



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 25 OF 2017

(Being an appeal arising from conviction and sentence in Kitale

Chief Magistrate's Court Criminal Case No. 1092 of 2015 delivered

by C.C. Kipkorir – Resident Magistrate delivered on 2/3/2017.)

MATHIAS WANGILA MAKOKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Stealing Motor vehicle contrary to Section 265(1) as read with Section 278(A) of the penal code**. The particulars of the offence were that on **30th March 2014 at Kitale town Trans Nzoia County jointly stole a motor vehicle make Probox Toyota station wagon Registration number KBN 512Z valued at Kshs 300,000/- the property of Samuel Juma Makhanu .**
2. The appellant was convicted and sentenced to serve 16 months imprisonment which he has served in full according to his counsel . He however wishes to proceed with appeal regardless.
3. The appellant has raised several grounds and before delving into them it would be worthwhile to summarise the proceedings at the trial court.
4. **PW1 Samuel Juma Makhanu** the complainant told the court he purchased the Motor vehicle on 18/8/14 from one Tom Njoroge for the sum of kshs 350,000/- and he produced the sale agreement witnessed by Kidiavai & Company Advocates. After staying with it for a week he sort for a driver and he found the appellant who was his friend. He allowed him to use the vehicle for taxi purposes at Eldoret.
5. Later in December 2014 the appellant called for the gage log book as the vehicle had been detained at Eldoret police station. In January 2015 he inquired of the vehicle documents from the appellant who became evasive.
6. Later he was traced to Kakuma refugee camp where an agreement was recovered in which it showed that he had sold the vehicle to one Isaac Wangui on 30/12/2014 for a total purchase consideration of Kshs 300,000. He was arrested and the vehicle traced and recovered at Othaya police station in Nyeri.
7. During cross-examination it emerged that the appellant and the complainant were members of Simei Co-operative Self help group.
8. **PW2 Moses Wangila** was the treasurer at Simei housing cooperative where the complainant borrowed the sum of kshs 350,000/- to purchase the car. He testified that the car was being driven by the appellant as a public service vehicle or taxi by the appellant.
9. **PW3 Amos Wafula** was the chairman Simei cooperative society and he also testified that the complainant borrowed some money in August 2014 to purchase the vehicle and he gave it to the appellant who used it as a taxi. He infact released the vehicle documents to the appellant so as to release it from the police station. He also said that he was among the people who went to Kakuma and had the appellants arrested.
10. **PW4 PC Benjamin Koome** produced the photographs of the said motor vehicle as exhibits.

11. **PW5 PC Sammy Kimanzi** carried out the investigation and preferred charges upon the appellant.

12. When put on his defence the appellant denied the charges. He said that he borrowed a loan from Nacho Housing society of Kshs 300,000/-. He gave out 3 log books of his motor cycles as security. The total amount borrowed was Kshs 500,000/- and according to him the 300,000/- given to the complainant was his. That amount was used to purchase the said motor vehicle. He said that he gave the money (kshs 100,000/-) to the complainant but the agreement they signed was taken while at Kakuma. He was given the log book and other documents of the vehicle and he took insurance for the same. He later sold the same to Isaac Nderitu and entered into a sale agreement. He denied that the vehicle was ever impounded and that the same was in use at Kitale.

13. **DW2 Nelson Wamalwa Maranga** testified that he was a member of Simei housing cooperative and knew the appellant as well as the complainant. He said that in 2014 members borrowed loan where the appellant borrowed kshs 3000,000/- and the complainant Kshs 100,000/-. He said that the appellant loan was given to the complainant. On 29/9/14 the appellant paid to Samwel Kshs 100,000/- and he in turn gave him all the legal documents. According to his evidence therefore the vehicle all along belonged to the appellant and not the complainant.

Analysis and Determination

14. This being a first appeal the court is enjoined to reevaluate the evidence afresh and come up with afresh independent decision taking into account the fact that it never had the opportunity to hear the parties during trial. I have perused the parties written submissions on record.

15. What runs across the grounds of appeal is whether or not the case was proved beyond the shadow of doubt. The substantive issue is who owned the motor vehicle? Did the complainant surrender his rights to the appellant when he handed him the motor vehicle? Was the vehicle jointly purchased by the appellant as well as the complainant by virtue of being members of Simei housing cooperative?

16. I have perused the exhibits and in particular the sale agreement dated 13th August 2014 in which Joram Njoroge Gathihi sold the said motor vehicle to Samuel Juma Makhanu for a sum of Kshs 350,000/- which amount he paid in full. The appellant did witness the same together with 2 others.

17. The other sale agreement is that dated 30/12/2014 between Mathew Wangila Makokha in which he sold the same vehicle for the sum of kshs 300,000/- to one Isaac Nderitu Wangui his co-accused who was released for lack of sufficient evidence.

18. Is it true then that the loan taken by the complainant actually belonged to the appellant as he put it in his defence? If so why did he permit the complainant to purchase the vehicle on his behalf?

19. I have perused Defence exhibits NO. 2, a loan Approval form for National cooperative Housing Union Ltd in which one Isaac Simiyu Nyongesa was applying for some loan and the appellant together with 4 others guaranteed the same.

20. There is nothing to show that the loan was ever paid. In any case there is nothing to connect the complainant with the said loan. If it was fully paid, the court has not been shown any documents to that effect.

21. In my view therefore the appellant defence was simply a sham. He tried to create something out of nothing. If the loan allegedly approved was his there was nothing for him to have signed the sale agreement at Kidiavai & Company Advocates as the purchaser and not the witness. Why would he witness yet he ought to have been the principal person. In any event what shows that the complainant borrowed some loan?

22. The insurance of the vehicle appears from the record took place while the appellant was using it as a taxi. The documents had already been availed to him. The insurance cover does not in any case indicate the ownership of the vehicle.

23. The appellant has also argued that it was not clear who owned the vehicle. I respectfully do not think so. The initial agreement showed the complainant and not the cooperative society.

24. As to the fact that the loss was not immediately reported, as claimed by the appellant, I do not think this holds water. The complainant as well as his witness clearly explained how they had trusted the appellant who was their member to handle the vehicle and get profit out of it.

25. In the premises I do find that the case was proved beyond reasonable doubt. The appellant took advantage of the trust bestowed upon him by the complainant to utilise the vehicle as a public service vehicle and therefore make profit out of it. Its a cock and bull story that the complainant had taken the loan on his behalf. After selling the vehicle the appellant took cover at Kakuma till when he was smoked out.

26. This appeal must and ought to fail. Its dismissed accordingly.

Delivered, signed and dated at Kitale this 20th day of March 2018.

H.K. CHEMITEI

JUDGE

20/3/18

In the presence of:

M/s Kakoi for the Respondent

Arunga for the Appellant

Appellant – present

Court Assistant – Silvia

Judgment read in open court.