Ndegwa v Republic (Criminal Appeal 117 of 2023)
[2024] KEHC 5393 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5393 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 117 OF 2023

FN MUCHEMI, J

MAY 16, 2024

BETWEEN

MWANGI NDEGWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Thika by Honourable N. M. Kyanya-Nyamori (RM), in Traffic Case No. 367 of 2018 on 21st March 2019)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Resident Magistrate Thika. He was charged and convicted of exceeding speed limit contrary to Section 42(1) as read with Section 43(1) of the Traffic (Amendment) (No.2) Act No. 38 of 2012 and sentenced to pay a fine of Kshs. 40,000/- in default five (5) months imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 7 grounds which can be summarised as follows:-

    a. The learned trial magistrate erred in law and in fact by convicting the appellant on insufficient evidence since PW2 did not prove that he was an expert and he admitted to having destroyed the primary evidence;

    b. The learned trial magistrate erred in law and in fact by convicting the appellant despite the requirements of Sections 65 and 106B of the *Evidence Act* having not been complied with;

    c. The learned trial magistrate erred in law and in fact by disregarding the appellant's defence;

d. The learned trial magistrate erred by passing a sentence that was inordinately excessive and illegal in the circumstances.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that he was charged with the offence of exceeding speed with the particulars being that on 25th February 2018, he was driving motor vehicle registration number KCN 198Y at a speed of 89 km/hr instead of 80km/hr.

5. The appellant relies on Section 43(3) of the *Traffic Act* and the case of High Court of Kenya at Naivasha Criminal Revision No. 3 & 4 of 2014 David Njogu Gachanja v Republic and submits that the prosecution did not demonstrate that there were speed signs on the stretch of the road where he was driving and only one witness, PW2 testified with regard at which the appellant was travelling.

6. The appellant submits that pursuant to Section 48 of the *Evidence Act*, PW2 was not an expert. PW2 testified that he had been deployed by the Base Commander, Thika with a speed camera along Thika Nairobi Super Highway when he detected the appellant driving at a speed that was excessive and stopped him and subsequently preferred charges. The appellant further submits that PW2 indicated that the serial number of the speed gun he was using was 2380 and had a certificate from KBS for one year. However on cross examination, PW2 admitted that he required to have been trained to use the speed camera. It was PW2's further evidence that he had a certificate which he was not required to produce. Thus, the appellant states that, this fact was a confirmation by PW2 that he had not proved that he was an expert and was thus qualified to operate the speed camera.

7. The appellant further submits that PW2 admitted to having erased the data from the speed camera which is unclear as the fact that he was charged was reason enough for PW2 to preserve the evidence against him. Furthermore, PW2 admitted that PExh1(a) did not have a serial number indicated yet the appellant argues that the only way the image would be produced in evidence is through the speed camera which developed it and which bore the serial number 2380. As such, the serial number ought to have been on the image so as to connect it with the speed camera. The absence of the camera leads to a conclusion that the prosecution's evidence was not sufficient to procure a conviction. The appellant further contends that PW2 insisted that an image from a speed gun does not require to have a serial number.

8. The appellant submits that the evidence the prosecution relied on was allegedly gathered using a speed gun and although PW2 alleges to have made a print out from the speed gun using a computer, he did not attach the computer certificate which is contrary to Section 65 and 106B of the *Evidence Act*. The appellant cites the case of Nairobi Criminal Appeal No. 94 of 2015 Lucy Nyambura Marubu v Republic and submits that the production of electric evidence ought to comply with Section 65(8) of the *Evidence Act* for it to be admissible. The appellant further argues that while the trial court may have been correct in holding that the speed gun did not have to be produced, the calibration certificate cannot be said to satisfy the requirements of Section 65(8) of the *Evidence Act* as read together with Section 106B. The certificate of calibration could only prove that the speed gun was in good working condition. The appellant contends that the certificate envisaged under the *Evidence Act* is not a calibration certificate.

9. The appellant submits that the image used by PW2 is a fabrication with the sole purpose of charging him. The image purportedly printed out by PW2 clearly shows that it is not from a speed gun as an image from a speed gun is similar to an image taken by a digital camera. The appellant further submits

that when such an image is downloaded into a computer, the four knobs appearing on the image cannot possible appear. Furthermore, the appellant contends that the features on the subject image could not possibly have been as a result of an image downloaded into a computer as PW2 alleged. The appellant testified that he had seen a print out from a speed gun and it was not similar to the image produced before the trial court.

