



**Ngiakanu v Republic (Criminal Appeal E043 of 2024)
[2024] KEHC 12507 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E043 OF 2024
LM NJUGUNA, J
OCTOBER 16, 2024**

BETWEEN

JOSEPH MUTURI NGIAKANU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged with four counts of stealing contrary to section 268(1) as read with section 275 of the penal code, with an alternative charge of handling stolen property to count four. He was also charged with four other counts of making a Document without Authority contrary to section 357 of the Penal Code, as per the charge sheet.
2. With regards to the counts of stealing, it was alleged that on the 7th, 8th, 11th, and 15th of June 2019 at Kiritiri township the accused stole assorted hardware goods belonging to Jammer Hardware whereas in the alternative charge it is alleged that the accused person otherwise than in the course of stealing retained 50 iron sheets of 2.5 m and 3m in sizes and 4 rolls of barbed wire for the benefit of Stanley Ileri Kiura knowing or having reason to believe that the same were stolen goods. With regards to the counts for making documents without authority, it is alleged that on the same dates, the accused person made Bank Deposit slips issued by Kenya Commercial Bank, Embu Branch with intent to deceive and/defraud.
3. Having pleaded not guilty to the charges, the case proceeded to full hearing and at the close of the prosecution's case, the appellant was placed on his defence after the court found that he had a case to answer. After considering both the prosecution and the defence cases, the learned Magistrate found the appellant guilty of counts 1, 2, 3 and 4 but was acquitted in counts 5, 6 and 8. He was sentenced to one year imprisonment for each count and the sentences were ordered to run consecutively.



4. Being dissatisfied with both the conviction and the sentence, the appellant appealed to this court vide the Memorandum of appeal dated the 29th, April 2024 seeking for orders that, the appeal be allowed, the conviction be quashed and the sentence be set aside and the appellant be set at liberty. The following are the grounds of appeal;
 1. The learned magistrate erred in law and in fact in finding that the prosecution has proved it's case beyond any shadow of doubt in circumstances where the evidence presented was clearly inadequate to sustain and prove the charges.
 2. The learned magistrate erred in law and in fact in relying on and giving due credence to the prosecution's evidence which was inconsistent, full of contradictions and loose ends incapable of proving charges against the appellant.
 3. The learned magistrate erred in law and in fact in finding that the prosecution witnesses' testimonies particularly that of PW6 would corroborate other witnesses when in fact there were glaring contradictions, exaggerations and misinformation in the whole case and evidence.
 4. The trial magistrate erred in law and in fact by disregarding and failing to consider the sworn testimony of the appellant which testimony was unshaken by the prosecution in his judgment.
 5. The learned Magistrate erred in law and in fact by shifting the burden of disapproving the charges to the accused/ appellant
 6. The learned magistrate erred in law and in fact by reaching conclusions on facts and giving opinions not founded in or supported by the evidence tendered by any witnesses.
 7. The learned magistrate erred in-law and in fact by convicting the appellant of the charges without the benefit of any evidence to support the charges
 8. The learned magistrate erred in law and in fact by disregarding the submissions and Authorities on behalf of the appellant
 9. Without prejudice to all the foregoing, the learned magistrate erred in law and in fact by imposing an excessive sentence upon the appellant.
5. The summary of the evidence was as follows; PW1 was the owner of the Hardware which is located in Kiritiri market plot No. 3A and B and he sells all types of hardware, cement, Mabati, Plumbing materials etc. That his wife and one Abishang Irima Njiru have been running the business since 2003. That Abishag runs the hardware with their authority which authority includes signing of cheques. Further that they run an account with Kenya Commercial Bank being account number 1124xxxxxxx.
6. That on the 13th, June 2019, his wife was given some bank slips purportedly deposited by a customer and when she went to check at Embu with the Bank it was discovered that the bank slips were a forgery as there was no money deposited in the account. That on the 14th June, 2019, he made a report at Itabua police station. The police laid a trap for the suspect and the customer came with a lorry and it was packed with goods worth Ksh.210,600. He hired two boda bodas to trail the lorry which was driven into a particular plot and the goods were offloaded in a certain room and one, Nicasio the person who had taken the Bank slips was arrested. The police proceeded to where the goods had been off loaded where they laid a trap and another lorry came to collect the goods from the plot and the driver was arrested together with the off loaders and the owner of the lorry. The value of the recovered goods was about Ksh.40,000 but he lost goods worth a total Ksh.679,540.



