REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL 50 OF 2018

(From original conviction and sentence in stealing motor vehicle Cr. 475 of 2017 of the Principal Magistrate's Court at Wang'uru)

AGNES WANJIRU MUGO alias SUSAN ……. APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant Agnes Wanjiru Mugo alias Susa who was the second accused in the trial before the Magistrate' Court at Wang'uru was convicted of stealing a motor vehicle Contrary to Section 278 A of the Penal Code and sentenced to serve five (5) years imprisonment. She was also convicted of stealing goods in transit Contrary to Section 279 of the Penal Code and was sentenced to serve three years imprisonment. The sentence was ordered unconsecutively.

2. The appellant was dissatisfied with both the conviction and sentenced and lodged this appeal. She has raised the following grounds: -

1. THAT the Learned trial magistrate erred in law and fact in failing to appreciate that no case has had been demonstrated by the prosecution to warrant a conviction for the Appellant.

2. THAT the Learned trial magistrate erred in law and fact that the Appellant had not been properly and sufficiently identified to warrant a conviction.

3. THAT the Learned trial magistrate erred in law and fact in failing to appreciate the essence of an identification parade in identifying the Appellant where the identification was made extremely difficult and wanting circumstances.

4. THAT the Learned trial magistrate erred in law and fact in using the data from Safaricom that showed that the Appellant was in Wnag'uru to construe that she must have been at Mugumo Bar and no other place.

5. THAT the Learned trial magistrate erred in law and fact in purporting to impose the burden on the Appellant to render an explanation of the alleged theft or explain his whereabouts on the material day.

6. THAT the Learned trial magistrate erred in law and fact by failing to establish a direct link that would justify the blameworthiness of the appellant in the alleged offences.

7. THAT the Learned trial magistrate erred in law and fact in failing to hold that the prosecution had established its case beyond reasonable doubt.

8. THAT the Learned trial magistrate erred in law and fact in expressly taking into account apparent circumstantial evidence without adhering to the principles governing the same.

9. THAT the Learned trial magistrate erred in law and fact in proceedings to convict the Appellant on circumstantial evidence as opposed to relying heavily on primary evidence before the court.

10. THAT the Learned trial magistrate erred in law and fact in failing to appreciate that nothing allegedly stolen was recovered from the Appellant or any other person at all.

11. THAT the Learned trial magistrate erred in law and fact in failing to take into account that no exhibit was produced in court at all to warrant the conviction of the Appellant.

12. THAT the Learned trial magistrate erred in law and fact in failing to appreciate the role of evidence in criminal matter as he did not consider the absence of exhibits to prove that goods were actually stolen.

3. The appellant prays that the conviction and sentence be set aside, she be acquitted forthwith.

4. The brief facts of the case are that Linus Kinyua Nyaga who is a business man and operates a hardware and transport business was the owner of the motor vehicle KBN 726 F. The vehicle was being driven by Angelo Gitonga Njagi (PW3).

5. On 17.3.2017 the vehicle KBN 726 F (to be referred to as the vehicle) the driver PW3 delivered some goods at Molo and proceeded to Athi River to deliver some goods. The vehicle was then loaded with goods worth 40,785/= which include 30 metal bars Y10, 4 hoop iron and 750 pieces of stones from Ndarugu. The goods were supposed to be delivered at……

6. PW2 was tracking the movement off the vehicle and on 18.3.17 between 9.50 and 10.000 pm the vehicle was at Mwea where PW3 alleged to had stopped to relax before resuming the journey.

7. On 19.3.17 PW2 received a call from the driver (PW3) informing him that the vehicle was stolen. Before then PW3 had picked 1st accused who was an aquittance. On reaching Mwea, PW3 went to Mugumo bar to have a meal and while there 1st accused introduced him to the appellant. After driving in the bar PW3 did not know what happened as he found himself the next day in a lodging room which was locked from outside. His phone, car keys and driving licence were missing. He screamed to alert the manager.

