



REPUBLIC OF KENYA



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**Kariuki v Republic (Criminal Appeal E044 of 2023)
[2024] KEHC 3046 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E044 OF 2023
AK NDUNG'U, J
MARCH 7, 2024**

BETWEEN

JOHN MAINA KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Conviction and Sentence passed on 12/09/2018 in
Nanyuki CM Criminal Case No 1885 of 2017 – Njeri Thuku, PM)*

JUDGMENT

1. The Appellant herein, John Maina Kariuki (1st Accused during trial) was charged alongside five co-accused with the offence of conspiracy to defeat justice and interference with witnesses contrary to section 117(c) of the *Penal Code*. The Appellant, 2nd, 4th and 5th Accused were convicted after trial and were sentenced to five (5) years imprisonment. The 3rd Accused was convicted and sentenced to three (3) years probation. The 6th Accused was acquitted of the charges.
2. The particulars were that on 22/11/2017 at Mara Moja area of Nanyuki within Laikipia County, knowingly prevented the execution of a criminal process by interfering with the reporting of a defilement case.
3. Being dissatisfied with the conviction and the sentence, he appealed to this court vide amended grounds of appeal file alongside his submissions. He raised eight grounds of appeal which are as follows;
 - i. The learned magistrate erred by failing to appreciate that the case was not proved beyond reasonable doubt.
 - ii. The learned magistrate erred convicting him on a case that was fraught with contradictory and inconsistent evidence.



- iii. The learned magistrate failed to note that none of the prosecution witnesses testified that he paid any money to defeat justice.
 - iv. The learned magistrate erred convicting him without prove that the 2nd Accused received any money from the Appellant or at his direction.
 - v. That there was no evidence that he sent money to 2nd Accused in order to stop him from reporting the case to the police station.
 - vi. That the investigating officer did not have concrete information as to where the Appellant and the 2nd Accused used to work.
 - vii. That his defence was quashed by the trial court without a good reason.
 - viii. That the magistrate erred by meting out manifestly harsh and excessive sentence.
4. The Appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that the Kshs.5,000/- that was sent to the 2nd Accused by the 5th Accused (Appellant's employer) was to cater for the transport and medication for the minor as the minor testified in court that after she was taken to hospital by her father, they proceeded to police station where the matter was reported. That the village elder also confirmed that the money was meant for treatment. PW2 the assistant chief confirmed that he was shown an OB No. 39/22/11/17 which was a defilement report and this fortifies that the money that was sent was indeed to cater for treatment and the fact that the Appellant did not accompany the minor and her parents to hospital should not have been assumed as a ploy to defeat justice.
 5. That PW2 acted hastily out of suspicion that the money sent to 2nd Accused by 5th Accused was meant for reconciliation without knowing that 5th Accused was the 2nd Accused employer and he had met the 2nd Accused on his way to hospital and needed money for transport and treatment and the 5th Accused paid the 2nd Accused part of the money he owed him. There was no viable explanation why the minor's parents reported defilement to the police station on the same day despite receiving the alleged bribe.
 6. Further, the appellant maintained that there was no evidence that he called his employer (5th Accused) requesting him for money or even notified him of the allegations as the call data did not implicate him. PW3 did not explain why the 5th Accused sent money to the 2nd Accused. That she arrested the Appellant on 23/11/2017 for the offence of conspiracy to defeat justice without knowing that the defilement case had already been reported on the previous day. PW4 indeed confirmed that a defilement case was reported on 22/11/2017. That there was no plausible reason given by the prosecution why the money changed hands between the 5th and 2nd Accused. It was just an assumption that it was meant to bribe 2nd and 3rd Accused not to press charges against the Appellant. It also beats logic that the matter was reported by the same people said to have been bribed.
 7. The appeal is opposed. It is submitted for the Respondent that to prove the offence of conspiracy, the prosecution has to establish that the Appellant, together with others, agreed by common mind to commit an unlawful act which inference must be made from the actions of the accused and the evidence tendered in court. Reliance was placed on *Halsbury's Laws of England* Vol. 25 where it is observed that it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. That it requires a common purpose between parties or among the subject parties to be proved. As to what common intention is, the same is defined under section 21 of the *Penal Code*.
 8. It is urged that the evidence on record revealed that the Appellant and his co-accused had a meeting of minds as evidenced by their actions immediately after the 5th Accused sent kshs.5,500/- to the



