**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**HIGH COURT CRIMINAL APPEAL NO. 231 OF 2019**

**SAMUEL OMAIYO OMUNDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*(Being an appeal against the decision of; Hon. J. Kamau (Senior Resident Magistrate) rendered on; 30th August, 2019, vide Criminal Case No. 4230 of 2014, at Kibera Chief Magistrate's Court)*

1. On the 16th day of September, 2013, the appellant was arraigned in court charged jointly with another, with the offence of; unlawfully using a motor vehicle contrary to; section 294 of the Penal code. The particulars of the charge read that, on diverse dates, between 12th July, 2013 and 8th January, 2014, at Ngong Township, in Kajiado North sub-county, within Kajiado county, unlawfully and without colour of rights, jointly converted to his own use, a Motor Vehicle Registration No. KBL 919X Toyota NZE white in colour, the property of; Joseph Macharia Njoroge.

2. The charge was read to the appellant and he pleaded not guilty. The case proceeded to full hearing. The prosecution case in brief is that, on the 12th July, 2014, at about 10.00 hours, Inspector Tusca Opondo, an officer in charge of traffic, attached to Kajiado Police Station, received a call from one; Grace Kivuita, a director of Bounty Hotels, to the effect that, the aforesaid Motor Vehicle Registration No. KBL 919X Toyota NZE was parked at the hotel compound with suspicious characters therein.

3. Inspector Opondo reported the matter to; Inspector Chea, the officer in charge of crime, at Ngong Police Station for investigation. IP Chea called an officer; No. 403011, PC Justus Mutunga, attached to; Kiserian Police Station and instructed him to arrest the occupants of the vehicle and take them and the vehicle to Ngong Police Station. The suspects and vehicle together with the car keys

were taken to; Ngong Police Station and handed over to Inspector Chea.

4. However, the suspects were released by (PW3) Inspector Chea, on the basis that, after detaining them, he was approached by the appellant who was also a Police officer at; Ngong Police Station and informed that he, the appellant had received a call from the owner of the detained motor vehicle, who had travelled to Sudan and who was the appellant's friend and a businessman and sought for assistance toward the suspects; John Ibrahim Kiplalam and James Obiero.

5. That, on the following day; 13th July, 2013, the appellant approached; Inspector Chea and told him that, he should speak to the owner of the motor vehicle, one Meily Koech. Inspector Chea spoke to him on the appellant's phone and that owner, asked Inspector Chea to assist the two suspects and release the motor vehicle to the appellant. IP Chea obliged and released the two suspects and then gave the appellant the car keys and instructed him to be starting the vehicle daily to avoid the battery from dying.

6. On 8th January 2014, Inspector Chea received a call from DCIO Kajiado North, one Superintendent Bakari, who inquired as to whether there was an officer by the name of; Bernard Simiyu, at the station. Bernard Simiyu, was the 2nd accused, in the subject trial case herein; Criminal Case No. 4230 of 2014, at Kibera Chief Magistrate's Court. It was reported that, he had been arrested in Eldoret with the subject motor vehicle, registration No. KBL 919X Toyota Saloon.

7. That, the vehicle was reported to have been used to commit a criminal offence at Eldoret, wherein the owner, had been murdered. Upon inquiry from the appellant who had the custody of the vehicle, as to where the motor vehicle was, Inspector Chea learnt that, the appellant had given the vehicle to 2nd accused to take his children to the stage in Nairobi, to go to school in Western Kenya. However, Inspector Chea

denied authorizing the appellant to give out the motor vehicle. Subsequently, after the investigations, the appellant was charged jointly as aforesaid.

8. Be that as it were, upon evaluation of the evidence in support of the prosecution case, the learned trial Magistrate ruled that, each accused had a case to answer and put them on their defence. The appellant testified to the effect that, he was attached to; Ngong Police Station in the years 2013 to 2014, and assigned to the OCPD as a body guard. That, at the material time, (PW3) Inspector Chea, was the officer in charge of crime at Ngong Police Station.

