**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 18 OF 2018**

**SALIM OKUMU IMBUNDU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(from the original conviction and sentence by T. A. Odera, SPM,*

*in Mumias PMC Criminal Case No. 494 of 2017 dated 2/2/2018)*

**JUDGMENT**

1. The appellant was convicted of the offence of stealing of a motor vehicle contrary to section 278 A of the Penal Code and sentenced to 42 months imprisonment. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:-

> 1. The learned trial magistrate failed to appreciate the fact and law that there was no evidence presented in court to link the appellant with the offence charged.
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> 2. The learned trial magistrate failed to note the fact that there were two keys in respect to the stolen motor vehicle with one being in possession of the complainant and the other in possession of the appellant.
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> 3. The learned trial magistrate failed to note and appreciate the fact that the complaint being in possession of a spare key used to access the stolen motor vehicle.
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> 4. The learned trial magistrate failed to note that no evidence was tendered in court to show the complainant had instructed the appellant to park the stolen motor vehicle at Garissa Filling Station.
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> 5. The learned trial magistrate failed to appreciate the fact that there was no evidence presented to show the stolen motor vehicle was always parked at Garissa Filling Station before it disappeared.
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> 6. The learned trial magistrate failed to note the prosecution did not proof the appellant had a felonious intention to steal the motor vehicle.

2. The state did not oppose the appeal.

3. The particulars of the charge against the appellant were that on the night of 30th day of April, 2017 and 1st day of May, 2017 at Ekero Market, Ekero sub-location in Mumias Sub-County within Kakamega County jointly with others not before court stole a motor vehicle registration number KBT 298 Z make probox toyota station wagon white in colour valued at Ksh. 530,000/= the property of Benard Olunga Mumia (herein referred to as the complainant.

**Case for Prosecution –**

4. The case for the prosecution was that the complainant was operating the above stated motor vehicle as a taxi. He had employed the appellant as the driver of the motor vehicle. The appellant had worked for him for one year. He had instructions from the complainant to park the vehicle at Garissa Petrol Station every evening. That on the morning of 1/5/2017 the appellant called the complainant over his mobile phone and told him that he had on that morning gone to pick the motor vehicle where he had parked it on the previous evening and he

had found it missing. The complainant went to Mumias Police Station and found the appellant having made a report to the police. The report was that the vehicle had been parked at Ekero near Mumias Tyre Centre. PC Kimutai of the said police station investigated the case. The complainant told him that the appellant had instructions to park the motor vehicle at Garissa Petrol Station and not at Mumias Tyre Centre which are about 50 metres apart. That PC Kimutai went to Mumias Tyre Centre and found that the place was not guarded at night. The vehicle was not recovered. PC Kimutai charged the appellant with the offence.

**Defence Case –**

5. When placed to his defence the appellant gave sworn testimony in which he stated that the complainant had employed him as a driver. That the arrangement was for the vehicle to be parked at Ekero at Mumias Tyre Centre next to Garissa Petrol Station. That he, the appellant, was using the vehicle during the day while the appellant was using it at night. He would pick the vehicle from the parking every morning. That the complainant had his own key for the vehicle. That on 30/4/2017 at 8 pm he parked the vehicle at the usual place near Mumias Tyre Centre. On the following morning he went to pick it and found it missing. He called the complainant and informed him. He made a report at Mumias Police Station. He was charged with the offence. The vehicle was not recovered.

6. The appellant called one witness, Naftali Wesonga DW2 who testified that he is a motor cycle taxi (boda boda) operator. That the appellant was his client. That on a date he cannot remember in the month of March, 2017 the appellant called him at 6 a.m. and asked him to pick him at his home. He went and picked him. The appellant was carrying a jerrican. He told him that his vehicle had stalled on the way. The appellant bought fuel. They took it to where the vehicle was. They found a certain person with the motor vehicle. The appellant told him that the person with the motor vehicle was the owner of the vehicle. The appellant drover the vehicle to Ekero.

