



**Republic v Ongati (Criminal Appeal E023 of 2021)
[2023] KEHC 2021 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E023 OF 2021**

TA ODERA, J

FEBRUARY 9, 2023

**APPEAL FROM JUDGMENT OF HON. R.K ONDIEKI SPM DELIVERED ON 27.5.2021 IN
ORIGINAL CRIMINAL CASE NO.266 OF 2019 CM'S COURT AT KISUMU**

BETWEEN

REPUBLIC APPELLANT

AND

SILA JUMA ONGATI RESPONDENT

*(Appeal from Judgment of Hon. R.K Ondieki SPM delivered on 27.5.2021
in original criminal case no.266 of 2019 CM'S court at Kisumu)*

JUDGMENT

1. The Respondent was charged in the chief Magistrate's court at Kisumu with stealing contrary to section 268 (1) as read with Section 275 of the *Penal Code* in count 1 and Stealing of a motor vehicle contrary to Section 278A of the *Penal Code* in count 2. The particulars of counts 1 and 2 are that on September 8, 2018 at Aga Khan Hospital Yard within Kisumu county he stole one motor vehicle registration Number KCK 339 Y Ford Ranger Double cabin valued at Kshs 5,695,000/= property of Silas Nyambok on behalf of Ministry of transport infrastructure Housing and urban Development.
2. He also faced an alternative charge if handling stolen goods contrary to section 322 of the penal code. Particulars of the alternative charge are that on 8.9.2018 otherwise than in the course of stealing , at Aga Khan Hospital Yard within Kisumu county retained motor vehicle registration Number KCK 339 Y Ford Ranger Double cabin valued at Kshs 5,695,000/= property of Silas Nyambok on behalf of Ministry of transport infrastructure Housing and urban Development.
3. The undisputed brief facts of this case are that in the year 2016 the Ministry of transport infrastructure housing and urban Development entered into an agreement with IBEL Construction Company to



carry out construction of Oyugis market. Upon taking up the contract IBEL contractors sub-contracted the project to Lisset Investment Company whose director is the respondent herein and IBEL donated all its functions to Lisset. It was a term of clause 138 the said contract that the contractor was to purchase a new motor vehicle whose engine capacity was not to exceed 2500cc. also that the vehicle was to be retained by the Principal Secretary Ministry of Transport infrastructure, housing and urban Development upon completion of the project.

4. The sub- contractor bought motor vehicle registration no KCK 339 Y for the said project and it was registered in its name as per the NTSA search.
5. Payment was made to the contractor by 5 instalments totaling to Kshs 52, 628,194.5/=.
6. The project went on well till the year 2018 when problems like non- payment of the workers and suppliers arose and some unpaid suppliers withdrew materials from the site.
7. On September 8, 2018, PW3 George Omollo dropped Silas Ogut Nyambok (who was the Resident Engineer of the project) PW1 at Aga khan Hospital Kisumu and as he was leaving he met some people who introduced themselves to him as acting on behalf of CMC and told him of their mission to repossess the vehicle on account of an outstanding loan but the driver drove it to an auctioneers yard on instructions of PW1 where he found Respondent who signed for it and drove it off .
8. The matter was reported to police and respondent was arrested and charged with the stealing and an alternative of handling a suspected stolen vehicle.
9. The gist of defence of respondent is that he is a director of Liset construction company as per certificate of on corporation memorandum and Articles of Association – Dexh1 & Sexh 2. Further that IBel contractors who won the contract for Building Oyugis market sub –contracted to him the said contract. It is defence case that motor vehicle KCK 339 Y was bought on ,loan form CMC as per Dexh 9,10 , 11and 12. Also that accused later fell out with PW3 in the year 2017 and asked PW1 to return the vehicle and vide letter dated August 1, 2018 Dexh 20 and PW1 handed him the vehicle on September 8, 2018 in writing as per Dexh 21. He was later surprised when police officers jumped into his compound in Millimani Kisumu alleging that he has stolen he vehicle herein. He was arrested and the vehicle was confiscated. The case was heard and defence of respondent was that and determined and the trial Magistrate acquitted respondent on the grounds that the case was purely civil in nature and thus an abuse of the process of the court.
10. The Director of Public prosecutions filed petition of Appeal dated June 7, 2021 Pursuant to section 348 of the *Criminal procedure Code* ,(CAP 75 Law of Kenya) of the following grounds :
 - a. The Honorable trial magistrate erred in fact and in law in failing to appreciate the totality of the evidence adduced by the prosecution and hence arrived at an erroneous decision.
 - b. The Honorable court erred in fact and law in failing to appreciate that the purported arbitration was in limbo having been frustrated by the respondent in his failing to meet the required Bond sum for the arbitrators.
 - c. The Honorable court erred in fact and law in failing to appreciate the respondent never tendered any arbitration proceedings not arbitration cause number to support his theory that the matter was subject to an active arbitration proceeding.
 - d. The Honorable court erred in fact and law in failing to consider that the subject motor vehicle KCK 339 Y make Ford Ranger was purchased on monies paid by the state department for Housing and urban Development to Ibel Construction Co Ltd as evidenced by payment certificate No 2 and captured at page 47 of the judgment dated May 27, 2021.



