



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL CASE NO. 24 OF 2014
DANIEL KIPTOO METO APPELLANT
VERSUS
REPUBLIC RESPONDENT

*(Being an Appeal from the original conviction and sentence by Honourable T.Nzyioki,
Principal Magistrate in Eldoret Chief Magistrate's Court Criminal Case No.1760 of 2012 dated
24th April,2013)*

JUDGEMENT

1. The appellant, **Daniel Kiptoo Metto** was tried and convicted on a charge of stealing a motor vehicle contrary to **Section 278A of the Penal Code**. He was sentenced to four (4) years imprisonment.

The particulars of the charge alleged that on the 8th day of April 2012 at Kapsaret area in Uasin Gishu District within the Rift Valley province, the appellant stole a tractor Registration No. KT CB 033J make Massey fugasson valued at Kshs. 1,430,000/- the property of **Irene ChepchumbaTarus**.

2. The appellant was aggrieved by the conviction and sentence hence this appeal. In his petition of appeal filed on 7th March, 2014, the appellant advanced six grounds of appeal which can be condensed into the following three grounds:

(i) That the trial magistrate erred in law in failing to appreciate that the charge was unconstitutional and oppressive as it was presented to court after violation of his constitutional rights under **Section 72(3) (b) and 77 (1) of the Constitution**.

(ii) That the trial magistrate erred in law and fact by failing to record in the judgment the reasons for dismissing the appellant's defence.

(iii) That the trial magistrate erred in law by convicting the appellant on the basis of insufficient evidence.

3. The appeal was prosecuted by way of oral submissions. In his submissions, the appellant urged the court to allow the appeal on grounds that the prosecution witnesses contradicted themselves in their evidence particularly PW1 and PW4.

He further submitted that the prosecution failed to prove beyond doubt that the tractor he was convicted of having stolen belonged to the complainant as alleged as the person who reported its theft to the police

was **Gabriel Tarus** ; that the tractor had not been found in his possession and that the charge was a fabrication by the complainant and one **Yator** to keep him from demanding his money. In a nutshell, the appellant submitted that the evidence adduced against him in the lower court fell short of establishing his guilt as charged beyond reasonable doubt.

4. The appeal is opposed by the state. In supporting the appellant's conviction and sentence, learned prosecuting counsel **Mr. Mulati** submitted that the appellant was properly convicted as the evidence adduced against him in the trial court was sufficient to sustain a conviction. He urged the court to dismiss the appeal for lack of merit.
5. This is a first appeal to the High Court. I am alive to the duty of the first appellate court which is to re-evaluate and re-examine the evidence on record with a view to drawing its own conclusions. In doing so, the court should have in mind that it did not have the benefit of seeing or hearing the witnesses.

See: Pandya V Republic (1957) EA 336; Njoroge V Republic(1987) KLR 19; Ruwala vs Republic (1957) EA 570.

6. Briefly, the case for the prosecution is that the appellant was employed by the complainant Irene **Chepchumba Tarus** (PW1) as a driver. According to her evidence, on request by the appellant, she permitted him to use her tractor Registration Number KT CB 033J to transport his iron sheets and pieces of timber from Kapsaret to Burnt Forest. Their agreement was that the appellant was to return with the tractor the same day in the evening as they were to embark on a planting exercise on the following day. **Paul Kipkorir** (PW4) accompanied the appellant to Burnt Forest with the tractor as PW1 left for church.

On her return home in the evening, she found that the appellant had not returned. She also noted that her tractor disc plough was missing. She called the appellant on his mobile phone and he promised to return the following morning. He did not do so. When she tried to reach him on his mobile phone thereafter, she found that it had been switched off.

She then reported the matter to PW2 **Corporal James Mulama** at Eldoret police station.

7. PW4 in his evidence confirmed having accompanied the appellant to his home at a place known as Kondoo where he deposited goods he had ferried in PW1's tractor from Mosoriot. He had tied the goods onto the tractor's disc plough.

After depositing the goods, they went back to Kondoo Trading Centre. And on the suggestion of the appellant, PW4 went to have some tea. The appellant then drove away with the tractor saying he was going to fuel it. That was the last he saw of him that evening.

8. On 12th April, 2012, the tractor was found parked outside a house at Awendo in Migori by PW3 a police officer attached to Awendo police station. A report had been made to him about the presence of the tractor in that area by One **Ephantus Tarus**. The owner of that home led them to a person who he described as the owner of the tractor. That person turned out to be the appellant in this case. He was arrested together with other people found in his company and they were all escorted to Eldoret Police station.

After PW2 finalized his investigations, he discharged the other suspects and charged the appellant with the offence for which he was tried and convicted.

9. I now wish to examine the defence proffered by the appellant during the trial.

The appellant gave a sworn statement denying that he had been employed by PW1 as a driver and that he committed the offence as alleged. He alleged that the charge had been framed against him by one Yarto who had refused to pay him the money he was entitled to after selling maize to him. In cross-examination,

he admitted that no grudge existed between him, PW1 and PW4 and that only Yarto had a grudge against him.

