REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 34 OF 2017

JOHN MUTUKU KIOKO……..…..APPELLANT

VERSUS

REPUBLIC ……..……..…….RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's court at Milimani Cr. Case No. 4666 of 2014 delivered by of Hon. H. Nyaga, CM on 15th March ,2017).

JUDGMENT

Background.

John Mutuku Kioko, herein the Appellant, was charged with stealing a motor vehicle contrary to Section 278(A) of the Penal Code. The particulars of the offence were that on diverse dates between the months of July 2014 and September 2014 at Eastleigh Section 3 in Nairobi Area County jointly with another not before court stole a motor vehicle registration number KAP 915P, make Mercedes Benz lorry, valued at Kshs. 1.2 million, the property of Joseph Wambugu Kiragu.

The Appellant was found guilty of committing the offence in question. He was sentenced to four years imprisonment. He was dissatisfied with conviction and sentence and preferred the current appeal. He set out his grounds of appeal in a petition of appeal filed 29th March, 2017. The Grounds of appeal were that the circumstantial evidence on which he was convicted was not established to the required standard and that the case was not proved beyond a reasonable doubt.

Submissions

The appeal was canvassed by way of filling written submissions. Those of the appellant were filed by Wanjohi Gachie Advocates. In brief, his submission was that although the appellant was convicted based on circumstantial evidence, the same was not strong enough and did not meet the threshold set out in the case of ***Kipkering Arap Koskei vs Republic [1949] 16 EACA 135*** *that:*

> ***"it is now settled that for a court to convict on circumstantial evidence, there must be evidence which points irresistibly to the accused person to the exclusion of any other person. At the same time, there must be no co-existing factor or circumstance which may weaken or destroy the inference of guilt of the accused person… In order to justify the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of his guilty."***

In this regard, counsel submitted that when the vehicle broke down, PW1 asked the appellant to look for alternative work. He was not therefore responsible for taking care of the vehicle which was parked at Kamulu. Furthermore, it was not demonstrated that it was the appellant who took it to the parking yard. Counsel also submitted that at the time the vehicle was recovered, it did not have an engine or gear box but only the body. Therefore, it was in error to charge him for stealing a motor vehicle as opposed to stealing motor vehicle parts. The appellant further took issue with the fact that PW1 did not employ a watchman to look after the vehicle and therefore its disappearance could not be attributed to him. It was urged that the appeal be upheld.

Learned State Counsel Miss Kimiri for the Respondent opposed the appeal vide written submission filed on 15th June, 2017. The gist of the submission was that the prosecution had proved beyond reasonable doubt that PW1 had left the vehicle under the care of the appellant when it broke down and that he used to send money for its security to the appellant. She submitted that at no point did the appellant inform PW1 that the vehicle was unavailable yet he continued to receive the money. Furthermore, even after its disappearance, the appellant did not inform PW1. Accordingly, the circumstantial evidence irresistibly pointed to the guilt of the appellant. The case ***of Judith Achieng Ochieng vs Republic [2009] eKLR – Court of Appeal sitting in Kisumu*** *was cited to buttress the submission that the circumstantial evidence was sufficient to found a conviction against the appellant. Counsel also submitted that the penalty imposed of four years imprisonment was not only reasonable but sufficient. She urged the court to uphold both the conviction and the sentence.*

Evidence.

The prosecution's case was that the Appellant was employed by the complainant to take care of his lorry and take charge of its day to day activities. The lorry subsequently broke down at Kamulu and the owner entrusted the Appellant with the duty of having it kept safely. However, a few months later he received information that the body of the vehicle in question was found in Eastleigh and was up for sale. By the time the owner could follow up on the report the lorry was already missing.

PW1, Joseph Wambugu Kiragu, *was the complainant and the owner of the Motor Vehicle Reg. No. KAP 915P Mazedez Benz Truck. His testimony was that between July and September, 2014 he relocated to Nyeri and left the motor vehicle under the care of the Appellant. The vehicle had however broken down in March, 2014. It was taken to a yard in Kamulu and the Appellant was charged with the responsibility of securing it. PW1 could send money to him though Mpesa money transfer so that he could pay for its security. Sometime in September, 2014, he received a call from* ***Oliver Mulei Musyimi, PW2*** *that he had seen the body part of the aforesaid motor vehicle in Eastleigh and was up for sale. He testified that before this date, he had seen it parked outside Joska Supermarket in Kamulu. He then called PW1 to enquire from him whether he was selling the vehicle. PW1 was surprised that the vehicle was on sale. He produced Mpesa money transfer transaction scripts to confirm that he had been sending money to the appellant to pay for the security of the vehicle.* ***PW3, PC Benjamin Kiptoo*** *of Shauri Moyo Police Station investigated the matter. While summing up the evidence of the prosecution witnesses, he confirmed that the vehicle body was recovered without its Registration Numbers.*

At the close of the prosecution case, the court ruled that the appellant had a case to answer and was accordingly put on his defence. He however elected to remain silent and await the court's decision.

Determination.

