REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 126 OF 2010

JOHN GAKUO NGUGI…….APPELLANT

VERSUS

REPUBLIC……..….RESPONDENT

(Being an appeal against conviction and sentence in Karatina Senior Resident Magistrates' Court Criminal case No. 122 of 2008 (Hon. L. Mbugua) in a judgment delivered on 13th May, 2010)

JUDGMENT

The appellant was charged with the offence of stealing contrary to **section 275** of the **Penal Code**. According to the particulars of the offence, on the 16th day of February, 2008 along Sagana- Karatina road in Kirinyaga District of the Central Province, jointly with others not before court, the appellant stole three sacks of wheat, two sacks of green grams, two sacks of 'pishori' rice and half a sack of charcoal all valued at Kshs. 35,000/= the property of **Elizabeth Wairimu Githui (PW1)**.

The appellant entered a plea of not guilty but after the trial, the learned magistrate held that the prosecution had proved its case beyond reasonable doubt and accordingly convicted the appellant as charged and sentenced him to three years imprisonment. Being dissatisfied with the decision of the learned magistrate, the appellant appealed to this Court on the following grounds:-

1. The learned magistrate erred in law and fact in failing to find that the prosecution had not proved its case beyond reasonable doubt, thereby occasioning a miscarriage of justice to the detriment of the appellant.

2. The learned trial magistrate erred in law and in fact in failing to find that the appellant was never identified by the complainant in any identification parade.

3. The learned trial magistrate erred in law and in fact in rejecting the defence case without giving cogent reasons for doing so.

4. The learned magistrate erred in law and fact by convicting the appellant on a defective charge sheet.

5. The learned magistrate erred in law in basing his judgment on his own opinion rather than the evidence on record.

6. The learned magistrate erred in law in shifting the burden of proof on the appellant thereby occasioning miscarriage of justice.

7. Considering all the evidence on record and the circumstances of the case, this was not a proper case for conviction and the trial magistrate erred in law by refusing to resolve the apparent doubts in favour of the appellant.

The prosecution case was relatively brief; it was made up of the evidence of only three witnesses who were the complainant, an alleged fellow passenger in motor vehicle registration number **KAD 657 J** which the appellant is said to have been driving at the material time and last but not least, the investigations officer.

According to the complainant, **Elizabeth Wairimu Githui (PW1)**, she was a business woman trading in cereals. On 16th February, 2008 she bought two sacks of green grams, three sacks of wheat, two sacks of rice and half a sack of charcoal at Mwea. These items were carted to Makutano where the complainant hoped to catch a vehicle to ferry them to Karatina where she ordinarily traded.

The appellant came along, driving a vehicle which she described as a yellow canter registration number KAD 657 J. After some negotiations between them the appellant agreed to ferry the complainant's consignment to Karatina at a fee of Kshs. 600/=. According to her evidence, the vehicle developed mechanical problems along the way, at Kibirigwi and since it apparently could not move any further the appellant advised the complainant to go home as he would, so he promised, deliver her consignment at Karatina.

The complainant waited for two days without seeing the appellant or the vehicle; she got desperate and started looking for the vehicle. She also made a report on the disappearance of the appellant, the vehicle and her goods to the police on 23rd February, 2008. She finally located the vehicle on 25th February, 2008 at a certain homestead which turned out to be the appellant's home. With this discovery, the complainant alerted the police who towed the vehicle to Karatina police station.

One of the people who boarded the vehicle with the complainant at Makutano was one **Meshack Maribe Kabuku (PW2);** this witness testified that on the material date he was at Makutano bus stage waiting for a vehicle to Karatina when the appellant's vehicle, registration number KAD 657 J came by. According to his evidence the two of them, that is, himself and the complainant stopped the vehicle. The appellant, who was the vehicle's driver, alighted together with his conductor. The appellant negotiated the charges for transportation of the luggage. The witness recalled that he saw the appellant and that together with this witness, the appellant assisted the complainant to load her luggage to the vehicle after the two of them had agreed on the transportation costs. Somewhere along the road, the vehicle stalled but since his home was not very far from where the vehicle stalled this witness found alternative means to go to his home. Four days later he met the complainant who told him that the appellant had disappeared with her luggage. The witness said that he could remember the appellant because it was him and his conductor who were assisting them load the complainant's goods to the vehicle.

Police constable Obedi Kosgei (PW3) testified that he received the complainant's report on 23rd February, 2008 that on 16th February, 2008 she had hired a lorry registration number KAD 657J a yellow Mitsubishi lorry to ferry her goods to Karatina Market. According to the police officer, the lorry belonged to one Mugi who after interrogation, revealed that the lorry was being driven by his son, the appellant, at the material time. Although the lorry's owner agreed to bring the lorry together with his son to the police station, he never did forcing the police to tow it to the station. It is on 10th March, 2008 that the lorry's owner came to the station with his son, the appellant. The appellant was then arrested and charged. The scene of crime personnel took photographs of the lorry which this witness produced in evidence.

