



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.144 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2509 of 2014 by: Hon. A.P. Ndege (SRM))

JAMES MWENJA.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

James Mwenja, the appellant, was convicted for the offence of stealing a motor vehicle contrary to Section 275 as read with Section 278A of the Penal Code by Hon. Ndege (SRM) on 19/1/2017.

The particulars of the charge are that on 18/9/2013 at Subukia Trading Centre, within Nakuru County, stole a motor vehicle No.KBL 154K Land Rover Defender valued at Kshs.500,000/=, the property of Peter Wanjohi Mwangi.

Upon conviction, the appellant was sentenced to 2½ years imprisonment. Being aggrieved by the court's judgment, the appellant filed this appeal through the firm of Waichungo Advocate based on the following grounds:

1. That the trial court erred by not finding that the dispute before him was purely of a Civil nature;
2. That the trial court erred by failing to find that this case was founded on breach of contract for hire of motor vehicle on 18/9/2018;
3. That the court erred to failing to find that the complainant voluntarily surrendered his vehicle to the appellant;
4. That the court erred in finding that the appellant stole the said motor vehicle;
5. The trial court erred in failing to consider the appellant's defence.

The appellant's prayer is that the conviction be quashed and sentence set aside.

The appeal was disposed of by way of written submissions.

This being a first appeal, this court has a duty to carefully examine all the evidence that was tendered before the trial court, analyze and evaluate it and arrive at its own findings. The court has however to bear in mind that this court neither saw nor heard the witnesses testify. However the trial court had that benefit. This court is guided by the decision in *Okeno v Republic (1972) EA 32*.

The complainant Peter Wanjohi Mwangi of Subukia (PW1) told the court that in September, 2013, the appellant approached him and asked for his vehicle KBL 154K Land Rover Defender, to use in ferrying timber from Bahati Forest. He was to return it after three months. After three months, the appellant informed him that the gear box and plugs were damaged and PW1 told him to repair which the appellant claimed to have cost him Kshs.210,000/=. The appellant agreed to continue using the vehicle for another 6 months in order to offset the amount. However, he did not return the vehicle after six months and when they met, the appellant claimed that the vehicle got spoilt in Congo and the appellant told the appellant to repair it. When the appellant did not return it, PW1 contacted his advocate who had prepared an agreement for them and he made a report to the police. He produced the agreement entered into with the appellant as P.Ex.4. He denied that the vehicle had been returned to him at the time of his testimony. He identified a vehicle in a photograph to be his though it did not bear the number plates, instead, it was KAC 715G. He said that he saw the vehicle in Kitale Police Station but with modifications. He denied having sold the vehicle.

PW2 PC Julius Kiptanui of CID Subukia arrested the appellant on 18/10/2014 after he was pointed out to him and there was a report of theft of motor vehicle.

PW3 PC Omutelema Japheth of CID Subukia was the Investigating Officer. He read a report made by Peter Wanjohi(PW1) about theft of motor vehicle KBL 154K which had been hired by the appellant; that PW1 showed him the hire agreement dated 18/9/2013 and logbook the period for hire had already lapsed and he started to look for the appellant whom he arrested on 18/10/2014. He learned that the vehicle was detained at Kitale for failure to display an insurance cover and that it had been found at the garage of one Peter Sifuna. He travelled to Kitale and found the Registration number of the vehicle had been changed to KAC 715G. It was photographed by scenes of crime. However the chassis and engine number remained those of KBL 154K; that the appellant claimed to have gone with the vehicle to the Congo where it got spoilt. PW3 denied that the appellant ever disclosed that the vehicle was in Kitale. He said that the vehicle was in working condition when found and it was taken to Subukia.

