



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 36 OF 2017

CHRISTOPHER MAINA GATHONDIA ALIAS JAMES MAINA KANYINGI;

ALIAS MUGUKU WANYORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against both conviction and sentence from the judgment of Hon.B.M.Ekhubi the Senior Resident Magistrate's Court, Othaya delivered on 27th June, 2017 in Criminal Case No. 538 of 2016)

JUDGMENT

FACTS

1. The appellant, **Christopher Maina Gathondia alias James Maina Kaningi alias Muguku Wanyoro**, was charged on Count I with the offence of Stealing a Motor Vehicle contrary to **Section 278 A** of the **Penal Code**; on **Count II** the charge was that of Having Suspected Stolen Property contrary to **Section 323 of the Penal Code**; and the alternate charge was that of Handling Stolen Goods contrary to **Section 322(2)** of the **Penal Code**;
2. The particulars of the charge on **Count I** was that on the 12th day of June, 2016 at Kiinu Village in Nyeri South Sub-County, jointly with others not before the court stole motor vehicle Reg.No.KAS 574A make Toyota Station Wagon valued at Kshs.320,000/- being the property of John Thuku Muiko.
3. **Count II**, was that on the 14th day of June, 2016 at Gikira bridge along the Othaya Mukurweini road in Nyeri South Sub-County the appellant jointly with his co-accused were found by police officers namely Corporal Odhiambo Force No.74942 and PC Ann Owino Force No.85877 having a motor vehicle plate registration No. KAW 242X which was reasonably suspected to have been stolen or unlawfully obtained and fixed in motor vehicle registration number KAS574A make Toyota Station Wagon.
4. The particulars of the alternative charge of handling stolen goods was that the appellant on the same date at Gikira bridge along the Othaya Mukurweini road within Nyeri South Sub-County, jointly, otherwise than in the course of stealing dishonestly retained motor vehicle registration number KAS 574A Toyota Station Wagon which was fixed with false number plates registration number KAW 242X knowing or having reason to believe it to be stolen property.
5. The prosecution called a total of three (3) witnesses in furtherance of its case; the appellant was convicted on the two Counts and was sentenced on Count I to a term of four (4) years imprisonment; and on Count II to a term of one (1) year; the court did not give any indication on the manner the sentences were to run.
6. Being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal on the 7th July, 2017 together with the Supplementary Grounds of Appeal as hereunder summarized:-
 - (i) The evidence of the complainant was insufficient, unsatisfactory and unsafe to support a conviction; the evidence adduced by the prosecution witnesses was inconsistent; and the evidence was full of contradictions;
 - (ii) The police officers who were key witnesses were not called to testify;
 - (iii) Crucial items were missing from the Inventory Recovery Form making it incomplete; the prosecution failed to discharge the burden of proof to the desired threshold;

(iv) The trial court failed to consider the appellant's credible defence;

7. At the hearing hereof the appellant was unrepresented and relied on his written submissions; whereas the State was represented by Prosecuting Counsel Mrs Gicheha who made oral submissions; hereunder are the parties rival submissions;

APPELLANTS SUBMISSIONS

8. The evidence of **PW1** was that he did not know who had stolen his motor vehicle from his compound; he did not know how the appellant was arrested; and he was also unable to identify the appellant as the person who stole his motor vehicle; his evidence was insufficient, unsatisfactory and unsafe to support a conviction;

9. Evidence based on identification must be absolutely water tight; the evidence of **PW1** did not connect the appellant with the offence; and relied on the case of **R vs Eria Sebwato 1960 EA 174**;

10. There were four (4) crucial witnesses who were not called by the prosecution to testify; these key witnesses were mentioned in the evidence of **PW3** as being present at the scene of crime and ought to have been called to testify so as to corroborate the evidence of **PW3**; the failure to summon them to testify infers that their evidence would have been adverse to the prosecution's case; case referred to **Reuben Gitonga vs R CR.App. No. 349 of 2009 (UR)**;

11. The evidence of **PW1** and **PW3** was inconsistent and full of contradictions; no one was with **PW3** when the motor vehicle was recovered; and no one could verify to the trial court as to where and how the appellant was arrested; therefore **PW3's** evidence without the evidence of the other crucial witnesses amounted to that of a single identifying witness; the trial court erred in relying on this evidence which was not credible nor was it corroborated; not all the items recovered were listed on the Inventory Recovery Form;

12. The evidence of **PW2** was not of any cogent value to the case and did not link the appellant to the vehicle; the prosecution failed to prove its case to the desired threshold;

13. That trial court failed to consider his defence of alibi which was credible and well corroborated by that of his two (2) defence witnesses; and that it displaced the prosecution's case;

14. The appellant urged this court to re-assess and re-evaluate the evidence and to allow the appeal in its entirety; that the conviction be quashed and sentence be set aside.

