



REPUBLIC OF KENYA



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**Koech v Republic (Criminal Appeal E046 of 2022)
[2024] KEHC 9766 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E046 OF 2022**

RL KORIR, J

JULY 16, 2024

BETWEEN

EZEKIEL CHERUIYOT KOECH APPELLANT

AND

REPUBLIC RESPONDENT

(From the Conviction and Sentence in Criminal Case Number 1075 of 2021 by Hon. Kiniale L. in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant herein was charged with the offence of stealing a motor vehicle contrary to section 278A of the *Penal Code*. The particulars of the charge were that on 28th June 2021 at Silibwet trading centre, Bomet township location, within Bomet County, jointly with another not before court stole a motor vehicle registration number KCR 268X valued at Kshs 780,000/=, the property of Robert Kiprono Terer.
2. The Appellant pleaded not guilty to the charge before the trial court, and a full hearing was conducted. The prosecution called seven (7) witnesses in support of its case.
3. At the close of the prosecution case, the trial court ruled that a *prima facie* case had been established against the Appellant and he was put on his defence.
4. At the conclusion of the trial, he was convicted on the charge of stealing a motorcycle and sentenced to serve five (5) years imprisonment.
5. Being dissatisfied with the Judgment dated 13th October 2022, Ezekiel Cheruiyot Koech appealed to this court and relied on the following grounds reproduced verbatim:-
 - i. That, the learned trial Magistrate erred in law and fact in convicting me on evidence which did not meet the required standard of proof in accordance with the law.



- ii. That the learned trial Magistrate erred in law and fact by relying on extrinsic evidence that were not adduced in court during the trial.
 - iii. That the learned trial Magistrate erred in law and fact by depending on evidence which was based on theory of conspiracy between me, the complainant (PW1) and PW2 that was not proved beyond reasonable doubt by the Prosecuting witnesses.
 - iv. That the learned trial Magistrate erred in law and fact by convicting me on charges that were not tallying and favourable.
 - v. That I wish to be present during the hearing of my appeal and I also request court proceedings.
6. This being the first appellate court, it has a duty to re-evaluate and scrutinize evidence on record and draw its own independent conclusions. See *Mark Ouiruri Mose v R* [2013] eKLR.
 7. I now proceed to analyse the Prosecution and Defence cases in the succeeding paragraphs.

The Prosecution's Case.

8. It was the Prosecution's case that on the night of 28th June 2021, the Appellant in the company of another stole motor vehicle registration number KCR 268X belonging to Robert Kiprono Terer.
9. Robert Kiprono Terer (PW1) stated that on the material day, while parked at Digital bar within Silibwet Township, he locked his car keys in the car. That he requested Patrick Kipngetch Rono (PW2) to watch over the car as he went home to get his spare car keys. PW1 stated that when he reached home, he was called and informed that his car had been involved in an accident.
10. No 83367 PC Paul Mawacho (PW6) stated that when he arrived at the accident scene, he found the injured Appellant who was thereafter taken to hospital. PW6 stated that there was also a dead person in the motor vehicle, whom they took to the mortuary. Geoffrey Kirui (PW4) who was a clinical officer testified that he examined the Appellant and he had chest pains and bruises on his face and chest.
11. CIP Boniface Mulee (PW7) testified that the Appellant recorded a confession statement admitting to stealing the said motor vehicle with Dennis Cheruiyot Bett (deceased).

The Appellant's Case.

12. The Appellant (DW1) denied committing the offence. He stated that on the material day, he was riding his boda boda and he just found himself in hospital. That the said motor cycle belonged to his sister and had never been recovered. It was his further testimony that he was arrested in hospital.
13. This Appeal proceeded by way of written submissions.

The Appellant's submissions.

14. Through his submissions filed on 23rd March 2023, the Appellant submitted that PW1 was not the owner of the subject motor vehicle according to the logbook he presented in the trial court. Further that PW2 and PW3 stated that they never saw him steal the said motor vehicle.
15. It was the Appellant's submission that the testimony of the clinical officer was contradictory as he testified that he attended to him on 31st August 2023 while he was attended to in Tenwek Hospital on the material day, 28th June 2021. It was his further submission that the deceased had informed him that the subject motor vehicle was his and he wanted him to take him home as he felt unwell.



16. The Appellant submitted that he was forced to confess at the police station that he stole the subject motor vehicle.

The Prosecution's/Respondent's Submissions.

