REPUBLIC OF KENYA

IN THE CRIMINAL DIVISION HIGH COURT OF KENYA

CRIMINAL APPEAL NO.57 OF 2020

FELIX GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgment, conviction and sentence dated;

22nd November 2019, by Hon. F. Mutuku (SRM in the Chief Magistrate's Court,

Criminal Case Number; 5289 of; 2015 Kibera Law Courts).

JUDGMENT

1. By a Petition dated 12th March 2020, the Appellant is seeking for orders that, the conviction and sentence meted by; Hon Mutuku Senior Resident Magistrate (SRM), against him on; 4th December 2019, at the Chief Magistrate's Court at Kibera, Nairobi, vide Criminal Case Number 5289 of 2015, be set aside.

2. The Petition is based on the grounds reproduced here below:

a) That, the Learned Senior Resident Magistrate erred in law by failing to comply with mandatory provisions of; the Criminal Procedure Code (Cap 75), Laws of Kenya and thereby prejudiced the Appellant in the trial;

b) That, the Learned Senior Resident Magistrate erred in law by failing to appreciate that the prosecution's case was full of contradictions and failing to resolve the same in favour of the Appellant;

c) That, the Learned Senior Resident Magistrate erred in law and in fact by failing to consider the Appellant's evidence or defence;

d) That, the Learned Senior Resident Magistrate erred in law and in fact by failing to place the burden on the prosecution to disprove the Appellant's alibi defence as required by law;

e) That, the Learned Senior Resident Magistrate, erred in law and in fact by shifting the burden of proof to the accused person, hence failing to give the Appellant the benefit of doubt and lowering the standard of proof to a level below the requisite of reasonable doubt and arriving at the conviction against the weight of available evidence;

f) That, the Learned Senior Resident Magistrate erred in law and in fact by disregarding the probation officer's report and meting out a sentence that is harsh and disproportionate to the alleged offence.

3. The brief background facts of the case are that; the Appellant was arraigned in the Chief Magistrate's Court, at Kibera, charged with an offence of; theft of a Motor Vehicle contrary to; Section 268(1) as read with section 278(A) of the Penal Code. The particulars thereof states that, on the 26th November 2015, at Langata District, within Nairobi county, with others not before court, he stole a motor vehicle Registration No. KBK 170J, Toyota Hilux, Pick up, silver metallic in colour valued at, Kshs 1.400,000.00, the property of Morris Muthomi Eustace.

4. The charge was read to the Appellant who pleaded not guilty thereto, whereupon the prosecution called a total of four (4) witnesses. PW1, the Morris Muthomi testified that, he is the owner of the stolen motor vehicle. That, he had employed the Appellant as the driver therefore, but the parties did not enter into any formal engagement of employment.

5. That, on 26th November 2015, the Appellant told him there was a customer who wanted the Appellant to ferry for him seats from Langata

to the Show Ground. He authorized the Appellant to do the work in the company of the conductor. However, the Appellant left with the motor vehicle but without the conductor and did not return the, motor vehicle by end of the day. When PW (1) called him, he said that, it was raining though he had picked the seats. After sometime, the Appellant send a message which read: "he had left" but shortly thereafter, his phone was switched off.

6. The following day, the incident was reported at Jamhuri Police Station. That, when the Appellant's home was visited, his wife informed the Police Officers that, the Appellant did not return home the day before. However, the Appellant was later arrested at; Ngando on 15th December, 2015, and charged. To date, the motor vehicle has never been recovered. PW (1) told the Court that; the motor vehicle was valued at; Kshs 1,040, 000,00, as per the valuation from Regent Valuers dated; 24th November, 2015.

7. The prosecution case was also supported by the evidence of; PW2, Martin Murimi Mati; the conductor attached to the subject motor vehicle. He testified that, he wanted to accompany the Appellant to ferry the seats but the Appellant told him that, three people could not fit in the front seat of the motor vehicle, being a Pick up. The Appellant left with the customers but did not return the motor vehicle that day. When the Appellant was called, he said he was on the way and then switched of the phone. That, the vehicle has never been recovered.

