



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 58 OF 2015

(An appeal from the judgment of the Senior Principal Magistrate, Embu in CR. Case No. 1872 of 2014 dated 25/6/2015)

ROBERT KARANJA KAMAU..... APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

1. The appellant was charged and tried by Embu Senior Principal Magistrate P. Biwott who also prepared the judgment.
2. The trial magistrate proceeded on transfer and sent the judgment for delivery to Hon. S.K. Mutai who did the needful and sentenced the appellant to serve the following sentences:-

- Count I - Three (3) years imprisonment
- Count II - Three (3) years imprisonment
- Count III - Seven (7) years imprisonment
- Count IV - Seven (7) years imprisonment
- Count V - Seven (7) years imprisonment
- Count VI - Seven (7) years imprisonment

The sentences were to run concurrently.

3. Being dissatisfied with both the convictions and the sentences, the appellant lodged this appeal. He was represented by the firm of Maina Ngaruiya & Co. Advocates in this appeal. The respondent was represented by Ms. Nandwa for the State.

4. The parties disposed of this appeal by way of written submissions. The appellant's grounds of appeal may be summarized as follows:-

- (i) *That having been acquitted under Section 210 of the Criminal Procedure Code of counts II to VI, it was erroneous and a misdirection on the part of the magistrate who delivered the judgment to sentence him on the four counts.*

(ii) *That the ingredients of the offence of conspiracy to defraud contrary to Section 317 of the Penal Code were not proved.*

(iii) *That the evidence of the prosecution was contradictory and uncorroborated.*

(vi) *That the appellant was not put on his defence in respect of counts II – VII of which he had been acquitted thus violating his constitutional rights of a fair trial under Article 50(2) of the Constitution.*

(v) *That his constitutional rights under Article 50(2) ... were violated in that he was not given adequate time and facilities to defend his case.*

5. The facts of this case are that the complainant as a result of an advert in the Daily Nation of 30/9/2014 for sale of a motor vehicle Toyota Fielder pursued the contact person on cell phone number 0714174503. It was PW2 the complainant's husband who made the call and talked with the so called “agent” or “broker” of the owner.

6. The vehicle was availed to PW2 in Embu town where it was inspected and tested on the road for mechanical suitability. A search was done at Kenya Revenue Authority office showing that the vehicle was jointly owned by Equity Bank and one Robert Kamau. The necessary documents for the vehicle including the log book were availed by the said Robert Kamau. A sale agreement was executed between the parties and Kshs.555,000/= paid followed by execution of transfer.

7. About five (5) days later, the accused came to Embu and repossessed the motor vehicle which he alleged was stolen from him. PW2 called police from Manyatta police station who arrested both PW2 and the accused. The vehicle registration No. KBV 690 B was seized by the police. Subsequently, the appellant was charged with the offence.

8. The evidence of PW1 and PW2 explained how PW2 bought the car after withdrawing Kshs.600,000/= from his bank account part of which was paid to the seller of the vehicle Kshs.555,000/=. The vehicle was to be followed by the accused as stolen property and police had to commence investigations on the matter.

9. Investigations revealed that the purported discharge of charge from Equity Bank was fake and on a forged bank letter head. The logbook presented to PW2 was not genuine either.

10. The appellant in his defence said that he is car hire business and that on 23/9/2014, he had hired out one of his cars KBV 690 to a certain lady who was to travel Nairobi to Embu for six days. The vehicle was not returned and the appellant reported the matter to Pangani police station after trying to call the hirer in vain. The motor vehicle was later traced in Embu in possession of PW1 and PW2. The accused denied selling the vehicle to PW2.

11. In his petition of appeal, the appellant alleges that he had been acquitted of counts II and VI under section 210 of the Criminal Procedure Code and yet he was convicted of the same by the magistrate who delivered the judgment. In the ruling of the trial magistrate delivered on 14/5/2015. He stated:-

The prosecution have not established a prima facie case against the accused in counts II to IV. I acquit him of these 5 charges under Section 210 of the CPC for no case to answer. I shall proceed to place him on his defence in count I.

12. It is therefore correct that the appellant had been acquitted of counts II – VI under Section 210. He proceeded to make his defence only on count I for the offence of conspiracy to defraud contrary to Section 317 of the Penal Code. It was therefore erroneous for the magistrate who delivered the judgment to convict the appellant of all the counts he was originally charged.

13. Under Section 354(3) of the Criminal Procedure Code, the High Court is empowered to correct the

mistakes of the subordinate courts on appeal. This error will therefore be corrected accordingly.

14. In respect of Count 1, the appellant argued that the prosecution's evidence was contradictory and uncorroborated. However, no single instance of corroboration was brought out or explained by the appellant. I find no basis in this ground for its also not supported by the evidence.

15. It was argued that the ingredients of the offence of conspiracy to defraud were not established. First and foremost, the prosecution must prove that the appellant conspired with others to defraud the complainant. The offence is worded in the Penal Code Section 317 (in part):-

“Any person who conspires with another....”

16. The trial magistrate stated in his ruling:-

There is no evidence that the accused obtained money from PW1 or PW2. There is no direct evidence that he made the fake documents as well. He did not even utter the documents to the complainant at all. The prosecution have not established a prima facie case against the accused in counts II to VI to warrant me place accused in his defence.”

17. I have also perused the evidence of PW1, PW2 and that of the investigating officer. I find no evidence of conspiracy to defraud against the accused and any other person named or not named. The appellant did not meet the complainant or her husband at any one time before or during the execution of the agreement. Neither of the two witnesses identified the appellant as the person who sold the vehicle to them.

18. The appellant relied on the case of **CHARLES KARUGO NDUMIA Alias CYRUS KAIRI KANYINGI VS REPUBLIC [2014] eKLR** where it was held by Githua J:-

“...As stated earlier, the appellant's co-accused was acquitted in the course of the trial for lack of sufficient evidence. And since the offence of conspiracy to defraud must of necessity be committed by two or more persons acting in concert to execute a common intention to defraud, it is difficult to see how the appellant could have been convicted alone while his co-accused had been acquitted for the lack of evidence....”

19. After carefully evaluating the evidence, I am of the considered opinion that the prosecution failed to prove the offence of conspiracy to defraud against the appellant.

20. It was therefore a misdirection by the trial magistrate to find that the offence had been proved. The conviction was not supported by cogent evidence.

21. Consequently, I quash the conviction and sentence in count 1 and acquit the appellant of the charge.

22. As I have already stated, that the appellant was erroneously convicted of counts II, III, IV, V and VI. I hereby quash the said convictions and sentences in respect of the five counts and accordingly acquit the appellant.

23. Since the appellant was convicted of count 1 and sentenced, I find no violation of constitutional rights under Article 50(2) as alleged. He was given a fair trial in the case for he gave his defence in Count 1 which was the only count that the trial magistrate found that he had a case to answer.

24. The conviction and sentencing of counts II – VI was just a mistake by the magistrate who delivered the judgment on assumption that the accused had been put on his defence by the trial magistrate on all the counts. The trial magistrate had not specified at the conclusion of his judgment on which count he convicted the appellant.

25. In my considered opinion, the error does not constitute violation of the rights of the appellant.

26. The appeal is hereby allowed.

27. The appellant is therefore set at liberty unless otherwise lawfully held.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF NOVEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Maina for the Appellant

Ms. Nandwa for the Respondent