Ondeu v Republic (Criminal Appeal E005 of 2024)
[2025] KEHC 2482 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2482 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E005 OF 2024

WA OKWANY, J

FEBRUARY 13, 2025

BETWEEN

BERNARD ASIAGO ONDEU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment and Sentence at the Chief Magistrate's Court in Nyamira, CMCCR NO. 894 OF 2017 delivered by Hon. W. Chepseba, Chief Magistrate on 18th January 2024)

JUDGMENT

1. The Appellant herein was convicted for the offence of stealing a motorcycle contrary to Section 278A of the *Penal Code*. The particulars of the charge were that on the 17th day of November 2017 in Nyamusi village, Nyakerimo Sub-location, Bokeira location in Nyamira North Sub-County within Nyamira County, jointly with others not before the court stole a motorcycle registration Number KMEG 254U make Bajaj Boxer BM100 valued at Kshs. 91,700/= the property of Evans Nyanaro Hamisi.

2. He was, upon conviction, sentenced to serve two (2) years imprisonment thereby precipitating the filing of the instant appeal in which the Appellant listed the following grounds of appeal: -

    a. The Learned Trial Magistrate erred in law and in fact in not appreciating evidence on record indicating that the Accused/ Appellant's fundamental right as provided in Article 49 (1) (f) was gravely violated as he was arrested on 18th December 2017 and arraigned in court on 28th December 2017 and making no finding on the violation by the Learned Trial Magistrate.

    b. The Learned Trial Magistrate erred in relying on the complainant's evidence holding that he was truthful and inspiring confidence and holding him as a credible witness against the weight

of evidence and completely ignoring the worthless, contradictory and discredited evidence of the complainant and other Prosecution witnesses.

c. The Learned Trial Magistrate erred in law and in fact in selectively impugning the prosecution's evidence and then giving credence to the same testimonies and holding (sic) prosecution's evidence which was material, profound and favourable to the Appellant.

d. The Learned Trial Magistrate erred in failing to make a determination that the Prosecution's failure to call certain key witnesses mentioned by the complainant in this testimony ought to have led to an adverse inference that if such evidence would have been adduced, it would have been in favour of the Accused.

e. The Appellant's conviction is against the weight of the evidence. The Learned Trial Magistrate erred in fact and law by ignoring or not weighing sufficiently and not judiciously appreciating the inconsistent and contradictory evidence of the complainant and other relevant witness who told numerous untruths, were cunningly unreliable and evasive, forgetful and contradictory on material aspects.

f. The Learned Trial Magistrate erred in law and in fact by not giving any or adequate consideration/rejecting, ignoring and not appreciating the sworn and unchallenged evidence of the Appellant and not considering the defence of the Appellant judiciously and in its totality.

g. The Learned Trial Magistrate erred in not giving any sufficient consideration to the Appellant's evidence and when considering the defence, the Learned Trial Magistrate erred by shifting the onus of proof onto the Accused as if to prove his innocence.

h. In the circumstances of the case and bearing in mind the binding High Court authorities, disregarded by the Learned Trial Magistrate, the sentence imposed is manifestly harsh by not considering that the Appellant was a first time offender.

3. The Appeal was canvassed by written submissions which I have considered.

4. The duty of a first appellate court was explained in the case of Shantilal M. Ruwala vs. Republic [1975] EA, 57 thus: -

> "The first appellate Court must itself weigh conflicting evidence and draw its own conclusions."

5. A summary of the Prosecution's case, as was presented by three witnesses, was as follows: -

6. On 17th November 2017 the victim, Evans Nyanaro Hamisi (PW1), requested the Appellant to ferry him to a funeral on his (PW1's) motorcycle registration No. KMEG 254U since he did not know how to ride a motorcycle. Upon reaching Ekerenyo, PW1 then boarded a vehicle to the funeral venue at Nyachogocho but that on returning from the funeral, the Appellant was nowhere to be seen.

7. The complainant's search and enquiries about the Appellant's whereabouts did not bear any fruits but the complainant later learnt that the Appellant had sold the motorcycle and disappeared. The Appellant was however arrested several days later. The Appellant informed the police that he had sold the motorcycle for Kshs. 25,000/=. The motorcycle was never recovered.

