



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 65 OF 2019**

**ROBERT ONCHWARI ORINA.....1<sup>ST</sup> APPELLANT**

**REHEMA KEAH SELEMANI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**The Appellants in person**

**Mr. Alenga for the State**

**JUDGMENT**

The appellants' appeal against their conviction and sentence by the Chief Magistrate Court at Shanzu being presided over by **Hon. D. Mochacha** for the offence of stealing contrary to Section 268 (1) as read with Section 278 (A). Further, the appellants also were indicted in the same information with the offence of conspiracy to steal a motor vehicle contrary to Section 317 of the Penal Code. Following a full trial, the appellants were to be sentenced to a compensation of Kshs.1,500,000/= in default serve ten (10) years imprisonment.

Aggrieved with both the conviction and sentence. Each of the appellant preferred an appeal to the High Court, based on the following grounds:

- 1. That the Learned trial Magistrate erred in Law and fact in convicting and sentencing ten (10 ) years imprisonment without considering that there was no proof beyond any reasonable doubt as required by Law.***
- 2. That the Learned trial Magistrate erred in Law and fact in convicting and sentencing to serve ten (10) years imprisonment without considering that the prosecution case was marred by massive contradictions and discrepancies and thus a conviction could not have resulted.***
- 3. That the Learned trial Magistrate erred in Law and fact in convicting and sentencing to serve ten (10) years imprisonment without considering that no identification parade was done to connect me to the present case and the Court relied on a dock identification which does not stand in Law.***
- 4. That the Learned trial Magistrate erred in Law and fact in convicting and sentencing to serve ten (10) years imprisonment without considering that the real ownership of the alleged vehicle was not established as required by Law and thus a conviction could not have been reached at.***
- 5. That the Learned trial Magistrate erred in Law and fact in convicting and sentencing to serve ten (10) years imprisonment without considering my reasonable defence.***

**1<sup>st</sup> Appellants Submissions**

The first appellant relied entirely on his written submissions to challenge the Judgment of the trial Court. The main contention was on the fact that the issue on his identification was never established by the prosecution witnesses. He submitted that the alleged identification

documents belonged to **(PW3)** and therefore was the rightful owner of the motor vehicle which the complainant **(PW1)** told the Court had been legally contracted out but never returned within the agreed period of two (2) days.

The next issue, the appellant submitted on to distance himself from the theft of the aforesaid motor vehicle was in respect to the recovery of the subject motor vehicle in Tanzania. In the appellant's submissions, the suspect who was arrested in possession of the motor vehicle was released under very unclear circumstances. It follows therefore argued the appellant that he was not at the scene where the motor vehicle was recovered by the police and subsequently identified by the complainant **(PW1)**.

In conclusion, the appellant urged the Court to allow the appeal on the strength of the principles on identification evidence elucidated in the case of **R v Turnbull (1976) 3 ALL 549**.

### **The 2<sup>nd</sup> Appellant Submissions**

Likewise, the second appellant in her written submissions argued that the prosecution failed to prove the elements of the offence beyond reasonable doubt. For an appreciation of the matters, the 2<sup>nd</sup> appellant invited the Court to appraise the evidence given by **(PW2)** which failed to place her at the scene of the crime.

Her main contention was that she never took part in the commission of the offence as alluded to by the prosecution and subsequent findings made by the Learned trial Magistrate on the prosecution evidence was a misdirection. The appellant submitted that there was no identification parade conducted by the police that at any one moment she was part of the suspects involved in the crime. She placed reliance on the principles in the case of **Walter Omollo v R (1991) KLR, Cleophas Wamunya v R (1989) KLR** to demonstrate that identification evidence founded in the impugned Judgment was mistaken and in error to sustain a conviction.

On this submissions, the appellant prayed to the Court to consider the velocity of the issues raised to move and overturn the findings by the Learned trial Magistrate.

### **The Respondent's Submissions**

The Senior Prosecution Counsel addressed the Court on behalf of the state and concluded that the evidence on record can prove him right. That the elements of both counts established the guilt of the appellants beyond reasonable doubt.

According to the Senior Prosecution Counsel, this was in line with the ingredients as provided for under Section 268 and 271 of the Penal Code. Further, it was the contention by the Learned Senior Prosecution Counsel that there were no discrepancies or inconsistencies to discredit identification evidence of both appellants to entitle them a benefit of doubt.

The Learned Senior Prosecution Counsel cited and relied on the guiding principles in the cases of **Wamungu v R (1989) KLR, Peter Omukaga v R** to disapprove the arguments by the appellants that the identification evidence was of poor quality to squarely place them at the scene of the theft of the motor vehicle.

