



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 145 OF 2018**

**REPUBLIC .....APPELLANT**

**VERSUS**

**DEVFRAJ MANJI SERGANI ..... 1<sup>ST</sup> RESPONDENT**

**RAVILAH KESHIRA PATEL.....2<sup>ND</sup> RESPONDENT**

**HARESH DEBRAJ PATEL .....3<sup>RD</sup> RESPONDENT**

**SAMJI LALJI VEKARIYA .....4<sup>TH</sup> RESPONDENT**

**(An appeal from the ruling by Hon. A. G. Munene SRM delivered on 18/5/2018 in the Maua CMCC No.4914 of 2014)**

**JUDGMENT**

1. In December, 2014, the appellant charged the respondents with three Counts. Count 1 was the offence of conspiracy to defraud contrary to **section 317 of the Penal Code CAP 63 of the Laws of Kenya**. The particulars of the offence were that **Devraj Manji Sengani, Ravilal Keshira Patel, Hareesh Devraj Patel and Samji Lalji Vekariya** (“the respondent”) on or about 27/12/2014 at an unknown place in Meru County, jointly conspired to defraud Kenya Wildlife Service of Kshs. 6,625/-.

2. Count II was the offence of permitting another person to be in possession of an identity card issued to him contrary to **section 14 (1) (j) (ii) of the Registration of Persons Act CAP 107 Laws of Kenya**. It was alleged that, on the 27/12/2014 at Meru National Park in Igembe South Sub – county within Meru County, with intent to deceive, **Hareesh Devraj Patel** unlawfully permitted **Samji Lamji Vekariya** to be in possession of an Identity Card serial number 21925518 issued to the said **Hareesh Devraj Patel**.

3. Count III was the offence of making use of an identity card belonging to another person contrary to **section 14 (1) (f) of the Registration of Persons Act CAP 107 Laws of Kenya**. It was alleged that on 27/12/2014 at Meru National Park in Igembe South Sub – County within Meru County, **Ravilal Keshira Patel and Samji Lalji Vekariya** jointly made use of an Identity Card serial number 21925518 belonging to **Hareesh Devraj Patel**.

4. After the prosecution closed its case, the trial court ruled that no *prima facie* case had been established against each of the accused and acquitted them under **section 210 of the Criminal Procedure Code (the CPC)**. Aggrieved by the said decision, the prosecution appealed to this Court setting out three (3) grounds; *to wit*, **that the trial magistrate erred in law and fact, in finding that the prosecution had not proved its case; in failing to grant the prosecution an opportunity to call crucial witnesses; and in failing to allow the prosecution the right to withdraw the matter under Section 87 (a) of the CPC.**

5. This being a first appeal, the Court is obligated to revisit and re-evaluate the evidence before the trial court afresh, reassess the same and make its own independent conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. R [1972] EA 32**.

6. **PW1 No. 8639 Ranger Aisha Ibrahim** with KWS stated that on 27/12/2015, she was on duty at **Murira National Park** collecting revenue and offering security at the gate. At about 0700 hours, a convoy of seven (7) vehicles came with visitors of Indian origin. The team leader was the 2<sup>nd</sup> respondent. He came to the counter and she proceeded to serve him. He was paid on behalf of the others. She charged them according to the ID cards he gave her. There were 23 Kenyan Citizens who paid Kshs. 350/- each (23 receipts produced as *Exhibit 2*). Three (3) alien cards for Kenyan residents who paid Kshs. 1,200/- each (3 receipts produced as *Exhibit 4*) and ten (10) Kenyan children who paid Kshs. 250/- each (10 receipts produced as *Exhibit 3*).

7. As for the vehicles, there were five (5) 5 – seater vehicles which paid Kshs. 350/- each (5 receipts produced as *Exhibit 5a*) and two (2) 6 – seater vehicles which paid Kshs. 1,200/- each (2 receipts produced as *Exhibit 5b*). They also paid for guest house, *bandas* and park map. That

being 2 receipts for 1 guest house at Kshs. 9000/- each, one receipt for *banda* plus map at Kshs. 7500/- (produced as *Exhibit 6*). The record of the vehicles and visitors was entered in the cash book. Visitors are to sign against their names but the 2<sup>nd</sup> respondent being the team leader, signed on behalf of all of them. Thereafter the visitors were let in.

8. At about 7.00 pm, the same day, the ticket inspection unit led by Madam Mwanakhamisi informed her that some of the said visitors were non residents. She was shown an ID card which one of the visitors used to gain entry as a citizen. The ID was in the name of **Haresh**. They also showed her the special pass for one of the visitors. She revised the fees payable and the underpayment was made.

9. **PW2 Assistant Warden Simon Katachuru** recalled that on the material day at about 1700 hours, he was on duty inside the Meru National Park when they came across the said visitors. When they inspected their documents, they found one of them had an ID card which did not resemble his face which was confirmed by his colleagues Mwanahamisi Twali and Adan Ibrahim. The client produced a copy of special business ID card which he claimed was his.

10. When they assessed the documents, they established some irregularities. They found that there were 19 Kenyan citizens, 2 Kenyan residents, 11 Kenyan children, 2 non-residents and three (3) of the seven (7) vehicles were above 6 – seater. They were supposed to have paid Kshs. 30,750/- as park fees but had only paid Kshs. 18,300/-. Hence there was an underpayment of Kshs. 12,350/-. They sent the team leader to the head office where the deficit was paid. They proceeded with investigations and released the client but later decided to charge them.

11. After **Pw2** had testified on 23/1/2018, the matter was adjourned to 27/4/2018. On the said 27/4/2018, the prosecution applied for adjournment for two reasons; that the investigations officer was away on an urgent personal matter and the witnesses were away in South Africa on a training. The adjournment was declined and the prosecution was forced to close its case. On the material on record, the trial court found that the prosecution had not established a prima facie case thereby provoking this appeal.

12. At the hearing of the appeal, the respective Counsels made oral submissions. **Mr. Namiti** Senior Counsel for the appellant submitted that, the gist of the appeal was that the respondents were wrongly acquitted under **section 210 of the CPC** because the prosecution was always eager to prosecute the case. That witnesses were always procured but for reasons on record, the trial Court could not proceed. That in the premises, it was unfair for the court to acquit the respondents on the only occasion when the witnesses were not present. He urged the Court to relook at the evidence and order a retrial.

13. **Mr. Muriuki**, Learned Counsel for the respondents submitted that, since the trial started in 2014 the prosecution had been delaying the matter. That the delay had led to the recusal of the first Magistrate on 8/10/2015. The prosecution was given several last adjournments that resulted in the trial Court finding that there was no case to answer based on the evidence adduced. That the documents connecting the respondents to the charges were never produced.

14. On a retrial, Counsel submitted that the respondents will be prejudiced as they have been in court for four (4) years and the 4<sup>th</sup> accused is no longer in Kenya. For those reasons, Counsel urged that the appeal be dismissed.

15. Arising from the grounds of appeal and the submissions of Learned Counsel, the issues that arise for determination are; ***Whether the prosecution was granted the opportunity to call crucial witnesses; Whether the appellant established a prima facie case against the respondents and whether the acquittal of the respondents was merited.***

16. The record shows that the respondents were arraigned in Court on 29/12/14. The charge sheet was amended twice, the last of them being 23/2/2016. After that, two of the prosecution witnesses testified on 27/5/16 and 23/1/2018, respectively. On 27/4/2018, the prosecution applied for adjournment on the basis that the investigations officer was away on an urgent personal matter while the witnesses were away in South Africa attending a training.

17. The trial Court declined to grant the adjournment on the grounds that there was lack of seriousness on the part of the prosecution. The trial Court was of the view that, the police file could have been surrendered to another officer and that the witnesses should have attended Court instead of going for training in South Africa. In the trial Court's view, 4 years was too long a period to have kept the 4<sup>th</sup> accused in Kenya awaiting the trial.

18. The rights decreed in the **Constitution** are holistic. They must be read in terms of **Article 259 of the Constitution**. This means, rights that are declared in one **Article** should not be read in isolation so as to obscure rights declared in a subsequent or another **Article of the Constitution**. Fair trial for an accused under **Article 50 of the Constitution** is climaxed with a decree that Parliament do enact a law providing for the protection, rights and welfare of *victims of offences* in Article 50(9).