**Submissions –**

7. The advocates for the appellant, **Marisio Luchivya & Co. Advocates**, submitted that there was no evidence to prove that the appellant stole the motor vehicle. That it was shown that the complainant had a spare key to the motor vehicle. That he used to access it after the appellant had parked it. That the police did not carry out investigations on whether the complainant had taken away the motor vehicle on the day it was reported missing. That there was nothing to prove that the complainant had given instructions to the appellant to park the motor vehicle at Garissa petrol Station. That the complainant admitted that he had not made arrangements for security of the motor vehicle while parked at the said place. That the trial magistrate erred in holding that the appellant changed the vehicle's usual parking place at Garissa Petrol Station to a place next to Mumias Tyre Centre with the intention of stealing it. That the investigating officer PW2 admitted that he had no evidence that the appellant stole the motor vehicle. The advocates urged the court to quash the conviction and the set aside the sentence.

**Analysis and Determination –**

8. This is a first appeal. The duty of a first appellate court is to analyze the evidence adduced at the lower court and draw its own conclusions while bearing in mind that it did not see or hear the witnesses testify – See **Okeno –Vs- Republic (1972) EA, 32.**

9. The appellant was charged with stealing of a motor vehicle. Stealing is defined in Section 268 (1) of the Penal Code as follows:-

> ***(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.***

10. The prosecution was therefore under duty to prove that the appellant took the motor vehicle without a claim of right with an intent to permanently deprive the complainant of the motor vehicle.

11 The trial court based the conviction of the appellant on the ground that there were firm instructions from the complainant for the vehicle to be parked at Garissa Petrol Station. That the conduct of the appellant in changing the parking area of the motor vehicle to another area where it was stolen was inconsistent with his own innocence – referring to **R –Vs- Kipkering Arap Koskei & Another 16 EACA 135**. Therefore that it is the appellant who stole the motor vehicle.

12. The complainant stated that they had agreed that it is the appellant who was to pay for security for the vehicle's parking at Garissa petrol Station. The appellant on the other hand stated that the agreement was for the vehicle to be parked at Mumias Tyre Centre. That he had parked the vehicle there for one year before it went missing. He contended that Mumias Tyre Centre is next to Garissa petrol Station. The trial court said that it had taken judicial notice that the distance between Garissa Petrol Station and Mumias Tyre Centre was 100 m and not next to each other as claimed by the appellant. The investigating officer said that the distance is about 50 metres apart.

13. The prosecution did not call any witness from Garissa petrol Station to prove that the vehicle was indeed being parked there. The whole evidence therefore amounts to the word of the complainant that the vehicle was being parked at Garissa petrol Station against the word of the appellant that the same was being parked at Mumias Tyre Centre. The investigating officer does not seem to have made any enquiries from the personnel working at Garissa petrol Station whether the vehicle was being parked there. He did not take any statement from any person working there. The short of it then is that the prosecution did not prove that the vehicle was being parked at the said place. The prosecution did not disapprove the appellant's evidence that the vehicle was being parked at Mumias Tyre Centre. There was thereby no evidence that the accused changed the vehicle's parking place from Garissa Petrol Station to Mumias Tyre Centre. The trial court erred in holding so.

14. Both the complainant and the investigating officer stated that they suspected that the appellant had stolen the motor vehicle. The investigating officer said in cross-examination that he had no evidence to show that the appellant stole the motor vehicle. With that kind of evidence it was an error for the trial magistrate to find otherwise - that the appellant had stolen the motor vehicle. Suspicion however strong cannot be the basis of a conviction.

15. The trial court relied on circumstantial evidence to convict the appellant. It is settled law that when a case rests on circumstantial evidence such evidence has to satisfy three tests as was held in **Abanga Alias Onyango –Vs- Republic Criminal Appeal No. 32 of 1990** that:-

(a) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

(d) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

(c) The circumstances cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

16. In **Ndurya –Vs- Republic (2008) KLR 135** the Court of Appeal held that before convicting on the basis of circumstantial evidence the court has to be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt.

17. In the case against the appellant it was not established, as stated above, that the vehicle was being parked at Garissa petrol Station. It was not proved that the appellant changed the vehicle's usual parking place with the intention of stealing the vehicle. It is possible that another person stole the motor vehicle without the knowledge of the appellant. The evidence adduced by the prosecution did not unerringly point at the appellant as the thief to the exclusion of everybody else.

18. The upshot is that the prosecution had not proved that the appellant is the one who stole the complainant's motor vehicle. The trial court erred in convicting the appellant. The conviction is thereby quashed and the sentence set aside. The appellant is set at liberty forthwith unless lawfully held.

**Delivered, dated and signed in open court at Kakamega this 29th day of July, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Miss Omondi for state

Mr. Luchivya for appellant

Appellant - present

Court Assistant - George

14 days right of appeal.