8. PW2, Beatrice Moraa, the victim's wife confirmed that the Appellant ferried the victim on the motorcycle on 14th November 2017 but later disappeared with the said motorcycle. She stated that they had employed the Appellant as their motorcycle rider.

9. PW3, No. 11051 P.C. Paul Kimwele, was the investigating officer. He arrested the Appellant on 18th December 2017. He testified that the Appellant led them to Isebania where he had allegedly sold the motorcycle but that they were unable to trace it. He produced the receipt and invoice for the purchase of motorcycle as P.Exh 1(a) and P.Exh1(b) respectively.

10. When placed on his defence, the Appellant (DW1) testified that he was informed about the loss of the motorcycle. He maintained that he did not steal the motorcycle.

Analysis and Determination

11. I have carefully considered the record of appeal and the parties' rival submissions. I find that the main issues for determination are: -

    i. Whether the Appellant's rights were violated.

    ii. Whether the charge was proved to the required standard.

    iii. Whether the sentence was just and legal

i. Violation of the Appellant's rights.

12. The Appellant submitted that his rights, under Article 49 (1) (f) of *the Constitution*, were violated. He cited the case of Betty Jemutai Kimeiywa vs. Republic (2018) eKLR and Salim Kofia Chivui vs. Resident Magistrate Butali Law Courts & Another (2012) eKLR where the courts emphasized the importance of arraigning an accused person within the 24-hour timeline, after arrest, to guard against unwarranted arrest and detention.

13. The Respondent, on the other hand, submitted that the matter before the court is a criminal appeal and not a constitutional petition which would have been best suited to determine the issues of constitutional violations raised by the Appellant.

14. A perusal of the charge sheet reveals that the Appellant was arrested on 18th December 2017 and arraigned before the trial court for plea taking 10 days later on 28th December 2017. It was therefore not disputed that the Prosecution did not comply with the 24-hour rule provided under Article 49 of *the Constitution*. The said Article provides thus:

    49.

        (1) An arrested person has the right —

            (f) to be brought before a court as soon as reasonably possible, but not later than —

                (i) twenty-four hours after being arrested; or

                (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

15. The importance of the constitutional right stated under the above Article cannot be over-emphasized. The Human Rights Committee expressed the following view in Michael Freemantle vs. Jamaica, Comm. 625/1995, U.N. Doc. A/55/40, Vol. II, at 11 (HRC 1905) thus:-

> " The author has claimed a violation of article 9, paragraph 3 of the Covenant since there was a delay of 4 days between the time of his arrest and the time when he was brought before a judicial authority. The committee notes that the State party has not addressed this issue

specifically but has simply pointed out in general terms that the author was aware of the reasons for arrest. The committee reiterates its position that the delay between the arrest of an accused and the time before he is brought before a judicial authority should not exceed a few days. In the absence of a justification for the delay of four days before bringing the author to a judicial authority the Committee finds that this delay constitutes a violation of article 4, paragraph 3, of the Covenant."

16. This court is now required to consider if the proceedings undertaken before the trial court were a nullity in view of the failure, by the Respondent and the police, to arraign the Appellant in court within 24 hours from the time of his arrest. In the case of Hussein Khalid and 16 others vs. Attorney General & 2 others [2019] eKLR the Court held as follows:-

> "(122) Consequently, without downplaying the Appellants' allegations of infringement, we find that they have recourse under Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69 where it was stated that: -
>
> > "The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest in the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence."
>
> (123) Consequently, we are not persuaded, just like the High Court and the Court of Appeal, that this is an instance where this Court should intervene in order to quash the proceedings before the trial Court. The criminal proceedings pending before the trial Court should be allowed to continue expeditiously given the amount of time it has taken."

17. Guided by the decision in the above cited case, I find that failure, by the Prosecution, to arraign the Appellant before the court within 24 hours does not automatically result in an acquittal of the Appellant or the nullification of the trial court proceedings. This Court concurs with the submissions by the Respondent's Counsel that the Appellant has a recourse before the constitutional court where the alleged violation of his rights may be addressed. I therefore dismiss this ground of appeal.

ii. Whether the charge was proved to the required standard.

18. Section 278A provides as follows: -

> 278A. Stealing motor vehicle
>
> If the thing stolen is a motor vehicle within the meaning of the *Traffic Act* (Cap. 403), the offender is liable to imprisonment for seven years.