- 2nd Accused. That it was not contested that the 5th Accused was the Appellant's employer and they were present when the money was sent to the 2nd Accused. The 4th Accused did not give a plausible explanation why he released the Appellant when the money was sent. The trial court evaluated the defence and found that there was no doubt that the money sent was to secure the release of the Appellant and therefore, the offence was proved to the required standard.
9. Counsel submits that the evidence adduced before the trial court was consistent, corroborative and reliable enough to secure a conviction. The 2nd Accused confirmed that he received money from the 5th Accused though he claimed that he was his employer. The 4th Accused failure to report the matter points to a deliberate effort to defeat justice.
 10. In regard to the challenge on the sentence, it is submitted that the same was lawful. The trial magistrate considered the Appellant's mitigation, the role he played, the gravity of the offence and the fact that he was not a first offender.
 11. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
 12. I have painstakingly read and considered the evidence as recorded by the trial court. I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. Over and above the evidence, I have had occasion to consider the submissions on record and the case law cited.
 13. In the course of writing this judgment, I noticed that the Appellant's co-accused appealed to this court vide High Court criminal Appeals Nos 54, 53 and 55 Benjamin Kimani Gachango & 2 others (Consolidated) and their convictions were quashed and the sentences set aside by this court (Waweru J) vide a judgment dated 11/03/2020 on account that the charge sheet was defective.
 14. The learned Judge stated;

“In order to fully appreciate the first two grounds of appeal it is necessary to set out fully the provisions of Section 117 of the *Penal Code*:

117. Any person who –
- a. conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or
 - b. in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or
 - c. obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal, is guilty of an offence and is liable to imprisonment for five years.”

It can be seen immediately that section 117 creates three (3) distinct offences as follows –



- i. False accusation of crime and obstruction, prevention, perversion and defeat of the course of justice.
- ii. Dissuading, hindering or preventing witnesses from testifying (or endeavouring to do so) in order to obstruct the due course of justice.
- iii. Obstructing, interfering with or knowingly preventing execution of any legal process.

Now let us look at the charge as laid against the Appellants and their co-accused:

“Charge:

Conspiracy to defeat justice and interfere with witnesses contrary to section 117(c) of the *Penal Code*.

Particulars of Offence:

On the 22nd day of November, 2017 at Mara Moja area of Nanyuki within Laikipia County, knowingly prevented the execution of criminal process by interfering with the reporting of a defilement case.”

As already seen, paragraph (c) of section 117 of the *Penal Code* creates the offence of obstructing, interference with or knowingly preventing the execution of any legal process, civil or criminal. That is the paragraph that the Appellants were alleged to be afool of. However, the statement of the offence alleged interference with witnesses. That is an offence under paragraph (b), not under paragraph (c) of section 117!

As for the particulars of offence given in the charge, the term “legal process” is not defined either in the *Penal Code* or in the *Interpretation and General Provisions Act*, Cap 2. However, in *Black’s Law Dictionary*, 10th Edition, the term “process” is defined thus:

1. The proceedings in any action or prosecution (due process of law).
2. A summons or writ, esp. to appear or respond in court.”

And the same Dictionary defines “legal process” thus –

“process validly issued.”



It is clear from these definitions that the reporting of a complaint to the police and subsequent investigation by the police cannot be termed a legal process. That is a police investigation. Any judicial proceeding resulting from that investigation, and any warrants, summons, etc issued therein is what will be a legal process. The particulars of offence given in the charge against the Appellants therefore did not disclose an offence under section 117(c) of the *Penal Code*. Those particulars may have disclosed an offence of obstructing, preventing, perverting or defeating the course of justice under section 117(a). However, the Appellants were not charged under that paragraph of section 117.

As it is, the charge was never amended. I find that the charge as laid against the Appellant was incurably defective for one, not disclosing the offence charged, and two, for duplicity. It was not possible to know with any degree of certainty which of the three distinct and separate offences under section 117 of the *Penal Code* the Appellants were facing in order to mount proper defences.”

...Suffice it to say that the evidence did not disclose any interference with a criminal process for the simple reason that there was not yet any criminal process in place. Nobody had been charged yet. Preventing someone from reporting a crime to the police may amount to obstruction, prevention, perversion or defeat of the course of justice, an offence under paragraph (a) of section 117 of the *Penal Code*. But it cannot be obstruction, interference with or prevention of execution of any legal process under paragraph (c) of section 117 where there is not yet any legal process afoot. And, as already seen, there was no amendment of the charge.

15. I am in agreement with the Learned Judge. The defect in the charge sheet cannot be cured by the provision of Section 382 of the *Criminal Procedure Code*. The defect was grave and left a lot of uncertainty on the charge the Appellant and others were facing. In view of this finding, I find it unnecessary to delve into the other issues that called for determination in this appeal.
16. With the result that the appeal succeeds and is allowed. I quash the conviction and set aside the sentence against the Appellant and substitute thereof an order for acquittal. The Appellant be set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF MARCH 2024.

A.K. NDUNG’U

JUDGE