9. That, in the month of August 2013, he was called by Inspector Chea to drive him to; Ngong Police Station. The Inspector gave him the keys to the motor vehicle herein to use. He drove the Inspector to, Ngong town and back. The following day, Inspector Chea sent him to fetch water for him using the same motor vehicle. He obliged. That, it became routine, and in January 2014, Inspector Chea left him with the car keys, as he wanted the appellant to pick him.

10. However, the 2nd accused borrowed the vehicle to take his son to school. Later, the appellant learnt that, the 2nd accused had a problem in Eldoret, as the car was stolen. He was then forced by DCIO and Inspector Chea to record a statement of what he knew of the motor vehicle. The appellant denied knowledge of the suspects who were arrested and/or released nor the fact that, the motor vehicle was an exhibit. That, all through the motor vehicle was parked at the private residence of Inspector Chea and he believed that, it was his personal motor vehicle.

11. The 2nd accused, testified that, he drove the motor vehicle with the authority of; Inspector Chea who authorized the appellant to give him the keys to take his child to school. However, he was arrested in Eldoret with the vehicle, which was usually parked outside Inspector Chea's residence within the Police Station residence. That, he did not know it was an exhibit. He thought it belonged to the appellant, who drove it most of the time, but later learnt it was Inspector Chea's motor vehicle.

12. At the close of the entire case, the learned trial Magistrate found that, the prosecution had proved the charges, beyond reasonable doubt, against the appellant and convicted him. The 2nd accused was acquitted for lack of adequate evidence. The appellant was then sentenced to pay a fine of; Kshs 10,000, in default to serve two (2) months imprisonment.

13. However, the appellant is aggrieved by the decision of the trial court on both conviction and sentence and has appealed against it, vide a petition of appeal dated; 14th November 2019, on the following grounds: -

*a) That, the learned trial Magistrate erred in law and fact in convicting the appellant against the weight of evidence and gave no weight by disregarding the evidence of the appellant;*

*b) That, the learned Magistrate erred in law and fact when the evidence adduced could not sustain a conviction;*

*c) That, the learned trial Magistrate erred in law and fact by convicting the appellant yet the complainant's evidence does not support the charges against the appellant;*

*d) That, the learned Magistrate erred in law and in fact in failing to find that, the prosecution did not prove their case beyond any reasonable doubt;*

*e) That, the learned Magistrate erred in law by denying the accused his right to a benefit of doubt;*

*f) That, the learned trial Magistrate erred in law and in fact in failing to find that, there were reasonable doubts in the evidence tendered by the prosecution which doubts ought to have been resolved in favour of the appellant.*

14. The appeal was opposed by the Respondent vide grounds of opposition dated, 27th October 2021 which states as here below reproduced: -

*a) The appeal lacks merit, is misconceived and unsubstantiated;*

*b) The appeal is an abuse of the court process since the applicant was properly convicted before the trial court and the prosecution did discharge its burden of proof beyond reasonable doubt;*

*c) The application lacks merit and the same should be dismissed in its entirety.*

15. Having considered all the material before the court, I note that, the role of the 1st appellate court is to, evaluate afresh the evidence adduced in the trial court and arrive at its own conclusion. In so doing, the court is mindful of the fact that, it did not have the benefit of the demeanor of the witnesses. This role was well articulated by the Court of Appeal in the case of; ***Okeno vs. Republic (1972) EA 32,*** **as follows: -**

***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) 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. Ruwala V. R [1957] E.A. 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".***

16. I further note that, the burden of proof in any criminal case, lies on the prosecution, to prove its case, beyond reasonable doubt. In that regard, the provisions of; section 107 of the Evidence Act (Cap 80) Laws of Kenya stipulates as follows: -

> *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that, the burden of proof lies on that person.*

17. In the same vein, the provisions of; section 109 of the Evidence Act states that: -

> *"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".*

18. Pursuant to the aforesaid, the burden of proving the charge and/or the particulars or ingredients thereof, in the instant case, was on the prosecution. In that regard, it is noteworthy that, the appellant was charged and convicted of the offence of; unlawful use of a motor vehicle contrary to; section 294 of the Penal Code (Cap 63) Laws of Kenya.

