



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 122 OF 2014**

**BETWEEN**

**CALVINS OWINO OCHIENG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the original conviction and sentence in Criminal Case No. 989 of 2013 at the Chief Magistrates Court at Homa Bay, Hon. N. Kariuki, Ag. RM dated 19<sup>th</sup> September 2014)***

**JUDGMENT**

1. The appellant, **CALVINS OWINO OCHIENG**, faced two counts of stealing a motor vehicle contrary to **section 278A** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the first count were that the appellant alias Kevin Okoth, jointly with others not before the court, on 10<sup>th</sup> August 2013 at Kanyada Location in Homa Bay District, stole motor vehicle registration number KBU 664 make Toyota Probox valued at Kshs. 800,000/- the property of Mordecai Atiang'a Ooko.
2. The particulars of the second count were that the appellant alias Kevin Okoth, jointly with others not before the court, on 11<sup>th</sup> August 2013 at Rongo Town in Rongo District stole motor vehicle registration number KBU 934W make Toyota Probox valued at Kshs. 800,000/- the property of Kennedy Okeyo Obat.
3. After the trial the appellant was convicted on both counts. He was sentenced to serve 3 years imprisonment with the sentences running consecutively. He now appeals against the conviction and sentence. For reasons that will become apparent I will deal with only one ground of appeal raised by the appellant.
4. The appellant complains that his right to a fair trial was violated when the trial court failed to accord him the opportunity to produce documents that were required for his defence namely the Occurrence Book (OB) from Parliament Police Station where the he had been held in custody after his arrest and his driving licence.
5. According to the proceedings, after the appellant was put on his defence, he requested for the prosecution to give him his driving licence for use in his defence. The prosecutor informed the court that he did not have the licence but would make inquiries from another officer. When the matter came up on 8<sup>th</sup> May 2014, the appellant requested to be supplied with OB for 26<sup>th</sup> August 2013 from Parliament Police Station and the Homa Bay GK Prison Visitors entries for 5<sup>th</sup> October

2013. The learned magistrate obliged and issued the orders.

6. The accused gave sworn testimony in his defence on 20<sup>th</sup> August 2014. Thereafter, he informed the court that he had still not been provided with the OB for Parliament Police Station. His closed his case and the learned magistrate reserved the matter for judgment.
7. Under **Article 50(2)** of the Constitution, “*Every accused person has the right to a fair trial, which includes the right — to have adequate time and facilities to prepare a defence.*” This right for the accused to prepare his defence includes the right to to be assisted by the State to acquire the necessary evidence to prepare one’s defence. In this instance, the appellant had requested to be provided with specific documents to enable him prepare his defence. Despite a court order to that effect, the documents were not provided. The learned magistrate did not inquire why the same had not been furnished despite the appellant drawing the court’s attention to the issue.
8. I find that the failure to accord the appellant the documents requested and ordered by the court violated his right to a fair trial. In ***Collins Odhiambo and Others v Republic KSM CA Crim. App. No. 199 of 2008 [2014]eKLR*** the Court of Appeal dealt with the issue of accused’s request for documents as follows;

*Before we conclude this judgment, one other matter has caught our attention which would suggest that both courts below may not have adequately evaluated the evidence which was adduced at the trial. On 14<sup>th</sup> December, 2005 the appellant applied for production of the Occurrence Book (OB) of 4<sup>th</sup> March, to 8<sup>th</sup> March 2005. The learned trial magistrate allowed the application but the record does not show that the said OB was ever produced. Even when the appellant reminded the court, that he had applied to have the OB produced and that his case was just “fitina” (malicious), nothing was done about his plea. Neither the learned trial magistrate nor the learned Judges of the High Court mentioned the appellant’s plea for production of the OB in their judgments. In the absence of any direction regarding the OB by the two courts below it is not possible to appreciate how the contents of the OB would have impacted on the case put forth by the prosecution.*

*We take this opportunity to caution courts of first instance and first appellate courts that they should be careful not to be accused of ignoring pleas made by the accused/appellants especially when they are not represented. Indeed in such cases the courts should be in the forefront in championing the unrepresented parties’ fair trial rights.*

9. As the Court of Appeal noted in ***Collins Odhiambo’s case (Supra)***, it is not possible to know how the OB entries, Homa Bay GK Prison Visitors entries or the licence would have impacted on the prosecution case. It was therefore improper for the learned magistrate to state that, “[T]he production of an OB from Parliament Police Station would not have served any purpose other than to show that there was a Calvins Okoth booked on 26/8/13” or otherwise comment on the appellant’s driving licence which the appellant had asked for but which was not provided by the prosecution. It was the appellant’s right to have the documents which had been requested by him and ordered to be provided by the court. I am therefore constrained to quash the conviction and sentence.
10. I now turn to whether I should order a retrial. The principles governing whether or not a retrial should be ordered were enunciated in ***Fatehali Manji v Republic [1966] EA 343*** East Africa Court of Appeal stated,

*In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only*

*be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.*

In ***Mwangi v Republic*** [1983] KLR 522 the Court of Appeal held that;

*We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.*

11.I have reviewed the evidence and it is clear that there is overwhelming evidence against the appellant that may well lead to a conviction. The matter occurred within the local limits of the court's jurisdiction and the witnesses will not be difficult to secure and taking into account the time that has lapsed, I do not think a retrial would be difficult.

12.I there allow the appeal, quash the conviction and sentence. I direct that the appellant shall be retried by any other magistrate other than Hon. N. Kariuki, RM. For that purpose he shall remain in custody and shall be taken before the Chief Magistrates Court, Homa Bay on **29<sup>th</sup> April 2015** to plead to fresh charges.

**DATED and DELIVERED at HOMA BAY this 28<sup>th</sup> day of April 2015**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.