to Burnt Forest along Nakuru-Eldoret Road. Thereafter, the driver could not pick up her calls or the agent, Mr. Kagecha. Both reported the matter at both Industrial Area and Nakuru Police Stations. The driver's mobile phone was tracked at Kaptebwa in Nakuru. On the following day, they recorded statements at Kasarani Police Station. Later, the truck was traced at Kenol Petrol Station along Thika Road. Investigations revealed that the actual registration number of the truck was not KBC 061G but KAW 217T which was owned by the Appellant. Incidentally, motor vehicle KBC 061G had been involved in an accident and was extensively damaged. Its wreckage was still lying at a garage. PW1 had unfortunately not seen the driver who would transport his beer to Lokichogio, but his agent Mr. Kigecha named him as John Mwangi Gichungo. The truck was discovered without any beers. Seven suspects including the Appellant were arrested in relation to the incident.

The Appellant had employed **PW2, one Douglas Mwangi Muchori** as the driver of lorry KAW 217T. The witness had on 21<sup>st</sup> September, 2011 parked the vehicle at Kenol Petrol Station along Thika Road as

he left for a funeral of his uncle in Murang'a. He left the vehicle keys with the petrol station watchman. He resumed duty on 27<sup>th</sup> September, 2011. On 30<sup>th</sup> September, 2011, he parked the same vehicle at the Petrol Station but on going to pick it up, he was informed by the watchman that police wanted to interrogate him about some beers the lorry had transported on 20<sup>th</sup> September, 2011. The testimony of PW2 was that he was not aware that the vehicle had transported any beers in his absence. He also denied that his employer, the Appellant herein owned a motor vehicle Reg. No. KBC 361G. He however admitted that when he returned to pick up the vehicle, he found it had been moved from where he had left it.

**PW3, John Kigecha Koinange** who was contracted by PW1 to secure her the vehicles to transport beer entirely corroborated her evidence. In addition, he testified that he secured the said motor vehicle through one Peter Kahonge who in turn contacted his brother one, Dickson. He confirmed that he was in touch with the driver of the vehicle until 21<sup>st</sup> September, 2011 when he (driver) informed him that his phone battery was getting low and that they would talk on the following day. But on the following day, the driver could not be reached on phone. He thus reported the matter to the police in company of the said Peter Kahonge.

A search with the Registrar of Motor vehicles showed that motor vehicle KBC 061G belonged to Family Bank and Kartra Sacco and the same had been involved in an accident along Mombasa Road and the wreckage was still in a garage. **PW6, George Nganga Ndathe** confirmed that he owned the said motor vehicle and that it was involved in an accident on 22<sup>nd</sup> March, 2010 near Mutito Andei and as at 20<sup>th</sup> September, 2011 the wreckage was still in the garage. **PW10, James Peter Mburu** of Kenya Revenue Authority, Road Transport registry confirmed that Motor vehicle KAW217T was owned by James Kariuki Gatene, the Appellant herein.

Further investigations located the driver to motor vehicle KBC 061G at Londiani where he was arrested. While describing the said motor vehicle, PW 1, 2 and 3 stated that it bore the address of Farm Truck on the driver's door. They also could identify it with its mud flaps. They confirmed that although the registration numbers had changed from KBC 061G, it was the same and one motor vehicle KAW 217T that was packed at Kenol Petrol Station. **PW5 Jackson Ole Sayaya**, a security officer at DHL Ruaraka Breweries confirmed that motor vehicle KBC 062G was indeed loaded with beers on 20<sup>th</sup> September, 2011 and that it was being driven by one J. Mwangi. **PW7, Senior Sergeant Muriuki Kamaki** of Kasarani CID is one of the police officers who recovered the subject motor vehicle at Kenol Petrol Station. His evidence was that a perusal of a register kept by the petrol station revealed that the said motor vehicle had not been parked at the petrol station between 20<sup>th</sup> and 24<sup>th</sup> September, 2011. He thus concluded that it must have been used to collect the beers at Kenya breweries. At the time of its recovery, the vehicle was not loaded with any beers.

**PW9, Corporal Peterson Gathua** of Flying Scud Makuyu helped in the arrest of the 7<sup>th</sup> accused one, Hesbon Kariuki within Makuyu after a tip off by PW1. **PW11, 12 and 13** namely'; **CPI Maxwell Otieno, CPI Benjamin Kiptum** and **PC Joseph Mucheru** respectively investigated the matter. PW11 of CID Kasarani re-arrested Dickson Njuguna Wainaina, the 5<sup>th</sup> accused on 1<sup>st</sup> October, 2011 who was then detained at Nakuru Police Station. He later handed over the matter for further investigations to Flying Squad Officers. PW12 alongside PW7 recovered the motor vehicle KAW 217T at Kenol Petrol Station. PW13 arrested the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons.

After the close of the prosecution's case, the Appellant together with all his co-accused were found to have a case to answer and were accordingly put on their defence. The Appellant testified as DW 1 in a sworn statement of defence. He testified that he was a farmer and transporter residing in Ruiru. He recalled that on 30<sup>th</sup> September, 2011 he was from Nakuru when he received a call from an attendant at the Kenol Petrol Station where he used to park his vehicle. He informed him that police officers were at the petrol station and were looking for the owner of KAW 217T. He talked to one of the officers who informed him the vehicle was required at Kasarani Police Station. He therefore called his driver and asked him to drive the lorry to the police station. He testified that he went to the police station where he was informed that the truck had ferried some goods from Kenya Breweries. Police asked him where the

vehicle was on 20<sup>th</sup> and 21<sup>st</sup> September, 2011 and he informed them it was parked at the petrol station. He testified that he did not let out his vehicle to haul goods from the Breweries and that he did not know the complainant. In cross examination he testified that the keys to the truck were at the petrol station.

