Mungania v Director of Public Prosecution (Criminal Appeal E040 of 2023) [2024] KEHC 14799 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14799 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E040 OF 2023

LW GITARI, J

NOVEMBER 7, 2024

BETWEEN

BENARD KAIRI MUNGANIA ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

JUDGMENT

1.

Grounds of Appeal

a. That, the learned Trial Magistrate erred in both law and fact by failing to note that the prosecution side failed to prove their case beyond reasonable doubts.

b. That, the learned Trial Magistrate erred in matters of law and fact y failing to note that Section 279(g) of the Penal Code does not support the charge.

c. That, the learned Trial Magistrate failed to note that there is no evidence adduced by the prosecution witnesses to support the value of the alleged motor vehicle arts as stated in the charge sheet.

d. That, the learned Trial Magistrate erred in matters of law and fact by failing to grant the appellants an option of a fine.

e. That, the learned Trial Magistrate erred in both law and fact by failing to note that the investigation was shoddy.

f. That, the learned Trial Magistrate erred in both law and fact by failing to consider the appellant's defence.

g. That, the learned Trial Magistrate erred in law and fact by failing to take into the period spent in custody under Section 333 (2) of the Criminal Procedure Code.

2. The appellant prays that the appeal b allowed, sentence be set aside and he be set at liberty. The appeal arises from the proceedings in the Chief Magistrate's court at Meru Criminal Case No.E476/2020 where the appellant was charged with stealing motor vehicle parts Contrary to Section 279(g) of the Penal Code.

3. The particulars of the charge are that the appellant with others, on 22/12/2020 at Kanyuru area Meru Town in Imenti North Sub-County within Meru County, jointly stole exhaust muffler of motor vehicle Registration Number KCN 669K Probox valued at Kshs.50,000/- the property of Domisiano Kamenchu. The appellant was charged with two others and was the 2nd accused. The appellant denied the charge. A full trial followed and in the end the appellant was found guilty, convicted and sentenced to serve Four Years imprisonment.

4. The appellant was dissatisfied with both conviction and sentence and filed this appeal.

5. The respondent opposed the appeal and prays that it be dismissed.

The Prosecution Case:

6. PW1: Domisiano Kamenchu Maitare testified that on 22/12/2020 his motor vehicle Toyota Probox KCN 669K had a problem of Tyre-road (sic). He called the appellant who he knew as a mechanic and he in turn called three other men and they removed the tyres, the tyre-road which was then fitted with a machine. The appellant went behind and made a call, then the other accused persons and another man who is at large removed the exhaust pipe and left with it. The three men told his wife who was in the car that he has said that they remove the exhaust pipe. The complainant asked PW2 where the exhaust pipe was. After waiting for a long time the three men came with the exhaust and had removed the muffler. They had cut it and sold it then put mud on it. He asked them why they removed it. One man ran away. He then called the police. The 1st accused admitted that he had sold the muffler to a lady called Njeri and that the 3rd accused got a buyer. The 1st accused told PW1 that it is the appellant who asked them to remove the muffler and it was cut with gas flame and then they applied mud.

7. PW2 – Zipporah Karimi Mbaabu is the wife to PW1. She corroborated the testimony of PW1 that the vehicle had a problem and they took it to the appellant to repair it. The appellant got three people to repair it. One of the co-accused received a call and requested to drive the car to go and fix something. 1st and 3rd accused entered the vehicle, removed a metal part and went with it. The appellant and PW1 returned and she told them that the others had left saying they were going to repair the part. The three then returned with the metal part. PW1 noted the part was welded and mud applied. The three said they had not done anything. PW1 returned with police and the appellant was arrested.

8. PW3 – Dorcas Kangai testified that she was with PW1 & 2 and PW1 was taking the vehicle to the garage of the appellant for repairs. PW1 and the appellant left to go and buy a spare part that was needed. One of the mechanics said he had received a call telling him to remove the exhaust pipe. The three men then left after one of them entered the vehicle and removed the exhaust pipe. PW1 and the appellant returned and PW1 was angry because the exhaust pipe was removed and it had no problem. The three men returned and wanted to fix the exhaust pipe. PW1 checked the exhaust pipe and realized that something had been removed. PW1 came with policemen and the mechanics were arrested. She identified the exhaust pipe from the photographs which were produced in court.