The appellant opted to give an unsworn testimony in his defence. He agreed that indeed he was the driver of the vehicle in question but that he was only arrested when he went to the police station where the vehicle had been detained.

At the hearing of the appeal counsel for the appellant argued that since the appellant was neither known to the complainant nor to **Meshack Maribe Kabuku (PW2),** an identification parade was necessary and the

court ought not to have relied on dock identification to convict him. Counsel also argued that there were inconsistencies in prosecution case regarding the registration number of the motor vehicle.

The appellant's counsel submitted that considering that the appellant was convicted when none of the stolen items was found on him, the burden of proof was erroneously shifted to him. It was also counsel's submission that no reason was given for rejection of the appellant's defence. According to him, the case against the appellant was not proved beyond reasonable doubt.

In response to the appellant's submissions, counsel for the state agreed that the court relied on dock identification but denied that such identification was worthless or that an identification parade was mandatory in these circumstances. Counsel urged that as long as the trial court was persuaded that it was safe to convict, then identification parade was unnecessary and the court could convict based on the evidence of dock identification.

As for the inconsistencies in the prosecution evidence, the state counsel urged that they are not the kind of inconsistencies that would prejudice the appellant's case. He also urged that although the offence was committed on 16th February, 2008, the report to the police was only made on 23rd February, 2008 because the search for the appellant had up to that date been in vain.

The state counsel denied that the burden of proof had been shifted to the appellant or that his defence had been ignored; counsel submitted that it was clear from the learned magistrate's judgment that he analysed the entire evidence and found that the prosecution case had not been displaced and that the appellant's defence was wanting.

Looking at the evidence in its entirety and also considering the submissions by the respective counsel for the state and the appellant the major issue in this appeal is whether the appellant was properly identified. Was the learned magistrate right to rely on dock identification to convict the appellant or, to put it differently, should the learned magistrate have found that an identification parade was necessary to identify the appellant?

According to the complainant and the second prosecution witness, they both encountered the appellant at Makutano on 16th February, 2008, driving a lorry. They stopped the appellant because they both wanted transportation services; the complainant wanted her goods transported to Karatina while the second prosecution witness was only interested in being taken to his home. They negotiated the transportation charges with the appellant. The second prosecution witness helped load the complainant's luggage to the lorry and the two of them boarded the lorry to their respective destinations. When the lorry broke down along the way, the complainant says that she spent some time at the scene before the appellant asked her to go home since he could deliver her consignment at Karatina. The second prosecution witness decided to take alternative means of transport to his home.

The learned magistrate saw and heard these two witnesses; she found them to be truthful and their evidence consistent and credible. I have not found any reason on the record to suggest that the learned magistrate misdirected himself on these findings and should have therefore arrived at a different conclusion.

These witnesses' evidence shows that they both interacted and spent some considerable time with the appellant and in broad daylight. The time and circumstances under which they interacted were favourable enough for any of them to identify the other soon thereafter without any danger of mistaken identification. I would agree with counsel for the state that in such circumstances, dock identification was sufficient and an identification parade was unnecessary.

In the case of **Wamunga versus Republic (1989) KLR 424** the Court of Appeal, while addressing the question of identification, held at page 426 that:-

> ***"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied***

that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

In my view, the circumstances of identification were favourable and free from the possibility of any error. Identification parades are useful but they are not always mandatory; dock identification may be sufficient if a trial court, depending on the circumstances of the case, finds the identification to be sufficient. Again the Court of Appeal adverted to this reasoning in **Muiruri & Others versus Republic (2002) 1KLR 274** where it held:

> ***"It is believed because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of…we do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo versus Republic (1953) 20 EACA 166, Roria versus Republic (1967) EA 583 and Charles Maitanyi versus Republic (1986) 2KLR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases the courts have emphasised the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification."(Underlining mine).***

Here, the court addressed the twin issue of single identification witness and dock identification. In the trial against the appellant, the appellant was identified, not by a single witness but by two witnesses in circumstances which, as noted, were favourable and free from any suggestion that their evidence could probably be untrue.

