



**Mwingi v Republic (Criminal Appeal 36 of 2021)  
[2023] KEHC 1594 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1594 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL 36 OF 2021  
LN MUGAMBI, J  
MARCH 10, 2023**

**BETWEEN**

**FRANCISCAH MWINGI ..... APPELLANT**

**AND**

**REPUBLIC ..... PROSECUTOR**

*(From original conviction and sentence in the SPM's  
Court at Siakago in Traffic Case no. 22 of 2020)*

**JUDGMENT**

1. The Appellant Franciscah Mwingi was charged with two traffic offences at Siakago Magistrate's Court.
2. The first count was Permitting the use of uninsured motor vehicle on a public road contrary to Section 4 (1) as read with Section 4 (2) of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 Laws of Kenya.
3. The Particulars were that on May 20, 2020 at about 1742 hours along Embu-Kiritiri road in Mbeere South Sub-County within Embu County being the owner of the motor vehicle reg No KCA 155Q make Isuzu NPR Canter did permit the use of the said motor vehicle to be driven along the said road without a valid certificate of insurance.
4. On the 2<sup>nd</sup> count, she was charged with failure to keep written records of the name, address and driving licence number of the person she had employed to drive contrary to Section 111 (1) as read with Section 111 (3) of the *Traffic Act* Cap 403 Laws of Kenya.
5. The particulars were that on May 20, 2020 at about 1742 hours along Embu-Kiritiri road in Mbeere South Sub-County within Embu County, she failed to keep written records of the name, address and driving licence number of the person she had employed to drive the motor vehicle reg No KCA 155Q



make Isuzu NPR Canter who police officers had arrested along the said Embu road but ran away at Kiritiri police station leaving the vehicle behind.

6. After a full trial judgment was delivered by the lower court on September 28, 21.
7. The trial court acquitted the appellant on the 2nd count on the basis that the Prosecution had not provided evidence by way of a written notice that the particulars of name, address and driving licence number of the driver had been demanded from the owner and thus gave the Appellant a benefit of doubt.
8. The Appellant was however convicted and sentenced to a fine of Kenya shillings three thousand (3000/-) in default to serve one (1) month imprisonment in count 1.
9. The Appellant was aggrieved by the conviction and sentence hence this appeal.
10. Through the Petition of Appeal dated October 8, 21 filed on her behalf by Njiru Mbogo & Co advocates, the Appellant raised the following grounds of appeal:
  - i. That the trial Magistrate erred in law and fact when she failed to consider the following matters of law and fact which were very clear from the evidence.
    - a. That there were very clear and material contradictions in the evidence of PW 1-PC John Kennedy Mwenda, PW2-IP Nicholas Mathenge, PW3-Patrick Munene Njeru and PW4-Sergeant Abdi Yusuf. The Appellant averred that the contradictions and differences in the evidence were too gross to support the conviction of the Appellant.
    - b. That in the said evidence there were matters that were not explained and which created serious doubt in so far as the evidence of the prosecution witnesses' was concerned.

The vehicle was detained with eight young boys and the boys managed to escape. Appellant averred that this evidence was completely ignored by the Honourable court and actually supported her defence on record.
  - ii. The Appellant avers that the evidence adduced by prosecution witnesses raised more questions than answers and particularly the following matters:
    - a. Under what circumstances would a lorry be driven out of police station without anybody noticing.
    - b. How did the motor vehicle leave the station because according to PW 1-John Kennedy Mwenda, the vehicle was intercepted along Embu-Kiritiri road?
    - c. How did the driver escape from the road block and why did they not arrest the Appellant at that stage?
    - d. The Deputy OCS gave evidence that completely contradicted that of Sergeant Abdi Yusuf. They arrested 8 young boys along Embu-Kiritiri road and that they had also arrested a lady carrying them. How come the evidence was so different and contradicted other witnesses.

The Appellant averred that the matters raised demonstrated that she ought not to have been convicted on the evidence of allowing a motor vehicle without insurance to be driven on a public road.
  - iii. The Appellant further averred that the Learned Trial Magistrate erred in law and in fact when she convicted the Appellant with the offence of permitting the use of uninsured motor vehicle



on a public road contrary to Section 4 (1) as read together with Section 4(2) of the *Third-Party Risk Insurance Act* Cap 405 Laws of Kenya when there was no evidence to prove that she allowed the said motor vehicle to be driven on a public road. The Appellant further averred that there was no evidence to support the allegation that she was driving any vehicle because the police witnesses' evidence was that the vehicle was only parked by the road side and was under repair.

