Ochieng v Republic (Criminal Appeal 176 of 2019)
[2023] KEHC 2587 (KLR) (Crim) (29 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2587 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 176 OF 2019

LN MUTENDE, J

MARCH 29, 2023

BETWEEN

CALVINS OWINO OCHIENG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgement and Sentence of Hon. S.N Jalango PM delivered at Makadara Chief Magistrates' Court in CriminalCase No. 2718 of 2014 on 2nd August 2019)

JUDGMENT

1. Calvins Owino Ochieng, the appellant herein was charged with the offence of Stealing motor vehicle contrary to Section 278(A) of the *Penal Code*. The particulars of the offence being that on the 7th day of June, 2012 at Rabai Road in Makadara Sub County within Nairobi County jointly with others not before court he stole Motor Vehicle registration Number KBH 755 Z make Toyota Premio valued at Ksh 695,000/= property of Maurice Obewa Hezekiah.

2. He was taken through full trial, found guilty, convicted and sentenced to pay a fine of Ksh 100,000/ = In addition, he was ordered to compensate the complainant the value of the vehicle. And, in default he was to serve three (3) years imprisonment.

3. Aggrieved, the appellant proffered an appeal on grounds that: The trial court erred by failing to find that the prosecution failed to re-call PW2 for cross examination as ordered on 4/3/2016 and 30/6/2017, respectively, hence violating the appellant's right to fair trial under Article 50(2)(k) of the *Constitution*, failure that violated Section 302 of the *Criminal Procedure Code*.; That the trial court failed to find that PW1 and PW2's evidence with regard to the motor vehicle registration number rendered the charge sheet defective; That PW3 was not truthful by alleging that he had not known the appellant prior to the incident; That the court failed to find that the Investigating Officer's evidence

that the appellant refused to give his specimen signature was an afterthought; That the court failed to find that failure of the Investigating Officer to take specimen signatures to the document examiner violated Section 70 of the *Evidence Act*; That the court failed to consider the time spent in custody as per Section 137 and Section 333 of the *Criminal Procedure Code*; The trial court erred in law and fact by holding that there was a communication between the appellant and the prosecution witnesses when no phone number was quoted or data print out availed by the Investigating Officer; and, that the court erred in failing to consider the appellant's defence and submissions.

4. Briefly facts of the case were that PW1 Morris Hezekiah Obewa, the complainant, purchased motor-vehicle registration number KBH 755 Z from Samson Otieno who had purchased it from Joseph Muriuki Daniel the registered owner, therefore, he was the beneficial owner.

5. On the 7th day of June, 2012, he took the motor-vehicle to a mechanic for repair. After the vehicle was repaired, the mechanic, one Otieno told him that the vehicle had been hired to an insurance company/ car hire company. This was done without his consent.

6. Subsequently the appellant hired the vehicle from the company and was required to return it after two (2) days but he did not and the vehicle was never returned. On June 11, 2012, he sent money to PW3 Justus Ndolo Mulongilo who operated in the Business Name of Ngong Road Car Hire who had hired out the motor vehicle for two days. Thereafter, he switched off his phone. The matter was reported to the police who traced him at Homabay prison. PW 4 No xxxx Corporal Joseph Wanjohi investigated the case and caused the appellant to be transferred to Nairobi where he was arraigned in court.

7. Upon being placed on his defence the appellant denied having committed the offence. He stated that he hired the motor vehicle from PW3 to take his cousin Joyce Akinyi to Namanga to visit her ailing mother. After passing Isinya the car tracker switch went off and the motor vehicle could not move. That they called PW3 so that he could inform the owner but they did not turn up. Joyce decided to use a Public Service Vehicle (PSV) hence left him alone. Since it was 8.00pm, he left the vehicle and returned to Nairobi using a PSV.