On sentence, the Senior Prosecution Counsel questioned the rationale of sum of a fine of Kshs.1,500,000/= in default ten (10) years imprisonment was imposed by the Learned trial Magistrate. He urged the Court to set it aside by substituting it with the correct penalty.

### **Analysis and Determination**

This is a first appeal and the Court is duty bound to analyze and evaluate the evidence afresh and after doing so delve into its own inferences and conclusions, bearing in mind that the trial Court had the advantage of hearing and observing the demeanor of witnesses; and due allowance ought to be given to that fact. **(See Okeno v R (1972) EA 32, Pandya v R (1957) EA)**.

In this respect, the case for the prosecution was purely based on the chain of events as described by the five witnesses. At the material time, the complainant **Alice Chemtai (PW1)** testified that she usually hires out her motor vehicle. It emerged that on 15.12.2016 she was approached by **(PW2) Kevin Wachira** through his telephone call number 072356884 who was in need of a car to hire it out to a customer. That same day, **(PW1)** told the Court a meeting was arranged by **(PW2)** and the would be hirers to reach an agreement on the contractual terms to allow her rent car to be taken by the said customers.

The complainant alluded to the fact that though she did not know them, relying on character reference given by **(PW2)**, she consented to enter into a hirer's contract to rent out her motor vehicle registration number **KBZ 472V make Toyota Rav 4**. It was at the time of entering into that contract **(PW1)** got to meet the 1<sup>st</sup> appellant who in turn introduced the 2<sup>nd</sup> appellant as his wife. The two therefore agreed to hire the motor vehicle for two (2) days at a consideration of Kshs.23,000/=.

According to **(PW1)**, Kshs.19,000/= was paid affront while the balance of Kshs.4,000/= was to be paid through **(PW2)** which indeed she confirmed was settled within the agreement period. In the testimony of **(PW1)** and **(PW2)**, as earlier agreed the appellants failed to return the car and this prompted a search and trace through the report which was made to the police station, at Makupa, Mombasa. Further, **PC Kisoro, (PW4)** told the Court that on receipt of the complaint from **(PW1)** investigations commenced in earnest which led to the recovery of the motor vehicle in Namanga - Tanzania.

According to **(PW4)**, further inquiry and investigations showed that the 1<sup>st</sup> appellant had used forged identification documents belonging to **(PW3) Henry Kwangito** to enter into an agreement for hiring of the subject motor vehicle with **(PW1)**. This necessitated for **(PW4)** to trace the rightful registered owner of the identity card who happened to be summoned as a witness, **(PW3)**.

On this aspect (PW3) testified that sometimes 2014 while a resident at Bamburi, his house was broken into and several of his personal documents, testimonials and other properties stolen from therein. In support of the complaint on house breaking, (PW3) made reference to an OB extract of 41/5/2019. However, none of the investigations bore fruits to arrest the suspects who committed the offence in his house. What followed thereafter, was his arrest in connection with the theft of a motor vehicle belonging to the complainant. It was at that time (PW3) told the Court that he explained the circumstances of the personal identification documents which had been used to enter into a hirers contract with the complainant (PW1).

Therefore, (PW4) in possession of the information from (PW3) exonerated him of any culpability on the suspected theft of motor vehicle but instead preferred a charge against the appellants following them being positively identified by (PW1) and (PW2) respectively. The stolen and uttered false identification case was admitted in evidence as an exhibit in support of the prosecution case.

According to (PW4) evidence the 1<sup>st</sup> appellant took them to Namanga-Tanzania where the said motor vehicle had been detained for lack of proper identification documents.

(PW5) – **Zachauus Mutema**, testified as the Deputy Regional Manager in charge of motor vehicle registration. In his evidence (PW5) produced the repository data on motor vehicle registration number **KBZ – 472B Chasis No. AZA3, 15016827**, black in colour propelled by petrol and registered in the name of **Alice Chemutai** as the rightful owner. Thereafter, (PW6) – **Peter Njagi Maina**, a dealer of Amarin battery gave evidence identifying the battery car in motor vehicle registration number KBZ 472B as having been bought from their shop at a cost of Kshs.10,500/=.

At the close of the prosecution case, the appellants were placed on their defence. The 1<sup>st</sup> appellant on oath denied the offence of entering into any contract to hire a motor vehicle from the complainant as alleged by the prosecution. The appellant told the Court that the charge is all a frame up by his uncles so that they can take over the land owned by his late parents.

The 2<sup>nd</sup> appellant on her part also denied any knowledge of the theft of the motor vehicle or entering into a conspiracy with the 1<sup>st</sup> appellant to commit an offence. She denied being a wife to the 1<sup>st</sup> appellant as stated by the prosecution witnesses.