8. PW3, Sergeant Gilbert Otieno, testified to the effect that, upon receipt of information that, the Appellant was being sought by the police in connection of the matter herein, he arrested him at Ngando area where he was hiding and handed him over to the police.

9. PW4, Corporal Joram Karani, the investigating officer, confirmed that, upon receipt of the report of the theft of the motor vehicle, he caused the arrest of the Appellant and charged him accordingly. He produced a copy of the log book of the stolen motor vehicle, copy of; Appellant's identity card and driving licence as exhibits. The Prosecution closed its case.

10. Pursuant thereto, the trial court ruled that, the accused had a case to answer and placed him on his defence. In unsworn statement, the Appellant testified that, he was employed by the Complainant as a driver of the subject motor vehicle registration number; KBK 170J, Pick-up. However, on 26th November 2015, and during that week, he attended a cousin's wedding in Meru. That he knows nothing about the theft of the motor vehicle. He did not call any witness.

11. The trial court delivered its judgment and stated as follows: -

> *"I find the evidence of PW1, and PW2 to be clear, credible and consistent that the accused was in possession of the vehicle at the time it was stolen"*

12. The court went on to state that; -

> *"He raised (the accused) raised a defence of alibi where he alleged that he was in Meru during the incident attending his cousin's wedding. He did not however call any witness or avail any evidence to corroborate the same. Such allegations only came as an afterthought during the defence hearing since he never raised and/or cross examined any of the witnesses with regard to the same. I therefore find his alibi defence unbelievable"*

13. The trial court then concluded that, the Appellant "stole the motor vehicle which he had been entrusted with by his employer" and that "his actions before and after the incident clearly showed that he had formed the intention to steal it from the complainant." The learned trial Magistrate then stated that; the prosecution had proved its case against the accused beyond reasonable doubt and accordingly convicted him under section 215 of the Criminal Procedure Code.

14. The Prosecution subsequently treated the Appellant as a first offender. The Appellant in mitigation, stated that; he is the sole bread winner of the family, with a one-week old child who depends on him and sought for forgiveness. The court then ordered for a pre-sentencing report. Upon receipt of the report, the Hon Learned Magistrate stated that, "the court had considered the mitigation by the accused, as well as the nature of the offence and that, the accused was not remorseful and only kept on changing his story from what he stated in his defence." That the accused stole a vehicle given to him for employment and was therefore ungrateful. Further, the court had considered the Complainant's views and therefore a deterrence sentence was called for. The Appellant was then sentenced to serve three (3) years imprisonment.

15. At the hearing of the appeal the Learned Counsel Mr Mwinzi appearing for the Appellant argued that; the trial court did not comply with the provisions of section 211 of the Criminal Procedure Code and therefore the Appellant's rights were violated. That indeed, the Respondent had conceded to the same. As such the only issue is whether the Appellant should be acquitted or the court orders for a re-trial. The Appellant's counsel further reiterated that, there were contradictions in the prosecution's case, as the complaint was inconsistent on how the motor vehicle was taken away. That, only the turn boy could explain how the vehicle was taken away.

16. Further, the alibi by the accused was not considered and the trial court instead shifted the burden of displacing the same to the accused. Finally, the trial court ignored the Probation officer's report and meted a custodial report, citing unproved factual issues. Therefore, the three (3) years imprisonment is excessive.

17. The Learned State Counsel; Ms chege; in response conceded to the Appeal on conviction, on the ground that, the provisions of; section 211 of the Criminal Procedure Code, were not complied with but urged the court to order for a re-trial in the light of the fact that, the evidence was water tight. As regards sentence, she argued that, the period of three (3) years imprisonment that the Appellant was given, was not excessive as the sentence provided under the law is seven (7) years imprisonment. However, the Appellant argued that, he has served half of the sentence and re-trial will prejudice him.

18. I considered the arguments advanced by both parties alongside the submissions filed and the record of the lower court proceedings. I

then noted that, the original proceedings in the handwritten form were different from the typed proceeding in relation to; whether the provisions of; section 211 of the Criminal Procedure Code were complied with or not. I noted that, whereas, the original record shows that, on the 3rd December 2018, the court complied with the subject provisions and stated that, "section 211 of the CPC" was complied with wherein; the accused opted to give an unsworn statement and call two witnesses, the typed proceedings do not reflect this record. Further, the typed proceedings show that, the defence case was heard on the 3rd December 2018, but the handwritten proceedings show that; the defence case was heard on 11th March, 2019.