10. The appellant states that it is surprising that PW2 would have been taking the speed of his motor vehicle from behind rather than when the vehicle was approaching him. Further the appellant submits that the speed on the impugned image indicated as 089 is in a font that does not appear in digital devices such as the speed gun.

11. The appellant submits that on 25th February 2018 he was heading to Kangema from his home, whilst driving motor vehicle registration number KCN 198Y and on reaching Mang'u he was stopped by the police. The police then told him that he was driving at a speed of 89km/hr instead of 80km/hr which he indicated could not be the case as his vehicle had a speed governor and therefore his vehicle could not exceed 80km/hr. It was further submitted that the appellant testified to being familiar with the images that are produced by a speed camera which were different from the photograph produced by PW2.

12. The appellant was emphatic that the speed gun ought to have been produced in court. Further, the appellant states that the prosecution did not cross examine him and thus by failing to test the veracity of his defence, the trial court ought to have accepted that his vehicle could not exceed 80km/hr as it had a speed governor. The appellant further states that the trial court ought to have agreed with him that the photograph allegedly showing that he was speeding was clearly fabricated. Thus, the appellant said that his evidence stood unchallenged.

13. The appellant submits that the trial magistrate fined him a sum of Kshs. 40,000/- after finding him guilty of having exceeded speed by 9 kilometres. The appellant contends that there was no evidence that he was a repeat offender and thus the trial court ought to have been more lenient with him. The appellant further argues that he was not carrying passengers on the vehicle and he was on a road where private motorists are allowed a maximum of 110km/hr. thus, he argues that the circumstances of the case did not warrant a fine of Kshs. 40,000/- and urges the court to reduce the fine imposed to a maximum of Kshs. 10,000/-.

The Respondent's Submissions

14. The respondent submits that pursuant to Section 42(1) as read with Section 43(1) of the Traffic (Amendment) (No. 2) Act No. 38 of 2012 the ingredients for the offence of exceeding speed limit are that the accused must have been driving on a road at a greater speed than that prescribed. The respondent further submits that to prove the ingredients, the prosecution led evidence of PW1- 67357 Ceaser Githui, who stated that he tasked with doing patrols and was on duty on 25/2/2018 along Thika Road doing speed checks on motor vehicles. The witness further stated that he was alerted by PW2 No. 91996 Lawrence Mbuvi who had a speed gun about the appellant's motor vehicle exceeding speed limit and effected the arrest. PW2 testified that he had been deployed by Thika Base Commander on patrol duties assigned to man Thika Road using speed cameras when he saw the appellant's motor vehicle being driven at 89 km/hr. The witness then alerted his colleagues including PW1 who effected the arrest of the appellant. PW2 testified that he was armed with a speed gun number 2830 and the camera was licenced by KEBS and they obtained a certificate annually. The witness further produced exhibits in form of the photos of the said speed gun and the calibration certificates.

15. The respondent submits that the two witnesses ably led the prosecution case against the appellant as the evidence showed that the appellant was driving along Thika Road and he exceeded the speed limit for

the road. The respondent further submits that the conviction and sentence of the appellant was lawful and in compliance with Section 42 of the *Traffic Act*. The conviction was safe as the appellant was fined Kshs. 40,000/- which the respondent argues was equally lawful, not excessive and commensurate to the offence committed serving to punish the appellant for the offence and act as a deterrence measure to other drivers who endanger other road users. The respondent submits that the prosecution proved all the ingredients of the offence beyond the required standard of reasonable doubt.

Issues for determination

16. The appellant has relied on seven (7) grounds of appeal which considered together with the evidence on record translates into two main issues for determination:-

    a. Whether the prosecution proved its case beyond any reasonable doubt;

    b. Whether the sentence was harsh and excessive.

The Law

17. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

18. Similarly in the case of Okeno v Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.
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> (Shantilal M. Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174.

SUBDIVISION - Whether the prosecution proved its case beyond any reasonable doubt;

19. Section 42(1) of the *Traffic Act* Cap 403 provides:-

    No person shall drive, or, being the owner or person in charge of a vehicle, cause or permit any other person to drive, a vehicle on a road at a greater speed than such speed as may be prescribed as the maximum speed for that class of vehicle.