The main issue here was, who stole the complainant's motor vehicle. The evidence as demonstrated by the prosecution witnesses was both direct and circumstantial evidence. First, one has to consider the elements of the offences the appellants were charged with and convicted by the Learned trial Magistrate. For an accused person to be convicted of the offence under Section 268 of the Penal Code, its incumbent upon the prosecution to prove that he or she dealt with the property of the complainant fraudulently without any claim of right or converts it into his or her own use, other than the general or special owner thereof. That intention is executed in a manner to deprive the rightful owner of the property permanently.

In **R v Jones (1976) KLR 1** the Court observed that:

***“On a charge of theft, it was necessary to prove a fraudulent taking or conversion without claim of right, and a person was deemed to have taken or converted money fraudulently if he did so without a claim of right and with intent to use it at his will, even if he intended to repay the money to the owner.”***

I now consider the evidence upon which the appellants were convicted. In the first instance, the 1<sup>st</sup> appellant presented himself to (PW2) with a need to hire a motor vehicle with specifications fitting those of the complainant's (PW1) motor vehicle. According to (PW2) the 1<sup>st</sup> appellant was apparently known to him prior to this material day.

In the course of the day, (PW2) approached (PW1) to avail herself so that she would meet the appellants to enter into a contract of them hiring the car for two days. (PW1) in her evidence confirmed entering into a hirer's agreement with the appellant for this purpose for consideration of Kshs.23,000/= for a period of two (2) days. The complainant thereafter, on payment of initial amount of Kshs.19,000/= parted with the car as the balance of Kshs.4,000/= was paid through (PW2). The witness who introduced the appellants to (PW1). It happened that after the expiry of two days, the appellants never returned the motor vehicle. This triggered a series of events of police action as stated by (PW4) to locate and recover the motor vehicle.

The police action led them to Namanga, where another person besides the appellants was found in possession of the motor vehicle without valid registration documents. The motor vehicle positively identified by the complainant (PW1) and (PW2) as the one hired out to the appellants was subsequently recovered and driven to Makupa Police Station – Mombasa.

It emerged also from the investigations that the identification documents issued by the 1<sup>st</sup> appellant belonged to (PW3). According to (PW3) on or about 20154, his house at Bamburi was broken into and some of the crucial documents stolen were his testimonials and identity card. That despite the report having been made to the police, no arrest were made to bring to book the people who broke into his house.

Though initially suspected to have been part of the people who defrauded the complainants of her car, he was released for lack of cogent evidence, and that is how he was asked to testify on that issue of the identity card. The report on the house breaking and theft of the identity card of (PW3) sets the other dimension of the case that the 1<sup>st</sup> appellant uttered false documents to the complainant while entering into the contract of hiring the motor vehicle. It is clear that the 1<sup>st</sup> appellant never used his original identity card to negotiate and sign the agreement on the motor vehicle with the complainant. Nevertheless with these false misrepresentations the complainant (PW1) agreed to part vacant possession of the motor vehicle to the appellants. The agreement was for them to return the motor vehicle within two days of the agreement but instead, without her consent or authorization that period was never adhered to being a condition precedent to the agreement. It also followed that the subject motor vehicle was not in the hands of the appellants but a third party who was apprehended at Namanga border. The said suspect left the motor vehicle at Namanga police station, but failed to produce valid documents for it to be released to him. Thereafter, investigations from Makupa police station was to trace the motor vehicle and have it returned to Mombasa, in absence of the appellants who

had initially hired it with a promise to return it back to the complainant.

It is evident that the appellants gave out the motor vehicle to a third party who was not part of the contract signed at Mombasa with the complainant.

This evidence of **(PW3)** indicates the 1<sup>st</sup> appellant used the identity card of **(PW3)** to commit the offence. It is difficult to understand how the 1<sup>st</sup> appellant came into possession of **(PW3'S)** identity card which he used to sign a contract to hire the vehicle with the complainant. There is a further indication of the conclusion by the Learned trial Magistrate being right in view of the fact that the appellant avoided using his own identification documents. The result is that the evidence is consistent with the person who had formed the necessary intention to deprive the complainant of her motor vehicle permanently.