This is the first appellate court whose duty is to re-evaluate the evidence on record and come up with its own findings. In so doing, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. ***See Okeno vs Republic [1972] EA 32****.*

After considering the evidence and the respective rival submissions, I deduce the issue for determination to be whether the case was proved beyond a reasonable doubt. It is clear that the appellant was convicted purely based on circumstantial evidence. An avalanche of case law exists that give guidance on the principles to be considered before a court can convict based on circumstantial evidence. The primary test

is that the circumstantial evidence must be strong enough and must be inconsistent with the innocence of the accused. That is to say that it must irresistibly point to the exclusion of any other person that the accused is guilty and that there are no co-existing factors or circumstances which may weaken or destroy the inference of guilt. ***See Kipkering Arap Koskei vs R [1949] 16 EACA 135.***

In ***R v. Taylor, Weaver & Donovan[1928] 21 Cr. App. CA 21****,it was held that:*

> ***"Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."***

Also in ***Chamberlain v. R(No 2)[1984] HCA 7*** *the court delivered itself thus:*

> ***"Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of these facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts … The drawing of the inference is not a matter of evidence: it is solely a function of [court's] critical judgment of men and affairs, their experience and reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts."***

In the present case, I am convinced as testified by PW1 that the vehicle in question was left solely under the care of the appellant. Before the vehicle broke down, it is the appellant who was responsible for arranging and negotiating hire agreements as well as sourcing and hiring drivers. When the vehicle broke down in March, 2014, PW1 categorically left it under the care of the appellant. The appellant was responsible for paying for its security. He produced M-pesa money transactions evidencing that the appellant received the money so that he could pay for the security. When PW2 enquired from PW1 whether the vehicle was on sale, he tried contacting the appellant about the issue, but the appellant could not be reached. That itself raised an eyebrow because it was also the appellant who had secured the place that the vehicle was parked at. The appellant was therefore responsible for securing the vehicle and was answerable to PW1 for its whereabouts and he was unfortunately unable to account for it. The only inference then open to the court is that the disappearance of the motor vehicle was occasioned by the appellant. It is also safe to conclude that he took part in the theft or was complacent in its disappearance. In arriving at this finding, I borrow the words from the case of ***Exall v. R[1866] 176 ER 85*** *in which it was held that;:*

> ***"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may in circumstantial evidence- there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit."***

I am convinced beyond any doubt therefore that the appellant had everything to do with the disappearance of the motor vehicle. He was one and the same thing as the thief of the vehicle.

The appellant however contested that even if the court were to uphold the conviction, he could only be found guilty for stealing parts of a motor vehicle as opposed to a motor vehicle. Under the Traffic Act Cap 403 Laws of Kenya, a motor vehicle is any mechanically propelled vehicle subject to certain exceptions which exceptions however do not apply in this case. At the time of its recovery, the motor vehicle was immobile and as such, a key component, being mechanical propulsion, was non-existent.

Indeed, PW2 did testify that at the time he saw the motor vehicle in Eastleigh, both the engine and the gear box were missing. This notwithstanding, as at the time PW1 left the vehicle with the appellant, it was complete physically and, mechanically, it was to undergo some repairs. Obviously then, after the repairs, the vehicle was expected back on the road. It therefore remained for all intended purpose a mechanically propelled vehicle as was held in the case of ***Newberry v. Simmonds[1961] 2QB 345 that****:*

> ***"… we think it may be necessary to consider hereafter whether different considerations apply to a vehicle which has had its mechanical means of propulsion permanently removed. Such a question may be one of fact and degree in which both the extent to which the power unit and transmission have been removed and the permanence of such removal are matters for consideration. We are, however, satisfied that a motor vehicle does not cease to be a mechanically propelled vehicle upon the mere removal of the engine if the evidence admits the possibility that the engine may shortly be replaced and motive power restored."***

Further, in ***Smart v. Allan and another[1963] 1 QB 291,*** *viz:*

> ***"...it seems to me as a matter of common sense that some limit must be put, and some stage must be reached, where one can say: "This is so immobile that it has ceased to be a mechanically propelled vehicle." Where, …, there is no reasonable prospect of the vehicle being made mobile again, it seems that, at any rate at that stage, a vehicle has ceased to be a mechanically propelled vehicle."***

Finally, in ***The Law of Motor Insurance, Robert M. Merkin & Jerry Stuart-Smith(1st Edition),*** *viz:*

> ***"The test for determining whether an immobilized vehicle remains a "mechanically propelled vehicle" is whether there is a reasonable prospect of it ever being made mobile again. The degree of the immobility is not, therefore, conclusive where it can be shown that the vehicle was intended to be or was capable of being repaired."***

Accordingly, the appellant could not be charged for the offence of stealing motor vehicle parts but a motor vehicle.

As for the sentence, appellant was sentenced to serve four years imprisonment. It was not however clear whether this sentence was to take account of the period that the Appellant spent in remand during his trial. This court has found that the Appellant was in custody for two stints the first between 4th October, 2014 and 16th March, 2016 and the second between 31st January, 2017 and 15th March, 2017. This therefore means that he spent 19 months in remand. It is therefore proper that the time spent in remand should be taken into account.

In the end, the appeal herein is dismissed. The prosecution proved their case beyond a reasonable double. I uphold both the conviction and sentence. However, the period of nineteen months the appellant was in remand shall be reduced from the sentence.

Dated and Delivered at Nairobi this 2nd day of August, 2017.

G.W. NGENYE-MACHARIA

JUDGE

<u>In the presence of;</u>

1. Appellant present in person.

2. Miss Sigei for the Respondent.