19. The aforesaid said provisions states as follows: -

> *"Any person who unlawfully and without colour of right, but not so as to be guilty of stealing, takes or converts to his own use or to the use of any other person any draught or riding animal or any vehicle or cycle, however propelled, or any vessel, is guilty of a misdemeanour and is liable to imprisonment for six months or to a fine of three thousand shillings or to both".*

19. It was therefore paramount that, the prosecution had to prove inter alia that; the appellant took or converted the motor vehicle to his own use or to the use of any other person, without the authority of the owner and/or the owner's authorised agent; and in so doing, deprived the rightful owner of the use thereof.

20. In the instant matter, the prosecution had to, first and foremost, prove that, indeed the subject motor vehicle was in existence. I note that, in this matter, four witnesses testified. I have evaluated their evidence and I find that, none of them adduced evidence to support the fact that, the subject motor vehicle exists, or ever existed at the material time.

21. The existence of a motor vehicle, can only be proved by a record thereof, from the Registrar of Motor Vehicles, in this case, the National Transport and Safety Authority (NTSA). The log book issue by this agency, is proof beyond reasonable doubt, as to the existence of a motor vehicle and the proprietor or registered owner thereof at the material time.

22. It is noteworthy that, no log book or any other record was availed to prove the existence of the subject motor vehicle and the question that arises is; how then was the existence of the motor vehicle proved? In the same vein, how did the prosecution prove that, the motor vehicle belonged to one; Joseph Macharia Njoroge, without the evidence of the log book?

23. In this regard, I note that, in addressing these issues, the trial court rendered itself as follows: -

> *"In this regard therefore any item that is impounded and remains unclaimed in 48 hours can be deemed to belong to the state, In this case, the National Police of Kenya.*
>
> *In the foregoing, I find that, although this name James Macharia Njoroge appeared in the charge sheet, the prosecution has proved beyond reasonable doubt that, the motor vehicle registration number KBL 919X belonged to the State between July, 2013, to February 2014, when it was recovered"*

24. With outmost, respect to the finding of the learned trial Magistrate, first and foremost, the particulars of the charge sheet clearly state that, the motor vehicle was the property of; Joseph Macharia Njoroge and not the State. Secondly, none of the four witnesses who testified, stated that, during the subject period in time, the motor vehicle was deemed abandoned, as it had not been claimed within 48 hours and therefore, belonged to the State.

25. Thirdly, I note that, the learned trial Magistrate relied on the provisions of; section 63 of the National Police Act, to support her findings, however, these provisions state as follows: -

> *(1) A police officer shall—*
>
> > *(a) take charge of all unclaimed property handed to him by any person or found by him to be unclaimed; and*
> >
> > *(b) deliver that property without delay to the nearest police station.*
>
> *(2) Where any property has come into the possession of the Police, the police officer shall furnish an inventory or description of the property within forty-eight hours to a magistrate having jurisdiction in the area in which the property is found by, or handed to the magistrate, and the magistrate shall—*

*(a) give orders for the detention of the property; and*

*(b) cause a notice to be posted in a conspicuous place in the magistrate's court and at such police station as the magistrate considers necessary.*

*(3) The notice under subsection (2)(b) shall describe the property and require any person who may have a claim thereto to appear before the Magistrate or other person specified therein and establish their claim within twelve months from the date of the notice.*

*(4) Notwithstanding subsection (3), if the unclaimed property is—*

*(a) liable to deterioration, the magistrate shall deal with it in such a manner as may be appropriate; or*

*(b) a firearm or ammunition, the magistrate may order that the property be disposed of in such manner as the Inspector-General may prescribe in regulations.*