19. The protection and rights of victims of offences is set out in the **Victims Protection Act, 2014 ("the Act")**. That statute provides various rights of the victim. **Section 9 of the Act** provides for some of the rights to be; being present at the trial and for the trial to begin and be concluded without unreasonable delay. These are also rights that are accorded to an accused person under **Article 50 of the Constitution**.

20. In order to determine the first issue, it is important to understand how the proceedings in the matter was undertaken. The issue is, was the prosecution so hopelessly unserious because of previous adjournments that it was not fair to allow the adjournment sought on the 27/4/2018? In order to put it in perspective, it would be in order to examine why the case had taken an unreasonable long time to conclude.

21. In this regard, I hereby set out the respective adjournments caused by the prosecution, the defence and the Court or others: -

**a) Adjournment by the prosecution**

The prosecution caused adjournment on 15/4/15, 1/9/15, 23/2/16 and 8/2/17. The one of 27/4/18 that was rejected by the Court was the 5<sup>th</sup> one.

**b) Adjournments by the defence**

The defence sought and was granted adjournments on 17/3/15, 8/10/15, 15/4/16, 24/3/17 and 5/10/17 a record 5 times.

**c) Adjournments caused by the Court or other exigencies**

For reasons that the Court was either not sitting, the absence of a prosecutor (as it is common knowledge that the Maua Station suffered inadequacy of prosecutors at the time, a fact the Court well knew or should have taken judicial notice), public holidays or the trial Court being overwhelmed by matters in the Cause List, the case was adjourned on 27/11/15, 29/4/16, 27/7/16, 24/5/17 and 13/9/17 a record 5 times.

22. On all the above occasions, the victim had paraded its witnesses and was ready to proceed with the hearing. The victim was ready to exercise its right of being present and having its case heard under the constitution and the Act. The same way the respondents religiously appeared on all these occasions, so did the victim through its witnesses.

23. From the foregoing, it is crystal clear that the prosecution had only applied for adjournment a total of 4 times while the defence and the Court had caused adjournment for a total of 5 times each. It is incredible that the party being blamed for the delay of the case was the one who had caused the least adjournment.

24. I have also noted that the prosecution was given a final adjournment on 8/2/17, but on the following two hearing dates, the defence applied for adjournment which were allowed thereby collapsing the hearing of the case. On the 3<sup>rd</sup> hearing date, the prosecution paraded 3 witnesses for which only 1 testified.

25. In this regard, an issue of the prosecution being on a last adjournment could not arise as there were intervening dates when the prosecution was ready with witnesses but the matter could not proceed for reasons other than of its making but that of the defence.

26. From the foregoing, it is crystal clear that it is only once, the 27/4/18 when the victim failed to parade its witnesses and the trial Court decided to terminate the proceedings. Surely, the victim was treated unjustly.

27. It is surprising that it is on the very first time that the witnesses did not attend that the trial Court realized that the 4<sup>th</sup> accused had been in the country for 4 years. To my mind, the trial Court acted unreasonably and did not weigh the rights of the parties before it in a just manner when it declined the adjournment sought. The Court did not consider the reasons advanced properly before declining the application for adjournment. The trial Court therefore erred when it forced the prosecution to close its case.

28. Contrary to what the trial court held, the prosecution was not to blame for the delay of the case. The trial court wrongly exercised its discretion in refusing the adjournment. Its decision cannot be allowed to stand.

29. Accordingly, I find the appeal to be meritorious and the same is hereby allowed. The matter be and is hereby referred back to the subordinate Court for retrial before another Magistrate other than Hon. Munene SRM. The same to be mentioned before head of station, Maua Chief Magistrate Court on the 22<sup>nd</sup> day of June, 2020. The trial shall continue on a day to day hearing until conclusion or it is determined.

**DATED** and **DELIVERED** electronically at Meru this 5<sup>th</sup> day of May, 2020.

**A. MABEYA**

**JUDGE**