Kamonye v Republic (Criminal Appeal E057 of 2021)
[2023] KEHC 17231 (KLR) (10 May 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E057 OF 2021

AK NDUNG'U, J

MAY 10, 2023

APPEAL FROM ORIGINAL CONVICTION AND SENTENCE DATED 28/01/2021 IN MARALAL

PM CRIMINAL CASE NO 233 OF 2020– A.K GACHIE, SRM

BETWEEN

JOHN NJOROGE KAMONYE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from Original Conviction and Sentence dated 28/01/2021 in Maralal PM Criminal Case No 233 of 2020– A.K Gachie, SRM)

JUDGMENT

1. The Appellant in this appeal, John Njoroge Kamonye was convicted after trial of dealing in wildlife trophy contrary to Section 92(2) of the *Wildlife Conservation and Management Act* No 47 of 2013. The particulars were that on July 15, 2020 at about 0430hrs at Nomotio area along Maralal-Longewan marram road in Samburu Central sub-county within Samburu County, jointly with others not before court were found transporting prohibited East African Sandalwood to wit approximately 500 kilograms with a street value of Kshs2,000,000/- using motor vehicle KCK 415Y make Toyota land cruiser Prado without a permit from Director of Kenya Wildlife Service.

2. He was tried and convicted and on January 28, 2021, he was sentenced to seven (7) years imprisonment. Being dissatisfied with the conviction and the sentence, the Appellant filed a petition of appeal on November 4, 2021 raising the following grounds of appeal;

    i. That the trial magistrate erred by convicting the Appellant notwithstanding that the prosecution failed to prove the case beyond reasonable doubt.

ii. That the trial magistrate erred convicting him on a defective charge sheet.

iii. The trial magistrate erred convicting him on hearsay evidence and without identification parade being carried out.

iv. The trial magistrate erred convicting him notwithstanding the fact that forensic examination on the motor vehicle was not conducted to determine who was the driver at the time.

v. The trial magistrate failed to admit the Appellant's alibi defence.

vi. The trial court erred convicting the Appellant on a manufactured, doctored and defective sample examination report.

vii. The learned magistrate failed to find that the Appellant was in a car hire business and his personal items were found in the said car since he had handled the car while servicing it.

viii. The trial court convicted him without considering the contract between the Appellant and one Lee Lemanikor who would have led to the arrest of the real culprit.

ix. The trial court erred by misdirecting itself to the provisions of law thus shifting the burden of proof to the Appellant.

x. That the prosecution case was circumstantial and not proved beyond reasonable doubt therefore the sentence was illegal and excessive in the circumstances.

3. The appeal was canvassed by way of written submissions. Briefly, the Appellant's counsel submitted that none of the four prosecution counsel saw the Appellant driving the alleged motor vehicle transporting sandalwood. That the informer was not called to testify despite being a key witness in conviction of the Appellant hence the prosecution relied on hearsay evidence. The counsel relied on the case of *Kinyatti v republic* (1984) eKLR.

4. Counsel further submitted that identification parade was not conducted despite PW4 stating that the informer identified the Appellant and therefore it was necessary for an identification parade to be conducted to confirm whether the Appellant was the driver. Further, dusting of the vehicle was not done in order to lead the police to the real culprit since the Appellant testified that he was in a car hire business. That there were contradictions in the prosecution case since PW3 testified that the Appellant was arrested in Kikuyu whereas PW4 testified that he was arrested in Rumuruti over similar charges. That the Appellant was convicted on circumstantial evidence and he sufficiently explained to the court why his items were found in the car in that, he was in a hurry and engaged in other business.

5. The learned counsel for the Respondent supported the conviction and the sentence. The counsel raised a preliminary point of law and argued that the appeal was filed out of time without leave of the court hence, it was bad in law for being time barred.

6. The counsel submitted that the prosecution proved that the vehicle was transporting sandalwood which is an endangered species. That by dint of PW2's evidence that the Appellant hired the motor vehicle and his personal items were found in the car, including a phone that was working, the prosecution discharged its duty of proving the case beyond reasonable doubt. Counsel submitted that there was no need of carrying an identification parade since PW2 knew the Appellant and that the informer could not participate in the parade for the same would have exposed him to danger. The counsel further submitted that though the Appellant was convicted on circumstantial evidence, the evidence constituted a chain that pointed to the guilt of the Appellant.

