



**Ochieng v Republic (Criminal Appeal E29 of 2021)
[2023] KEHC 1941 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E29 OF 2021
JM CHIGITI, J
MARCH 14, 2023**

BETWEEN

EDWIN WAGA OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

(Being and Appeal against the conviction by the Hon. Mr. J. Kituku (PM), on the 27th day of April, 2018 in the Kiambu Chief Magistrates Courts Criminal Case no. 2382 of 2015)

JUDGMENT

Brief background:

1. The Appellant was charged with the offence of conspiracy to commit a felony jointly with others not before the court, the Appellant on December 11, 2013 at Muthaiga Mini Market conspired to steal cash 110,000 Euros property to Kronos East Africa Limited.
2. The matter proceeded into full hearing which culminated on Judgment dated April 27, 2018 with the Appellants being convicted under Section 215 of the *Criminal Procedure Code* of the offence of conspiracy to commit a felony contrary to Section 393 of the *Penal Code*.
3. Being dissatisfied with the conviction the Appellant lodged a petition of Appeal on May 11, 2018 wherein he raised 5 grounds and urged this court to allow the appeal and set aside the conviction.
4. Parties agreed to proceed by way of written submissions on 27/1/23 when the matter came up for directions and only the Respondent complied.



Analysis and Determination

5. The role of the first appellate court was set out in the case of *Okeno vs. Republic* [1972] E.A 32 as follows;

“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 findings and conclusions; it must make its own findings and draw its own 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...”

6. I have gone through the evidence and identified the following issues:

- a. Did the prosecution prove its case beyond unreasonable doubt or not?
- b. Did the trial court err in law and in fact in finding the appellant guilty of conspiracy?
- c. Did the trial court take into consideration the Appellant’s evidence or not?

7. According to Section 393 of the *Penal Code* on conspiracy to commit felony:

“Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”

8. PW1 one Ramesh Shah the finance manager testified that on December 11, 2013 he instructed the Appellant to deposit 13,000 US Dollars at the company’s bank at Barclays Bank in Muthaiga.

9. According to this witness he received a call later on informing him that the money had been stolen. He told the court that the Appellant had organized for a taxi since the company drivers were busy.

10. The PW2 had accompanied the Appellant to the bank when the robbery took place. She told the court that PW1 organized for the taxi. According to her the Appellant asked the driver to stop and when he got out of the car the envelope was snatched.

11. The person who snatched the envelope was accosted by a mob.

12. PW3 the general manager testified that the Appellant had been instructed to do the banking two days prior to the date of theft.

13. PW4 the taxi driver confirms that he was called by the complainant who instructed them to go to the Muthaiga shops.

14. The witness testified that the Appellant joined her later. She testified that the Appellant asked the taxi driver to stop at the shopping center when the envelope with the funds was stolen. He testified that the Appellant asked him to stop when the envelope with the funds got snatched.

15. PW5 – the Investigation testified that he was called to the scene where he found the suspect beaten unconscious by the mob.



16. The Investigating officer confirms the set of events as stated by the other witnesses. During his investigations he told the court that he acquired evidence from Safaricom where he found that the employee's phones were registered in the names of the company.
17. It is curious to note that the witness testified that he could not pin point who had made the calls to the person who was lynched. He testified that the Appellant's bank Account does not reflect any banking.
18. He testified that the accused had been assigned phone number 0722xxxxxxx and that the Appellant had communicated with the suspect at around 15.54pm on December 11, 2013 using the suspects number being 0723xxxxxx.
19. During cross-examination the witness indicated that the Appellant's personal number did not communicate with the suspect but company's number did. He confirms that there was nothing to link the Appellant to the incident since anyone could have made a call using the phone.
20. PW6 Sergeant Fazal Jerman who is based in Safaricom head office as a Liaison Officer told the court that he had been authorized by the court to extract data and Mpesa statements from the system.
21. He testified that he returned the phone data, for 0705xxxxxxx which showed that the phone belonged to Kronos East Africa Limited. He confirmed that it was a black Berry 9300, and it was used on November 16, 2013 by No 0721xxxxxx which belonged to Edwin Wasa Ochieng.
22. On his part, the Appellant testified that he worked as a Credit Controller at the complainant Company. He testified that the taxi had been secured by the Personal Assistant to the general manager. He recounted how the envelope with the money was snatched at Muthaiga mini supermarket.
23. He testified that the phone that was assigned to him was 0705 xxxxxxx and not 0722xxxxxxx. He says he was subjected to a polygraph test amongst employees. He was not informed of the outcome. This witness was not cross-examined by the prosecution.
24. The investigating officer PW5 testified that the employee's phones were registered in the names of the company and that he could not tell who had made the call.
25. I also note that prosecution witnesses confirmed the Appellant's version that the taxi had been called by the Managing director's personal Assistant.
26. I have further noted with a lot of concern that the prosecution did not produce the IMEI number of the phone that belonged to the Appellant. The call data shows that the phone number belongs to Kronos East Africa Limited. One is left to wonder how this number is then saddled on the Appellant as the number that used for purposes of the conspiracy.
27. The Appellant testified and told the court that the complainant subjected him to a polygraph test and that he does not know the results. This in my finding offended the Appellant's right to privacy as guaranteed under Article 31 of Constitution.
28. The fact that the Prosecution opted not to cross-examine the Appellant is a fundamental omission. It left the Appellant's evidence uncontroverted.

Disposition:

29. Pegged on the foregoing analysis and evaluation of the proceedings I find that the prosecution failed to prove its case beyond reasonable doubt. There are too many glaring spaces in the prosecution case.



30. The phone number's ownership does not link the Appellant to the crime. The phone that is said to have been used to commit the Crime belonged to the company and there is a doubt as to who placed the call to the suspect. It could have been any one from the complainant's company. It is hard to pinpoint.
31. The evidence of prosecution is not complete, the prosecution failed to equip the court with the much needed evidence that would have created the nexus between the Appellant and the suspect. It does not in way advance the conspiracy theory.
32. PW6 who would have helped the prosecution nail the Appellant told the court that the system indicated that on November 16, 2013 the phone number that was used was 0721xxxxxx which according to him belonged to the Appellant.
33. On his part, the Appellant told the court that the phone assigned to him was telephone number 0705xxxxxxx and not 0722xxxxxxx.
34. This creates a fundamental gap and doubt as to the correct phone number. Perhaps the prosecution would have settled and cleared the doubt had the cross-examination been done.
35. The Prosecution failed to prove its case beyond reasonable doubt. The court even doubts whether the money existed in the first place.

Orders:

36. After an evaluation, reanalyzing and reassessing the charge sheet, the evidence and the judgment I conclude that the appeal has merits. The prosecution did not prove its case beyond reasonable doubt.
The Appeal is allowed.

DATED AND DELIVERED AT KIAMBU THIS 14TH DAY OF MARCH, 2023.

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J. CHIGITI (SC)

JUDGE

In the Presence of:

For Appellant:

For Respondent

C/A:

