



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 21 OF 2015

(Appeal from original Conviction and Sentence in Thika CM Criminal Case No 1369 of 2013 – S Mbungi, Ag CM)

JOSEPH MBUTHIA WAHOME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Joseph Mbuthia Wahome**, was convicted after trial of **stealing a motor vehicle** contrary to **section 278A** of the **Penal Code**. It was alleged in the particulars of the charge that on 26th October 2012 at Ngoigwa Estate within Thika District of Kiambu County, jointly with others not before the court, he stole a motor vehicle Reg. No. KBT 704F, a white Subaru saloon valued at KShs 1.2 million, the property of **Mardav Logistics Limited**. He was sentenced to three (3) years imprisonment. He has appealed against both conviction and sentence. He was unrepresented both at his trial and in this appeal.

2. In his amended grounds of appeal tendered to court on 18/04/2016 the Appellant complained of the following –

(i) That the evidence tendered by the prosecution was inconsistent, contradictory and uncorroborated.

(ii) That the trial court was biased towards the prosecution.

(iii) That the trial court did not duly consider the Appellant's defence which was given in a sworn statement.

(iv) That the sentence imposed of 3 years imprisonment was excessive.

2. The learned counsel for the Republic did not support the conviction. She submitted that the case against the Appellant was not proved beyond reasonable doubt; that the evidence tendered by the prosecution was inconsistent and contradictory; that PW2 whose word the trial court accepted was himself initially arrested as a suspect; that in his sworn statement in his defence the Appellant gave a credible story about his dealings with the complainant; that there was no proper or sufficient investigation of the alleged offence; and that therefore the conviction was not safe.

3. I have read through the record of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind

however that I never heard now saw the witnesses testify, and I have given due allowance for that fact.

4. The prosecution case as laid out before the trial court was as follows. PW1 (Martin Kamau Kiarie) was the special owner of motor vehicle registration number KBT 704F Subaru Legacy (the real owner was his company, **Mardav Logisticts Limited**, a transport, clearing and importation of motor vehicles business). He advertised it for sale in its back wind-shield. A person made enquiries on the phone and they agreed to meet so that he may view the vehicle.

5. On 24/10/2012 that person turned up at PW1's home to view the motor vehicle. He was the Appellant. He viewed the vehicle and test-drove it. He said he liked the car and requested PW1 to process the logbook so that he (Appellant) can get a loan from his employer, who he said was BAT. PW1 took him as a serious buyer. He had introduced himself as George Mwaura Kanyi a name he verified with an identity card.

6. PW1 then proceeded to process the logbook and had a valuation of it done. He then informed the Appellant so, apparently by phone, and they arranged to meet on 25/10/2012, but he (Appellant) did not show up. The following morning he called at about 5.30 a.m. and told PW1 that he wanted his mechanic to first inspect the car at about 7.00 a.m. the same morning.

7. At about that time a young man turned up and told PW1 that he had been sent by Mwaura. PW1 called the Appellant to verify the *bona fides* of this young man; the Appellant said that indeed the young man was his mechanic and that he had sent him.

8. The young man then requested to test-drive the car. PW1 agreed but he did not to accompany the young man on the test drive. So he drove off alone.

9. After 20 minutes the mechanic (who testified for the prosecution as PW2) called PW1 and told him that Mwaura had requested him to take the motor vehicle to BAT. PW1 agreed. After another 30 minutes PW1 called the Appellant who told him that he was with the mechanic, and that he had decided to buy the car as he wanted to use it to visit his in-laws.

10. At about 9.00 a.m. PW1 again called the Appellant who told him that he was at **Barclays Bank** trying to get some money form him as a deposit for the car. PW1 asked him how he was going to accomplish that without a logbook of the car as he had not given the same and transfer form to him?

11. PW1 further testified that after 10.00 p.m. the Appellants phone was switched off. He then sent KShs 50/00 by M-Pesa to the number the Appellant had given him. The confirmation code showed that the money went to **Isaiah Gichohi**. PW1 then realized that he had been conned of his car. He then reported the matter to **Thika Police Station**.

12. PW1 also testified that a night or two later thugs broke into his house. They stole therein his phone and documents. He reported this incident to the police. After another 5 days the mechanic was arrested. The mechanic then assisted the police to trace the Appellant, and he was arrested. As already noted, the mechanic testified as PW2. The motor vehicle was never recovered.

13. The testimony of PW2 (Daniel Moi Mbinda) by and large corroborates the testimony of PW1. He knew the Appellant who approached him to inspect for him a car that he wanted to buy. He (Appellant) got someone to show him the home of PW1 where the car was. He went there, inspected the motor vehicle and asked to test-drive it. He drove off with the car alone after PW1 declined to accompany him. The Appellant then asked him to take the car to him. He (PW2) first asked PW1 if he could do so. PW1 agreed and so he took the car to the Appellant and gave it to him. Subsequently he was arrested as a suspect in the theft of the car; he assisted the police in tracing and arresting the Appellant.