7. On X- examination, he stated that the hardware is registered under his name and that of his wife and that he first saw the accused person in court during the mention of the case. That it was Abishag who gave the account details to the suspect after he requested for it so that he could make the purchase and deposit the money in the account. Further that, the accused person was not among the suspects who were arrested and from the information captured in the pay slips the persons who allegedly banked the monies are Alex Gitonga, James Gitonga, Jackson Gitonga and James Munyi. That the deposit slips do not bear the name of the appellant and he could not tell who wrote on the deposit slips. That though the appellant was not at the scene and he does not appear on the photographs that were taken at the scene, he was the person behind the whole syndicate or fraud from the information that he was given by the police. That he did not have the mobile number of the person who was communicating with Abishag and that the appellant was not found with the good
8. PW2 was Abishag Erima Njiru who is an accountant working with Jammer Hardware, the complainant in this case, stated that in the course of his work, he issues orders, and releases goods upon purchase, and also receives money and do stock taking and balancing of accounts. That he receives orders through SMS, LPOS and personally and payments are made through Mpesa and bank slips. She stated that on the 6th, June 2019, he received a call from 0726xxxxxx and the caller told him that he wanted to make a purchase of hardware materials. He requested for the account number and placed an order for goods worth Ksh.277,000 which was reduced to Ksh.198,600 as the customer said he did not have all the money. He made an order for 30 bags of cement, 10 pieces MDF Board, 30 pieces water heater, 20 pieces iron sheets (Dumuzas), 5 barbed wire (60) meters, 5 horse pipes ¾ X 120 and 10 pieces Y8 rods. That on the following day, Nicasio and another person came with deposit slips for Ksh, 187, 640 and the goods were packed in a lorry and it left
9. It was his further evidence that on the 11th June, 2019, the same customer made another order of more goods valued at Ksh 174,800 and Nicasio took a banking slip of the same amount and he (PW2) released the goods to him but when PW1 and his wife went to the bank to confirm the deposits they found out that the money had not been deposited in the account and they reported the matter at Itabua police station. That the customer made yet another order of assorted hardware goods worth Ksh.305,100 and on the 15th, June2019, Nicasio took to him a deposit slip of Ksh,210,600 and told him to load goods worth that amount. That PW1 trailed the lorry and he left the matter in the hands of PW1 and later went and recorded his statement with the police.
10. On X- examination, he stated that he did not know the appellant and only saw him in court but he talked with him on phone on 6thJune, 2019 and on 15th, June2019 on mobile number 0726xxxxxx but he could not tell who the registered owner of the mobile number is. That he did not visit the scene where the goods were recovered
11. PW3 was Nicasio Njeru Mwangi who stated that in the year 2019 he was a driver and was driving a lorry owned by one “Mrembo”and the lorry was being used for transport purposes. That on 6/6/2019-15/6/2019 a person approached him and requested for his services to collect some goods from Jammer hardware. He told him he had been sent by his boss and he talked to him on phone who confirmed the services that had been sought for. That in the company of one John, they went to collect the goods and transported them to Embu and he did so, on three occasions. On 15/6/2019, he was given some documents by a boda boda rider to deliver to Jammer hardware, which he handed to Abishag and goods were loaded on his lorry and he took them to a plot in Embu where they were off loaded but while on the way to Kiritiri, they were intercepted by police officers who told him he was needed for investigations concerning the goods that he was transporting. That they went back to the scene and found some people loading the goods to a lorry and the people were also arrested and escorted to the police station.