- e. The Honorable court erred in fact and law in failing to appreciate that the Government of Kenya through the state Department of Housing and urban Development was the beneficial owner of motor vehicle KCK 339 Y make Ford Ranger by virtue of clause 138 of the of the prosecution exhibit no. 1 that is the contract agreement for the proposed Reconstruction of Oyugis matatu/Bus park and market in Oyugis town.
- f. The trial court erred in law in failing to appreciate that the resident Engineer Eng Silas Nyambok PW1 on behalf of the state department for housing and urban Development was the actual complainant in the matter and not PW2 Mr Nicholas Okello who was one of the Directors at Ibel construction Co Ltd.
- g. The Learned trial Magistrate erred in fact and law in failing to appreciate that the prosecution did not prove mens rea and the actus rea by the accused and arrived at an erroneous decision.
- h. The Learned trial Magistrate erred in fact and law in failing to adequately evaluate the evidence on ownership of motor vehicle KCK 339 Y and hence arrived at an erroneous decision.

Reasons whereof the appellant prays that the Judgment be quashed and the decision to acquit the Respondent be set aside.

11. Directions were given that the appeal proceeds by way of written submissions.
12. The Appellant did not file submissions while the respondent filed submissions. Respondent submitted that;
 - i. The appeal is fatally defective as memorandum of appeal is not in the record of appeal and section 349 of the *Criminal Procedure Code* requiring that appeals be filed within 14 days of the date of order or sentence appealed from was not complied with.
 - ii. Also that the appeal has no merit as the respondent proved in the trial court that the vehicle is owned by Lisets Investment who purchased it and this was the holding by the learned trial Magistrate.
 - iii. Further that is it trite law that an appellate court can interfere with the finding of fact by the trial court if it is based on no evidence or misapprehension of evidence or the Judge is shown to have acted on wrong principles in reaching his conclusion as was held in the case of *Nkuba vs Nyamiro* (1983) KLR and in *Ndiritu vs Ropkoi & Another* and *Shah vs Mbogo* 1968 EA.
 - iv. He submitted that Lisets Investments Limited filed Misc application No 268 of 2019 against police and the state to block release of the vehicle to appellant and the court noted their mischief.
 - v. Counsel also submitted on Chronology of the events herein and told this court that this is purely a civil matter disguised as criminal and that it thus is an abuse of the criminal process of the court.
13. This being the first appellate court has a duty to re-evaluate the entire evidence and draw it's own conclusions as was held in the case of *Kiilu & Another vs. Republic* (2005)1 KLR 174, where it was stated;

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the



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

14. I have re-evaluated the entire evidence on record. Stealing is defined in section 268 of the penal code which provides that ‘

- (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.

Section 275 of the Penal Code sets out the penalty for stealing as follows:

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years. Section 278A of the penal code provides that

‘ if the thing stolen is a motor vehicle within the meaning of the traffic Act, the offender is liable to imprisonment for 7 years’.

15. It clear from the evidence on record that a dispute emerged between the contractor and the sub –contractor whose relationship went sour before completion of the contract and the respondent decided to take away the vehicle herein which was purchased by the sub –contractor for use in the project . Clause 13 of the sub-contract agreement between the parties herein also provides that a dispute between the parties which they are unable to resolve amicably shall be referred to Arbitration. There is also evidence that arbitration proceedings were on going at the time police confiscated the vehicle and charged respondent herein. In view of the aforesaid civil dispute, this court does not find any iota of evidence of intent to defraud on the part of the respondent as the issue of whether he was right or wrong in taking the vehicle is for determination by the civil court. I agree with the Learned case filed in the Lower court was an abuse of the process of the criminal court as it was a purely civil case disguised as criminal. *Mens rea* was therefore not proved.

16. In any event the appellant did not prosecute the appeal as it never filed submissions to argue its grounds of appeal.

17. Prosecution failed to prove its case beyond any reasonable doubt in both counts. The trial Magistrate thus rightly acquitted the respondent on both counts.

18. On ownership of the motor vehicle, appellant claimed that the vehicle was to be purchased by the contractor and be retained by the Principal Secretary upon conclusion of the contract. Respondent argued that the vehicle was purchased by his company and is registered in the name of his company and CMC and so it ought to be released to them. I have seen the log book of the said vehicle and the same indicates that it is co –owned by Liset Company and CMC motors. A log book is prima facie evidence of ownership of a vehicle. Police have no business holding a vehicle which is subject to a civil dispute. I order that Officer Commanding Kisumu central Police station to release the motor vehicle KCK 339 Y be released to representatives of Lisets Investments Limited and CMC motors group forthwith.

19. In the upshot I have re-evaluated the entire evidence on record I find that the Appeal is devoid of merit and I proceed to dismiss it.

14 days Right of Appeal.

T.A ODERA - JUDGE



9.2.2023

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

John Okoth for Appellant.

Miss Khisa holding brief for Ms Odeny for Respondent.

Court Assistant; Orando.

T.A ODERA - JUDGE

9.2.2023

