



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 24 OF 2019**

**RICHARD SETH ODHIAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against judgment, conviction and sentence in Criminal Case Number 196 of 2017**

**in the Senior Resident Magistrate's Court at Winam by Hon. B.Kasavuli (SRM) on 09<sup>th</sup> May, 2019)**

**JUDGMENT**

1. On 09<sup>th</sup> May, 2019; the Appellant was convicted for the offence of Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code and stealing motor vehicle contrary to Section 278A of the Penal Code and was sentenced to serve 2 and 4 years' imprisonment respectively.

**The Appeal**

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 20<sup>th</sup> May, 2019 in which he raised 7 grounds which I have summarized into one (1) grounds **THAT:**

**The learned trial magistrate erred in law and in fact in holding that the prosecution had proved its case beyond any reasonable doubt**

3. When the Appeal came up for hearing on 16<sup>th</sup> July, 2019, Mr. Sala advocate for the Appellant submitted that the Appellant was wholly relying on the grounds of appeal and written submissions filed on 16<sup>th</sup> July, 2019. Ms. Gathu, learned counsel for the state stated that the state was opposing the appeal on the basis of written submission also filed on 16<sup>th</sup> July, 2019.

**Analysis and Determination**

4. This being a Court of first Appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC (1972) E.A. 32**, where it held that: -

**“It is the duty of a first Appellant Court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”**

5. I have carefully considered the written submissions filed on behalf of Appellant and by the state.

6. Section 268 of the Penal Code Chapter 63 Laws of Kenya defines stealing as follow:

**1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.**

**(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 intent 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;**

**(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although**

7. From the evidence on record, it is apparent that the complainant Lilian Achieng Nyamema and the Appellant were lovers and cohabited together. It is on record that the complainant bought motor vehicle KBT 237G (**hereinafter referred to as the subject motor vehicle**) and fully paid its purchase price. Complainant testified that she returned home on 15<sup>th</sup> March, 2015 to find that the Appellant had left her house and gone away with the subject motor vehicle and ownership documents without her consent.

8. In his defence, the Appellant conceded that he had cohabited with the complainant from 2011 and that the complainant bought the subject motor vehicle in 2012. He denied stealing the subject motor vehicle and asserted that it was gifted to him in 2013 and further that sometimes in 2014, complainant left him a note together with the logbook of the original owner of the subject motor vehicle and transfer form and asked him to transfer the vehicle to his name which he did and was issued with a logbook on 15<sup>th</sup> March, 2014.

9. In his judgment, the learned trial magistrate acquitted the Appellant of the offence of uttering a transfer form which was alleged to have been made without authority. Essentially, this finding confirmed that the transfer of the subject motor vehicle was effected on the basis of a lawful document. Consequently, the trial court's finding that the transfer was not proper is a contradiction. The trial court did not expound on what form the complainant ought to have given her consent for the transfer of the subject motor vehicle to the Appellant in view of the fact that the original logbook and the transfer form were not in complainant's name but in the name of the previous owner.

10. Further to the forgoing, the complainant told court that the Appellant stole the subject motor vehicle and its ownership documents from her around 15<sup>th</sup> March, 2015. Essentially, the Appellant knew that the subject motor vehicle and the ownership documents had been allegedly stolen as early as March, 2015. It was her evidence that even after March, 2015, she used to meet the Appellant walking within Kisumu but did not report the alleged theft until 08<sup>th</sup> March, 2017.

11. I have considered the Appellant's defence that the vehicle was gifted to him by the complainant vis a vis the complainant's conduct of not reporting the alleged theft to the police for a period of two years from the time she discovered the alleged theft and I do not find it difficult to believe the Appellant that the theft report was fabricated for reasons only known to the complainant.

12. An Appellate Court will not normally interfere with findings of fact by the court below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the court below is shown demonstrably to have acted on wrong principles in making the findings. (See **Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR**). From the foregoing analysis, I have come to the conclusion that the prosecution did not prove its case beyond any reasonable doubt and the conviction cannot therefore be sustained. (See **Republic v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR**).

13. In the upshot, I find that the appeal has merit and it is hereby allowed. The conviction against the appellant is quashed, and the sentences are set aside and unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

**DATED AND SIGNED THIS 25<sup>th</sup> DAY OF July 2019**

**T. W. CHERERE**

**JUDGE**

**IN THE PRESENCE OF**

**Court Assistant: Felix & Okodoi**

**Appellant:**

**For the Appellant:**

**For the state:**