



**Mukora v Republic (Criminal Appeal E014 of 2021)  
[2023] KEHC 17702 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17702 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E014 OF 2021**

**PM MULWA, J**

**MAY 11, 2023**

**BETWEEN**

**PETER NJUGUNA MUKORA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein Peter Njuguna Mukora was charged in the trial court alongside 3 others with the offence of theft of goods on transit contrary to section 279(c) of the *Penal Code*. The particulars are that on December 29, 2014 between Malakisi in Bungoma County and Thika in Kiambu County, jointly with others not before the court, they stole 235 bales of tobacco valued at Kshs. 3.6 million shillings from Motor Vehicle Registration No. KBU 867B Trailer Registration No. ZD5874 the property of British American Tobacco Company Limited while on transit to BAT company Thika.
2. The appellant together with his co-accused pleaded not guilty to the charge.
3. To prove their case, the prosecution called a total of 8 witnesses. The prosecution case against the appellant was that the appellant being the driver of motor vehicle KBU 867B loaded goods in Malakisi in Western Kenya for delivery to Thika BAT Company Limited but failed to deliver the consignment to Thika. The vehicle was tracked down in Mombasa Bamburi and the consignment was not intact. The appellant being the driver was arrested. According to the prosecution the Goods Receipt Note (GRN) was a forgery.
4. Upon analysis of the evidence tendered by the prosecution, the trial court found the prosecution had proved its case beyond reasonable doubt, convicted and sentenced the appellant to serve 4 years imprisonment.
5. Being aggrieved by the judgment the appellant filed the Memorandum of Appeal dated March 3, 2021 citing the following grounds:



- a. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant when the evidence adduced was scanty and /or insufficient thereby arriving at a wrong decision.
  - b. That the learned trial magistrate erred in law and in fact in convicting the appellant when the evidence adduced was contradictory and misplaced thereby arriving at an improper, unjust and uniformed decisions/judgment.
  - c. That the learned trial magistrate erred in law and inn fact in arriving at an improper decision on facts which did not support the charge thereby occasioning a wrong and unjust decision.
  - d. That the learned trial magistrate erred in law and in fact in failing to reasonably and considerably assess and consider the evidence and mitigation of the appellant when convicting the appellant herein thus being an improper and wrong decision.
  - e. That the learned trial magistrate erred in law and in fact in admitting exaggerated and extraneous unjust information and evidence that necessitated a miscarriage of justice and improper decision.
6. The appeal was heard by way of written submissions and both parties complied.

### **Appellant's Submissions**

7. Counsel for the appellant filed submissions on September 19, 2021, and submitted that the trial magistrate erred both in law and in fact in pronouncing judgment against the appellant. That the fairness of the criminal justice system was not credible as the appellant was not given a fair hearing because the prosecution failed to prove the case beyond reasonable doubt.
8. According to counsel the prosecution evidence was contradictory and the alleged recovered exhibits were not produced before the trial court. Counsel urged the court to re-analyze and re-evaluate the evidence of the trial court and find the same was insufficient to sustain a conviction. He urged the court to allow the appeal and quash the conviction and sentence.

### **Respondent's Submissions**

9. In opposing the appeal Mr. Muriuki counsel for respondent filed submissions on March 27, 2023, in which he submits the prosecution in the trial court proved the charges against the appellant beyond reasonable doubt. That the prosecution did prove the essential ingredients of the offence of theft as follows: whether the goods were stolen, whether the goods were stolen by the appellant and whether the appellant was positively identified.
10. Counsel submits the tobacco which was the property of BAT Company Limited was stolen while on transit to the factory in Thika being ferried by Motor Vehicle Registration No. KBU 867B, and the appellant was the driver.
11. The appellant did not deliver the goods to the Thika destination and the motor vehicle was tracked down and intercepted at Bamburi, Mombasa and impounded. The appellant, who was the driver was arrested. The GRM in respect to the goods was confirmed to have been fraudulently obtained by the appellant to reflect that the consignment had reached the factory in Thika, it was further submitted.
12. Counsel submits the sentence meted out on the appellant was proper, that the learned trial magistrate did not act on wrong principles and neither did he overlook any material things during the sentencing process and urged the court to dismiss the appeal.



## Analysis of the evidence

13. This being a first appeal the court is clothed with the jurisdiction to re- evaluate and re-analyze the evidence of the trial court as was cited in the case of *David Njuguna Wairimu vs Republic* [2010] eKLR where the court of appeal stated:

“The duty of the first appellate court is to analyze the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
14. Pw1 Evans Ondieki Mosota testified he is a security guard at CRS Management BAT Limited in Thika. On December 31, 2013 he was notified by his supervisor that the delivery notes for Motor Vehicle KBU 867B were missing at gate 2. Upon conducting his inquiry, he noticed that on December 30, 2013 Motor Vehicle KBU 867B did not deliver the goods to the company, and neither was the consignment offloaded as was required.
15. In cross examination he stated the GRN is generated by the system by the receiving clerk, and in this particular case the receiving clerk entered the details of the vehicle falsely as the vehicle was not at the offloading point. He confirmed the goods loaded at Malakisi were not offloaded at the store in BAT Ltd Thika.
16. Pw2 Bernard Odhiambo Otieno testified he was a security Manager at BAT. On the morning of December 27, 2013 he received a call informing him that some vehicles needed to be offloaded. As he was waiting to offload the lorry he noticed Motor Vehicle KBU 867B was not at the offloading point. The motor vehicle was later impounded at Bamburi Cement Company.
17. Pw3 James Mwaura testified he works with DHL Company as a green leaf supervisor, based in Thika. He oversees all green leaf operations in the Company. He testified he was on duty on December 30, 2013 and the only vehicle offloaded was KBU 894P. He testified that motor vehicle KBU 867B was not offloaded and the TCN was irregularly obtained.
18. The evidence of Pw4, Pw5, Pw6 and Pw7 just described their normal daily duties which they went about on December 31, 2013, none of them dealt with the appellant on the specific day.
19. Pw8 PC Timothy Benedictus the investigating officer who took over the matter from the previous investigating officer adduced in evidence photos marked as PMF3a of the motor vehicle KBU 867B, and the consignment notes PMF2 of the goods to be delivered. He could not ascertain if the goods stolen were recovered.
20. The appellant Peter Njuguna Mukora testified that he delivered the 235 bales of tobacco at Thika BAT Company, submitted his delivery note and was issued with a Good Receipt Note (GRN) on December 31, 2013.
21. Accused 2 Charles Boke Nyarasi testified he was not aware of the incident and only learned of the same when in police custody.



22. Accused 3 Caleb Musoma Akweveta testified he was a security officer with Bob Morgan Service working with BAT Company. On the night of December 30, 2013, he was assigned the offloading section. While on duty a clerk at the offloading section came to him at 9.00 pm and asked for a TCN document in respect of motor vehicle KBU 867B which was yet to enter the offloading bay.
23. Accused 4 James Odongo Oringo testified that he is unaware of the charges before him and his co-accused were strangers to him.
24. At the end of the trial, the trial magistrate acquitted the 2<sup>nd</sup> and 4<sup>th</sup> accused persons on the grounds that the prosecution failed to prove the charges against them and there was no evidence to implicate them. The appellant and 3<sup>rd</sup> accused were convicted of the charges and sentenced. The appellant was sentenced to serve 4 years in prison while Caleb was sentenced to pay a fine of Kshs. 100,000/= or in default One (1) year imprisonment.

### **Determination**

25. Having analyzed the evidence of the trial court, the issue for determination is whether the prosecution proved the elements of theft as per Section 279 (c) of the *Penal code* against the appellant.
26. Section 279(c) of the *Penal Code* provides; "...if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another..."
27. For a conviction under Section 279(c) of the *Penal Code* to stand, the prosecution should prove that; goods of some value were stolen, from a vessel, vehicle or place of deposit used for conveyance or custody of goods; and the goods were in transit from one place to another.
28. From the trial court records the prosecution proved that the goods were loaded at Malakisi in Western Kenya on Motor Vehicle KBU 867B for delivery to Thika BAT Company Limited. It is the prosecution case that the goods did not get to their final destination but instead the delivery vehicle Regn. No. KBU 867B was tracked at Bamburi, with the appellant as the driver.
29. Section 268 (1) of the *Penal Code* provides for the definition of stealing:
 

“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”.
30. Under Section 268(5) *Penal code* a thing cannot be said to be stolen if the same has not been moved. It was the prosecution case that the appellant being the driver of Motor Vehicle KBU 687B, loaded a consignment of Tobacco in Malakisi in Bungoma and was supposed to offload the same at Thika BAT Limited. The appellant did not deliver the goods to their destination and instead fraudulently obtained a Tobacco Consignment Note (TCN) and Goods Receipt Note (GRN) as evidence that the consignment had been received in Thika.
31. The prosecution also proved the goods were in transit from Malakisi to Thika inside the vessel being Motor Vehicle KBU 867B and the appellant was the designated driver. The appellant in his defence submitted he delivered the goods to their final destination BAT Limited Thika where he submitted the delivery note and his ID card and was issued with a GRN and his ID card returned. He denies being involved in the offloading process and did not explain how the motor vehicle was found in Bamburi, a place other than its designated final destination at Thika BAT.



32. The defence of the appellant in the trial court does not exculpate him from liability. The 3<sup>rd</sup> accused testified that the TCN document issued to the appellant was a forgery as the vehicle KBU 867B was not at the Thika Factory when the appellant requested for the same.
33. From the evidence adduced at the trial court, I am convinced the prosecution proved its case beyond reasonable doubt. I am thus not persuaded that the trial court erred in convicting the appellant for the offence of theft as all the evidence pointed to the appellant as the probable culprit.
34. Section 279 of the Penal Code stipulates the punishment for theft as 14 years imprisonment. The appellant, having been convicted was sentenced to 4 years imprisonment. In my view, the conviction was within the law, the sentence of 4 years is fair and lenient to the appellant.
35. I have no reason to interfere with the conviction and sentence of the trial court.
36. Final orders:  
I find the appeal herein lacks merit and is dismissed. I uphold the conviction and sentence of the trial court.

**JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 11<sup>TH</sup> DAY OF MAY, 2023**

.....

**P.M. MULWA**

**JUDGE**

**In the presence of:**

Kinyua/Duale – Court Assistants

N/A - for Appellant

Mr. Muriuki - for State/Respondent