7. It is submitted that the issue raised on defective charge by the Appellant in his grounds of appeal was only raised on appeal and hence it ought to be disregarded for that would amount to extending the scope to which the trial never went. The counsel relied on the case *Japheth Mwambire Mbitha v R* (2019)eKLR

8. On the Appellant's defence, the counsel submitted that the Appellant's defence appears fanciful for reasons that it did not make sense that the Appellant had hired the car from PW2 at a price of Kshs 8,000/- and rehired the same to Lee Lemanaka at the same price. That would mean that he was in a zero-sum business. That it is strange how the Appellant would have left his phone in the car, a working phone for that matter. That it would be difficult to believe a business man like the Appellant would leave his phone in the car and go about his business. That the agreement the Appellant produced did not have a name hence it did not meet the essential requirements of an agreement. That the Appellant did not mention the name of the garage where he serviced the car, he did not call any witness from the garage, he did not produce receipts from the said garage and that he did not mention where he was on the material day, July 15, 2020. Hence, there was no alibi defence.

9. On the sentence, the counsel submitted that the Appellant was given the minimum sentence which was lenient and so it should be sustained.

10. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

11. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

12. The Respondent's counsel took a preliminary point of law to oppose the appeal on the ground that the appeal was filed out of time without leave of this court hence, the same is bad in law and should be struck out.

13. I have perused the court file and noted that the Appellant had filed a Miscellaneous Application Number E022 of 2021 dated June 4, 2021 and filed in court on June 23, 2021 seeking leave to lodge the appeal out of time. On October 5, 2021 an order was given by H.P.G Waweru (J) allowing the Appellant to file the appeal out of time hence, the Appeal is properly before this court.

14. Another preliminary issue is that the Appellant had alluded in his grounds of appeal that the charge sheet was defective. The Appellant did not however submit on this ground. The Respondent's counsel argued that this issue was not raised during trial therefore the trial court was deprived of the opportunity to make an observation about it. The counsel submitted that this issue should be disregarded since it was a fresh issue raised on appeal. This aspect of the appeal was not persued by the Appellant and on the strength of the Respondent's submission, this ground fails for the following reasons.

15. The Appellant was charged under section 92(2) of the *Wildlife Conservation and Management Act* which provide as follows;

> " A person who, without permit or exemption issued under this Act, deals in a wildlife trophy, of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a term of imprisonment of not less than seven years."

16. Trophy is defined under section 3 of the Act as;

> " trophy" includes any bone, claw, egg, feather, hair, hoof, skin, tooth or tusk of an animal, and for any species of plant, any bark, branch, leaf, log, sip or extract and includes any other durable portion whatsoever of that animal or plant whether processed, added to or changed by the work of man or not, which is recognizable as such.

17. The sixth schedule list the East African sandalwood as an endangered species. PW1 confirmed that the samples he received and examined were found to be sandalwood. From the foregoing, the charge sheet was properly drafted and I have not noted any irregularity with the same.

18. As to whether the case against the Appellant was proved to the required standard, the evidence before the trail court was as follows;

19. PW1 Wycliffe Mauta testified that he was an employee of Kenya Forest Research Institute in charge of wood anatomy. He testified that he received samples of the wood marked as a, b, and c inside an envelope. He examined them and his findings were that the samples were sandalwood. He produced the report as Pexhibit 1, the samples as Pexhibit 2 (a) (b) and (c).

20. PW2 John Ndegwa Wakaba, testified that he was the proprietor of a car hire company called Legacy car rentals limited. He testified that he was contacted by the Appellant on July 5, 2020 who wanted to hire a Prado. They met and they entered into an agreement and he released to him the car registration number KCK 415Y (subject car). On the subsequent days, the Appellant hired two more cars. The Appellant defaulted in payment and he tried to reach him to no avail. He reported the matter to the police where he was informed that his two vehicles were at police station. He was informed that KCK 415Y was at Maralal police station. He then saw a Facebook post that the said car was caught transporting sandalwood. He produced the log book as Pexhibit 4, certificate of incorporation of legacy car rentals as Pexhibit 6 and the agreement between him and the Appellant as Pexhibit7.

21. On cross examination, he testified that he had known the Appellant for one month since the Appellant was in car hire business as well. That the Appellant had told him that he had gotten business with a Chinese company in Maralal-Rumuruti road and in Busia. That the agreement was made between him and the Appellant's car hire company Kantel car hire. He testified that the Appellant was arrested since his documents were found inside the subject car.

22. PW3 PC Kennedy Otieno testified that on 15/7/2020, he received a call that there were two Prado vehicles at Maralal that appeared suspicious. Otieno was with Corporal Waithaka.The informer kept track on them. They followed the vehicles heading to Kisima but the vehicles diverted towards Nkuroto primary. They used Longawen route so as to intercept them but they found KCK 415Y abandoned at Nomitio. Upon opening it, it was loaded with sandal wood. They searched the car and recovered a black bag stuffed with clothes, driving license of the Appellant, a document of Legacy car rental and two phones which were working. He testified that the Appellant was arrested at Kikuyu through the help of PW2 on July 17, 2020. He was taken to Rumuruti and to Maralal to record a statement. An inventory of the items that were recovered was prepared. He produced the inventory as Pexhibit14. He testified that one of the phones recovered with SIM card number 0742015404 was registered under the Appellant's name. The other phone was registered under Damaris Mugichu. He identified the items recovered in the car.