The Appellant averred that the only person who drove the vehicle was a police officer.

- iv. That the learned Trial Magistrate erred in law and in fact when she relied on evidence on record to convict the Appellant which was full of contradictions and further failed to consider the defence of the Appellant which was supported by most defence witnesses.
11. The Prosecution called four witnesses (all police officers).
12. The Appellant gave sworn evidence in her defence.
13. This case was triggered by the impounding of a motor vehicle, a canter lorry registration number KCA 155Q on May 20, 2020 at about 4.30 p.m. and a subsequent detention of the same at Kiritiri police station.
14. According to the evidence of Seargent Abdulahi Yusuf -PW 4 (one of the police officers involved in the initial arrest), he and his colleague were on mobile patrol when they spotted the canter lorry, KCA 155Q that was being driven along Kiritiri – Embu Road. It had eight young men on board. COVID 19 regulations were still in force at the time hence they directed the driver to drive to Kiritiri Police Station as neither of those people he was carrying was wearing a mask nor were they maintaining the social distance.
15. Upon reaching Kiritiri Police Station, the driver and the boys fled leaving the lorry behind. The lorry was thus detained pending the arrest of the driver.
16. PW1 P C John Kennedy Mwenda told the court that he was manning the Covid 19 multi-agency road block on May 20, 20 at round 5.00 p.m. The road block had been mounted only few meters from Kiritiri Police Station.
17. It was while at the said road-block that he heard a commotion at the Police Station. He explained that it had been triggered by a lorry that had been detained but was now being driven away without having been released procedurally. The lorry was then driven towards Kiritiri direction. The lorry was however intercepted at the road block but the driver abandoned it in the middle of the road and escaped resulting in a massive traffic jam. P C John Kennedy Mwenda (PW 1) stepped in and drove the lorry back to the police station.
18. PW3 – P C Patrick Munene Njeru testified that he had just taken over second shift duties at the station. He had just been handed over the lorry and asked to keep watch because its driver had escaped with the keys. No sooner had the briefing ended than he noticed the lorry moving. He darted towards the lorry but it was driven out of the compound before he could reach there. He quickly alerted the officers who were manning the road block. The road-block police officers managed to impound the lorry but the driver escaped.
19. He testified that after a vehicle is detained at the Police Station, authority to release can only be given by the OCS, which was not the case here, hence the reason for seeking the assistance of his fellow police officers at the road block to impound the lorry.



20. Inspector Nicholas Mathenge (PW2) was the Deputy OCS but at the time, he was the Acting OCS as the substantive OCS was away at the time. He explained that PW3 Sergeant Abdulahi Yusuf had commandeered the lorry, KCA 155Q to the police station and booked it under O.B. number 38/20/5/2020 after its driver and the eight boys who had been on board escaped on reaching the Police Station following their arrest for contravening Covid 19 regulations.
21. However, at around 7.00 p.m. the driver sneaked back into the Police Station grounds and attempted to drive the lorry away but on quick intervention, it was intercepted at the road block outside the police station. The driver abandoned it, hence a police officer (PW1) drove it back to the police station.
22. It is after the failed attempt to drive the impounded lorry from police station that the Appellant showed up claiming she was the lorry's owner. He asked her to tender proof of ownership, that is the log book and also to produce the lorry's driver. However, she left and never returned.
23. On May 27, 20, PW2 through Misc Application Number 17/2020 applied for a court order to be allowed to detain the lorry until the owner showed up or produced the driver.
24. On the same day, May 27, 2020, he was also served with an order by the Appellant requiring him to attend court. He forwarded the same to the Attorney General to make a response. In the meantime, he also wrote to NTSA to confirm the ownership of the lorry. NTSA responded indicating that Francisca Mwingi (The Appellant) was the owner. This was pursuant to the NTSA letter- P exhibit 3 which he produced.
25. On the date he attended court for inter parte hearing he informed the Appellant that he would be charging her for failing to provide particulars of her driver's records. Further, upon further checks, he had also discovered that the insurance cover on the lorry had expired way before the date the lorry was impounded. It had expired on May 16, 2020 and the vehicle had been impounded on May 20, 2020. He produced the expired insurance cover – P exhibit-4.
26. He explained the procedure of releasing a motor after it was compounded by police as follows:

“When a vehicle is detained, it is booked and when it is released, it is also booked...”
27. On why it took long to charge the Appellant, he clarified that it is because he had not completed investigation. He explained:

“...I charged you on June 26, 2020. You had brought the log book to me when I charged you. I waited for the authentication. You are the one who owned the vehicle...”
28. The Appellant's defence was that on May 20, 2020, she was at her shop at Kiritiri Shopping Center when a police officer by the name Abdi called her on phone and informed her that he had impounded her lorry KCA 155Q for being on the wrong side of the road with eight juveniles who alleged they were going to be employed by her.
29. Since it was only about 100 meters away from Kiritiri town, she immediately rushed there and found a mechanic repairing the clutch. Abdi and another Police Officer, Kisira were standing by. She explained to Abdi that the vehicle had a mechanical problem. Nonetheless, Abdi directed that the vehicle must be driven to the police station. Her mechanic drove it there. The driver was released but the boys were punished by being made to slash grass in the compound and were then released. She was also asked to leave. She thus decided to drive out with her lorry. However, on reaching the police gate, an alarm was raised and she was informed that the lorry had not been released.



30. She insisted that she was not at any time required to produce the driver or the driver's records by the police. She also insisted that she never permitted her lorry to be driven on the road without insurance. She also stood her ground that the lorry KCA 155Q was properly insured and that there was a valid cover in place that was running from May 17, 2020 – June 16, 2020 that was affixed on the lorry.
31. She however explained the insurance cover was mysteriously disappeared and her efforts to get the insurer re-issue her with her with a re-print or a duplicate copy did not bear fruits.
32. I will consider the submissions made in this case made on behalf of the Appellant and those of the State/Respondent in the course of my analysis.
33. In the instant appeal, as the 1<sup>st</sup> Appellate Court, my duty is to re-evaluate all the evidence and draw my own independent conclusion, (*Okeno vs R* [1972 EAKR]).
34. I must however bear in mind that I did not see or listen to the witnesses when they testified.
35. In the present case, the only charge that was appealed against is Count 1 i.e. permitting the use of uninsured motor vehicle on public road contrary to Section 4 (1) as read with Section 4 (2) of *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 Laws of Kenya.
36. Section 4 of the Insurance (Motor Vehicles Third Party Risks) Cap 405 provides:
  - “1. Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or the other person, as the case may be, such a policy of insurance or such security in respect of third-party risks as complies with requirements of this Act.
  2. Any person who contravenes Sub-Section (1) shall be guilty of an offence and be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding two years or both, and such person upon a first conviction of such offence may, and upon a second or subsequent conviction for any such offence shall, unless the court for special reason thinks fit to order otherwise, be disqualified from holding or obtaining a driving licence or professional licence under *Traffic Act* (Cap 403) for a period of twelve months from date of such conviction or for such longer period as the court may think fit.”
37. The key issues to be considered in determining this appeal are:
  - a. ownership of the motor vehicle in question
  - b. whether or not the vehicle was being driven on a public road with the permission of the owner
  - c. Whether there was in existence a valid certificate of insurance in place at the time
37. In the instant case, both the evidence of the Appellant (her own admission in her sworn statement of defence) plus the letter obtained by PW 2- from NTSA- P. exhibit 3 firmly settle the issue of ownership, the Appellant was the owner of the motor vehicle in question.
38. The next question becomes, did the vehicle have a valid insurance certificate when it was impounded?
39. According to PW2 Inspector Nicholas Mathenge, the vehicle was seized by PW4 – Sgt Abdi because the driver and the people he was carrying (8 young boys) had not complied with Covid 19 regulations.