20. The ingredients of the offence are that the accused person must have been driving the vehicle on the road and the accused must have been driving at a speed greater than the maximum prescribed for that vehicle.

21. The prosecution led evidence by calling two witnesses who were police officers who testified as PW1and PW2. PW1 Ceaser Githui, police officer Force No. 67357 testified that he is attached at Thika traffic office and tasked with carrying out patrols. He testified that on 25th February 2018 while he was on duty along Thika super highway doing speed checks on motor vehicles he arrested the appellant who was driving motor vehicle registration number KCN 198Y, a private caravan/commercial vehicle for exceeding the speed limit. The witness testified that the appellant was driving at a speed of 89km/hr yet the speed required of a caravan is 80km/hr which is indicated at the back of the motor vehicle.

22. PW1 further testified that PW2 police constable No. 91996 Lawrence Mbuvi had the speed gun and he alerted him and others not before the court about the speeding vehicle. PW1 then flagged down the appellant's motor vehicle and PW2 showed the appellant the speed gun which indicated the details of the appellant's motor vehicle as KCN 198Y which was being driven at a speed of 89km/hr. The time the appellant's vehicle was captured was 9.52.03.

23. The witness stated that the appellant denied the speed and the witness preferred charges of exceeding the speed limit. PW1 then produced photos that showed the speed limit at the bottom left corner. The witness further produced the calibration certificate which was valid until 4/4/2018 to prove that the speed gun was well calibrated and further produced the current calibration certificate valid until 26/2/2019 serial number 2830.

24. PW2 testified that on the material day he had been deployed by the Base Commander Thika to man the speed camera along Thika Nairobi superhighway. Whilst on duty he saw motor vehicle registration number KCN 198Y being driven at 89km/hr instead of 80km/hr and he informed the officers manning the road block. The witness further testified that when the vehicle passed him, he focused the camera on it and took the image. The appellant was then stopped and arrested.

25. The witness further testified that he thereafter made a print out from the speed camera and produced the same as exhibits. PW2 testified that the machine gun is calibrated by the Kenya bureau of Standards (KEBS) and a certificate is issued annually. The speed gun he was using was 2380 and the machine gun has a certificate for one year valid until 26/2/2019 and thus at the time he was using it, the certificate was still valid. He then produced the said certificate in evidence.

26. According to the evidence, the appellant was driving motor vehicle registration KCN 198Y on the material day. This fact is admitted by the appellant during his defence in his testimony to the effect that that on the material day, he left his home at 7 o clock and was headed to Kangema whilst driving motor vehicle registration number KCN 198Y. Thus the prosecution proved the ingredient that the accused person was driving his vehicle on a road at the material time.

27. On the second ingredient, the prosecution relies on PW1 and PW2's testimonies as well as photographic and electronic evidence from the machine gun. PW1 and PW2 testified that the appellant's motor vehicle was a caravan whose speed limit is 80km/hr and the same is indicated at the back. However the appellant testified in his defence that his motor vehicle had a speed governor of 80km/hr. Thus it is imperative for the court to examine the evidence led by the prosecution to assess whether the prosecutor proved this ingredient of the offence to the standard of beyond reasonable doubt.

28. The appellant faults the prosecution for failing to demonstrate that there were speed signs on the stretch of the road where he was driving. He further argues that only one witness, PW2 testified in regard to the speed at which the appellant was driving contrary to Section 43(3) of the *Traffic Act*.

29. Section 43(3) of the Act provides:-

A person charged with the offence of driving a motor vehicle of any class or description on a road at a speed greater than the maximum speed allowed shall not be liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness the person charged was driving the vehicle at such greater speed.

30. Section 43(3) of the *Traffic Act* must be read alongside Section 119 of the same Act which inter alia gives power to the Minister to make rules regarding the regulation, control, restriction of the use of vehicles as circumstances may require. Rule 3 of the Traffic (Speed Limits) Rules made under the said section allows the use of a speed camera by a police officer in uniform for the purposes of "determining, recording or storing the digital image of the speed of any vehicle." Such records are also declared by the Rules to be admissible in court as evidence.