17. Through their submissions dated 26th October 2023, the Respondent submitted that the elements of stealing had been established. That PW1 produced ownership documents as P.Exh 1. They further submitted that PW1 had been deprived off the control and use of his motor vehicle fraudulently.

18. It was the Respondent's submission that the Appellant had been clearly identified as the perpetrator. That the investigating officer (PW5) found the Appellant at the scene inside the wreckage of the car. It was their further submission that the clinical officer (PW4) confirmed the injuries sustained by the Appellant in the accident.

19. The Respondent submitted that the confession was not procedurally procured. That the trial court ought to have conducted a *voire dire* to establish whether the confession was properly conducted but it did not. They further submitted that the improper procedure of procuring the confession did not negate the substance of the criminal trial and thus it was not fatal to the conviction as the case went to full trial and the evidence established was beyond reasonable doubt.

20. It was the Respondent's submission that the sentence imposed by the trial court was lawful, fit and proper in the circumstances of the offence. That the Appeal lacked merit and ought to be dismissed.

21. I have gone through and given due consideration to the trial court's proceedings, the grounds of Appeal filed on 26th October 2022, the Appellant's written submission filed on 23rd March 2023 and the Respondent's Written Submissions dated 26th October 2023. The following issues arise for my determination:-

- i. Whether the confession statement was validly and procedurally procured and admitted into evidence.
- ii. Whether the Prosecution proved its case beyond reasonable doubt.
- iii. Whether the Defence places doubt on the Prosecution case.
- iv. Whether the sentence preferred against the Appellant was excessive.

i. Whether the confession statement was validly and procedurally procured and admitted into evidence.

22. The Prosecution presented evidence of a confession statement (P.Exh 7) by the Appellant. Cpl Boniface Mulee (PW7) testified that he recorded a confession statement of the Appellant on 29th June 2021. In an interesting turn of events, the Respondent/Prosecution in its submissions stated that the same confession was invalid as it was unprocedurally procured.

23. The Appellant on the other hand submitted that he was forced to confess to the theft of the subject motor vehicle. In essence, the Appellant repudiated the confession statement, albeit on appeal.

24. Section 25 of the [Evidence Act](#) defines confessions under as follows:-

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.



25. In the case of *Sango Mohamed Sango & another v Republic* (2015) eKLR, the Court of Appeal interpreted section 25 of the *Evidence Act* as follows:-

“Broad as section 25 appears to be, a confession must still be sufficiently clear that the accused person admits all the elements of the offence charged. As the former Court of Appeal for Eastern Africa stated in *Rex v Kituyan s/o Swandetti* (1941) 8 EACA 56, a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence.”

26. Section 26 of the *Evidence Act* provides:-

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

27. In expounding the above, the Court of Appeal in *Kanini Muli v Republic* [2014] eKLR held:-

“It has consistently been stated by the courts in this country that it is the duty of every trial judge and magistrate to examine with the closest care and attention, all the circumstances in which a confession has been obtained to ensure that it was made voluntarily. The rationale for insisting that a confession should be voluntary is to ensure that it is ultimately reliable. A confession that is made due to torture, threats, promise, inducement, or similar conduct is not reliable since it could have been made with no regard to the truth but purely to avoid harmful consequences or to gain some advantage. (See *Njuguna S/o Kimani & others v Regina* [1954] EA 316, *Githinji S/o Njaguna & another v Regina* [1954] EA 410). The duty of every trial court to examine with the closest care and attention, all the circumstances in which a confession has been obtained is not restricted to confessions recorded by the police. Rather, it applies to all extra-judicial confessions.”

28. Out of court confessions such as the present one are governed by the *Evidence (Out of Court Confessions) Rules, 2009*. The relevant rules are as follows:-

Rule 5

(1) The recording officer shall caution the accused person in the following terms and shall record his response:

“Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.”

(2) While recording the confession, the recording officer shall ensure, and record compliance, that where the confession session is prolonged, the session included rest and relaxation periods.

(3) The recording officer shall ensure that the confession is recorded at the same time it is made and shall record the date and time of commencement of the confession session and the place where the confession is recorded.



Rule 7

Where the confession is to be recorded in writing, the recording officer shall inform the accused person of his option to write his own statement in his preferred language or to have the recording officer record it.

Rule 8

At the conclusion of the recording, the accused person shall be offered the opportunity to clarify anything he has said and to add anything he may wish.

Rule 9

The recording officer shall ensure that the written confession or electronic recording media contains the following certificate at the end of the confession, in the original language of the accused person:

“I have read the above statement and I have been told that I can correct, alter or add anything I wish. The statement is true. I have made it of my own free will.”

Rule 10

In the case of a confession not recorded in English or Kiswahili, the recording officer shall ensure that it is translated into English or Kiswahili.

Rule 13

The recording officer, having informed himself of section 26 the Act, shall be the proper prosecution witness to prove to the court beyond reasonable doubt that the Rules were complied with.

Rule 14

The recording officer shall certify, in writing, that a confession was not obtained as a result of any inducement, threat or promise having reference to the charge against the accused person.

29. I have looked at the confession statement (P.Exh 7) and I have noted that it complied with all the rules listed above. The confession was extracted in Kipsigis language that the Appellant confirmed he understood and the same was translated to English by his third party representative, Philemon Ruto Kipkirui. There is a translation certificate signed by the said Philemon Ruto Kipkirui at the end of the confession statement.
30. I have also noted that the Appellant was not coerced or threatened into making the confession statement. The Appellant and PW7 both signed certificates at the end of the confession confirming that the confession was the correct version of events as narrated by the Appellant and that the Appellant had made the confession voluntarily. The Appellant did not bring up any issue of threats or harm when he cross examined PW7. Additionally, the confession statement contains a caution where the Appellant was informed by PW7 that he was not obliged to say anything but if he did, whatever he said could be used as evidence against him in a court of law.
31. In an interesting turn of events, the Prosecution submitted that the confession was unprocedurally procured as the trial court failed to conduct a *voire dire* examination on the Appellant to confirm if the confession was voluntarily obtained. *Voire dire* was explained by the Court of Appeal in the case of *Macharia v Republic* [1976] KLR 209, as:-

“It [*voire dire*] must be a preliminary examination of a witness by the magistrate in which the witness is required “to speak the truth” with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she



is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth).....”

32. Clearly, the issue of *voire dire* did not arise in this case as there was no suggestion that the Accused was incapacitated or faced any disadvantage or vulnerability. This court would like to believe that the Prosecution intended to submit on whether or not there was a trial within a trial which would test the voluntariness of a confession.

33. It is salient to note that depending on the circumstances of the case, the failure to conduct a *voire dire* examination is not fatal. In *Maripett Loonkomok v Republic* [2016] eKLR, the Court of Appeal held that:-

“We turn to consider the effect of failure by the trial court to administer *voir dire* on the complainant. It is firmly settled that not in all cases that *voir dire* is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case.....”

34. The Appellant neither repudiated nor retracted his confession statement at the trial. On this Appeal however, he submitted that he was coerced to make the confession.

35. I have however gone through the trial court record and I have noted that the Appellant had the chance to cross examine CPL Boniface Mulee (PW7) who recorded his confession and he did not raise any issue as to the validity of the confession statement or if he was coerced into making the same.

36. In any event, courts do not automatically discard repudiated confessions. The court is mandated to carefully examine the circumstances precedent in recording the statement and also consider other corroborating evidence. The Court of Appeal in *Peter Njagi Muchangi & 3 others v Republic* [2013] eKLR held:-

“Further in the above mentioned case, the predecessor of this Court at page 91 held as follows:-

“We would summarize the position thus- a trial court should accept any confession which has been retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.”

37. Flowing from the above, it is my finding that the Appellant’s confession statement was procedurally procured and it abided by all the rules as envisaged in the *Evidence (Out Of Court Confessions) Rules, 2009*. It is my further finding that the confession statement was valid and the trial court was not in error when it admitted the same into evidence.

ii. Whether the Prosecution proved its case beyond reasonable doubt

38. The elements of stealing are contained in Section 268 of the *Penal Code* which provides:-



- (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;
 - (b) an intent to use the thing as a pledge or security;
 - (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
- (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
- (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

39. I am persuaded by Nyakundi J. in *Robert Onchwari Orina & another v Republic* [2021] eKLR, where he held that:-

“.....For an accused person to be convicted of the offence under Section 268 of the *Penal Code*, it’s incumbent upon the prosecution to prove (sic!) that he or she dealt with the property of the complainant fraudulently without any claim of right or converts it into his or her own use, other than the general or special owner thereof. That intention is executed in a manner to deprive the rightful owner of the property permanently.

In *R v Jones* [1976] KLR 1 the Court observed that:

“On a charge of theft, it was necessary to prove a fraudulent taking or conversion without claim of right, and a person was deemed to have taken or converted money fraudulently if he did so without a claim of right and with intent to use it at his will, even if he intended to repay the money to the owner.”