8. Further, that he met the owners and handed over the keys and told them the location of the motor vehicle. At 11.00pm, the owner of the motor vehicle called him and said that he found the motor-vehicle vandalized. They demanded Ksh 20,000/= but, when he told Joyce, she demanded to be refunded the Ksh 10,000/= that they had paid for three days but did not use the motor-vehicle. The following day while in company of Joyce they encountered PW3 who told them that they had been arrested and taken to Buruburu Police Station and they secured their freedom by paying Ksh 20,000/-

9. That Joyce needed a vehicle to use and PW3 carried them in the vehicle. That according to their arrangement, the vehicle was to be released to him and Joyce. However, when they reached Hamza, PW3 made them alight and he drove away. He urged that PW3 had a grudge against him and that the Investigation Officer knew him very well and used to hire his motor vehicle.

10. The trial court considered evidence adduced and found that the appellant hired the vehicle but did not return it, and the defence put up did not shake the prosecution's case that was cogent, hence the conviction.

11. The appeal was canvassed through written submissions. It was urged by the appellant that failure to re-call the witness was a violation of the right to fair trial as required by the *Constitution* and Section 302 of the *CPC*. That PW1 and PW2 's evidence in chief was contrary to the charge making it defective. That oral evidence cannot be cured by documentary evidence and that this would prejudice his case. That PW3 was untruthful, unreliable and of questionable integrity having alleged that he did not know the appellant prior to the incident but was contradicted by the Investigating Officer, PW1 and PW2 who

all testified that he knew the appellant; evidence that was in bad faith and intended to mislead the court as to how he came into possession of the appellant's documents later used as exhibits. That unless the contradictions are satisfactorily explained, they should lead to evidence of the witness being rejected. In this respect the appellant relied on the case of *Twehangane Alfred vs Uganda* CR No 139/01.

12. Further that the document examiner was not availed to prove the signature under Section 70 of the *Evidence Act*.

13. That the court simply stated that it considered the time spent in remand but did not expressly state that the appellant spent 5 years, that further, the three (3) year sentence was not proportional to the offence as the appellant will spend a total of eight (8) years in prison. In this respect reliance was placed on the case of *Elizabeth Andesi vsR* [2022] eKLR and *Macarious Lugose Ligono v R* [2021] eKLR.

14. The State/ Respondent failed to file submissions within the timeline given by the court. That notwithstanding this court's duty which is to determinatine on merit the appeal must not be dependent on whether the appeal is opposed or whether the prosecution has conceded. In the case of *Odhiambo v Republic* [2008] KLR 565, the Court held that:

> " The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

15. Therefore, this being a first appellate court, the duty of the court is to interrogate the record of the lower court and assess the evidence adduced at trial noting in mind that it had no opportunity of seeing and hearing witnesses who testified. This duty of the first appellate court was well set out in the case *Okeno v Republic* [1972] EA 32 thus:

> " 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 v Republic [1957] EA 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 Rulwala v Republic [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 findings and conclusions; 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 the case of *Eric Onyango Odeng' v R* [2014] eKLR.

16. The appellant complains that his rights were violated. Article 50 of the *Constitution* guarantees an accused person the right to fair trial, the accused has the right to cross examine witnesses and to challenge the evidence against him.

Article 50 (2) (k) provides that:-

> "every accused person has a right to fair hearing which includes-
>
> (k) to adduce and challenge evidence

17. In the case of *Moses Ndichu Kariuki v Republic* Criminal Appeal No 228 of 2008 [2009] eKLR, The Court of Appeal considered the provisions of section 77 of the former *Constitution* which is similar to Article 50 of the *Constitution* and stated thus:-

> " In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. On our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section (Article) 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant."

18. Section 146(4) of the *Evidence Act* provides that :

> "(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross- examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

19. From the proceedings, the accused applied to have PW1 and PW2 re-called for purposes of cross-examination on the ground that he did not have their statements when granted the opportunity to cross examine them. At the outset, on 4/3/2016, when PW1 testified, the appellant cross-examined him and requested to cross examine him further upon being supplied with witness statements. As a result, the court ordered the prosecution to furnish him with statements. The matter was mentioned on 16/3/16. The court prosecutor notified the court of the appellant's application to re-call witnesses and stated that he was ready to proceed, however, the appellant applied to settle the matter with the complainant.