When placed on his defence, the appellant in his sworn statement denied the theft. He said they agreed with PW1 that he takes the vehicle for use in ferrying timber and he gave PW1 a smaller car; that he repaired the vehicle for Kshs.200,000/= and when PW1 saw that it was good, he wanted it back but he did not have money to refund the appellant. They then agreed to change the agreement so that the appellant could use the vehicle for 6 months. After using the vehicle for three months, it developed some problems. As per the agreement, the appellant was to service the vehicle while PW1 bought the spares; that he informed PW1 that the vehicle was at Peter Sifuna's Garage in Kitale and required gear box. He was with two elders. PW1 refused to repair the vehicle. He told Peter Sifuna to use the vehicle for three months after he replaced the Turbo Charger, in order to recover his money; that Sifuna removed the number plate and replaced it with another number and continued to use it and when he passed there, he found the new number plates and reported to DCI Kitale; that the police went to remove the vehicle to the police station and he was asked to get the owner of the vehicle. He came to get the documents from PW1 but he refused to give them. A report was made to DCI Subukia and he was given two months to avail the vehicle. He was charged with robbery, the vehicle was taken to Subukia but the case was not withdrawn but the charge was later amended; that he was charged so that he could not claim his money from PW1.

DW2 David Kagiro who knew both PW1 and the appellant recalled that in June, 2013 he went with the appellant to PW1's home; that the Land Rover was damaged and PW1 asked the appellant to help him repair it; that the appellant agreed to be paying Kshs.2,000/= for the vehicle and PW1 asked for a saloon car; that the appellant took her vehicle and repaired it and gave it to his son; the vehicle got spoilt in Kitale and he went with the applicant to PW1's home and PW1 requested that the agreement be made. The vehicle was detained in Kitale but was later brought to Subukia and he later heard that the appellant was demanding Kshs.200,000/= which he used in repair of the vehicle.

DW2 denied knowing the nature of the dispute but was present when the agreement of 6 months was made but he was not party to it.

DW3 Philip Ngure recalled that in 2013, the appellant asked him to escort him to go and see PW1; that PW1 told the appellant to go and repair his damaged vehicle and give him a smaller car and next day the appellant collected the vehicle and that instead the appellant gave him a smaller vehicle.

The appellant's submissions:

Mr. Waichungo, the appellant's counsel submitted that PW1's evidence does not support a charge of theft under Section 268(1) of the Penal Code because on 18/9/2013, PW1 handed over the vehicle to the appellant under an agreement; that the appellant explained that after the motor vehicle was repaired, he was unable to pay for the repairs and that is why it was detained at a garage but that the mechanic fitted it with a different number plate and he reported to the police who collected it from the garage; that he demanded for the documents but he was not able to get them from PW1. It was also counsel's submissions that PW3 misled the court in stating that the vehicle was detained by police for lack of insurance sticker because a packed vehicle in a garage cannot be detained for lack of insurance; that though it was disclosed that the vehicle had been packed at Peter Sifuna's garage in Kitale before police took it to the Kitale Police Station, the said Peter Sifuna was not called as a witness. Counsel also submitted that an agreement dated 2/2/2014 between Peter Sifuna and the appellant was sneaked into the record and was never referred to by PW1 or PW3, the investigating officer; that since the investigating officer and PW1 knew of the whereabouts of the vehicle, no criminal offence was disclosed. Counsel stated that an important ingredient in a criminal case is *mens rea*, but that was not proved. Counsel relied on the case of Philip Muiruri Ndarigo v Republic (2016) eKLR and Wilson Odipo Opiyo v Republic (2014) eKLR.

Counsel urged that if the appeal fails, then the sentence of 2½ years was excessive because the vehicle was recovered and the complainant can file a Civil Suit.

The respondent's submissions:

Ms. Rugut, learned State counsel on her part submitted that the appellant did not explain why the vehicle was in Kitale bearing a different number plate. Counsel further submitted that by the appellant's own admission that he asked Peter Sifuna to use the vehicle after replacing the Turbo charger, it was theft; that the vehicle was found in Kitale in possession of somebody else which confirms that under Section 268(2) (b) of the Penal Code; that the number plates on the vehicle had been changed and the agreement never gave the appellant authority to change the number plates.

Analysis and determination:

I have duly considered the grounds of appeal, evidence on record and submissions of both counsel. The main question raised by the appellant whether *mens rea*, a requisite in criminal cases existed and whether the dispute was a Civil or Criminal one.

There is no doubt that PW1 handed the subject motor vehicle to the appellant following a hire agreement dated 18/9/2013. The terms of the agreement are clearly stipulated in the agreement. There cannot have been any theft on 18/9/2013. If any theft occurred, maybe at a later date.