The door was broken and when he went outside, he realized that the vehicle was missing from where he had parked it. He called PW2 and reported. PW3 was also vomiting and his stomach was swollen so he went to Ngurubani Medical Clinic where he was treated. PW3 was with the appellant for about two hours.

8. Police conducted investigation. It was confirmed by a bar maid at Mugumo Bar with the 1st accused on the night the lorry was stolen and were joined by a man. This was as testified by the bar maid (PW7). Police recovered mobile phones date from Safaricom which was produced by the Security Officer from Safaricom Daniel Hamisi (PW6). The telephone number registered for the appellant, 0722572244 was traced at Wang'uru on 19.3.17 upto 22:23:17 Hours. She had communicated severally with 1st accused. The appellant was traced to G.K. Prison Embu where she was for another case. She was then charged.

9. The appellant in her defence testified told the court that she was not at Mugumo Bar and does not know PW3.

10. The appeal was canvassed by way of written submissions. For the appellant, submissions were filed by Gachoki Murimi and associates. For the state, submissions were filed by Geoffrey Obiri Assistant Director of Public Prosecutions.

11. I have considered the Grounds of appeal, the proceedings and judgement of the trial magistrate as well as the submissions.

12. This is a 1st appeal and as rightly submitted by the counsel for the appellant a 1st appellate court has jurisdiction to consider both law and facts evaluate it and make its independent finding. This is provided under Section 347 (2) of the Criminal Procedure Code which provides:-

An appeal to the High Court may be on a matter of fact as well as on a matter of law".

13. This has been buttressed by a decision of the court of appeal as well as the High Court. The leading authority is ***Okero -V – (1972) E.A 32 In R - V – Paul Kabia Mbaya*** 2011 eKLR, Justice Lesiit, it was stated "an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Padya -V- R 1951 E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruvanda - V- (1957) E.A 570". The 1st appellate court must scrutinize the evidence, evaluate it and make its own findings and draw its own conclusions. In doing so however the court should make allowance for the fact that the trial court had the advantage of hearing and seeking the witnesses ***(Peters -V- Sunday Post (1958) E.A 424),*** and leave room for that. These principles were well articulate in Joseph Ndungu Kagiri -V- R Cr. App No 69/2012, 2016 eKLR where it was stated that the 1st appellate court has no limitation to review the evidence and come up with its own conclusions.

14. I should therefore embark on evaluating the evidence which was before the trial court and come up with my independent finding. In doing this I will first consider the grounds of appeal then make a finding. Having considered all grounds of appeal, I will collapse them into only two grounds, that is:

i) Identification of the appellant.

ii) Whether the charges against the appellant were proved beyond any reasonable doubts.

15. **Identification of the Appellant**

It was submitted that no identification parade was conducted. The evidence which the prosecution relied on was tendered by PW3 and PW7.

Looking at their evidence with regard to PW7 she had seen the appellant for a considerable time when she came to the bar and was later joined by her co-accused and PW3. As for PW3 he stated that he saw the appellant for nearly two hours when they sat at the same table at Mugumo bar taking drinks. The bar was well lit with electricity light.

The circumstances favoured a positive identification of the appellant. This is what the court had to consider when determining whether or not to rely on the identification of an accused by the witness. The trail magistrate was alive to this and properly analysed the evidence. This is what the trail magistrate stated:

> ***It is well settled conviction based on recognition identification sometime causes injustice. I am further guided dock identification without an earlier identification is almost worthless (See John Wachira Wandia & Ano. -Vs- Republic (2006) eKLR.***
>
> ***I equally agree identification parade is not a scientific test but a practicable method of identification without confrontation (See Samuel Kionzo Musau -Vs- Republic (2014) eKLR) it is for this reason I am guided by R -Vs- Turnbull & Others (1973) 3 all ER 549 that, "the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way…? Had the witnesses ever seen the Accused before? How often? If only occasional, had he had reason for remembering the Accused……? recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone he knows…mistakes……are sometimes made"***
>
> ***PW3 was able recognize 2nd Accused due to electricity and they stayed in that table for almost 2 hours and persistently, offered to buy him liquor until he relented.***

The trial magistrate was stating that PW3 was with the appellant for some time in circumstances that grounded a positive identification. I find that the trial magistrate arrived at the correct conclusion that the appellant was identified as a person who was in that bar on that material night.