31. In the instant case, the nature of the evidence on record did not conform with the "opinion" of the sole witness anticipated in Section 43(3) of the *Traffic Act*. The prosecution witnesses relied on the speed camera and not only on the personal opinion of the police officer in determining the speed of the subject vehicle. Thus this ground of appeal lacks merit.

32. The appellant further takes issue with the admission of electronic evidence yet it did not meet the requirements as set out in Sections 65(8) and 106B of the *Evidence Act*. Admissibility of electronic records is governed by Sections 65(8) and 106B of the *Evidence Act*.

33. Section 65(8) of the *Evidence Act* provides;-

In any proceedings under this Act where it is desired to give a computer printout or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

a. identifying a document containing a print out or statement and describing the manner in which it was produced;

b. giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

c. dealing with any of the matters to which the conditions mentioned in the subsection (6) relate,which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.

34. Section 106B of the *Evidence Act* provides:-

Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1) in respect of a computer output, are the following:-

a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

c. throughout the material part of the said period, the computer was operating properly or if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period in was not such as to affect the electronic record or the accuracy of its content; and

d. the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following-

a. Identifying the electronic record containing the statement and describing the manner in which it was produced;

b. Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

c. Dealing with any matters to which conditions mentioned in sub section (2) relate; and

d. Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device of the management of the relevant activities (whichever is appropriate);

shall be evidence of any matter stated in the certificate and for the purpose of this sub section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.

35. The purpose of the certificate of electronic evidence was discussed in the Court of Appeal case of County Assembly of Kisumu & 2 Others vs Kisumu County Assembly Service Board & 6 Others [2015] eKLR where the court held that:-

Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer.

In our view, this is a mandatory requirement which is enacted for a good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced.

The *Evidence Act* does not provide the format the certificate required under subsection (2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.

36. Similarly in the persuasive decision in the High Court in Earnest Tsuma & 2 Others v Republic [2020] eKLR the court held that:-

The entire idea behind the certificate is also to ensure the integrity of the source and authenticity of the data, so that the Court may be able to place reliance on it. This is important because electronic data is more prone to tampering and alteration and also to give technical assistance to the court.

37. The appellant further argued that the trial magistrate disregarded his defence. I have perused the trial record and noted that the appellant testified that on the material day he was driving motor vehicle registration number KCN 198Y heading towards Kangema when he was stopped by police at Mangu. The appellant further testified that the police told him he was over speeding at 89Km/hr instead of driving at 80km/hr. The appellant stated that his car had a speed governor of 80km/hr. The trial court in rendering its judgment stated that it considered the appellant's defence but it was not plausible as it did not poke any holes in the prosecution's case. It is not in doubt that the trial court considered the appellant's defence in its judgment.

38. Regarding the admissibility of the photographic evidence, Section 78 of the *evidence Act* provides that an officer appointed by the Director of Prosecution for that purpose who has prepared a photographic print or a photographic enlargement from exposed film or any other annex referred to herein; shall produce and that such evidence shall be admissible. The Section requires that such certificates be produced and that signature be presumed as genuine. Although the certificates were not produced, the photos and images from the speed gun were produced by PW2 who explained how the images had been processed. It was not necessary to produce the speed gun in court because the calibration certificate to confirm that the speed gun was in good working condition was produced.

39. The trial court correctly ruled that the electronic and photographing evidence produced by the respondent met the requirements of the law. The defence failed to establish that the vehicle of the appellant had a speed governor and could not have exceeded the speed limit. The evidence adduced by the respondent remained unshaken in my view. I therefore find that the conviction was based on cogent evidence and it is hereby upheld.

40. In regard to sentence, the law provides for a maximum fine of KShs.100,000/=. The accused was fined KShs.40,000 in default five (5) month's imprisonment. The appellant was a first offender and had exceeded only nine (9) kilometers of the allowed speed limit of his vehicle. In that regard it is my considered view that a lower fine ought to have been imposed on the appellant taking into account the judiciary sentencing guidelines. In consideration of the exceeded speed, I hereby substitute the fine imposed of KShs.40,000/= to KShs.20,000/=. The appellant paid the fine before he was released. As such, I hereby order that the balance of KShs.20,000 be refunded to the appellant.

41. The appeal is only partly successful.

JUDGMENT DELIVERED AT THIKA, SIGNED AND DATED THIS 16TH DAY OF MAY 2024..

F. MUCHEMI

JUDGE