10. I have carefully considered the evidence on record, the submissions made by the appellant and the learned prosecuting counsel as well as the grounds of appeal. I wish to deal first with the appellant's first ground of appeal to the effect that the trial magistrate erred in failing to take into account that his Constitutional rights had been violated prior to his arraignment in court. The appellant apparently abandoned this ground of appeal since he never made any submissions on it when prosecuting the appeal. But even if he had, nothing would have turned on that ground of appeal since the violation complained of was not a violation of his constitutional rights in the course of the trial such as the right to a fair trial in any of its various components or the right to legal representation.

11. Though the appellant did not expressly indicate the constitutional right he claims had been violated, he appeared to be referring to his detention at a police station beyond the period allowed by the constitution.

It is however trite that such a violation does not have to result to a criminal trial being declared a nullity. The law is that if an accused person feels that his constitutional rights had been infringed as alleged in this case, his remedy lies not in the nullification of the trial but in instituting a civil suit for an award of damages. – **See Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008.**

12. Besides, it is clear from the record that the learned trial magistrate considered this issue at length and arrived at the correct conclusion that allegations of violation of an accused person's constitutional rights before the commencement of a criminal trial cannot be used to vitiate a conviction.

13. Another complaint made by the appellant is that the learned trial magistrate erred in law in failing to record in his judgment the reasons for dismissing his defence.

I have looked at the judgment delivered by the trial magistrate on 24th April, 2013. It shows that the trial magistrate reproduced and considered at length the defence offered by the appellant. He also recorded his reasons for dismissing it as untrue. The trial court stated at page 26 as follows:-

“I have evaluated the story of the accused person in defence. The allegations that the case was fabricated and arose out of a disagreement with the Yartoo is unfounded and lacks truth. There is no evidence of a grudge or any other reason for the complainant Irene Chepchumba Tarus (PW1) to frame up the accused person. The complainant in her evidence narrated a detailed account from the moment she allowed the accused person to use the tractor on 8th April, 2012 to the time when the tractor was recovered at Awendo on 12th April 2012 where the accused person was arrested”.

There is therefore no substance in the appellant's claim that the dismissal of his defence was not anchored on reasons disclosed on record.

14. The appellant had also claimed that he was convicted on the basis of insufficient evidence. In support of this claim, he claimed in his submissions that there were contradictions in the evidence of PW1 and PW4 and that ownership of the tractor had not been proved beyond doubt. My re-appraisal of the evidence on record does not reveal any such contradictions. Infact, PW4 corroborated PW1's evidence in every material particular.

PW4's claim that he was PW1's driver does not in my view constitute a contradiction in PW1's evidence to the effect that she had employed the appellant as her driver since it is possible for an employer to have more than one driver.

15. On the issue of ownership of the tractor, I can do no more than refer to the letter produced as exhibit 3 and copy of a logbook produced as exhibit 2 which confirmed that the tractor had been sold to PW1 on credit by R M Patel & Partners Limited.
16. It is not disputed that the appellant was arrested at Awendo in Migori where the tractor was also recovered. PW1's evidence that the appellant had borrowed the tractor to transport his goods to his home but later disappeared with it without her consent was materially corroborated by the evidence of PW4. Their evidence on this point was not shaken by the appellant in cross examination.
17. In his defence, the appellant alluded to a grudge between him and one Yarto over a debt Yarto allegedly owed him. But Yarto was not the complainant in this case. The appellant confirmed in his evidence that he did not have any grudge with PW1 and PW4. PW1 and PW4 therefore could not have had any reason to give false evidence against him. The learned trial magistrate accepted and relied on their evidence and he cannot be faulted for so doing.
18. I concur with the learned trial magistrate that the fact that the appellant had tricked PW4 into believing that he was going to refuel the tractor but instead drove away with it to Awendo without PW1's consent and thereafter cut any communication with her by switching off his mobile phone demonstrates that he intended to fraudulently and permanently deprive PW1 of the use of her tractor. This in law amounted to theft.

Consequently, I am unable to agree with the appellant that the evidence adduced against him in the trial court was insufficient to sustain a conviction.

My analysis of the recorded evidence leads me to the conclusion that the prosecution proved the charges preferred against the accused person beyond any reasonable doubt. I am therefore satisfied that the appellant was properly convicted.

19. On the appeal against sentence, under **Section 278 A** of the **Penal Code**, the offence for which the appellant stands convicted attracts a maximum sentence of seven years imprisonment. The four years imprisonment imposed upon the appellant by the learned trial magistrate in this case was lawful and I find no reason to interfere with it.
20. For the foregoing reasons, I find that the appellant's appeal is not merited. It is accordingly dismissed.

Orders accordingly.

C. W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF FEBRUARY 2015

In the presence of:-

The Appellant

Mr. Mulati for the state