16. The evidence of identification was corroborated as the appellant mobile phone number was traced to that bar on the that material night as testified by PW6. The security officer from Safaricom who produced the mobile data for her phone.

17. The mobile data further showed that the appellant had communicated with the 1st accused on that material night and they were at Mugumo bar on that material night.

18. Though an identification parade would have elucidated any possibility of mistake, failure to conduct an identification parade in this matter was not fatal as there was sufficient material evidence to corroborate the identification by PW3 and PW7. The appellant was placed at the scene at Mugumo bar through identification by witnesses and the mobile phone data from Safaricom.

2. Whether the Prosecution Proved the charge against the Appellant beyond any reasonable doubts

19. The burden of proof in criminal cases rest upon the prosecution. The prosecution has a duty to discharge the burden for a conviction to stand.

In the case of ***Woolmington -V- DPP (1935) A C 462*** the court stated

> ***Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt.***
>
> ***If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner---------- the prosecution has not made out a case and the prisoner is entitled to an acquittal.***

20. The issue of burden of proof on the prosecution is anchored on the constitutional right of an accused person to be presumed innocent until the contrary is proved. Refer Article 50 (2) (a) of the Constitution which provides:

> (***2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(a) to be presumed innocent until the contrary is proved.***
>
> For a court to convict an accused person before it, the trial magistrate must be satisfied that the charge has been proved beyond any reasonable doubt and only then can it enter a verdict of guilty. This was stated by the Court of Appeal in ***Stephene nguli Mulili -V- Republic Cr. App. No. 90/2013***
>
> This calls on the court to carefully analyse the evidence weighs the prosecution and defence evidence in its entirely. The court must not convict in the basis of inferences or conjecture, whims and caprice without credible evidence proving the guilt of the accused person.

21. The trial magistrate seems to have convicted the appellant purely on the ground that she was at Mugumo bar in company of 1st accused.

At page 85 of the record the trial magistrate stated:

> ***"I am inclined to strongly infer 1at and 2nd accused stole the lorry with others not before court. There is no other logical conclusion when the above analysis is put into context"***

The trial magistrate did not rely on any evidence that proved the guilt of the appellant but clearly made an inference. The Court of Appeal in the case of ***Danson Mgunya Cr. Appeal No. 2/2016,*** rejected the prosecution's claim that the trial court ought to have made an inference that the accused short and killed the deceased even though there was no evidence that the gun belonged to the accused.

It was therefore wrong for the trial magistrate to infer the guilt of the appellant when it was not proved with evidence.

22. The evidence which was before the trial court, that the appellant was in the bar with 1st accused who had come to the bar with 1st accuse was not sufficient. Though the appellant and 1st accused had communicated through phone, the subject of their discussion was never made known to the court. It seems to me that the appellant was suspected to have been involved due to the fact that she sat with the 1st accused in the bar taking drinks. Suspicion, no matter how strong can never form a basis for conviction of a criminal offences. This has been stated in various decisions of the High Court and the Court of Appeal.

In Joan Chebichi Sawe -V- Republic the Court of Appeal drew a careful distinction between circumstantial evidence and suspicion. The Court of Appeal stated that,

> ***"Suspicion, no matter how strong cannot justify a conviction. To justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt". Refer to Republic - V – Kipleng arap Koskei & Another (1949) EACA 135.***

23. I must come to the conclusion that the evidence placed before the trial magistrate was insufficient and failed to prove the charges against the appellant beyond reasonable doubts. I find that the conviction was against the weight of the evidence. I order as follows: -

1) The appeal succeeds.

2) The conviction off the appellant by the trial magistrate is quashed.

3) The sentence is set aside.

4) The appellant set at liberty unless otherwise lawfully held.

Dated at Kerugoya this 13th day of November 2019.

L.W. GITARI

JUDGE