The one source of evidence upon which this case depends on therefore is that of **(PW1)**, and **(PW2)** on identification of the appellants. The evidence falls within the ambit and the principles explained in **Roria v R (1949) 16 EACA, R v Kipkereng Arap Koske (1949) EACA 135, R V Turnbull (1976) 3 ALL ER 549.**

Having set out the evidence of **(PW2)** largely from the examination in chief and later on cross-examination as the record stands, he knew the 1<sup>st</sup> appellant before that material day. That is why he was confident in introducing him to the complainant as a genuine car-hirer. More pertinent questions on the identification of the appellants in a joint verdict was elucidated in the testimony of the complainant **(PW1)**. The nature of the meeting, during the drafting of the agreement, the exchange of it and finally the release of the motor vehicle to the appellants was done in broad day light, and of course the memory would be clear and fresh as to their identity.

In my view, the identification evidence required no identification parade as submitted by the appellants. It is convincing to the Court that **(PW2)** testimony was corroborated with that of **(PW2)** on identification of the appellants.

The latter part of the story given by the 1<sup>st</sup> appellant that it was all a frame up by the uncles left no room to cast a doubt as to the intention and unlawful conduct of the appellants in the commission of the crime. After all, the circumstances immediately succeeding the handover of the motor vehicle by the complainant to the appellants demanded of them to explain matters within their knowledge under Section 111 of the Evidence Act. It is necessary to state with certainty matters which rise demanding of an answer from the appellants. In the instant case; it proved that a contract on the hire of the motor vehicle was entered into between the 1<sup>st</sup> appellant while in company of the 2<sup>nd</sup> appellant with the complainant.

In the premises, the property temporarily passed into possession of the appellants; afterwards, they failed to return the vehicle as per the agreement. The vehicle went missing only to be recovered at Namanga at the behest of the police investigations. Neither the 1<sup>st</sup> appellant nor the 2<sup>nd</sup> appellant pinpointed in their defence how the motor vehicle found its way to the Tanzania in the hands of a stranger who did not form part of the contract signed at Mombasa. All the two witnesses **(PW1)** and **(PW2)** swore on oath that the appellants took possession of the motor vehicle immediately after signing the agreement and making payment of Kshs.19,000/= with a further balance of Kshs.4,000/=, which was paid to the complainant by **(PW2)**.

Going by the evidence on identification, as the Learned trial Magistrate did, I am in agreement that it was cogent, of high quality, and watertight to sustain a conviction. The appellant did not adequately free up to the task of controverting it. It is certainly, a case where the charge of stealing was proved beyond reasonable doubt.

Reverting to the second count on conspiracy, I am guided by the principles in **Patris Ozia v R (1957) EA R v Ramji Hirji (1946) 13 EACA.**

In this regard, the action by the second appellant falls within Section 10 of the Evidence Act which provides that:

***“Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, anything said, done or written by anyone of such intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purposes of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”***

Thus, in the present case, the 2<sup>nd</sup> appellant was in company of the 1<sup>st</sup> appellant disguised as a wife. That statement reasonably did not exist but both aspect of the case denotes a conspiracy with the co-appellant to commit the offence. It would be fair to conclude that the evidence surrounding the circumstances were not a coincidence or accidental meeting incapable of proving a fact against the 2<sup>nd</sup> appellant with accuracy. It is undisputed fact that the two appellants set out to steal and defraud the complainant of her motor vehicle permanently.

The doctrine of common intention under Section 21 of the Penal Code makes parties to a criminal plan liable for not only the crime which is the object of that plan but for any crime committed in furtherance of the plan or in the course of its execution by one or more of the parties.

In making a re-appraisal of the evidence from the point of view of the evidence adduced by **(PW1)** and **(PW2)**, it would be unwise to ignore and hold that the 2<sup>nd</sup> appellant was an innocent by-stander in all the transactional events culminating in the theft of the motor vehicle. The theory of common intention application to the facts of the case is based on objective foreseeability of an incidental conduct of the 2<sup>nd</sup> appellant resulting from the prosecution of the common object and the imposition of joint liability.

In the end, it is my conceded view that the conviction of the appellants was based on sound evidence indicating a causal link between the offence and the appellants as the perpetrators of the crimes.

Finally, the appellants are aggrieved with the manifest excessiveness of the sentence or compensation of Kshs.1,500,000.00 in default 10 (ten) years imprisonment. As usual this Court will not interfere with direction of a trial Judge in the matter of sentence unless it appears that in assessing it he acted on some wrong principle or did not act on some correct one or as imposed one which is manifest excessive. **(See Ogallo Owuora v R (1954) 21 EACA 270).**

On consideration of the matter, I am persuaded that under the principle of proportionality the sentence imposed ought to be interfered with. As a consequence, I vary the sentence to a period of 48 (forty-eight) months imprisonment from the date of Judgment. The appeal partially succeeds to the extent on sentence only.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 18<sup>TH</sup> DAY OF MARCH, 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Alenga for the state
2. The appellants