23. On cross examination, he testified that he was called at 3:30 am. That Corporal Waithaka was informed by the informer about the two suspicious Prado vehicles with drivers who looked nervous. That

identification parade was not done and that dusting was not done since the services were only available at Nanyuki.

24. PW4, Corporal Samuel Waithaka was the investigating officer. He testified that he was called by an informer and he was informed of two suspicious vehicles. Accompanied by PW3, they went to where motor vehicle KCK 415Y was stuck. The vehicle was abandoned but inside, they recovered sandal wood and personal items including a black bag Pexhibit 8, weighing machine Pexhibit 9, a shirt and trouser Pexhibit 10 (a) and (b), a tecno phone with Sim Card 0759009149 Pexhibit11, Itel Phone with Sim card 0742015404 Pexhibit 12, driving license Pexhibit13. He testified that he forwarded the samples of the wood to Kenya Forest Research Institute and he produced the exhibit memo as Pexhibit 3. He testified that he further forwarded the two phones to the cybercrime department and a report was prepared which confirmed that the tecno phone, Pexhibit 11 belonged to the Appellant. He produced the report as Pexhibit 15(a) and (b). The motor vehicle, KCK 415Y and its content- the sandal wood was produced as Pexhibit 16(a) and (b) respectively. He testified that the Appellant was arrested in Rumuruti in a related case and they took him from Rumuruti to Maralal to record a statement.

25. On cross examination, he testified that they told the informer to monitor the cars and he took them where the vehicle was abandoned. The informer had identified the driver of KCK 415Y and he saw him escape. He described the Appellant to them. He testified that identification parade was not conducted since the Appellant had admitted to have committed the offence. He testified that the items found in the vehicle linked the Appellant to the offence and they concluded that the Appellant was the driver of the subject vehicle. The Appellant had hired the motor vehicle from PW2. He testified that the Appellant was arrested while he was on his normal daily hustle. He further testified that it was possible for one to drop the documents and that taking of fingerprints is meant for serious crimes.

26. On re-examination, he testified that the Appellant was the right person to charge since his documents were found inside the subject vehicle. He testified that the Appellant had hired the subject vehicle from the hirer hence it was not possible to have dropped the documents.

27. The Appellant in his defence testified that he is in car hire business. He admitted hiring the subject car from PW2. He testified that after hiring it from PW2, he rehired it to Lee Lemanaka on July 6, 2020 and they entered into an agreement, Dexhibit1. The said Lee Lemanaka had previously hired another vehicle KCB 538X. He produced the agreement as Dexhibit2. He testified that his company name is Kantel car hire, he produced the certificate of incorporation as Dexhibit3. He testified that he was arrested for unknown reasons after a week of hiring the motor vehicle. He testified that one vehicle was at Rumuruti police station while the subject car was held at Maralal police station. He confirmed that the phone and the wallet found in the vehicle belonged to him. He testified that he had forgotten them after taking the car for servicing. He denied transporting sandal wood.

28. On cross examination, he testified that the said Lee Lemanaka paid cash and he did not issue a receipt after payment. As per the agreement, the Appellant was the car rental driver. He testified that the agreement did not bear the names but only signatures. He confirmed that the phone and the license recovered in the subject car were his and that he forgot them after servicing the car. He testified that there was another case in Nyahururu.

29. On re-examination, he testified that the numbers in the agreement were not his and that Lee Lemanaka license was found in the other car.

30. From the evidence before the trial court, it is clear that there was no direct evidence linking the Appellant to the offence. His conviction was based purely on circumstantial evidence. The Appellant had hired the subject car from PW2, a fact that he did not deny. The evidence reveals that PW3 and PW4 acted upon information by an informer that two Prado cars fuelling at Maralal appeared

suspicious. The drivers of the said cars appeared nervous. PW4 testified that he requested the informer to trail the cars. They also followed the informer trail and they found the subject car abandoned on a road. There was no one inside the car. Upon searching the car, they recovered the sandal wood. There was also a bag that contained some clothes, Appellant's driving license, two phones, a weighing machine and a receipt from legacy car hire. The phones were working. The Appellant in his defence admitted that the phone and the driving license belonged to him and that he had left them in the car when he had gone to service it. He however testified that after hiring the car from PW2, he re-hired it to one Lee Lemanaka.