19. Section 268 defines stealing as follows:-

> 268. Definition of stealing
>
> (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
>
> (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—
>
> (a) an intent permanently to deprive the general or special owner of the thing of it;

20. It was not disputed that PW1 employed the Appellant to run his motorcycle taxi (boda-boda) business. PW1 testified that he did not know how to ride the motorcycle. His wife, PW2, corroborated his evidence and further testified that she is the one who handed over the motorcycle to the Appellant who had been introduced to them by one Micah Osebe. The Appellant did not controvert this testimony in his defence. Indeed, the Appellant conceded, in his submissions, that he was employed by the complainant and that he should have been charged with the offence of stealing by servant and not stealing a motorcycle.

21. Turning to the second limb of the offence, the Prosecution was required to prove that the thing that is capable of being stolen was unlawfully removed from the owner's possession or that the owner was deprived of it. PW1 and PW2 testified that the Appellant was the last person in possession of the motorcycle after he transported the complainant to Ekerenyo. It was the complainant's case that the Appellant disappeared for several days and could not be traced as he had switched off his phone.

22. It is my finding that since the Appellant was the one in possession of the said motorcycle on the 17th November 2017, he was the one who stole it from the victim or had knowledge of its whereabouts. It also emerged, from the evidence, that the said motorcycle was never traced. I find that the Appellant's conduct of disappearing from his place of work and switching off his phone for days on end until he was traced in Molo area one month later paint him as a person who was guilty of stealing the said motorcycle.

23. I find that the Prosecution's evidence was consistent, credible and watertight. I further find that the evidence presented by the Appellant, in his defence, consisted of mere denial of the offence which did not displace the overwhelming evidence presented by the prosecution witnesses.

24. I have also considered the issue of the alleged inconsistencies in the evidence of PW3 who indicated the OB Number as OB 26/11/2016 which meant that the report was made one year prior to the date of the incident and that the Appellant went missing on 19th November 2017 yet the evidence of PW1 and PW2 stated that the Appellant went missing on 18th November 2017. I refer to the case of Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007 where the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:-

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

25. I have considered the contradictions raised by the Appellant and I do not find that they are material enough to displace the Prosecution's case. They were minor contradictions and did not dent the evidence of the Prosecution witnesses.

26. On the issue of material witnesses, to wit, one Micah Osebe Ndege, not being called to give evidence, I find that the testimonies of the Prosecution witnesses were sufficient to prove the elements of the charge to the required standard.

27. It is trite that the Prosecution is not required to call a superfluity of witnesses to prove its case. This principle stems from Section 143 of the *Evidence Act* which provides that: -

> 43. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

28. The above principle was further explained in the case of Michael Kinuthia Muturi vs. R CRA 51 of 2002 (NRI) where the Court of Appeal stated thus:-

> " Although no particular number of witnesses is required to prove a fact, the failure to call certain witnesses in the instances where the evidence on record is not sufficient to sustain a conviction will attract adverse inference. However, in the instant case, the evidence on record was sufficient and therefore the omission by the prosecution to call the elders and the investigating officer attracted no adverse inference."

29. Guided by the above cited cases, I find that the evidence on record was sufficient to support the conviction as there were no gaps that the said Micah Osebe would have filled since it was not disputed that the Appellant was the complainant's employee.

30. It is my firm finding that the Prosecution proved the charge beyond reasonable doubt and I hereby uphold the conviction by the trial court.

iii. Whether the sentence was just and legal

31. It is a well-established principle that sentencing is at the discretion of the trial court which discretion an appellate court cannot interfere except where the trial court acted upon wrong principles or overlooked some material factors. The Appellant herein was sentenced to serve two years imprisonment.

32. Section 278A provides that a person found guilty for the offence "is liable to imprisonment for seven years".

33. In the case of Ogolla s/o Owuor vs. R (1954) EACA 270, the Court stated as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

34. In the present case, I find no reason to interfere with the sentence passed by the trial court as it was not only legal but also fair and just.

35. In the final analysis, I find that the Appeal lacks merit and I therefore dismiss it.

36. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF FEBRUARY 2025.

W. A. OKWANY

JUDGE