



**Muya & another v Republic (Criminal Appeal E026 of 2020)  
[2023] KEHC 17588 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17588 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E026 OF 2020  
SM GITHINJI, J  
MAY 11, 2023**

**BETWEEN**

**WILSON MUREITHI MUYA ..... 1<sup>ST</sup> APPELLANT**

**ELIJAH OLOO ABONG'O ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Criminal Case No. 702 of 2017 of the Senior  
Principal Magistrate's Court at Mariakani Court-Hon. S. K Ngii, PM dated 14th July 2020)*

**JUDGMENT**

CORAM: Hon. Justice S. M Githinji

Appellant in person

Mwangi for State

- 1 The Appellant was charged alongside one Elijah Oloo Abong'o with six counts. They both preferred their appeals separately and were consolidated in this file.
- 2 In the first count the accused persons were charged with the offence of stealing goods in transit contrary to section 279 (c) of the *Penal Code*. The particulars of the offence are that on 12<sup>th</sup> November 2017 at unknown place along Nairobi-Mombasa highway within the RePublic of Kenya, jointly with others not before court stole 360 packages of processed tea weighing 25 tonnes valued at Kshs. 10,208,000/= the property of Rukuriri Tea Factory from a locked container number FSCU946348045G1 loaded on truck number KCE 419N/ZC1485 while the said tea was being transported from Embu to KTDA Mombasa.



- 3 In the second count II the accused persons were charged with the offence of Conspiracy to commit a felony contrary to section 393 of the *Penal Code*. The particulars of the offence being that on 12<sup>th</sup> November 2017 at unknown place along Nairobi-Mombasa highway within the republic of Kenya, jointly with others not before court conspired to commit a felony namely theft of goods in transit.
- 4 In the third count the accused persons were charged with theft of a motor vehicle contrary to section 287 (a) of the *penal code*. The particulars of the offence are that on 12<sup>th</sup> November 2017 at unknown place along Nairobi-Mombasa highway within the republic of Kenya, jointly with others not before court stole a motor vehicle Mercedes Benz Actross registration number KCE 419N/ZE 1485 valued at Kshs. 7,000,000 the property of Mainstreet Logistics Limited.
- 5 In count IV Elijah Oloo Abong'o herein was charged with the offence of practicing medicine without a licence contrary to section 22 (1) as read with section 22 (2) of the *Medical Practitioners and Dentist Act* No. 12 of 2012. The particulars of the offence are that on 13<sup>th</sup> November 2017 at Mtwapa Township in Kilifi County within the Republic of Kenya, administered medication to Wilson Mureithi Muya without a licence.
- 6 In the first count, Elijah Oloo Abong'o was charged with the offence of holding a title of a doctor without a valid licence contrary to section 22 (2) of the *Medical Practitioners and Dentist Act* Number 12 of 2012. The particulars of the offence being that on 13<sup>th</sup> November 2017, at Mtwapa Township in Kilifi County within the republic of Kenya, held the title of a doctor without a valid license.
- 7 In Count VI Elijah Oloo Abong'o was charged with the offence of fraudulently procuring registration or license contrary to section 19 as read with section 22 (2) of *Medical Practitioners and Dentist Act* Number 12 of 2012. The particulars of the offence are that on 19<sup>th</sup> November 2017 at Mtwapa Township in Kilifi County within the republic of Kenya, fraudulently procured registration or license of Medical Practitioners and Dentists.
- 8 The appellants were convicted on the first count and sentenced each to imprisonment for 5 years. Aggrieved by the said conviction and sentence they lodged an appeal on the following grounds:
1. That the learned trial magistrate erred in law and fact by not considering that no exhibits were produced in court to place them at the scene of crime.
  2. That the learned trial magistrate erred in law and fact by not considering that there were various contradictions and invariances.
  3. That the learned trial magistrate erred in law and fact by not considering the defence evidence.
- 9 In light of the above grounds, the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

## Background

- 10 The prosecution called to the stand eight witnesses in support of its case.
- 11 PW1 Stanley Kiritie Mishugi told the court that he is a transporter of KTDA and his company is Main Street Logistics Limited and had a contract for one year to transport goods for KTDA which contract commenced on 1/7/2017 and was to end on 30/6/2018. He testified that he



had employed Wilson Mureithi Muya the 1<sup>st</sup> accused as his driver from the year 2016 up to the time the goods got lost. It was his testimony that on 14/11/2017, he received a call from his manager one Kennedy Gathina who told him that he could not reach the 1<sup>st</sup> accused on phone. He then called a CID officer named Kalya at Mariakani police station and informed him that one of his motor vehicles could not be reached and the track system showed that the lorry was at Bonje area. He added that the CID officers went to Bonje and found the lorry parked besides the road with its doors open but no goods. The registration number is KCE 419N, trailer number ZE 1485 and was driven by the 1<sup>st</sup> accused. The lorry was then taken to Mariakani Police Station.