12. On X-examination, he stated that he did not know the appellant and he had not seen him before and that he did not know the person who gave him the bank slips. That he received instructions and his money through mobile number 0726xxxxxx which is registered in the name of Stephen Muthara Njoka. That he did not know that the goods he was transporting were stolen.
13. PW4 was Stanley Ileri Kiura who stated that he runs a bar and a hardware called Stanbic General Store which is in Kabutiri market. That on 14/6/2019, he was at his place of work when a friend of his called Murathe introduced him to his friend called Jose and after engaging in a conversation, Jose told him that he was by then doing building and construction and that he was selling some materials that remained after he finished the construction and that he wanted to sell them at a cheap price. They negotiated on a price for some of the materials that he needed and settled for Ksh.30,000 for iron sheets and barbed wire. The goods were transported to his hardware and he paid for the same in two instalments in cash and third one was paid by Mpesa to mobile number 0704xxxxxx. That on 17/6/2019 police officers went to his hardware and impounded the iron sheets and the barbed wire and he was escorted to the police station after he failed to produce a receipt for the goods.
14. On X- examination, he stated that he had known Jose in 2017 and he used to run a bar and that he paid the appellant a total of Ksh.30,000. That he was charged with the offence of handling stolen property and that the appellant was his business friend. That he did not know the appellant as a contractor. He denied any involvement in the crime.
15. PW5 was CPL Henry Kibera, a scene of crime officer. He stated that on the 16/6/2019 he was requested by the investigating officer to photograph motor vehicle KCDxxxV which was intercepted transporting suspected stolen goods. That he took photographs of the vehicle and some stolen items. He prepared the report and produced the photographs. On X- examination, he stated that the person in the photographs does not look like the appellant.
16. PW6 was Simon Muchira Njoka who stated that he knows both the accused person and the complainant by appearance. That in June, 2019, he received a phone call from his brother's friend known as Kigunda who asked him if he was interested with some work. That after a short while the appellant also called and informed him of some work and requested him if they could meet in Embu and on meeting the appellant, the appellant told him that he had some goods at Kiritiri and he needed his hand to help transport them. On reaching Kiritiri, the appellant requested for his phone and he removed his (PW6) two simcards and inserted his and he called a number that brought out the name James.
17. The appellant then referred him to a lorry and gave him an envelope to take to the driver of the lorry which was handed over to a person in a certain hardware and it is him who handed over the envelope to a lady who was manning the hardware who ordered some goods to be loaded to the lorry. They then left the hardware and went to another hardware where more goods were loaded to the lorry. They proceeded to a site where the goods were off loaded and he was left by the lorry driver to guard the goods.
18. Further that after 20 minutes, the appellant came in a lorry and the goods were loaded to the lorry and they took them to a certain building which had not been completed. That on the following day, they met with the appellant who hired for him a motor cycle which took him to a certain location where goods were loaded in a lorry and he gave the driver Ksh.4000. After about two days, the appellant called him and informed him of more work at Kalegori where he went to a certain house and found some goods which were loaded to a certain vehicle and were off loaded to a certain house and others were taken to a certain hardware. On the following day the appellant instructed him to go to a certain place