RESPONDENTS SUBMISSIONS:

15. In response the respondent made the following submissions;

(i) The appellants contention was that the five (5) year sentence was harsh and excessive in the circumstances; and that the trial magistrate failed to indicate whether the sentences were to run concurrently or consecutively;

(ii) The sentences meted out by the trial court were not harsh and excessive in the circumstances; Section 278 (D) of the Penal Code attracts a sentence of seven (7) years; by giving him a sentence of four (4) years the trial court was lenient and took into consideration that he was not a first offender; and that was in 2003 in Cr.Case 503 of 2009 where he had been sentenced to three (3) years imprisonment for a similar offence of theft of a vehicle; that the court was indeed lenient and it ought to have meted out the maximum sentence because he was a repeat offender;

(iii) The appellant stated that the evidence of **PW1** and **PW3** was contradictory;

(iv) The evidence of **PW1** was that he was the owner of stolen motor vehicle; he narrated how the parked vehicle had been stolen from his compound on the night of 11/06/2016; he reported the loss at Kariko Police Post; the motor vehicle was recovered and he was called to identify it at the CID Office in Othaya; he confirmed that it was his vehicle although it had been slightly modified; in that the windows had been tinted and the insurance sticker on the windshield had been changed and the bumper had reflectors; he tendered into court the Log Book and Sale Agreement as evidence to prove ownership;

(v) **PW1** described his vehicle before and after it was stolen and he had adequate proof of ownership; the details of the vehicle were established by the engine number and chassis number found on the LogBook; this evidence was not challenged by the appellant;

(vi) The evidence of **PW3** was that he was on patrol with two other officers on the night of 14/06/2016 when they came across the motor vehicle parked alongside the road; they stopped to enquire from the occupants whether they had a problem; the appellant was seated on the driver's seat; he was ordered to open the window and that he refused to comply and attempted to drive off; **PW3** then broke the window and snatched the ignition key; he then proceeded to arrest the occupants and booked them at Othaya Police Station; the motor vehicle was towed;

(vii) That he conducted a search in the vehicle and found two mobile phones, safaricom sim cards, mobile phone batteries, a crow-bar, the appellants driving licence and an ID of Moses Mwai Muraya; the appellant could not explain how he came into possession of all these items;

(viii) The investigations included writing to the Registrar of Motor Vehicles to enquire on the ownership of motor vehicles KAW

242X and KAS 574A; discovered first car in the name of James Theuri who had sold it to **PW1**; and latter registration plate belonged to Jane Laban Wamugunda; whom the Investigating officer was unable to locate; **PW1** was called to identify the vehicle and confirmed that the vehicle had slight modifications; **PW1** and **PW3**'s narrative evidence on the vehicle was the same; there was consistency in their evidence and no contradictions that go to the root of the prosecution's case; and **PW2** corroborated their evidence

(ix) The appellant contends in one of the grounds of appeal that key witnesses who were officers on patrol with **PW3** on the material night; reference made to Section 143 of the Evidence Act which gives the prosecution the discretion to call any number of witnesses to prove its case;

(x) In this instance the prosecution called the number of witnesses it needed to call; the appellant never disproved that he was arrested by **PW3**.

(xi) The stolen vehicle was the one found in possession of the appellant three days after it was stolen and he was properly placed at the scene; the trial court properly invoked the doctrine of recent possession which formed the basis of the appellants conviction; the appellant had a duty to explain possession but failed to give reasonable explanation; therefore the presumption was that he was the thief;

(xii) The appellant submitted that his statement of defence not considered; that he was arrested in a blue vehicle while transporting milk; that **PW3** had a grudge arising from a land dispute; but the appellants evidence and that of his two witnesses didn't convince the trial court as to what he was doing inside the motor vehicle and what he was doing at the scene;

(xiii) The defence was a mere after thought and didn't displace the prosecution's case which was water tight; the appellant signed an inventory; and he admitted to having a previous record;

(xiv) Counsel prayed that the appeal be dismissed and the conviction and sentence be upheld.