*(5) If no owner establishes his claim to the property within twelve months from the date of the notice, the property may be sold in a manner directed by the Magistrate.*

*(6) Where the unclaimed property has been sold in accordance with subsection (5) the proceeds of sale shall be paid to the person who establishes his claim, or, if no lawful claim to the property has been established, the proceeds shall be paid into the Government Revenue. 64. Power to apply for summons*

26. Pursuant to the afore provisions, it is noteworthy that, it deals with "unclaimed" and not "abandoned" property. The procedure or manner of dealing with this property is quite well detailed. Even if the motor vehicle herein was deemed abandoned, there is no evidence that, it was dealt with in accordance with the subject provisions. I therefore find that, the learned trial Magistrate misdirected herself on the provision of the section 63.

27. In fact, it is clear from the evidence that, there was a person who alleged claimed ownership of the motor vehicle, it cannot therefore have been unclaimed or abandoned. Further, the evidence the evidence reveals that, the vehicle was an exhibit in a suspected criminal offence. The Police and in particular; Inspector Leornard Chea, was supposed to record the vehicle as an exhibit in the Occurrence Book, (OB), and cannot be treated as abandoned or unclaimed.

28. As a result of the aforesaid, I find that, the prosecution did not prove that, the motor vehicle existed and/or belonged to one; Joseph Macharia Njoroge.

29. The next issue to deal with is whether, the prosecution proved that, the appellant took or converted the vehicle to his own use on the material dates and did so without authority. In this regard, it suffices to note that, the prosecution main witness who testified to this issue was, (PW3), Inspector Chea, and the trial court relied heavily on his testimony in convicting the appellant.

30. In that respect, the trial court stated as follows: -,

*"PW3's evidence is key in this case. He implicated the 1st accused of conspiring to have him omit steps during his official Police duties where in result, he failed*

*a) To issue a cash bail to the issue cash bail to the two suspects;*

*b) Record witness statements and details of the two suspects;*

*c) Circulate the information through the Police Communication lines of a recovered motor vehicle;*

*d) Registration of the car in the exhibit inventory;*

*e) Storage of the said car at the car correct Police exhibit yard.*

*D Exhibit 1 emphasis the concerns that PW3 acted on guidance by a junior officer. However, the 2nd accused testified that, he knew PW3 and the 1st accused were great friends, and he saw them together on several occasions. This could be what clouded PW's judgment in the matter. He acted in trust of the 1st accused."*

31. Once again, with utmost due respect to these findings of the learned trial Magistrate, (PW3), Inspector Chea, did not attest to all these matters and it seems as though the court was drawing its own inference in that regard, but even if he did, evidence reveals, PW3, was an "Inspector" of Police, while the appellant a "Police Constable", then several questions arise: How could the appellant "conspire" to lead the Inspector to neglect his duties? How could the Inspector be misled by his junior? How could he put his trust in the junior?

32. It also suffices to note that, the finding of the trial court is inconsistent with the findings of the proceedings conducted by Cheruiyot S, from the DCI, to establish the conduct of Inspector Chea in the entire matter. By a report dated 22nd July, 2014, it was recommended that, disciplinary offences be instituted against (PW3), Inspector Chea, the then Acting OCS, Ngong Police Station.

33. It was further found that, he was idle and negligent in the performance of his duties, by releasing "prime robber suspects" and motor vehicle KBL 919X Toyota saloon Mode NZE, which he never booked as an exhibit in the OB. What was the motive of omitting to record the recovered vehicle as an exhibit?

34. The evidence of the appellant, his co-accused was that, (PW3) parked the motor vehicle outside his compound and used it for personal errands on several occasions. That he gave the keys to the appellant to chauffeur him around and run his errands. PW3 acknowledged he gave the appellant the car keys. The Inspector thus testified;

> *"My strict instructions were to start motor vehicle daily as they awaited the owner of the car to verify the ownership of motor vehicle" they were not permitted to take away the motor vehicles from the Police Station"*

35. If he gave the appellant the car keys, for whatever purpose, can it be said that, the appellant had the vehicle without any authority?

