



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NYERI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 10 OF 2016

BETWEEN

BERNARD MUCHERU KIBOI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against original conviction and sentence in Nyeri CMC CR Case No. 620/2013 delivered by Hon. D. Orimba Principal Magistrate on 1st February, 2016)

JUDGMENT

INTRODUCTION

1. The appellant herein Bernard Mucheru Kiboi was tried for the offence of stealing a motor vehicle contrary to Section 278 A of the Penal Code, the particulars being that on the 17th day of May, 2013 at Meeting Point in Nyeri Central District within Nyeri County, he stole a motor vehicle Registration No. KBS 133 V, a Toyota Fielder valued at Kshs.1,000,000/-, the property of Josephat Murimi. The appellant pleaded not guilty to the charge and the case went to full trial during which the prosecution called 7 witnesses.

2. The complainant Joseph Njenga Murimi was PW1, Samuel Matarus Mugogu was PW2, while Gladys Wairimu Muriuki the owner of the car wash business from where the complainant's car was stolen, testified as PW3. Samuel Kibui Maina, another customer of PW3 testified as PW4, while Daniel Kihara Ndiri one of the employees at the car wash business, testified as PW5. Number 93541, PC Robert Mugehe of Nyeri Police Station was PW6. He was the arresting officer. Number 48967 Cpl Fredrick Mbingu the investigating officer testified as PW7.

The Prosecution Case

3. Briefly, the prosecution case is that on 16th May, 2013, the appellant went to PW3's car wash business seeking to be employed as a car washer. Since PW3 was at the time on maternity leave, she only spoke to the appellant through the telephone number of PW3's husband when it was agreed that PW3 would interview the appellant the next day which was 17th May, 2013. It was also agreed between PW3 and the appellant that once the appellant got to the business premises on 17th May, 2013 he would call PW3 so that she could go to the business premises for purposes of interviewing the appellant.

4. On 17th May, 2013, the appellant went to the car wash premises but he did not notify PW3 that he had reported as agreed. Instead, the appellant got busy even before he was hired with trying to get customers coming to the car wash to let him wash their cars. One of the people the appellant approached was PW4, Samuel Kibui Maina but PW4 declined because he already has his own person who used to wash his car and because the appellant was a stranger. The appellant made three other futile attempts to get people bringing their cars to the car wash to let him do so. Eventually, when PW1drove into the car wash premises he agreed to have his car washed by the appellant. PW1 handed over the car and the keys to the appellant as he and PW4 went across the road to enjoy some roast meat as their cars were being washed.

5. According to PW2, the appellant washed PW1's car very fast, sat in it, turned it and then drove off with the car. PW1 was notified and together with PW4 they drove to Nyeri Police Station in PW4's car and reported the incident. PW3 was also informed about the incident and she went to the business premises to await arrival of the police and to get a physical description of the appellant which was given to her by PW2 and PW3 as well as PW5.

6. After making the report, PW1 was accompanied to the scene by police officers from Nyeri Police Station who took statements from witnesses.

7. On 26th August, 2013 at around 10.00 p.m., the appellant who initially identified himself as Josephat Mutugi Chege was arrested in Nyeri town around the Taifa Sacco area. The appellant was in company of one Jacob Mburu Wanjiru and both were handed over to Nyeri CID by Number 93541 Pc Robert Mugehe of Nyeri Police Station. Later it was established by the police that the appellant's correct name is Bernard Mucheru Kiboi.

8. PW7 investigated the case. He gave a summary of the facts given to him by PW2, PW3, PW4, PW5 and PW6. PW7 reiterated PW 6's testimony, that the appellant was arrested while in the process of trying to steal another car, a Toyota Probox around the Taifa Sacco. PW7 also testified that though he had arranged for an identification parade, the appellant refused to participate in it on grounds that his photograph had earlier been taken. PW7 stated that the appellant's allegations were untrue. The appellant had also alleged according to PW7 that he had stayed with PW3 at the car wash for a long moment and that he could therefore be easily identified.

9. PW7 produced the records from the Registrar of Motor Vehicles on motor vehicle KBS 133V and a copy of the identification parade form as P. Exhibits 2 and 3 respectively.