### **Determination.**

Upon summary of the entire evidence on record, it is trite that the Appellant was convicted purely on circumstantial evidence. I say so because none of the witnesses saw him at Kenya Breweries loading the beers into his truck. He neither was the driver of motor vehicle KBC 061G that was loaded with the beers. At the petrol station where motor vehicle KAW 217T was recovered, none of the witnesses saw him drive or park the said motor vehicle. Therefore, the only link for which he was implicated in the offence was that a search with the Registrar of motor vehicles revealed that motor vehicle KAW 217T belonged to him. It was concluded that that must have been the vehicle that was loaded with the beers because of the physical address it bore on the driver's door. Accordingly, the genuine registration number plates must have been removed to fit in fake ones so that after the beer was stolen, the truck could not be easily located.

But the question that follows is whether the prosecution sufficiently established beyond a reasonable doubt that that motor vehicle was the motor vehicle that was loaded with beers on 20<sup>th</sup> September, 2011. In that regard, I bear in mind that the evidence adduced must bear no circumstances weakening the chain of events relied on to found a conviction. That is to say that the circumstantial evidence must be so strong that no inference than of guilty could be inferred from the facts of the case. The case law on the principles to be considered in convicting on circumstantial evidence is rich. Just but to cite one or two cases, is **Sawe vs Republic [2003] KLR 364** in which the Court of Appeal sitting at Nairobi held that:

**“(1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**

**(2) Circumstantial evidence can be a basis of conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

**(3) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”**

Also in the case of **R v. Taylor, Weaver & Donovan[1928] 21 Cr. App. CA 21**, it was held thus:

**“Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.”**

Therefore, as long as the prosecution can discharge a strong case based on circumstantial evidence, nothing prevents the court from arriving at a guilty verdict. The question herein is whether this test was satisfied.

The only person who would have given a clear chain of events and therefore probably link the Appellant to the offence was the driver of the truck, PW2, Douglas Mwangi Muchori. The strong view of this court is that he ought to have been treated as a suspect as opposed to a prosecution witness. I say so because he is the only person who the agents PW1 had contracted to secure her the trucks would have identified that he was the Mwangi who drove the motor vehicle to Kenya Breweries for loading. His evidence in my view was of not of much value to the prosecution case because he only testified about parking the vehicle at Kenol Petrol Station. Interestingly, even after PW7 testified that investigations revealed that the motor vehicle was not at the Petrol Station between 20<sup>th</sup> and 24<sup>th</sup> September, 2011, no investigations were carried to confirm where it was during this period.

According to PW1, the vehicle was driven by one John Mwangi Gichungo who communicated with the agent, PW3 until he was at Burnt Forest. A look at the charge sheet though, does not reflect the name of one James Mwangi Gichungo as an accused. According to PW11, the person who was arrested in Nakuru and therefore must have been the driver of the truck when it left for Lokichogio was one Dickson Njuguna Wainaina, the 5<sup>th</sup> accused. It is then safe to conclude that one John Mwangi Gichungo was a fake name given to distort any attempt to arrest the person who was driving the subject truck. In his defence, he did not at all implicate the Appellant. Instead, he said that the truck KBC 061G was driven by the 7<sup>th</sup> accused one, Donald Ezborn Kariuki Kamau. He stated that he was only an agent contacted by John Kigecha to secure a truck to transport beer from Kenya Breweries. He confirmed that the person who was tracked at Kaptebwa in Nakuru was the 7<sup>th</sup> accused and not himself. The 7<sup>th</sup> accused was Donald Ezborn Kariuki Kamau who defended himself as DW6. He entirely denied he stole any beer or went to Ruaraka to collect any beer. He said he was arrested from Makuyu after which he came into contact with other accused persons whom he did not know. No challenge was put forth against his defence.

It suffices then to add that one crucial witness, by oversight or deliberately was omitted by the prosecution. This was the watchman at Kenol Petrol Station. He would have shed light on the whereabouts of motor vehicle KAW 217T, in view that PW7 testified that it was not parked at the petrol station between 20<sup>th</sup> and 24<sup>th</sup> September, 2011. He was the custodian of the register that recorded the vehicles that would be parked at petrol station. Failure to call his evidence heavily weakened the prosecution case as the evidence of both PW2 and 7 was contradictory in so far as whether the vehicle was at the petrol station during the period in question. In lieu therefore, the court concludes that had his evidence been called, probably it would have been adverse to the prosecution case.

Further, PW3 testified that the payment for the transport was made to one John Gichungo and the Appellant. One would easily conclude that if the vehicle that transported the beer belonged to the Appellant he would have received the payment. And in any case police did not adduce evidence on the actual identity of the recipient of the money. This fact ultimately exonerates the Appellant. Besides, the physical address on the truck was not clearly proved to be the address of the Appellant. This further delinked him from the offence.

From the foregoing, it is clear that the prosecution clearly failed to link the Appellant to the commission of the offence. It is difficult to state that he was involved in the theft of the beers. I conclude that the circumstantial evidence on record did not irresistibly point to his guilt. The burden then still lay with the prosecution to prove beyond a reasonable doubt that the facts of the case were inconsistent with his innocence. It is my view that the prosecution failed to discharge this burden and that the Appellant was charged purely on suspicion which can never found a ground for conviction. See **Sawe v Republic (Supra)**. It is a case where the conviction was not safe.

On the result and after re-evaluation the entire evidence, I find that the case was not proved beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free. It is so ordered.

**DATED and DELIVERED this day 30<sup>th</sup> March, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Kariuki Njiri for the Appellant
2. Miss Sigei for the Respondent