- 12 He further testified that he started looking for the 1<sup>st</sup> accused and was informed by one of his uncles that the 1<sup>st</sup> accused had been located at Mombasa. He was arrested and taken to Mariakani police station where he met him and had a plaster on his hand and wore a blood stained shirt. The 1<sup>st</sup> accused's explanation was that he had been carjacked, beaten and injured by robbers but on being pressed further, he admitted that he stole the tea and sold it with other people then drove and abandoned the vehicle at Bonje area and that he cut himself to fake a robbery.
- 13 PW2 Bonface Magala, an employee of KTDA attached to Rukuriri tea factory confirmed that on 11/11/2017 the 1<sup>st</sup> accused was given tea to transport to KTDA Mombasa on Motor Vehicle KCE 419 ZE 1485 for which he was the driver. He however stated that he could not say what transpired with the vehicle between 11/11/2017 and 14/11/2017.
- 14 On cross examination, he told the court that the 1<sup>st</sup> accused was present during the loading and that the value for the tea was Kshs. 10 million.
- 15 PW3 Moses Thuo testified that he helped the complainant in tracing the motor vehicle which was spotted at Bonje and the container was empty.
- 16 PW4 Kennedy Njoroge a supervisor with Main Street Logistics Ltd told the court that he was charged with among other duties to supervise and monitor drivers while transporting goods to ensure safe arrival to their destinations. It was his statement that the 1<sup>st</sup> accused was assigned to transport tea from Rukiriri tea factory in Embu to KTDA Mombasa on 11/11/2017. That on 12/11/2017, he received a call from the 1<sup>st</sup> accused informing him that he was at Juja weighbridge and the vehicle had developed a mechanical problem. He went there and fixed it on the same day and the 1<sup>st</sup> accused proceeded with his journey to Mombasa and was expected to arrive on 13/11/2017. On 13/11/2017 he was out of reach and by 5pm he checked the tracking system and found that the motor vehicle had been abandoned at Bonje.
- 17 On cross examination, he told the court that even though the 1<sup>st</sup> accused had a plaster on his hand, it was later established that he had no fracture. The 2<sup>nd</sup> accused was arrested because he was the one who had treated the 1<sup>st</sup> accused.
- 18 PW5 Mwangolo Chigulu told the court that the 1<sup>st</sup> accused was on 17/11/2017 brought to him for examination following claims that he had been carjacked and injured in the process. His observations were that he had superficial bruises on the right neck, right forearm and right thigh. He also had a plaster of paris on his left forearm but he had no fracture.
- 19 PW6 CIP Sandra Asubira of Mtwapa Police station told the court that on 16/11/2017 the 2<sup>nd</sup> accused well known to him went to the station allegedly to follow up on payment for medical services he had rendered to the 1<sup>st</sup> accused. She then interrogated the 1<sup>st</sup> accused who told her



that he had been carjacked at gun point at Meli Kubwa. The two accused persons were then arrested and handed over to police from Mariakani police station.

- 20 PW7 PC Dennis Nyakina of DCI Kilifi based at Mtwapa stated that he had assisted in the arrest of the two accused persons and he did not investigate the matter.
- 21 PW8 Sgt Salim Juma Mwambachi of DCI based at Mariakani police station testified as the investigating officer. He told the court that he received a report from the complainant that his vehicle which had been dispatched from Rukiriri Tea factory on 12/11/2017 to transport tea to KTDA Mombasa and had not reached its destination by 14/11/2017. He then commenced a search and found the vehicle near a petrol station at Bonje Area and the container in which the tea had been loaded was empty. He further testified that on 16/11/2017, he got information that the 2<sup>nd</sup> accused had taken the 1<sup>st</sup> accused to Mtwapa police station after treating him on 12<sup>th</sup> November 2017 for injuries he allegedly sustained following a carjacking incident. He interrogated the two accused persons and the 1<sup>st</sup> accused was taken to the hospital where it was established that he had no fracture yet he had plaster on his left arm. Further, that even though the 1<sup>st</sup> accused's clothes were full of blood stains he only had minor injuries.
- 22 The prosecution closed its case and the trial magistrate ruled that the accused persons had a case to answer and placed the accused on their defence. The 1<sup>st</sup> accused elected to give unsworn evidence and called no witnesses while the 2<sup>nd</sup> accused gave sworn evidence and called no witnesses
- 23 DW1- Wilson Mureithi Muya testified that he was driving the subject motor vehicle transporting tea from Embu to Mombasa. That during the journey he kept in touch with Kennedy and on 12/11/2017 at around 8.30 he informed him it was his wish to sleep at Mariakani. It was his testimony that on reaching Meli Kubwa, he stopped for a short call when a car pulled over and three men one armed with a pistol alighted. He was ordered to drive the vehicle past Mariakani weighbridge after which the carjackers took control of the vehicle. He was asked for the location of the tracking device to which he responded he did not know and one of the men drew a knife and repeatedly stabbed him on the ribs, hand and neck and threatened to take his life. He was then blindfolded and forced to drink a substance he could not identify. He lost consciousness and when he came to, he found himself in a Hospital at Mtwapa where he was treated.
- 24 DW2 Elijah Oloo Abonyo testified that he holds a Diploma in medical laboratory science. That he has been running a medical liaison network for commission based in Shanzu. He told the court on 15/11/2017 he received a call from one Nkatha at around 9pm informing him that she had a patient requiring medical attention. He joined them at St. Annes Medical Clinic where he attended to the 2<sup>nd</sup> accused overnight until he regained consciousness on 16/11/2017. He informed them that he had been assaulted on his way to Mombasa. They then reported the matter at Mtwapa police station and were later arrested by police officers from Mariakani.
- 25 I have considered the offence in the first count to which the appellants were convicted and sentenced. I have as well weighted the evidence on record, judgment of the lower court, sentences, grounds of the appeal and submissions by both sides.
- 26 Section 279 (c) of the *Penal Code* reveals the ingredients for the offence of which the appellants were convicted and sentenced. It states as follows; -