Section 268 of the Penal Code defines the offence of stealing. It provides as follows:

“268(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;

(b) An intent to use the thing as a pledge or security;

(c) An intention to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;”

The appellant has explained the reason that caused the motor vehicle to be in Kitale. He must have taken it there and seemingly it broke down there. According to the appellant his responsibility was to service the vehicle but PW1 had to buy the spares which he failed to do and that is why one Peter Sifuna came to repair it and detain it.

However, from a reading of the said hire agreement at clauses 5 and 6 the appellant was responsible for routine maintenance and major maintenance of the vehicle and major replacements such as clutch, tyre replacement. At clause 8, the hirer was also responsible for the insurance cover. It seems that the appellant was responsible for repair of the turbo charger which he blames PW1 not refusing to repair.

In his defence, the appellant explicitly admitted that he left the vehicle with Peter Sifuna who did the repairs and he asked Peter Sifuna to use the vehicle in order to recover his money. Nowhere in the hire agreement was the appellant permitted to pledge or assign the subject motor vehicle to another person.

By giving the vehicle to a stranger, the appellant breached the terms of the hire agreement. The question I will need to answer at the end is whether that action of giving the vehicle to Peter Sifuna to use to recover his money amounted to conversion.

When PW3 arrested the appellant and interrogated him, the appellant revealed that the vehicle was held at Kitale Police Station after being found at Peter Sifuna's garage for lack of insurance cover. As submitted by Mr. Waichungo, the allegation that the vehicle had been taken to the Kitale Police Station for lack of insurance cover did not make sense. The vehicle could only have been detained for lack of insurance cover if it was being driven on the road but not parked at a garage. There must have been another reason.

The trial court found that apart from giving the vehicle to Peter Sifuna, the vehicle's number plates were changed and hence the appellant converted the vehicle. The appellant's explanation was that it is the said Peter Sifuna who changed the number plates after he left the vehicle with him to use to recover his costs; that in fact he reported to the police who came and took the vehicle to the police station. As a result, the appellant contends that the said Sifuna was a key witness and should have been called.

Section 143 of the Evidence Act provides that no particular number of witnesses is required for the proof of any fact. It means that even the evidence of one witness can prove a fact.

The prosecution has a duty to call all witnesses necessary to establish the truth even though their evidence may be inconsistent (see *Bukenya & others v Uganda* [K72] EA 549). Where essential witnesses are available but are not called, the court may draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. In this case, Peter Sifuna having been mentioned by the appellant as the person who changed the number plates, he was a key witness to explain why he would have changed the number plates. He would also have shed light on how the vehicle came to be removed from his garage to the Police Station.

Though not mentioned by the appellant, the police officer to whom the appellant allegedly made the report and who caused the vehicle to be taken to Kitale Police Station was a necessary witness to explain under what circumstances the said vehicle came to be at the Kitale Police Station.

To Prove that the appellant had converted the vehicle, the prosecution had to prove that he intended to deprive the owner of it. I do agree with the appellant's submissions that the prosecution had the duty to prove *mens rea*. In *Philip Muiruri Ndarunga v Republic (2016) eKLR*, the court held:

“It is a cardinal principle of criminal jurisprudence that mens rea of the accused person is very much essential ingredient to prove the guilt against the accused.

The essence of criminal law has been said to lie in the 'maxim lactus non facit reum nisi mes sit rea'. There can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is every other, that the essence of an offence is the wrongful intent, without which the offence cannot exist.”

The vehicle was found at Kitale Police Station after PW1 reported to Subukia Police Station. With the appellant's explanation, that it is him

who caused the vehicle to be taken there after he found Peter Sifuna had changed number plates, there are doubts as to whether the appellant intended to deprive the complainant of the vehicle. Even if the appellant had given to Peter Sifuna to use for a while, he did not leave it with him. In my view, *mens rea* was not proved. The appellant may have genuinely been unable to repair the vehicle which caused a delay in returning it to the owner which would in effect be breach of contract which is purely a civil matter. I am not convinced that any theft took place and I do not agree with the magistrate's findings.

In the end, I find that the prosecution did not prove beyond any doubt that the offence of stealing as alleged was committed. The conviction is not well founded. It is hereby quashed and sentence set aside. The appeal has merit. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at NYAHURURU this 30th day of July, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for the State

Mr. Waichungo for appellant

Appellant – present

Eric – Court Assistant