20. On October 21, 2016, the appellant offered to pay the complainant Ksh 100,000/- which he failed to raise. PW2 testified on 30/6/2017, the appellant did not have any questions for him, he sought to be provided with witness statements and to have PW1 and PW2 re-called. PW1 was re-called on 3/10/2017 for further cross examination. But, the prosecution did not re-call PW2.The court did not follow up on this despite the appellant's subsequent application and his submissions on case to answer that the omission violated is right to fair trial; and, the prosecution did not give reasons for not availing this witness in further proceedings.

21. The appellant had a right of being informed of the case he faced at the outset so as to prepare for his defence appropriately, but this was not the case herein. He was also denied the right to have PW2 re-called for purposes of being cross examined, so as to challenge evidence adduced by the prosecution. The omission was fatal, in breach of the law and the right to fair trial. This made the trial defective having been vitiated by a mistake of the court. The question to be posed is whether a retrial should be ordered?

22. In the case of *Fatehali Manji v Republic* [1966] EA 343 Sir Clement de Lestang, the then acting President of the Court of Appeal stated at Page 344 that:

> " In general a retrial will be ordered only when the original trial was defective or illegal ; It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial ; even

where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered ; each case must depend on its particular facts and circumstance and an order of retrial should only be made where the Interests of Justice require it and should not be ordered where it is likely to cause injustice to the accused person."

23. Elements of the offence of stealing are set out in Section 268 of the *Penal Code* that enact thus:

> "1. A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
>
> 2. A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –
>
> a. An intent permanently to deprive the general or special owner of the thing of it;"

24. The prosecution was obligated to prove that the accused took the complainant's vehicle without authority or consent, with the intention to convert the vehicle to his own use and thus depriving the owner of it permanently.

25. It is urged by the appellant that the evidence adduced by PW1 and PW2 did not support the particulars of the offence in respect of the details of the vehicle registration number No KBH 775Z instead of KBH 755Z. The discrepancy was as a result of the witnesses having failed to recall the number which was something that would have been cured by the witness refreshing their minds by looking at statements recorded. As a result, the discrepancy was not fatal to the charge since documents adduced proved the vehicle in issue belonged to the complainant and it was registration number was KBH 755 Z. This could not affect the conviction.

26. Ownership of the motor vehicle that was in custody of PW2 who had assigned a mechanic to repair it was not in dispute. It is also not in dispute that the vehicle was hired to the appellant without the owner's consent. It was admitted by the appellant that he did hire the vehicle which was never returned. Without going into technicalities like questionable signatures, the appellant's own admission and proposal to settle the matter was sufficient to hold him culpable.

27. On sentencing, Section 278 A of the *Penal Code* provides as follows:

> "....if the thing stolen is a motor vehicle within the meaning of the Traffic Act, the offender is liable to imprisonment for seven years.

28. The provision of law does not provide for sentence by fine. However, the power to impose a fine is discretionary. In exercising discretion the court must be guided by the provisions of Section 28 of the *Penal Code* which sets out the period of imprisonment in case a party defaults paying a fine.

29. Section 28 (2) of the *Penal Code* provides that:

> "In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be

paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale:

.....Exceeding Sh. 50,000 .....12 months."

30. Compensation of a person wronged is provided for by Section 31 of the *Penal Code* which provides:

> "Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment."

31. The default sentence for the fine meted being Ksh 100,000/= ought to have been twelve (12) months imprisonment. A sentence beyond the term stated was illegal.

32. For a retrial to be ordered, circumstances of each case must be taken into consideration, and, interests of justice should be taken into consideration so that an injustice is not caused to the accused. The appellant herein upon being arraigned on 9/6/2014 was granted bond, but, did not raise a surety. By 2/8/2019, he had spent five (5) years in remand custody. Having proffered the appeal he was released on cash bail but failed to comply with the terms given hence the cash bail was forfeited to the State.

33. This, therefore, is not an appropriate matter for a retrial. Consequently, the appellant shall be released forthwith, unless otherwise lawfully held. It is so ordered.

34. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 29TH DAY OF MARCH, 2023

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Accused

Ms. Ntabo for DPP

Court Assistant - Mutai