Defence Case

10. When put on his defence at the close of the prosecution case, the appellant gave sworn evidence to the effect that on 10th May, 2013, he was admitted at Nakuru Provincial Hospital for typhoid and pneumonia and was discharged on 25th May, 2013. He produced a document which he called a receipt as D. Exhibit 1. He denied committing the offence. He also testified that he was arrested while looking for a place to sleep after arriving late in the night in Nyeri from Nakuru.

11. DW2 was Susan Wairimu who stated that she was wife to appellant and that he was admitted in hospital at Nakuru on 8th May, 2013 until 24th May, 2013 when he was discharged. It was also her testimony that the appellant left the hospital on 25th May, 2013, despite having been discharged on 24th May, 2013.

Judgment of the Learned Trial Court

12. Though this case was heard by more than one Magistrate, it is Hon. D. Orimba who wrote and delivered the Judgment after hearing evidence from the appellant and his witnesses. After carefully considering the whole of the evidence on record, the Learned Trial Magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was accordingly found guilty as charged, convicted and sentenced to 4 years imprisonment.

The Appeal

13. The appellant was aggrieved by the entire Judgment and accordingly filed his petition of appeal on 5th February, 2013. In the appeal, the appellant is only complaining against the severity of the sentence which he says is excessive and wants it reduced. He also says that his long period in custody has made him contract serious tuberculosis (TB).

Submissions

14. I have considered the appellant's as well as the respondent's submissions on the appeal. I have also carefully considered the grounds of appeal and the evidence on record. This is a first appeal and same is on sentence only. It is thus incumbent upon this Court to determine whether the sentence imposed by the Trial Court was appropriate in the circumstances, remembering however, that sentencing is a matter of discretion by the Trial Court.

Issues, Analysis and Determination

15. As already stated herein above, the issue for determination is whether there are any good grounds for interfering with the sentence in this case. In *Nilsson vs Republic (1970) EA 599*, the Court held that in assessing sentence, "the fact that an accused pleads guilty should be taken into account". In *Griffin vs Republic*, the Court held inter alia, "that the Court of Appeal cannot interfere with the sentence solely on the ground that it was heavy, unless it was also manifestly excessive. In sentencing, the Court must exercise its discretion depending on the circumstances of the case".

16. In the instant case, the appellant did not plead guilty. Secondly, when he was asked to say something in mitigation, he simply stated, "I have been in custody for long. I pray for leniency." Thus, the appellant showed no remorse for the offence which he has now admitted by not challenging the conviction. It was also noted during the hearing that PW 1's car was never and has never been recovered. From the record also the appellant was not a first offender because he had been charged with stealing in *Embu CMC Cr. Case No. 1219/2013*, tried, convicted and sentenced to 2 years imprisonment.

17. A look at Section 278A of the Penal Code under which the appellant was charged provides that a conviction for stealing of a motor vehicle within the meaning of the Traffic Act calls for imprisonment for seven years. Under Section 2 of the Traffic Act, "motor vehicle" means "any mechanically propelled, vehicle, excluding any vehicle running on a specially prepared way such as a railway or tramway or any vehicle deriving its power from overhead electric power cables or such other vehicles as may from time to time by rules under this Act be declared not to be motor vehicles for the purpose of this Act".

18. From all the foregoing it is not correct as submitted by the appellant that the sentence imposed upon him was excessive. He was not a first offender and he showed no remorse for the fact that through his acts, PW1 lost his motor vehicle, in fact, from the appellants conduct on the day he committed the offence he was determined to commit the offence, at whatever cost. It is also clear that the appellant did not

commit an ordinary theft.

Conclusion

19. I find that the appellant's appeal on sentence lacks merit and the same is dismissed. In fact, if the respondent's counsel had been vigilant and addressed the Court on the issue of enhancing the sentence, this Court would have done so.

20. These are the orders.

Judgment delivered, dated and signed in open Court at Nyeri on this 28th day of September, 2018.

RUTH N. SITATI

JUDGE

In the presence of:-

Present in person

Mrs Owuor for Respondent

Scholastica - Court Assistant