9. PW3 – Police Constable George Imwene investigated the case. He testified that the complainant told him that he had taken his motor vehicle Registration Number KCN 669K Silver in colour for repair.

The tie rod was removed and he left with the appellant. He left the three other men behind. On coming back he found the exhaust had been removed and on enquiry why it was removed the three left in a hurry. The complainant managed to arrest Samuel and Stephen and went to the police station. He later arrested the appellant on 23/12/2020 and they were charged.

10. PW4 saw the exhaust was cut and welded. Something was removed. Photographs of the exhaust were taken and were produced in court as exhibit 1(a) and (b). The appellant was then charged.

11. The appeal was canvased by way of written submissions.

The Appellant's Submissions

12. He submits that the charge was not proved beyond any reasonable doubts. The appellant further submits there was no evidence to prove that the appellant stole the said exhaust. He further submits that Section 279(g) of the Penal Code does not support the charge of staling motor vehicle parts. He relies on Section 134 of the Criminal Procedure code.

13. The appellant further submits that there were gaps in the prosecution case which raise doubts in the evidence. That the complainant did not give the value of the stolen exhaust. The appellant further submits that the learned Magistrate erred by failing to consider an option of a fine. He relies on Section 26(3) of the Penal Code.

14. Finally, the appellant submits that the defences were rejected without giving cogent reasons and yet it was comprehensively and yet it cast doubts in the prosecution case. He relies on the case of Oketch Okale –vs- Republic (1964) E.A.C.A 179 where the court held that "Failure to consider the defence is contrary to natural justice and unsettles the judgment".

15. He also relies on Ouma –vs- Republic (1986) KLR 619 where it was stated that "at the time of evaluating the prosecution case the court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is any doubt the benefit of that doubt always goes to the accused person."

16. He submits that this was not done.

Analysis and Determination

17. I have considered the proceedings before the trial court, the grounds of appeal and the submissions. The issues which arise for determination are:-

    1. Whether the charge sheet was defective.

    2. Whether the charge was proved beyond any reasonable doubts

    3. Whether the defence was considered.

18. This is a first appeal and the duty of this court is to consider the evidence which was adduced before the trial court, analyze and evaluate it and come up with its own independent findings. The court is supposed to give allowance to the fact that it did not see the witnesses when they testified. See Okeno –vs- Republic (1972) E.A 32.

Whether the charge sheet was defective

19. The substantive law on defective charge sheet in Section 134 of the Criminal Procedure Code__ which provides as follows:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

20. In Peter Mwangi Ngure –vs- Republic (2014) eKLR the court of Appeal stated that there are two factors to be considered.

21. Firstly, whether or not the charge sheet is defective and two whether or not the ends of justice could be met notwithstanding the defect. "The court stated that, in a nutshell the test whether a charge sheet is defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the applicant to the extend that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result he was not able to put up an appropriate defence"

22. On defective charge sheet, Section 382 of the Criminal Procedure Code provides as follows:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> > Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

23. The section gives guidance on whether even where such defects are evident, justice could still be met or whether the defence is curable.

24. The appellant submits that Section 279(g) does not disclose the offence of staling motor vehicle parts. Section 279(g) of the Penal Code provides as follows:-

> if the theft is committed under any of the circumstances following that is to say – if the offender in order to commit the offence opens any locked room, box, vehicle or other receptacle by means of a key or other instrument the offender is liable to imprisonment for fourteen years".

25. The appellant was charged under Section 279(g) of the Penal Code. The particulars state that, "On 22/12/2020 at Kanyuru area Meru Town, jointly stole exhaust Muffler of motor vehicle Registration Number KCN 669K Probox valued at Kshs.50,000/- the property of Domisiano Kamenchu". These particulars do not disclose a charge under Section 279(a) of the Penal Code for the reason it is not alleged that in order to commit the offence with which he was charged, the appellant opened the locked motor vehicle by means of a key or other instrument. The particulars are so fare and the witnesses concerned themselves with stealing of a motor vehicle part namely muffler. The said muffler was not

stolen from the said motor vehicle. PW1 said the exhaust was removed from the vehicle, it was cut a muffler removed from it (exhaust).