REJOINDER

16. The record shows that **PW1** never stated that the vehicle was damaged; **PW3** told the court that he broke the window; but the vehicle does not look damaged; no finger prints were lifted from the vehicle; that there was nothing to connect him to the possession of the motor vehicle; that the alias was not his name; that he was not charged for using false names; and no keys included in the inventory;

ISSUES FOR DETERMINATION

17. After taking into consideration the forgoing submissions made by the appellant and those of the Counsel for the State, this court has framed the issues as set out hereunder for determination;

(i) Whether the trial magistrate correctly invoked the provisions of the doctrine of recent possession; whether the prosecution proved its case to the desired threshold;

(ii) Whether the prosecution failed to call crucial witnesses;

ANALYSIS

18. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Reference is made to the case of **Okeno vs Rep (1972) EA 32**.

Whether the prosecution failed to call crucial witnesses; Whether the evidence proffered by the prosecution was sufficient to support the convictions; whether the prosecution proved its case to the desired threshold;

19. The appellant contends that the other police officers who accompanied **PW3** and at time he was arrested were not called to testify; that they were eye-witnesses and crucial witnesses and would have corroborated the evidence of **PW3**; that this action was deliberate as their evidence would have been adverse to the prosecution's case;

20. The evidence of Corporal Richard Odhiambo (**PW3**) as recorded by the trial court was that on the 14th June, 2016 at about 3.00am he was on regular patrol together with PC (W) Owino and PC (D) Gitonga when they came across a motor vehicle reg.no KAW 242X parked near Gakindu Bridge along Othaya- Mukuruweini Road; that upon checking he found two persons sitting inside the vehicle and that the appellant was seated on the driver's seat; he testified that he ordered them to open the car but the appellant ignited the car and attempted to drive off;

21. The evidence of **PW1** was that he did not know or see who stole his motor vehicle; that he went to identify the motor vehicle at Othaya Police Station; that despite some modification viz tinted windows, sticker on the windscreen, reflectors on the bumpers, he was able to identify the vehicle; that the car was intact and that nothing was missing or vandalized; no mention was made by this witness of a broken window; had he mentioned a broken window this would have corroborated the evidence of **PW3** on how he took possession of the vehicle from the appellant;

22. **PW2** who was scene of crime investigator gave evidence and produced the pictures that he took of the motor vehicle; this court notes that apart from taking pictures this witness did nothing else; there is no evidence on record of dusting for the appellants finger prints either inside or outside of the motor vehicle which would have established the presence of the appellant inside the vehicle and corroborated the evidence of **PW3** on possession of the motor vehicle by the appellant;

23. Further upon perusal of Pexb.5(a) – (e) and PExb.6 and in particular the pictures; there is no medium view shot of the motor vehicle from a side view on the driver's side showing the broken window; this too would have corroborated the evidence of **PW3**; all in all this court finds that the evidence of **PW2** was not of any cogent value to the case and did not link the appellant to the vehicle;

24. Under the provisions of Section 143 of the Evidence Act the State is obligated to call only the number of witnesses that it thinks is sufficient to prove its case; the evidence of the two police officers PC (W) Owino and PC (D) Gitonga who were on regular patrol with **PW3** on the material date when the appellant was allegedly found in possession of the motor vehicle was not an option; they would have shed light on whether indeed they came across a motor vehicle reg.no KAW 242X parked near Gakindu Bridge along Othaya- Mukuruweini Road; and the appellant and his co-accused found seated inside;

25. There is no doubt that **PW1's** car was stolen; but there was no evidence on identification of the person who stole the motor vehicle; there is only the evidence of **PW3** on possession which is uncorroborated; and in the absence of the evidence of the two police officers there is insufficient evidence for this court to arrive at a conclusion solely based on the evidence of **PW3** of the appellant being found in possession of the stolen motor vehicle; this court reiterates that his evidence required corroboration;

26. This court also finds that the appellants defence of alibi was well corroborated by his two (2) defence witnesses; and that it raises doubts as to the place the appellant was arrested; and displaced the prosecution's case;

27. For this reason the evidence proffered by the prosecution is found to be insufficient to support the convictions; the prosecution is found to have failed to have proved its case to the desired threshold;

28. The three grounds of appeal are found to have merit and are hereby allowed;

FINDINGS

29. For those reasons this court makes the following findings;

(i) The evidence proffered by the prosecution is found to be insufficient to support the convictions; the prosecution is found to have failed to have proved its case to the desired threshold;

(ii) The prosecution was not obligated to call any particular number of witnesses; but failure to call the two (2) crucial witnesses is found to have been fatal to the prosecution's case;

DETERMINATIONS

30. The appeal is found to be meritorious and is hereby allowed;

31. The convictions are hereby quashed;

32. The sentences are hereby set aside;

33. The appellant to be set at liberty forthwith unless otherwise lawfully held;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 14th day of June, 2018

HON.A. MSHILA

JUDGE