- where they were to load some goods to a lorry but while they were in the process of doing so, they were arrested by police officers and were taken to Itabua police station.
19. On X-examination, he stated that he was arrested on 15/6/2019 and charged with the offence of stealing in Criminal case number 546/2019 and that he was told to record a statement implicating the appellant before he could be released and that if he agreed to be a witness in the case before the trial court, his case could be compromised. That he met the appellant once and that he was familiar with his face and that he used to communicate with the appellant through an Airtel line but he could not remember the number but he does not know the registered owner of the line nor could he remember the number. That the appellant sent him money through Mpesa and the name that popped was Joseph Muturi but he (appellant) used to have several communication lines. That he did not know the owner of the house where the goods were stored and the appellant is not in the photographs that were taken at the site where some of the goods were recovered.
 20. PW7 was Isaiah Orara who stated that on the 15th, June 2019, while on normal patrol duties within Itabua area with other officers, they received a tip off from members of the public that there were some suspected stole hardware items which were being loaded from one house into a motor vehicle using a motor vehicle make canter registration number KCD xxxV. They proceeded to the scene and on arrival they found the loading process on going and they stopped the process and arrested the loaders after they failed to produce ownership documents and escorted them to Itabua police station. The motor vehicle was also impounded. They later realized that the goods were stolen at Kiritiri market center. He identified the appellant as one of the loaders that they arrested. On X-examination, he stated that he cannot recall the loaders that they arrested nor their names. He could not tell the owner of the premises or the owner of the motor vehicle on which the goods were being loaded and that they did not get any documents of ownership.
 21. PW8 was PC Dominic Rugut who investigated the case having taken over from Cpl Fred Ochido. He stated that the matter had been reported at Itabua police station by James Ngari Runji, the owner of Jammer Hardware. That on 15th, June 2019 the complainant had organized for a dispatch of some materials after which he hired a boda operators to track the lorry that carried the materials and they traced the lorry at Itabua area near Vyezinina center in a rental house. That he had also mobilized some administration police officers who managed to arrest the loaders. The registration number of the lorry was KCD xxxV. They were arrested and taken to Itabua police station. The materials were photographed and released to the owner That the main suspect was Simon Muchira Njoka who was the head loader and he is the one who named the appellant herein as the chief suspect as he worked under his instructions on different dates on how to carry out the operations in terms of acquiring the items, transporting them and offloading them to a certain destinations.
 22. That they managed to recover some of the materials in a hardware owned by one Stanley Kiura who told them that he bought them from the appellant and had paid for the same partly via Mpesa and cash. The scenes of crime photographed the items and they were released back to the owners. That the goods were not paid for as the complainant's account was never credited with the money.
 23. On X-examination, he stated that the appellant was not at the scene but he was playing behind the scene of the crime. That the bank slips were fake and none of them bore the appellant's name and although all of them were signed by the depositors, they did not investigate the signatures. That the appellant was not arrested with loaders but Simon Muchira Njoka who had hired the loaders told him that he was working under the instructions of the appellant. That the owner of the lorry was Stephen Kivuti Kiura and the driver was John Kariuki Njue and that both of them recorded witness statements but none of them testified. That he did not know the owner of the premises that the goods were being