26. There was no evidence that the appellant stole from a locked motor vehicle by opening with a key or other instrument. Indeed PW1 said his wife was inside the car when the exhaust was removed.

27. The aggravating factor of the theft under Section 279(a) of the Penal Code under which the appellant was charged is opening the locked motor vehicle by use of a key or other instrument in order to commit that offence. This circumstance was neither charged nor proved against the appellant in the court of the first instance.

28. Without this circumstance, being charged and proved against the appellant the charge was not sustainable. Theft in a common factor to both Section 279(g) and 275 if the Penal Code. Section 279(g) has the additional aggravating circumstance of breaking into motor vehicle by opening and maximum penalty is fourteen years as opposed to Section 275 which provides for a maximum of three years. The proper charge would have been stealing under Section 275 if the Penal Code. Had the charge been proved under Section 179(1) of the Criminal Procedure Code the appellant would have been convicted under Section 275 of the Penal Code. I find that the charge was defective as the particulars did not support the charge.

Whether the charge was proved beyond any reasonable doubts.

29. An accused person is presumed innocent unless proved guilty. This is a constitutional principal of a fair trial. An accused person bears no burden to prove his innocence. Article 50 (2) (a) of *the Constitution* provides as follows:

30. An accused person has the right:-

    a. To be presumed innocent until proved guilty

31. The prosecution bears the burden to prove the quilt of an accused to the required standard which is beyond any reasonable doubts.

32. In Wilmington –vs- DPP (1935) AC 485 the court held that the prosecution bears the burden to proof the charge against the accused beyond any reasonable doubts. In Republic –vs- David Ruo Nyambura, (2000) eKLR the court stated that "An accused person does not assume any burden of prove his innocence in a criminal case"

33. In Republic –vs- Andrew Mueche Omwenga (2009) eKLR the court stated that "An accused must be proved to be responsible for conduct or existence of a state of affairs prohibited by criminal law before conviction can result."

34. In this case, the evidence adduced the appellant was not water tight. It was riddled with contradictions, inconsistences and discrepancies. Whereas PW1 stated that, his vehicle had a problem and he called the 2nd accused who in turn called three other men who removed the tyre-road (Sic).

35. The second accused who is the appellant went behind and made a call the 1st and 2 accused went behind and called a man who is at large, removed exhaust pipe and left. The other three told his wife that he had said that they remove the exhaust pipe. After waiting, the three men came with the exhaust pipe and they had removed the muffler. Accused 1 admitted to have sold the muffler. 1st accused said it is 2nd accused who told them to remove the muffler. The PW1 did not have evidence that implicates the appellant. What 1st accused told him was hearsay and accomplice evidence.

36. Furthermore, the testimony of PW1 contradicted by PW2 and PW3 whose evidence is that the appellant had left with PW1 when the other 3 men removed the exhaust.

37. PW4 that 1st and 3rd accused are the ones who were implicated. He then arrested the appellant but did not give the reason why he decided to arrest him. It is clear that there was no sufficient evidence to implicate the appellant to the charge. The call which was alleged to have been made by the appellant was not verified. It was based on suspicion which is not sufficient to prove a fact. The finding by the learned Magistrate that he evidence was cogent, consistent and corroborative is not borne out by evidence. What is clear is that evidence of PW1, 2 and 3 was contradictory. The law as set out in several authorities is that grave contradictions on material particular will lead to evidence of witnesses being rejected.

38. See the case of Twehangare Alfred –vs- Uganda quoted by the Court of Appeal in Odeng –vs- Republic, the court stated that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. In this case evidence of PW2 and 3 absolved the appellant from guilt in the said theft.

39. Secondly, the prosecution did not establish what was stolen. It is said to be valued at Kshs.50,000/- but even PW1 did not give the value or how it was arrived at.

40. I find that for the reasons stated, I find that for the reasons slated, the charge was not proved beyond any reasonable doubts.

Conclusion:

41. I find that the charge sheet was totally defective and the charge was not proved beyond any reasonable doubts against the appellant. I allow the appeal and order that the conviction be quashed and the sentence be set aside. The appellant be set at liberty unless he is otherwise lawful held.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF NOVEMBER 2024.

L.W. GITARI

JUDGE