



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 103 OF 2012

SAMUEL GACHIE KAMITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in criminal case number 228 of 2010, R. vs Samuel Gachie Kamiti, delivered Hon. W.A. Juma, CM on 13.6.2012).

JUDGEMENT

The appellant herein had filed two appeals against the same judgement, being criminal appeal number **103** of **2012** filed by his advocate on 25th June 2012 and criminal appeal number **106** of **2012** which he filed in person the same day. At the hearing of the appeal, **Njuguna Kimani**, counsel for the appellant withdrew appeal number **106** of **2012** and sought to proceed on number **103** of 2012.

The appellant was charged with the offences of being in possession of a firearm and ammunition without a firearm certificate contrary to section **4 (1)** as read with section **4 (3)** of the Firearms Act^[1] and transporting a firearm and ammunition without a removal permit contrary to section 29 (1) as read with section 29 (20) of the Firearms Act.^[2]

The grounds of appeal are that the evidence tendered in court was insufficient, inconsistent and uncorroborated, that the finding was erroneous and that the magistrate disregarded the fact that a passenger alighted from the vehicle and ran away.

The crux of the prosecution evidence was that the police manning a road block stopped a taxi vehicle with one passenger, that upon searching they recovered the firearm and ammunitions. The police also confirmed that a passenger alighted from the vehicle and pretended to relieve himself in a nearby bush and vanished. The appellant who was the driver of the said taxi was arrested and charged with this offence. At the time of arrest, he told the police that he did not know what he was carrying in the boot and that the parcel belonged to the passenger who had vanished after the vehicle was stopped by the police.

His defence in court was that he was a taxi driver, that at the material time a customer asked him to ferry him to a place called Ihururu and on his way back a person stopped him, told him he wanted to go to town, he opened the boot of a car and the passenger threw a luggage therein. He did not know the person nor did he know the what he was carrying. Upon being stopped by the police, he gave his driver's licence, he was asked whether he had anything in the boot and he said yes and told them the property belonged to a passenger and he opened the boot for the police. At that point the passenger alighted and pretended that he was going for a short call but disappeared and the police told him he was the one to be charged since the passenger disappeared.

The above account by the appellant was confirmed by the prosecution witnesses but nevertheless the court went ahead and convicted the appellant. The learned Magistrate stated in her judgement that " *the accused had an obligation to know what he was carrying. It would not be fair/fetched to say that when the accused borrowed the taxi from his friend he knew what he wanted to do with it otherwise he could not have expanded operations with the vehicle beyond what they had agreed upon. When the accused led police to the boot he knew that the luggage belonged to his client. He should have told the police that what was in the boot belonged to that client, and could have requested that they go to check the luggage together, even with client...*"

Referring to above sentiments by the magistrate, counsel for the appellant Mr. **Njuguna Kimani** submitted that it was wrong for the magistrate to impute bad motive on the part of the appellant, that the conviction was totally unsafe and that the accused discharged his burden under section **111** of the Evidence Act.[\[3\]](#)

The appeal is not opposed. Learned counsel for **DPP Miss Chebet** conceded to this appeal and in her written submissions she argued that the defence casts doubt in the prosecution case, that the prosecution evidence was shaky and unreliable and that there was evidence that the passenger vanished into the bush after the vehicle was stopped by the police, hence the evidence was weak and the conviction was not safe.

Regarding the comments by the magistrate cited above, I find guidance in the decision rendered by the High Court of Bloemfontein, South Africa in *S v Singh*[\[4\]](#) where the court stated:-

"The best indication that a court has applied its mind in the proper manner ...is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses".

When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. As Nugent J (as he then was) in *S v Van der Meyden*[\[5\]](#):-

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

In order to apply the above-mentioned legal principles to the facts of this case, this court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decisions / findings or judgment.

In other words, this court must consider whether the magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the conviction and sentence. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.

Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties mentioned above, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said judgment.

In my view, this means that if an appellate court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the

part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal.

Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or evidently erroneous as in the present case or where the court overlooks facts or improbabilities. In this case there is clear probability that the luggage belonged to the passenger who vanished. It was wrong for the court to ignore such evidence and hastily draw conclusions/inferences which were not necessary or supported by the evidence.

In my view, the trial court did not give due weight and consideration to the probabilities or improbabilities inherent in the circumstances of this case. Even in expressing the view cited above which went against the evidence adduced by the prosecution witnesses, the magistrate only mentioned her conclusion which was based on totally erroneous basis and contrary to the evidence. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment. The reasoning of the magistrate certainly reveal the magistrate did not apply her mind properly to the evidence adduced before her and even proceeded to make conclusions which went against the evidence adduced by the prosecution.

I have been unable to find, from a reading of the judgment, the reasons why the trial court made the above conclusions notwithstanding the clear evidence of the improbabilities present in the version of the prosecution evidence. The only reasonable inference to draw from the lack of the factual basis for the said finding is that the trial court failed to consider the probabilities or improbabilities.

I am persuaded that on that this is a case where the accused ought to have been acquitted because the offence was not proved as required. The South African case of *Ricky Gandavs The State*^[6] provides useful guidance. In the said case it was held:-

“The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt”

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am **not** persuaded that the conviction was justifiable at all. This is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

In the present case and after carefully considering the defence and prosecution evidence, I find that there were reasonable grounds for creating reasonable doubts as to the guilty of the accused. The conviction was not supported by evidence. In fact it went against the weight of the evidence. The upshot is that this appeal succeeds. I hereby quash the conviction and set aside the said sentence.

Signed, Delivered and Dated at Nyeri this 11th day of October 2016

John M. Mativo

Judge