- PW 4 Abdulahi Yusuf confirmed in evidence that they had no masks and were not keeping social distance. On reaching the police Station, they all escaped hence the lorry was detained.
40. When PW 2 checked the lorry in detail, he discovered that there was no valid sticker displayed as the one that was there had expired on May 16, 2020 (four days prior to the date of its impounding on May 20, 2020). He thus decided to prefer the traffic charge of permitting the lorry to be driven on a public road without a valid insurance when the owner finally showed up without the driver.
41. Before preferring the charge, he had verified the ownership details from NTSA.
42. The Appellant disputed the prosecution narrative and insisted that the lorry had a valid insurance sticker that was commencing from May 17, 2020 and ending on June 16, 2020. She could not however produce the sticker for said validity period in court during her testimony. She explained her inability to produce it by stating that the insurance company had informed her that it could neither issue a re-print nor a duplicate cover.
43. Under the evidential burden principle (or the burden of adducing evidence as distinguished from the legal burden) the Appellant had an obligation to demonstrate by way of credible proof that she had a valid insurance cover in place for her lorry at the time the vehicle was impounded.
44. Section 111 of *Evidence Act*, has a sub-head - 'burden on Accused on certain cases':  
Section 111 (1) states:  
“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from a qualification to the operation of the law creating the offence which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.  
Provided that such burden shall be deemed to be discharged if the court is satisfied the evidence given by the prosecution, whether in cross examination or otherwise, that such existence is facts exist.  
Provided that the person shall be entitled to be acquitted of the offence which he is charged if the court is satisfied that the evidence given by either the prosecution or defence creates reasonable doubt as to the guilt of the accused person in respect of that offence.”
45. A matter pertaining to the existence of a valid licence is a matter that perfectly lies within the knowledge of the Appellant. She even asserted the existence of the same hence she had a duty to provide proof of its existence.
46. In the case of *Mohammed Hassan vs Republic* [1955] 22 EACA 461.  
A charge of being in possession of firearm without a firearm licence was preferred. The prosecution evidence was that the Appellant was told to produce the certificate but did not provide any even after being given time to do so. All he could do was to avail one for the past year.
47. The court held that the existence of a valid certificate was a matter within the Appellant’s knowledge hence the onus fell on him to provide proof of the same.
48. Applying the above principles to the instant case, I find that the prosecution discharged its burden of adducing evidence when through Inspector Mathenge (PW 4), it was demonstrated that there was not valid cover displayed at the time the vehicle was impounded and booked on May 20, 2020 since



- the one available had expired four days earlier, that is on May 16, 2020. The expired cover was even an exhibit before the court.
49. The onus (evidential burden) thus shifted to the Appellant to demonstrate by way of credible evidence that she had a valid insurance cover for the vehicle at the time.
  50. She did not provide any certificate from the period between May 17, 2020 to June 16, 2020 despite alleging that was in place. It was only her own word of mouth.
  51. She insisted the cover was on the vehicle but it was mysteriously removed. However, she did not even call evidence from her own insurer to demonstrate that a valid cover had been issued for the period in question. She said her insurer had refused to issue her with a reprint or duplicate cover but even the evidence of that refusal was not presented to the court.
  52. I concur with the trial court for taking judicial notice that insurance stickers are ordinarily issued together with their duplicate copies. That is an ordinary business practise in this country. It is odd therefore that the Appellant could not even provide a duplicate copy of the insurance she was asserting had been in place.
  53. I find her evidence that there had been a valid insurance cover in place for the period May 17, 2020 to June 16, 2020 not credible.
  54. On whether or not the lorry was being driven on the public road at the time it was impounded, the appellant claimed it was being repaired by the roadside after it developed clutch problem.
  55. The question is, are stalled vehicles repaired by the road side? Ought they not to be towed to a garage for repair? And also, to pose another question, for how long had it stalled there? There was no evidence that the vehicle stalled prior to lapsing of the insurance cover.
  56. Further, if the vehicle had in fact stalled due to a faulty clutch, how come that it came to life immediately police officers arrived and commandeered it to the police station? That evidence in my view is highly suspicious and incredible!
  57. My finding is that the Appellant's testimony as to the circumstances the lorry was impounded was not credible. Her lorry was being driven on a public road as attested by the evidence of Prosecution witnesses without a valid insurance.
  58. There was no explanation offered by her capable of raising doubts to the inference that the vehicle was on the road without her permission. All she insisted was there was a valid insurance, an allegation that this Court has found based on evidence on record to be false.
  59. I find the offence of permitting the use of motor vehicle on public road without a valid insurance was proved beyond reasonable doubt.
  60. The appeal lacks merit and is hereby dismissed.

**JUDGMENT READ, SIGNED AND DELIVERED AT BUSIA IN OPEN COURT THIS 10<sup>TH</sup> DAY OF MARCH, 2023.**

**L N MUGAMBI**

**JUDGE**

**In the presence of: -**

**Coram:**



**Court Assistant- Brian**

Appellant: - absent

Advocate for the Appellant - absent

State/ODPP – M/s Mbevi for ODPP.

**COURT**

To be transmitted digitally by the Deputy Registrar to the Parties through their respective email addresses.

**L. N. MUGAMBI**

**JUDGE**

**M/s Mbevi for DPP.**

We had notified SCCIO, Mbeere South to serve the Appellant with judgment notice though she is absent.

We did that on 10.2.2023 and also attached judgment notice and was duly received.

**Court** – in that case, judgment will be delivered in her absence since she is out on bond she can follow up on the results of the appeal with the Embu high court.

**L. N. MUGAMBI**

**JUDGE**

**10.3.2023**