40. From the evidence on record, Robert Kiprono Terer (PW1) stated that he owned the stolen motor vehicle registration number KCR 268X. He produced a Sale Agreement as P.Exh 2 dated 11th



December 2018 which showed that he bought the subject motor vehicle from Nickson Langat. He further produced the log book as P.Exh 1 which showed the subject motor vehicle was still registered under Nickson Langat. This testimony and exhibits were uncontroverted as the Appellant did not cross examine PW1. I am therefore satisfied that the motor vehicle registration number KCR 268X belonged to PW1.

41. The Prosecution also had to prove that PW1 had been fraudulently deprived off the use of his motor vehicle. PW1 stated that he had accidentally locked his car keys inside the car and he could not access them. He asked the watchman, Patrick Kipngetich Rono (PW2) to watch over his car as he rushed home to get his spare keys. Before PW1 could return, he was called and informed that his motor vehicle had been involved in an accident.
42. No 83367 PC Paul Mawacho (PW6) who was the investigating officer stated that when he reached the accident scene, he found that the Appellant had been injured and his accomplice, Dennis Cheruiyot Bett had died. The Appellant was rushed to hospital for treatment and his accomplice's body was taken to the mortuary. Geoffrey Kirui (PW4) who was the clinical officer who examined the Appellant after the accident stated that the Appellant had chest pain and bruises on his face and chest. PW4 produced a P3 form as P.Exh3 and the P3 form confirmed the injuries suffered by the Appellant.
43. PW6 produced pictures of the mangled up subject motor vehicle as P.Exh 5a and the requisite accompanying certificate as P.Exh 5c. The pictures satisfy the requirements of section 106B of the Evidence Act on admissibility of electronic records. I hereby accept the admissibility of the said pictures.
44. From the above evidence alone, I am satisfied that the Appellant was placed at the scene of accident and was in the subject motor vehicle when it was involved in an accident.
45. That notwithstanding, CIP Boniface Mulee (PW7) produced the Appellant's confession as P.Exh7. In the confession, the Appellant admitted that in collusion with the watchman of Digital Bar where the motor vehicle was parked, they stole the said motor vehicle together with the deceased, Dennis Cheruiyot Bett. The Appellant admitted that he drove the car in at a high speed resulting in the accident which claimed the life of his accomplice. As I have already found, the confession statement was valid and admissible.
46. There is no doubt in my mind that the Appellant and his accomplice stole the subject motor vehicle and were only stopped in their tracks by the accident. They deprived PW1 off the use of his motor vehicle.
47. What is of concern to this court was why the charges against PW2 were dropped. The watchman who was referenced as a colluder in the confession statement was Patrick Kipngetich Rono (PW2). PW2 was initially charged alongside the Appellant before the charges were dropped presumably after turning into a State witness. Having looked at PW2's evidence, I am convinced of PW2's laxity and complicity in the matter. He was the one whom the complainant had requested to watch over the vehicle and he indeed was the one who had the knowledge that the ignition key was inside the vehicle.
48. Flowing from the above and based on the totality of the evidence before me, it is my finding that the Prosecution established and proved the elements for the offence of stealing. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

iii. Whether the Defence places doubt on the Prosecution case.

49. The Appellant (DW1) denied committing the offence. He testified that on the material day, he was riding his sister's motorcycle when he suddenly found himself in hospital. When the Appellant cross examined the investigating officer (PW6), PW6 stated that he did not find any motor cycle at the scene of the accident.



50. The Appellant's defence contradicted his confession statement. The confession statement was backed up by the testimonies of the investigating officer (PW6) and the clinical officer (PW4) who found the Appellant at the scene of the accident and who treated the Appellant respectively. In my view, the Appellant's defence was an afterthought.
51. Having considered the Appellant's defence as a whole, it is my finding that it did not place doubt on the Prosecution's case, which I have already found proven.

iV. Whether the sentence preferred against the Appellant was excessive.

52. The penal section for the offence of stealing is contained in section 278A of the *Penal Code* which states:-

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.

53. Having considered the circumstances of the case, it is my finding that the trial court did not err when it handed the Appellant a 5 year prison sentence. The sentence was just, fair and proportionate. I consequently uphold the conviction and affirm the sentence passed by the trial court.

54. In the end, the Appellant's Appeal filed on 26th October 2022 has no merit and is dismissed.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 16TH DAY OF JULY, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person, Mr Njeru for the Respondent and Siele (Court Assistant).

