



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.312 OF 2002

(Being an Appeal from Original Conviction and Sentence in Criminal Case
No.3973 of 2001 of the Chief Magistrate's Court at Mombasa –K.
Muneeni, RM)

STEPHEN RAGUI NJOROGE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant Stephen Ragui Njoroge was charged with the offence of unlawful use of a motor vehicle contrary to Section 294 of the Penal Code. It was alleged in the particulars that on 8th Day of December 2001, along Mombasa Nairobi highway he unlawfully and without colour of right but not as to be guilty of stealing took to his own use a motor vehicle Registration Number KAG 557L Trailer ZB 5734 by ferrying one thousand five hundred feet of building bricks. He pleaded not guilty to the charge but after trial, he was found guilty and convicted. He was sentenced to serve a term of four (4) months in jail. He has not appealed against the same conviction and sentence and has filed through his learned counsel six grounds of appeal, the last ground being an appeal against sentence. The learned Magistrate agreed in his judgment with the learned counsel for the Appellant that the most important witness in the entire case was the loader, James Karani Mtoto. He is the witness who gave evidence to the extent that when the vehicle which had ferried sugar to Nairobi was returning to Mombasa, it did carry what the witness called in his evidence building stones but which were referred to in the charge sheet as building bricks.

He said the same building stones were offloaded by hired men at a place near Salama. Other than this witness and PW.4 who was clearly approached to give evidence well after the case had started, no other witness implicated the accused on the allegations in the charge sheet. The law as to the quality of a witness upon whose evidence the court should rely on in convicting an accused person is well spelt one in the case of **NDUNGU KIMANYI VS. THE REPUBLIC, (1979)KLR 282** , WHERE THE Court of Appeal in a Judgment delivered by Madan JA stated as follows:

“The complainant was not a virtuous virgin. A man of loose conscience; on a previous occasion also he had been involved in a swindle operation for making easy money when he lost Sh.40,000. In our opinion the evidence of the complainant does not come up to the minimum standard which we required before upholding a conviction in a criminal case. We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression

in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

In this case, PW.2 at first gave the erroneous impression that the Appellant had deliberately left him at Machakos junction so as to further the criminal intention of the Appellant. Later when he was recalled for cross-examination by the Defence Counsel, it transpired that in fact he was drunk that early morning to an extent that he could not even follow the Appellant to Nairobi. He said in the cross-examination by the Defence Counsel as follows:

“I did not follow the accused because I was drunk. I decided to rest. I woke up again at 11.00 a.m. I did not tell the police I was drunk. I was woken up by my bedmate”

Further, this witness talked to one Musa and reported the accident but he also agrees in the cross-examination that he did not tell Musa of the stones allegedly carried in the vehicle illegally. PW.3 Majid Abdul Kikiko was the next person known to this witness who arrived at the scene on 7.12.2001 at 6.00 p.m. He is an employee of the same company as PW.2. He pulled this vehicle later after coming from Nairobi to Sultan Hamud. This witness PW.2 was there but PW.3 says PW.2 never told him about the stones that were allegedly being carried. He says in his evidence in chief as follows:

“The Turnboy told me nothing else about the goods they were carrying.”

Lastly, from the evidence of PW.1, it would appear that he only offered to give PW.1 and others the truth after interrogation. I do not find this witness PW.2 a witness upon whose evidence the court can rely to convict. No wonder his evidence is contradicted by both PW.3 and PW.4 on material aspects. For example, whereas he says accident took place on 8.12.2001, PW.3 says he found the vehicle had had an accident on the road and that was on 7.12.2001 at 6.00 p.m. PW.4 on the other hand says he offloaded the vehicle on 8.12.2001 at 3.00 a.m. whereas that is the time PW.2 says the vehicle stopped. Secondly PW.4 says when he went to buy cigarettes after offloading the stones he returned to the scene and found the subject vehicle 100 metres away from where the stones were. PW.2 however maintains that the subject vehicle was towed away to a distance of about 2-3 kilometres. On my own calculations, if the vehicle left Mombasa on 5th December 2001 as PW.1 says and it stayed the night either at Mazaras, as PW.2 first said in his evidence in chief or at Samburu as he later said in his further cross examination, or at Maungu as the Appellant says and on 6th December 2001, it left for Nairobi, but again stayed the night at Machakos Junction, then it goes without saying that it was in Nairobi on 7.12.2001 and if PW.2 waited for it at Machakos Junction and it did not stay the night in Nairobi then it was back on the same 7.12.2001 and chances are that accident took place that same 7.12.2001 or depending on where they again delayed accident could have taken place very early in the morning of 8.12.2001 – I mean close to midnight.

What then is the effect of the non reliability of the evidence of PW.2 on the entire case. It leaves only evidence of PW.4 against evidence of PW.3. PW.3 says he never saw any stones or bricks in the vehicle. PW.4 says they offloaded stones from the vehicle. PW.4 as I have stated was approached to give evidence on a date he cannot remember well but says it was likely to have been in February 2002. That was after the hearing had long started. One cannot rule out a possibility of his being a witness of convenience. The question then as to whether the vehicle was illegally loaded with either stones or bricks by the Appellant and as to whether the same building bricks being ferried were One Thousand Four Hundred feet in length was for the Police to prove through their investigations. Did the police do anything about it. No. Bricks or stones were never produced as exhibits. PW.5 was the investigations officer in the case. He said in his evidence that he never visited the scene. There is no evidence that any attempt was made to establish the existence of the same material either in the subject vehicle or at the place where they were said to have been offloaded. No attempt was made to investigate as to where the same bricks or stones went to. PW.5 said he did not find out whether the bricks were offloaded at Makindu Mosque. One does not even know who measured the length of the same material to come to the conclusion that the length was One Thousand Four Hundred feet of building bricks. Sure one must accept that there could be a police station nearby. Why was the matter not reported to that police station nearby for full investigation and why was the case not instituted in a court close to where the offence took place? I do feel in my opinion that if the

learned Magistrate had fully considered all the above aspects, he would have found at least that it was not safe to convict the Appellant on the evidence that was then before him. I do allow this appeal, quash conviction and set aside the sentence. The Appellant is set free forthwith unless otherwise legally held. Judgment accordingly.

Dated and Delivered at Mombasa this 4th Day of September, 2002.

J.W. ONYANGO OTIENO
JUDGE