



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL

No. 2 of 2018

BETWEEN:

FREDERICK ALWANGA AMUNGUAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. E. Nderitu SPM at SPM's Court Voi. CR. Case No.730 of 2016 delivered on 14th July 2017)

J U D G M E N T

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL

No. 6 of 2018

BETWEEN:

ELIAKIM ONYAMATOGO OKITUIAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. E. Nderitu SPM at SPM's Court Voi. CR. Case No.730 of 2016 delivered on 14th July 2017)

J U D G M E N T

1. The Court has before it two appeals against conviction and sentence. Both appeals arise from and are brought against the Judgment of Hon E. Nderitu SPM delivered at the SPM's Court in Voi on 14 July 2017. On that day the Appellants were jointly convicted of stealing a motor vehicle contrary to **Section 278A of the Penal Code**.

2. The particulars of the offence and what the Appellants were convicted of is that at some time between the night of 9th September 2016 and the early morning of 10th September 2016 jointly with others not before the Court they stole a Motor Vehicle Registration No. KCC854B, a white Toyota Probox, valued at KShs.650,000/=, the property of Frederick Kavoi Nzimbi from Maungu Trading Centre, Taita Taveta County. The Prosecution called 7 witnesses. The First Accused gave sworn testimony in his defence but called no witnesses. The Second Accused gave unsworn evidence in his defence and similarly called no witnesses.

3. The evidence before the Court was that the Complainant at first lost his car keys on or about 27th August 2016. He assumed that he had

misplaced them and they had been picked up by someone else. However on the morning on 10th September 2016 he found that the car had been stolen. The car had a tracking device and the tracking company located it first in Mololongo in the outskirts of Nairobi, then on Gitanga Road and finally on Waiyaki Way near the Total Petrol Station at Kangemi. The car was then disabled. The occupants believing the car to have stalled because it ran out of fuel set-off to purchase petrol from the nearby petrol station. In the meantime the Police in Kabete were alerted and managed to arrest both accused in possession of both the car and the missing key. The Learned Trial Magistrate found that all the components of the offence had been proved. The property was positively the property of the Complainant. Said property was stolen. The property was found in the possession of the Accused. In the circumstances she convicted both the Accused.

4. The First Accused/Appellant is recorded as being a Muslim and he gave sworn testimony. He stated that he was a resident of Kabete Kiambu County where he worked as a supermarket attendant. He claimed that on 10 September 2016 when he was arrested, he had been at work but left early because he had an epileptic fit. He claims he was arrested at the stage waiting for a matatu. He stated that the Complainant did not know him and that he was subjected to beating and extortion by PW-7 the scenes of crime officer in Voi but that was not put to the officers in cross-examination although it was put by the Second Accused to PW6.

5. In relation to the First Accused (***Appeal No 2 of 2018***), he stated that he was an orphan with responsibilities and was epileptic. The Second Accused said he was asthmatic and suffered from eye problems. Having considered the mitigation and the fact that the two accused were first offenders (although there is no probation report on the file confirming that fact), the Learned Trial Magistrate said; "I have duly considered that the accused persons are first offenders. Mitigation too considered. *"The nature of the offence is too considered and there is need to teach accused persons a lesson that it does not pay to leap where one has not sown (sic). Each is hereby sentenced to three (3) years imprisonment"*. The Accused were informed of their right to Appeal within 14 days.

6. The First Accused did not petition to Appeal the conviction and sentence until 23 January 2018. In his Application for leave to appeal out of time he said he filed the appeal late because firstly he did not understand that the time to appeal was limited to 14 days. He also said that he was waiting for his family to hire a lawyer for him but he did not have sufficient funds. Hon J. Kamau J granted the prayer and allowed the Appellant to file his Appeal out of time. She listed the matter for directions in February but she did not admit the Appeal for Hearing. On 14th June 2018 this Court declined to admit the Appeal. The matter was listed for directions. On 25th June 2018 the First Accused/Appellant was granted leave to file Amended Grounds of Appeal. On 17th July 2018 he filed the following Grounds of Appeal:

1) *I am indeed remorseful*

2) *The sentence is excessive by convection standard considering I am a first offender*

3) *The learned trial magistrate erred in both law and fact and failed to take into consideration that the appellant had overstayed in remand custody*

4) *I promised to abide by any condition that will be set, forth for my release from prison as the honourable court may deem fit and proper in the circumstance*

5) *The confinement in prison is harsh because I am now being exposed to more hardened criminals in custody which might make it difficult for me to reform in future*

6) *The Learned trial magistrate erred in both law and fact fails to take into consideration the defense given by the appellant."*

7. In his Written Submissions the First Accused/Appellant asks the Court to disagree with the findings of the trial magistrate concerning sentence. He claims the trial magistrate did not consider the period of one year the Appellant spent in prison on remand. He also feels that the evidence of PW1 and PW 2 were inconsistent. He claims to have been framed. That is a complaint not raised during the trial. He asks the Court to quash the conviction.