14. PW3 (Anthony Munene Muthike) was PW1's employee. He was the one who took the car from the yard to PW1's home to enable the Appellant to view it. He was present when the Appellant viewed the car and accompanied him on his test-drive.

15. PW4 (PC Joseph Marira Mutahi) was one of the officers who arrested the Accused.
16. PW5 (PC Morris) was the investigating officer of the case. He and other officers arrested PW2 upon the complaint of PW1. After recording his statement PW2 assisted in tracing the Appellant. PW5 also produced in evidence, copies of the Appellant's identity card, the logbook of the stolen motor vehicle Regn KBT 704 F and photographs of the motor vehicle. It was never recovered.
17. The Appellant defended himself by a sworn statement. He did not call any other witness. He admitted his interaction with PW1 and PW3 in viewing and test-driving the motor vehicle. His further testimony however was that he intended only to lease the car from PW1, not to buy it, and for that purpose he left PW1 with a sample of a lease agreement to read and then call him (Appellant). PW1 never called him. In November 2012 he went "abroad" as he was campaigning for some Parliamentary candidate. He came back after 4 months. He was subsequently arrested.
18. As for PW2, the Appellant stated that there was bad blood between them as he (Appellant) had declined to assist him and another person when they had been arrested for stealing a motor vehicle. He denied that he stole PW1's motor vehicle.
19. In cross-examination he stated that PW2 had lied to court when he stated that he had taken the motor vehicle to him (Appellant).
20. That was the totality of the material evidence before the trial court. There is no dispute that the Appellant approached PW1 to view motor vehicle KBT 704 F, Subaru saloon, which had been advertised for sale on its rear windshield. The Appellant indeed viewed the motor vehicle and test-drove it. The testimonies of the Appellant, PW1 and PW3 are in agreement in this regard.
21. PW1 stated that after viewing and test-driving the motor vehicle the Appellant agreed to buy it and requested PW1 to process the vehicle's paper-work so that he (Appellant) could get financing from his employer (which employer he said was BAT). PW1's testimony in this regard was corroborated by the testimony of PW3.
22. The Appellant on his part stated that he only agreed to lease the motor vehicle, and that he then left a sample agreement with PW1 to read and then call. PW1 never called him. The question immediately arises, if PW1 had advertised the motor vehicle for sale, and the Appellant came to view it as such, why would he (PW1) then want to lease it?
23. Again, why did the Appellant give to PW1 a false name and a fake identity card if his dealings with him were honest and *bona fide*?
24. It will all depend on what to make of the testimony of PW1 and PW2 on the one hand that the former gave to the latter the motor to test-drive on behalf of the Appellant; that the Appellant then asked PW2 to take the motor vehicle to him and that PW2 did so with the consent of PW1; and that PW2 indeed took the motor vehicle to the Appellant and gave it to him. Against this is the Appellant's denial under oath that he never asked PW2 to inspect the motor vehicle for him, that he never verified PW2's *bona fides* to PW1; that he never asked PW2 to take the motor vehicle to him; and that in fact PW2 never took the motor vehicle to him.
25. In regard to passing possession of the motor vehicle from PW2 to the Appellant, it is really the word of the one against the other. There are two disturbing aspects here with regard to the passing of possession of the motor vehicle from PW1 to PW2 and then from PW2 to the Appellant. Why did PW1 allow PW2 (a person he did not know) proceed alone to test-drive the car? And why, when PW2 telephoned him to tell him that the Appellant had asked that the motor vehicle be taken to him, did he allow the motor vehicle to be taken to the Appellant who had not paid any deposit for it nor committed himself to buying it in any way?
26. The testimonies of PW1 and PW2 disclose strong suspicion that the Appellant may have stolen the

motor vehicle. But then, PW1's own acts of giving away possession of the motor vehicle so casually to strangers raises serious doubts which could have been removed by adequate investigation had there been any. For instance, why did the police not investigate whether or not the motor vehicle was insured against theft, and if it was, whether a claim was lodged with the insurance company after it was allegedly stolen?

27. At the end of the day, suspicion of itself, no matter how strong, is not enough. In this case there were important aspects of the case that were not investigated. The result is that the conviction of the Appellant is not safe at all and cannot be upheld. Learned prosecution counsel has properly conceded the appeal.

28. I will allow this appeal. The Appellant's conviction is hereby quashed and the sentence imposed upon him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED, SIGNED AT MURANG'A THIS 16TH DAY OF JUNE 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 17TH DAY OF JUNE 2016