31. The trial court while convicting the Appellant held inter alia that it was difficult to comprehend how the Appellant could have left the important documents like a wallet, a phone and a driving license for such a long period in a vehicle. That PW3 testified that the phone was working at the time they found the motor vehicle hence the court had no doubt in its mind that it was the Appellant who was driving the motor vehicle KCK 415Y at the time it was found abandoned and loaded with sandal wood.

32. The Appellant's counsel submitted that the Appellant was convicted on the basis of hearsay evidence since the informer who was alleged to have seen the Appellant did not testify. This however is not the case since the trial court convicted the Appellant on the basis that his personal items were found in the car and not on the identification by the informer.

33. The crucial question is whether proof that the Appellant's phone and driving license were found inside the abandoned subject car amounts to proof of his active involvement and/or participation in the crime. As I have stated earlier, there is no direct evidence placing the Appellant at the scene where the car was found, the vehicle was not recovered in the possession of the Appellant – it was found abandoned by the roadside. The evidence linking the appellant to this offence was largely circumstantial. Circumstantial evidence has been described as indirect evidence linking the suspect to the offence. In the case of JAMES MWANGI v REPUBLIC [1983] KLR 327, the Court of Appeal in defining circumstantial evidence held as follows:

> "In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt."

34. The police having found the Appellant's personal items in the car, the Appellant was bound to provide an explanation how his phone and the license were found in the subject car. This is in line with section 111 of the *Evidence Act*. See also the case of *Kelvin Nyongesa & 2 others v Republic*(2017)eKLR where the court held that:

> " Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see Malingi v Republic [1988] KLR 225"

35. The explanation that the Appellant gave was that he was in a car hire business operating a company known as Kantel car hire. This was confirmed by PW2 who was also in the same business. He testified that he had known the Appellant for one month and was operating a car hire business. The Appellant stated that after hiring the car from PW2, he re-hired it to one Lee Lemanaka at a cost of Kshs8,000/- per day. The alleged hire agreement is dated July 6, 2020. The offence was committed on July 15, 2020. On cross examination he stated that the hirer brought the vehicle back for service and it is during the service that the Appellant left his phone and driving licence in the car. On re- examination, he strangely

confirms that Lee's driving licence was found in the other car. He confirms that there was another case in Nyahururu.

36. I have reviewed the evidence adduced at trial. The burden of proof lay upon the prosecution throughout the trial. The prosecution laid before the court cogent and uncontroverted, indeed, admitted evidence that the Appellant's phone and driving licence were recovered in the abandoned vehicle. The recovery of the items places the Appellant at the scene of crime in the absence of a plausible explanation to the contrary. And what is the explanation by the Appellant in his defence? That he hired the subject vehicle for Ksh 8000 and re-hired it to Lee Lemanaka for the same amount of Ksh 8000; That he left his driving licence and phone when he had gone to service the vehicle; He produced a car hire agreement which is ambiguous since apart from naming the Appellant as the Car Renter, there is no indication that Lee Lemarnaker hired the car as his name appears in the ''home address'' column.

37. It is incomprehensible that, having hired the vehicle out on July 6, 2020 as alleged, the Appellant would have stayed without his phone and driving licence for about 10 days without making efforts to get them from the hirer of the vehicle whom he knew and whose contacts he had. Without shifting the burden of proof to him, his explanation leaves the circumstantial evidence intact and unshaken. Am satisfied that the incriminating facts in this case are totally incompatible with the innocence of the Appellant and are incapable of explanation upon any other reasonable hypothesis than that of guilt

38. Am satisfied that the prosecution proved its case beyond reasonable doubt. The Appeal on conviction thus fails and is for dismissal.

39. Was the sentence illegal or excessive? The Appellant was sentenced to 7 years imprisonment. It is trite that sentencing is the discretion of trial Judge. An appellate court will not interfere with the exercise of such discretion unless it is proved that the trial Magistrate acted on some wrong principles, overlooked some relevant factors or failed to consider some relevant matters or the sentence is manifestly excessive.

Each case must be treated on its set of facts and circumstances. In Ogalo S/o Owoura –v- R (1954) E. A CA 270 the court stated;

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R (1950) 18 EACA 147, 'it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.' To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case....."

40. In sentencing the Appellant, the trial court considered the gravity of the offence. The Appellant's mitigation was considered. The Applicable law was correctly captured. Though the court expressed the fact that 7 years imprisonment was the minimum sentence for the offence and meted it out appearing to shackle itself to the minimum sentence, I find no valid grounds upon which to interfere with the sentence.

41. Consequently, the appeal herein is dismissed in its entirety.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 10TH DAY OF MAY 2023

A. K. NDUNG'U

JUDGE