19. I then deferred the judgment and brought the issue to the notice of the parties, whereupon the Appellant Counsel requested the court to consider that, the Appellant's sentence is due to end in the month of; September 2021, and reduce the sentence to the period served.

However, the Respondent's Counsel sought for time to peruse the lower court file before responding. The request was granted with leave to both parties to file any further submissions, if need arise. Both parties subsequently, filed supplementary submissions considered herein.

20. At this point, the Appellant has basically invited the court to consider the sentence. However, in the interest of justice and in view of the fact that, the entire appeal was fully canvassed I shall deal with the conviction too. In that regard, as stated in the case of; *Okeno vs. Republic (1972) EA 32*, the duty of the court as the first Appellant court is to; analyse and evaluate afresh all the evidence adduced before the trial court, and draw its own conclusions, while bearing in mind that, it neither saw nor heard any of the witnesses.

21. The court in the above decision stated as follows: -

> *"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the Appellate court's own decision on the evidence. The first Appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 finding and conclusion; 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, see Peters vs. Sunday Post (1958) E.A* ***424."***

22. In view of the aforesaid, I find that, first and foremost, the provisions of; section 211 of the Criminal Procedure Code were complied with and that is how the accused opted to give unsworn statement and call two (2) witnesses. Therefore, the submissions by the parties to the contrary are not well founded or factually correct.

23. The other ground relied on was inconsistence in the prosecution case. The Appellant submitted that, PW (1) stated that "he had gone to the gym when the Appellant left with the motor vehicle and later stated that, Martin, his employees and brother saw him give the accused the vehicle". Therefore, the evidence was contradictory and further PW (2), the turn boy contradicted that evidence when he testified that, when the vehicle left, PW (1) the owner was not present. That in any event, the Appellant used to take the vehicle as and when required, on what is called "squad".

24. The Appellant relied on the case of; *John Mutua Munyoki vs Republic*, Criminal Appeal No. 11 of (2016) to argue that, the contradictions should be resolved in favour of the Appellant. The Respondent did not squarely respond to this argument.

25. I have considered the evidence adduced in the trial court on the subject issue and I find that, the evidence reveals that, PW (1) testified that, he had gone to the gym, when the Appellant informed him there were customers who wanted seats ferried. Presumably, then, they did not communicate physically. Therefore, his subsequent evidence, that the above named persons saw him give out the motor vehicle was contradictory and neither is it supported by PW 2's evidence.

26. The other issue relates to weight given to the alibi raised by the Appellant and shifting the burden of proof thereof to the Appellant. The Appellant relied on the case of; *Kimotho Kiarie vs Republic, (1984), e KLR* and submitted that, the Learned Trial Magistrate, did not state reasons for rejecting the alibi defence. Further reference was made to the case of; *Victor Mwenda Mulinge vs Republic (2014), e KLR*, to argue that the burden of; proving the falsity, if at all, of the defence of alibi lies on the prosecution.

27. In response, the Respondent submitted that, the Appellant was the last person with the vehicle and never returned it and there is no reason why he did not go with the conductor.

28. I have considered the rival argument and consider whether the prosecution proved its case beyond reasonable doubt. However, before I do so, it suffices to note that, before convicting the Appellant the Learned Trial Magistrate stated as follows: -

> *'From the aforesaid proceedings, I have no doubt that, the accused stole the motor vehicle which he had been entrusted with by his employer PW1 only to steal and disappear immediately after the incident. His action before and after the incident clearly show that, he had formed the intention to steal it from the complainant"*

29. In my own analysis and or evaluation of the evidence, the following facts are not in dispute.

a) That PW (1) and the Appellant were well known to each other as they hail from the same place, in Meru;

b) That the Appellant used drive the subject motor vehicle, whether on "squad" basis or otherwise. This is supported by the evidence of PW (1) that the Appellant gave him his ID card and driving licence, which were produced in court;

c) *That the motor vehicle disappeared on the material date and has never been recovered to date. PW (1), produced a copy of a log book in proof thereof.*