8. The Respondent, the State filed its Written Submissions on 25th September 2018 in both files. The Submissions set out the particulars of the offence of Stealing as set out in ***Section 268 of the Penal Code*** which are:

268. Definition of stealing

(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;

(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 he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move

9. The Submissions then set out the salient points of the Prosecution evidence namely that the Complainant was the owner of the Motor Vehicle and he had produced his log Book as Exhibit 1. He had given evidence of how he lost his key but continued using the car with a replacement key. He explained that early on the morning of 10th September 2016 he discovered that the car was missing. He related how he sought assistance from the APs and the Police in Voi and ultimately decided to contact the Company that had installed the tracker and they located the car to a point where the Police from Kabete located it. The Accused/Appellants were both arrested at that point.

10. The duties of the Court on a first appeal are well known and oft-repeated. However, there is always benefit in restating them. The duty of the Court was set out succinctly in **Criminal Appeal No 145 of 2013**. The Court said:

*This being the first appeal this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that neither saw the witness nor heard the evidence when parties were testifying to see their demeanor. See the case of **MARK OIRURI MOSE –VS- REPUBLIC [2013] e KLR Criminal Appeal No.295 of 2012** where the Court of Appeal stated: "It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."*

11. The evidence put forward on the Prosecution is clear and consistent. The Learned Trial Magistrate found the particulars of the Charge and the offence were proved beyond reasonable doubt. The First Accused/Appellant now states that he was framed but he did not raise that in his initial defence. In fact when the Complainant said he was a Customer, he denied that.

12. The Second Accused/Appellant filed his Application for leave to appeal out of time under **Section 349 of the Civil Procedure Code** on 23 January 2018. The Supporting Affidavit is identical to the one filed by the First Appellant. Interestingly, it is deponed before the Senior Principal Magistrate Voi, who may be the same judicial officer who delivered the Judgment being appealed against.

13. The attached Petition of Appeal sets out the following grounds;

"I the under mention do humbly beg to appeal against both the conviction and sentence for an offence of handling stolen property c/sec 278A of the penal code passed upon by the chief/principal/senior resident/1st class/2nd class SPM Voi.

In the above criminal case number judgment dated 14/07/2017

(Here state grounds of appeal and separate sheet if necessary)

I am a poor man and have no money for appeal."

14. The attached Grounds of Appeal lists the following grounds:

"1. I pleaded not guilty

2. That the pundit trial magistrate erred in both law and fact fails to take into consideration the defence given by the appellant

3. The sentence was excessive and harsh."

15. On 25th June 2018 this Court directed the Second Appellant to file Amended Grounds of Appeal particularising how the SRM erred in law and in fact within 14 days. On 17th July 2018 he filed the following grounds:

1) I am indeed remorseful

2) The sentence is excessive by convection standard considering I am a first offender

3) The learned trial magistrate erred in both law and fact and failed to take into consideration that the appellant had overstayed in remand custody

4) *I promised to abide by any condition that will be set, forth for my release from prison as the honourable court may deem fit and proper in the circumstance*

5) *The confinement in prison is harsh because I am now being exposed to more hardened criminals in custody which might make it difficult for me to reform in future*

6) *The Learned trial magistrate erred in both law and fact fails to take into consideration the defense given by the appellant."*

16. In fact the Second Defendant was also convicted of the same offence as the first. The Proceedings contain only one Charge Sheet in which both the First and Second Accused were Charged with "Stealing a Motor Vehicle Contrary to Section 278A of the Penal Code". There was no other charge. In the circumstances the Appeal by the Second Appellant as pleaded is incompetent. However, in compliance with **Article 159(2)(d)** of the **Constitution of Kenya 2010**, this Court interprets the Petition as an intention to appeal against the conviction and sentence in fact passed.

17. On the issue of conviction, neither Appellant has put forward any persuasive grounds on which this Court could interfere with the decision of the Court below. For that reason the Appeal against conviction on each file (No 2 of 2018 and No 6 of 2018 is dismissed).

18. On the issue of sentence. This Court is guided by the Court of Appeal's decision in ***Ogolla s/o Owuor v R. (1954) EACA 270*** where the Court stated that "The Court does not alter a sentence unless the Trial Judge has acted upon wrong principles or overlooked some material factors. To this we could add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case ..."

19. **Section 275** of the **Penal Code Cap 63, Laws of Kenya** provides

275. General punishment for theft

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

20. On behalf of the State it is argued that the Lower Court took note of the mitigation offered. What is apparently from the record of proceedings is that the Learned Trial Magistrate heard the mitigation in both cases. That included the fact that the perpetrators were first offenders. She then sentenced them to the maximum term^[1]. Her justification for that was that they need to be taught a lesson. The use of that terminology indicates an element of vindictiveness. It is true that the two Appellants conspired to steal the car of the Complainant. They did not steal the car as soon as they stole the keys but waited for their opportunity. They then tried to move the car as far away as possible as quickly as possible, no doubt to avoid detection. In the circumstances, the mitigation they offer is offset by those aggravating features which justify the maximum sentence.

21. In the circumstances, the Appeal against sentence for both Appellants is similarly dismissed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 31st day of October 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: In Person

Respondent: Ms Anyumba

[1] Assuming there is a discretion when a single term is set in the Act