



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 115 OF 2014

DAVID THUO KARIUKI.....APPELLANT

VERSUS

REPUBLICSTATE

(Appeal from the Sentence of the Senior Principal Magistrate's Court at Molo Hon. H. M Nyaga – Senior Principal Magistrate delivered on the 12th May 2014 in CMCR Case No. 1344 of 2013)

JUDGEMENT

The appellant **DAVID THUO KARIUKI** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts. The appellant had been arraigned before the trial court on 16/7/2013 charged with 2 others of the offence of **STEALING A MOTOR VEHICLE CONTRARY TO SECTION 278(A) OF THE PENAL CODE**. The particulars of the charge were that

“On the 13th day of July 2013 at Peace Area in Molo District within Nakuru County, jointly with others not before the court you stole a motor vehicle registration KAZ 589M Nissan Matatu make Toyota Hiace white in colour valued at Ksh 1.2 million the property of Molo Liners”

The appellant pleaded ‘Not Guilty’ to the charge. His trial commenced on 15/11/2013. The prosecution led by **CHEIF INSPECTOR MUTETI** called a total of four (4) witnesses in support of the case.

PW1 SAMUEL NJOGU MUNGAI is the Chairman of Mololine Nissan Sacco Ltd. He told the court that the Nissan Hiace Registration No. KAZ 578 M white in colour belonged to their SACCO. **PW1** also informed the court that the appellant was a driver employed by Mololine SACCO and had been assigned this particular vehicle to drive.

On 13/7/2013 at 8.30pm the appellant went to the Mololine offices and surrendered the day's collections to **PW1**. The appellant then left saying that he was talking the vehicle to be washed. Later the same evening **PW1** received information that the vehicle had been stolen from the car wash. The matter was reported to police. The appellant together with the turn boy and the boy from the car wash were all arrested and charged in court.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied any involvement in the theft of the vehicle

in question form the car wash.

On 12/5/2014 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of stealing and thereafter sentenced him to serve five (5) years imprisonment. The appellant's two (2) co-accused were both acquitted of the charge. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appellant who represented himself during the hearing of this appeal relied entirely upon his written submissions which had been duly filed. **MS OUNDO** Senior Assistant DPP representing the State opposed the appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate the prosecution evidence and to draw its own conclusions thereof. (**AJODE Vs REPUBLIC [2004] KLR 8**). Likewise in the case of **MWANGI Vs REPUBLIC [2004] 2 KLR 28**, the Court of Appeal held that

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”

In this case the question of ownership of the motor vehicle Registration No. KAZ 589 M Nissan Haice is not in any doubt. Both **PW1** the chairman of Mololine SACCO and **PW2 JEREMIAH WAWERU NDUNGU**, the Vice Chairman of the SACCO told the court that the vehicle belonged to Mololine SACCO. The sale agreement. **P. Exb 1** and copy of log-book **P. Exb 3** were produced as exhibits in court confirming the ownership of the vehicle.

There is equally no dispute over the fact that the appellant was the driver assigned to drive the said vehicle as a matatu along the Molo-Olengruone route. The appellant in his defence readily admitted that he was the driver of that vehicle.

What is not clear is the circumstances under which that vehicle went missing. **PW1** told the court that on 13/7/2013 at 8.30pm the appellant went to the Mololine Offices and surrendered to **PW1** the cash proceeds for the day. The appellant then left saying that he was taking the vehicle to the car wash. No witness was called from the car-wash to confirm if and when the appellant delivered the vehicle there for cleaning. The person from the carwash was a co-accused one '**David Mogaka Nyambati**' who in his defence in the lower court confirmed that the appellant did deliver the vehicle to the car wash at 7.30pm. Then the appellant left to buy omo to clean the vehicle but when he returned the car was gone. As stated earlier this co-accused was eventually acquitted by the trial court.

Nobody saw the appellant drive the vehicle out of the car wash. Indeed no witness saw any other person drive the vehicle away. It is not clear how or when this vehicle left the car wash.

The learned trial magistrate relied upon circumstantial evidence to convict the appellant. He cited the fact that the appellant was the driver and had custody of the vehicle; therefore he was responsible to keep the vehicle secure at all times.

In the case of **KARIUKI KARANJA Vs REPUBLIC [1986] KLR** the court in discussing circumstantial evidence held as follows:

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution”.

In the case of **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009] eKLR** the Court of Appeal sitting in Kisumu held as follows

“It is trite law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests

(i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.

(ii) Those circumstances should be a definite tendency unerringly pointing towards the guilt of the accused.

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

Do the facts in this case meet this test? I think not. The appellant took the vehicle to a public car wash. No doubt there were other vehicles there and other persons there other. Persons other than the appellant had access to the vehicle. Nobody saw the vehicle being driven out of the car wash. Nobody saw who drove it away. The appellant himself made no attempt to escape. There is evidence that it was the appellant himself who went to the police station to report that the vehicle was missing. It is unlikely that he would steal the vehicle and then go to inform police of the theft. The actions of the appellants were bonafide and did not display a guilty mind – he even assisted in the search for the vehicle.

All in all the evidence against the appellant remains that of suspicion. Since the appellant was the driver of the vehicle and since the vehicle went missing under his custody, he is suspected to have had a hand in the theft of that vehicle.

Suspicion can never in law form the basis for a conviction. In the case of **JOAN CHEBICHII SAWE Vs REPUBLIC Criminal Appeal No. 2 of 2002** the Court held

“That suspicion may be strong but his is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt. As this court made clear in the case of MARY WANJIKU GICHIRA Vs REPUBLIC (Criminal Appeal No. 17 of 1998 (unreported)). Suspicious however strong cannot provide a basis for inferring guilt which must be proved by evidence”

I find that the appellant’s conviction was in the circumstances unsafe as the evidence did not point exclusively at him as the perpetrator of the theft. I therefore allow this appeal. The appellant’s conviction is quashed and the 5 year term of imprisonment is set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 9th day of December, 2016

Read in open court.

Maureen A. Odero

Judge