“ If the theft is committed under any of the circumstances following, that is to say-



(c) 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 The prosecution case is vivid and undisputed that 360 packages of processed tea, weighing 25 tonnes, valued at Kshs. 10,208,000/= was stolen while on transit from Rukiriri Tea Factory to KTDA Mombasa, on a truck registration number KCE 419N/ZG 1485, in a locked container No.FSCU 946348045G1. The 1<sup>st</sup> appellant, Wilson Mureithi Muya was the driver of the said truck. The appellant (Wilson Mureithi Muya) stated in his defence that he was carjacked by men who were armed with a pistol and it is them who stole the tea.

28 However, the circumstances under which it was stolen shows that he was untruthful, and was involved in the theft. He went missing from 13/11/2017 upto 16/11/2017. When he was traced, he had some minor injuries of which were exaggerated, and a fracture, faked to fit his claim. His claim that he was stabbed several times on the ribs, hand and neck with a knife could not be substantiated. The doctor who examined him (PW -5) did not find such. He had a plaster on the left hand to imply that he had a fracture of which PW-5 found was not true. He had no such fracture. Considering that he had the possession of the goods on transit as the truck driver; and that they were stolen, his effort to make up a fake case of carjacking and theft, points irresistibly to the fact that he took part in the said theft. As was held in *GMI v Republic* [2013] eKLR, the circumstances from which his guilt was inferred was cogently and firmly established; the circumstances unerringly points to his guilt and are not open to explanation on any other hypothesis other than that of his guilt.

29 Considering the foregoing, he was rightly convicted. The offence carries a maximum of 14 years imprisonment. He was sentenced to 5 years imprisonment. Considering the value of the stolen tea and that it was not recovered, I would have given a stiffer sentence, but I will leave it at that.

30 The bottom line is that appeal for Wilson Mureithi Muya lacks merit and is hereby dismissed.

31 For Elijah Oloo Abong’o there is no evidence placing him at the scene of the crime. He was a “doctor” at Mtwapa, Kilifi. He was charged because he took the 1<sup>st</sup> appellant to the police station to report the matter after having treated him. As observed, he exaggerated the injuries and faked a fracture that was not there when he plastered his left hand.

32 The trial court in evaluation of the evidence made a wrong finding when it expressed that; -

“The 2<sup>nd</sup> accused was in my considered view involved either directly or indirectly in the cover up of the offence committed by the 1<sup>st</sup> accused and for that reason the law deems him equally guilty for the theft of the tea.”

33 There is no law that deems him equally guilty for the theft of the tea which was on transit. He was simply an accessory after the fact having knowingly aided a person he knew had committed a felony in order to cover up for the offence. Section 396 (1) of the *Penal Code* defines an accessory after the fact as follows; -

“A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him escape punishment, is said to become an accessory after the fact to the offence.”



- 34 Under section 397, any person who becomes an accessory after the fact to a felony is guilty of a felony and is liable, if no other punishment is provided to imprisonment for three years.
- 35 Under section 179 of the *Criminal Procedure Code*, when a person is charged with an offence and facts are proved which establishes a minor offence, he may be convicted of the minor offence although he was not charged with it.
- 36 The established offence against the 2<sup>nd</sup> appellant, of an accessory after the fact, is a lesser offence to the one he was charged and wrongly convicted of. His offered defence is appropriate and applicable to the established offence, only that it is not credible. He is therefore not prejudiced in any way in finding him guilty of this lesser charge.
- 37 In the interest of meeting the ends of justice, I do acquit the accused of the offence he was convicted and quash the meted sentence of 5 years. I replace it with the offence of an accessory after the fact; I do convict him of it and sentence him to serve 3 years imprisonment from the date of sentence by the lower court.

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

.....

**S.M.GITHINJI**

**JUDGE**

**In the presence of:**

The appellant in Person

Mkongo for the State