- off loaded and that the appellant did not appear in the photographs that were produced in court. That it was the appellant who handed over the bank slips to someone to take to the hardware.
24. When he was placed on his defence, the appellant testified as DW1. He stated that he was arrested on 24th July, 2019 on allegation that one Simon Njoka had stolen from Kiritiri and upon arrest had claimed that he is the one who had sent him. That Simon was arrested and charged but the case against him was withdrawn and he was charged in his place. That he was charged because at Mugoya police station, the police demanded Ksh.200,000 from him but he could not give the money as he had not committed the offence. That Simon in his evidence told the court that he had been told to frame him so that he could be set at liberty and Stanley Ileri was charged together with Simon for handling stolen goods. That the Ksh.3000 that was sent to him by Stanley was the balance of 5 Keg Barrels that he had sold to him. . That they differed with Stanley over land boundary and that he threatened that he would find a way of punishing him.
 25. DW2 was Peter Muriuki Kamunu who stated that in June he witnessed a sale agreement wherein the appellant was selling 5 empty Keg Barrel to one Stanley Ileri at a total of Ksh.15,000 out of which he paid Ksh.12,000 and the balance of Ksh.3, 000 was sent later. On X-examination, he stated that he had known the appellant for 10 years and that at the time he witnessed the agreement, he was living in Kutus and he came all the way to witness the same.
 26. The role of an appellate Court is to re-examine the evidence at the trial and come up with its own conclusion while keeping in mind that it did not have the benefit of hearing and seeing the witnesses.
 27. In the case before the trial Court, eight (8) witnesses testified in support of the prosecution's case. PW1 who was the complainant is the proprietor of Jammer hardware which he runs together with his wife who did not testify in the case. They have employed one Abishag Erima Njiru who is an accountant by profession whose work is to issue orders and release goods upon purchase. He also receives money and do stock taking and balancing of accounts. In the course of his business, he received a call from a new number from a person who wanted to make a purchase. He requested for the account number and placed for an order for goods worth Kshs.277,000 but the amount was reduced to Kshs.187,640 as some goods were not available.
 28. PW3 was given the work to collect the goods from PW1's hardware which he did on three occasions and he transported them to Embu using the lorry that he had been employed as a driver by one ("Mrembo). On the 15/06/2019, he received a call from a boda-boda rider who had been sent to him with some documents in an envelope for onward transmission to Jammer hardware and they were from K.C.B. He delivered the same to the said hardware and dealt with the person who made the orders on phone but he did not meet him.
 29. PW6 is a person who is known to the appellant. The appellant called him over some work that he wanted to give him and they met in Embu town and he asked for his hand in transporting some goods from Kiritiri. He gave him an envelope which he took to a lorry driver and they drove to a certain hardware and the envelope was handed over to someone at the hardware and he is the one who handed over the same. The goods were then loaded to a lorry and they went and offloaded them in Embu in a certain compound where he was left to guard the goods and after some 20 minutes the appellant came with a lorry in company of other people where the goods were loaded and they took the goods to a certain building.
 30. The evidence of PW6 corroborated that of PW3 in every material particulars. PW6 had known the appellant for a period of 1 ½ years, before the incident and he therefore knew him quite well and could not have mistaken him for someone else. During this period of the incident, they met severally and the appellant engaged him on several occasions.



31. Although in his evidence PW6 stated that the Police asked him to implicate the appellant so that he could be released in return, the evidence that he gave against the appellant was overwhelming and the same contains very minute details and this Court is not convinced at all that he was enticed to implicate the appellant. Further that his evidence was corroborated by that of PW3.
32. I am fully aware of the law relating to the evidence of an accomplice and so was the learned magistrate and that such evidence must be corroborated. See the case of *Karanja & Another Vs. Republic* (1996) eKLR but like I have stated, the evidence of PW6 was sufficiently corroborated and the learned magistrate was right in relying on his evidence to convict the appellant.
33. PW4 in his evidence stated that he bought building materials from the appellant and paid him in cash and through Mpesa. The payment via Mpesa of Kshs.3,000 was done on the 15/06/2019 to the appellant's phone. According to him, the appellant whom he knew for 1 ½ years by then told him that he was doing building and construction business and he sold him (PW4) some building materials which the appellant said had remained after he finished some construction. PW4 produced a copy of his Mpesa statement to the effect that he sent Kshs.3,000 to the appellant. It was PW4's evidence that the appellant was operating a bar and he was not engaged in the building and construction as he alleged.
34. Though the appellant in his defence stated that the money he received from the PW4 was for payment of some 5 kg Barrels that he had sold to him, this defence is not believable. The issue was only raised at the defence stage and Counsel did not cross-examine PW4 on the agreement pursuant to which the money was allegedly paid to the appellant by PW4. It is, therefore, my view that the defence was raised as an afterthought and too late in the day and it does not hold any water.
35. On the contention that the prosecution's evidence was inconsistent and full of contradictions, the Court in the case of *MTG Vs. Republic* (Criminal Appeal No. E067/2021 had this to say about contradictions in evidence of a witness.

“Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies of contradictions are substantial and fundamental to the main issues in question before the Court and therefore necessarily create some doubt in the mind of the trial Court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically.....”

36. I have gone through the evidence of the witnesses and the contradictions that exist are minor and do not relate to material facts.
37. On the sentence, the same is fair and I have no reason to interfere with it. The appellant has not shown any error of principle that was committed by the learned magistrate in meting out the sentence.
38. In the end, I find that the appeal has no merit and it is hereby dismissed.
39. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

L. NJUGUNA
JUDGE