In my considered opinion, the manner in which PW3, performed his duty, in relation to this matter leaves a lot desired. Did he verify the information allegedly given to him by the appellant regarding the two suspects, or the owner of the motor vehicle, before releasing the suspects? Did he check with Safaricom (K) Ltd, to establish whether, the phone call, allegedly made by the appellant to the owner of the motor vehicle, was real?

36. Did Inspector Chea really give the appellant the car keys for the purpose of just starting it daily? Was it only the appellant who could start the vehicle daily and no other police officer? Did Inspector Chea supervise the same daily or periodically? How come Inspector Chea did not notice that, the vehicle had left yard, if he had kept an eye on it? Did Inspector Chea take action against the appellant for unlawful release of motor vehicle?

37. Further, has the prosecution proved that, the appellant drove the vehicle out of the station? None of the prosecution witnesses testified to that effect, other than Inspector Chea. The other prosecution witness was; (PW4), No. 21794, Inspector Peter Njihia, who testified that, (PW3), Inspector Chea instructed him to give the 2nd accused off duty to go and attend to his child's issue in Eldoret. He allowed the request, but later learnt the 2nd accused was arrested, while driving the subject motor vehicle, which was involved in a robbery with violence incident, wherein the owner was killed.

38. It is therefore clear, that, Inspector Chea knew that the 2nd accused was going to take his children back to school and that may support the evidence of the appellant and the 2nd accused that, he authorized the appellant to release the motor vehicle to the 2nd accused for use. The question that arises is: is it a normal practice to omit to book an exhibit in the yard for over five months? What was the motive of Inspector Chea?

39. It also suffices to note that, the prosecution omitted to call eye witnesses in this matter. The Investigating officer in this matter was not called to give evidence. The caller from Bounty Hotel did not testify.

40. With utmost respect to the decision of the trial court, it is my considered opinion that, the evidence of Inspector Chea could not be relied on, to convict the appellant. The Inspector was just as culpable as the other accused may have been culpable. He could not throw the 1st stone, and neither did he have the legal or moral authority to testify against the appellant and his co-accused. His evidence was in self defence. He should have been charged jointly with the other accused or if the Police decided to subject him to internal disciplinary action, the same procedure should have been applied in relation to the appellant and his co-accused.

41. Furthermore, I note that, the trial court acquitted the 2nd accused on the ground that, the 1st accused assured him that, the vehicle was his. However, that is not in evidence. The 2nd accused to the contrary testified that, when he requested the appellant to assist him with the vehicle, the appellant told him that, the vehicle belonged to PW3, Inspector Chea. That, all through, the vehicle was parked at the Inspector's compound and he believed it belonged to him.

42. Finally, if the 1st accused had no legal and/or moral authority to drive the vehicle, then he could not have given the 2nd accused authority to drive the motor vehicle. The doctrine of; *Nemo dat quod non habet applies"*. In that case, if both accused drove the vehicle at all without authority, one could not be convicted and the other acquitted.

43. I therefore, find and hold that, the three persons herein who handled the motor vehicle should have been subjected to investigations as the manner in which a serious matter as herein where a person was robbed and killed, should not have been handled so casually and/or negligently. Be that as it were, the evidence adduced herein was insufficient to sustain a safe conviction.

44. I therefore quash the conviction and set aside the sentence imposed upon the appellant. If the fine imposed has been paid it should be refunded.

It is so ordered.

## DATED, DELIVERED AND SIGNED ON THIS 28TH DAY OF JANUARY, 2022.

**GRACE L NZIOKA**

**JUDGE**

**IN THE PRESENCE OF;**

**MS MARTINS HOLDING BRIEF FOR D. OMARI FOR THE APPELLANT**

**MR KIRAGU FOR THE RESPONDENT**

**APPELLANT PRESENT**

**EDWIN: COURT ASSISTANT**