30. The question that arises is whether it is the Appellant who stole the vehicle. It was the evidence of PW (2), the conductor who worked with the Appellant on the motor vehicle that, it is the Appellant who left with the motor vehicle and did not return it. There was no bad blood between the Appellant and the turn boy for the latter to fabricate evidence against him. Further, from the cross examination, of the witness the turn boy maintained that the Appellant left with the motor vehicle. The trial Court indicated that the witness "appeared confident." The Appellant did not ask any other question. Therefore, even if the court were to disregard the contradiction in the evidence of PW1, as to whether he was present when the vehicle left or not, the Appellant will still not be out of the drag net.

31. Further, PWI and PW2 gave corroborative evidence on how they frantically tried to trace the Appellant when he failed to return the motor vehicle in vain, as he kept on giving different messages as to where he was and eventually switched of his cell phone. This evidence must be viewed in the light of the evidence that, the Appellant opted to abandon the conductor and ferry the customers. Who was going to load the seats? What is the work of the conductor? The Appellant did not challenge this evidence in cross examination. Therefore, his conduct of abandoning the conductor "smells a rat".

32. Finally, the Appellant gave an alibi for a defence. In addressing the same the trial court stated as follows:

> "*He raised a defence of alibi where he alleged he was in Meru during the incident attending his cousin wedding. He did not however, call any witness or avail any evidence to corroborate the same. Such allegation came as an afterthought during the defence hearing since he never raised and/or cross examined any witnesses with regard to the same. I therefore find his alibi defence unbelievable."*

33. I have gone through the entire proceedings of the lower court and I entirely agree with the Learned Trial Magistrate's observation that, the defence of alibi was an afterthought and in that case, the prosecution could not rebut the "unknown" defence only raised at the defence case. Even then, having given an unsworn statement the prosecution could not test the veracity of his statement. Therefor nothing falls on his argument that, the defence was not displaced.

34. The upshot of the aforesaid is that, I find no merit in the challenge against the conviction herein. I shall now move to the sentence. I have considered the sentiments expressed by the trial court before sentence and the submissions by the parties thereto, in particular supplementary submissions. I find that, the trial court has indicated it considered the accused's mitigation and the nature of the offence. The court also took into account the complainant's views as sieved from the Probation officer's report. As such the sentiments of both parties were considered.

35. However, the observation by the trial Court that, the Appellant was "not remorseful and/or was ungrateful" though well intended, can easily be misconceived and are better left to lie where they fall, than "create a thin thread to hang on." Be that as it were, I don't think they render the sentence unlawful or improper.

36. Indeed, the sentence provided for the offence of which the Appellant was convicted of is seven (7) years' imprisonment. The Appellant was sentenced three (3) years' imprisonment. That sentence is below half of the period prescribed under the law. In the circumstances it cannot be described as harsh or excessive.

37. However, I note that, the trial court did not indicate when the sentence was to commence. In that regard, section 333 (2) of Code states as follows: -

> "*(2) Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code.*
>
> *Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody." (emphasis mine)*

38. In the instant matter, I find that, the Appellant was arrested on 15th December 2015 and arraigned in court on the following day. On 21st December 2015, he was granted cash bail of; Ksh 800,000 and the same reviewed on 18th January 2016, to Kshs 200,000 and 12th February 2016 to; Kshs 80,000. He paid the cash bail and was released on that date. He was therefore in custody from 15th December 2015 to 12th February 2016, a period of; one (1) months and twenty (28) days. That period should have been considered. There is no indication on the lower court file that it was so considered.

39. The upshot of the aforesaid is that, there are no grounds to interfere with the sentence meted herein otherwise than; to put the provisions of; section 33(2) aforesaid, into effect. Therefore, the Appellant's sentence is reduced by a period of; one (1) months and twenty (28) days, and therefore the sentence shall be revised accordingly. The relevant notification of the revised sentence be communicated accordingly.

40. Those then are the orders of the court.

Dated, delivered virtually and signed on this 10th day of February, 2021.

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr Mwinzi.....for the Appellant

Ms Akunja .....-for the Respondent

Yusuf Kandoro.....Court Assistant