



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 106 OF 2015

BETWEEN

DENNIS OSITO KINGORI1ST APPELLANT

RONALD OCHIENG ORENGO2ND APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. M. Kimtai, SRM dated 8th July 2013 in Criminal Case No. 717 of 2013 at Senior Principal Magistrate's Court at Nyando)

JUDGMENT

1. The appellants **DENNIS OSITO KINGORI** and **RONALD OCHIENG ORENGO** were charged with stealing a motor vehicle contrary to **section 278(a)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 2nd July 2013 at Awasi Trading Centre in Nyando District within Kisumu County, they, jointly with others not before the court stole motor vehicle registration number KBT 105B, Toyota Probox valued at Kshs. 800,000/- the property of **JULIUS ONGERO AREGE**. The appellants were convicted and sentenced to seven (7) years imprisonment. They now appeal against conviction and sentence.

2. At the hearing of this appeal, Ms Osoro, learned counsel for the respondent, conceded that the conviction could not be supported for two reasons. Firstly, that the testimony of the key identifying witness was not supported by any other corroborating evidence. Secondly, that the circumstantial evidence implicating the appellant was weak.

3. Notwithstanding this concession, it is the duty of this court, as the first appellate court, to satisfy itself of the propriety of the conviction and sentence in order determine whether such a concession by the respondent is well founded. In doing so, I recall the well-worn principle so clearly stated in ***Okeno v Republic [1972] EA 32*** that the duty of the first appellate court is to consider the entire evidence, evaluate it and reach an independent conclusion as to whether it should uphold the conviction bearing in mind that it neither heard nor saw the witnesses testify. In order to do so it is necessary to set out the evidence as it emerged at the trial.

4. There was no dispute that Justus Okero Arege (PW 1) owner of the subject vehicle as he produced a sale agreement. He recalled that he had employed Fredrick Cheruiyot Rotich (PW 2) as his driver to do taxi business. On 2nd July 2013, he was informed by PW 2 that the vehicle had been stolen. He reported the theft to Awasi Police Station. About a month later he received a call from a bar attendant in Kericho

informing him that the people who had stolen had been seen.

5. PW 2 recalled that on 2nd July 2013, a person by the name Moses told his that he had some clients who wanted to go to Awasi. He gave the vehicle to Moses to drive and they left to pick the appellants and another accused. PW 2 recalled the appellants had alighted at Kapsoit while PW 1, Moses and the other accused proceeded to Awasi. They stopped at Awasi to have lunch at a bar. Moses told PW 1 that he needed to pick a lady friend. He left PW 2 and the other accused. Moses did not come back with the vehicle whereupon PW 2 became suspicious and reported to Awasi Police Station that the vehicle had been stolen. A month later he was called by a bar attendant and informed that the people who had stolen the vehicle had been located. He reported the matter to Chief Inspector Edward Kisanga (PW 3).

6. PW 3 testified that he received a report of the stolen vehicle from PW 2. After being spotted, the 1st appellant was arrested in Kericho and the 2nd appellant in Narok. He told the court that the vehicle was not recovered. PC Kiboma (PW 4) testified that PW 1 reported that one of the suspects who stole his vehicle was in Narok. He located the 2nd appellant and arrested him.

7. The appellants were put on their defence and elected to give sworn testimony. Both of them denied stealing the vehicle. The 1st appellant stated that on 2nd July 2013, he was at Muhoroni in his barber shop. He stated that he was arrested in Kericho on suspicion of having stolen a motor vehicle. The 2nd appellant stated that on 2nd July 2013, he was at home all day and at home all night in Kericho where he works. He admitted that he was arrested in Narok.

8. The learned magistrate concluded that, *“From the evidence it’s clear that a plot was hatched on how to steal this motor vehicle and (the) same executed without arousing any suspicion. I note that after arresting the [1st and 2nd appellants] it was PW 2 who also corroborated the evidence by PW 1 that the persons he had ferried to Awasi disappeared with the motor vehicle.”*

9. The only witness who gave direct evidence was PW 2. He testified that the appellants alighted from the vehicle after they had paid him. He never saw them again. There is no evidence that the appellants were anything other than passengers or that they acted in association with any other person to steal the vehicle. In any case, it is strange that no complaint was lodged against Moses who was the driver of the motor vehicle and to whom PW 2 handed over the vehicle when they arrived at Awasi. Lastly, the fact that the people who called PW 1 and PW 2, to implicate the appellants, were never summoned to testify how the appellants could have been involved in the theft undermined the prosecution case.

10. The evidence against the appellants was threadbare and could not support a conviction.

11. The appeal is allowed and the conviction and sentence quashed. The appellants are set free unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 5th day of August 2016.

D.S. MAJANJA

JUDGE

Appellants in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.