Again in the case of **Bernard Mutuku Munyao & Another versus Republic, Nairobi Criminal Appeal No. 222 of 2004 (2008 eKLR)** which was cited by counsel for the state, the Court of Appeal held that a conviction based on dock evidence is safe and that failure to hold an identification parade is not always fatal. At page 3 of the judgment, the Court said:-

> ***"Evidence of identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and considering the surrounding circumstances as stated in R v Turnbull (1976) 63 Cr. App. R. 132.The absence or presence of it goes to the weight to be placed on the available evidence and does not make such evidence inadmissible or of no probative value. One would think of circumstances where lack of an identification parade would seriously weaken the evidence of visual identification where there is a solitary witness or it is the only evidence available and the identification was made in difficult circumstances. We have no reason to doubt that the findings of the two courts below that the two witnesses positively identified the two appellants at the scene in circumstances that were conducive to such identification."***

That is as far as I can go on this question of identification.

The appellant listed as one of the grounds of his appeal the contention that the charge sheet was defective and that it was wrong for the learned magistrate to have relied on it to convict him; counsel for the appellant did not, however, submit on how or to what extent the charge sheet was defective. As a matter of fact, no submissions whatsoever were made in support of this ground and I would, in the circumstances, assume that the appellant abandoned this particular ground and thus, does not warrant attention in this judgment.

Counsel also argued that there were inconsistencies in the prosecution witnesses' evidence on the registration number of the lorry in issue. The record shows that there were no such inconsistencies; the original handwritten record shows that all the prosecution witnesses were consistent in their evidence that the registration number of the vehicle was KAD 657 J.

It was not in dispute that the vehicle registration number KAD 657 J was the vehicle in issue; I say so because the record shows that on 27th March, 2008 counsel for the accused told the court and was categorical that the appellant was driving motor vehicle registration number KAD 657 J when he was arrested. He applied to have the vehicle released to the appellant because in his view, there was no relationship between the vehicle and the charges that the appellant was faced with.

The notion that there could have been some variance in the prosecution testimony on the registration number of the vehicle seems to have arisen from the typed proceedings which appear to have deviated from the original record on the complainant's and the investigation officer's evidence on the registration number of the vehicle.

A casual glance at the original record reveals that there appears to have been a deliberate attempt to overwrite the registration number "KAD 657 J" so as to read "KAD 467 J". It is clear that the original record which, for whatever reason, is sought to be changed is "KAD 657 J". If the attempt to change the registration number of the vehicle was mischievous then that mischief is clear to me and if its author, whoever it was, deliberately intended to mislead anybody, I would, on my part not fall for it. As testimony of the investigations officer, the original hand written record clearly shows that he referred in his evidence to registration number "KAD 657 J" and not any other number.

The appellant's next ground that the learned magistrate rejected the appellant's defence without reasons does not also appear to hold any water. In his judgment the learned magistrate found, correctly in my view, that the appellant did not rebut the evidence of the first two prosecution witnesses that he carried them in the lorry which was presented as an exhibit in court and which the appellant himself admitted that he was its driver. The appellant did not shake or displace these witnesses' evidence that the appellant alighted from the lorry and negotiated with them his charges for transporting them and their luggage to their respective destinations. All that the appellant said in his defence in the face of the prosecution testimony was this:-

> ***I am John Gakuo Njugi staying at Mweiga. I am a farmer. I was a driver when I was arrested. It was in 2008, March, but I cannot recall the day. Our vehicle was towed to Karatina police station and as the driver I came to the station to check it but I was just put in cells. I was told that the vehicle had carried luggage. That is all.***

Surely, this defence cannot be said to have created any doubt as to whether the appellant met the complainant and **Meshack Maribe Kabuku (PW2)** at Makutano on 16th February, 2008; neither does it cast any doubt on whether the appellant was the vehicle's driver at the material time and whether he engaged these witnesses and offered to transport the complainant's goods to Karatina. The defence cannot be said to have been even a mere denial because nowhere in his statement does the appellant categorically deny the allegations against him. I appreciate that it is always the accused person's right even to remain silent but when the appellant chose to give his unsworn statement, again as he was entitled to, whatever he said did not displace the evidence adduced against him. In my humble opinion, the learned magistrate was right in rejecting his defence.

My appreciation of the evidence on record and the learned magistrate's finding does not suggest, as the appellant has claimed, that the burden of proof was shifted to the appellant or that he was convicted based on the opinion of the magistrate rather than on the basis of the evidence before court.

I would, for reasons I have given, find that the appellant's appeal lacks any merit and it is hereby dismissed; I uphold the conviction and sentence of the subordinate court. I note that the appellant had been admitted to bail pending the determination of his appeal; I direct that the appellant be committed to prison forthwith and resume serving the prison term of three years to which he had been sentenced by the

magistrates' court less fifty four (54) days which he had served before he was released on bail. It is so ordered.

Dated, signed and delivered in open court this 8th day of May, 2015

Ngaah Jairus.

JUDGE