



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 15 OF 2013

GEORGE OMONDI ABUDHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Principal Magistrate's Court at Bondo Criminal Case No. 375 of 2012 Before Hon. P.W. Mutua]

J U D G M E N T

Introduction

1). The appellant and his accomplices were charged with the offence of stealing a motor vehicle contrary to section 278 of the Penal Code.

The particulars were that on 26th day of May 2012 at Bondo Town in Bondo district within Siaya county jointly stole a motor vehicle make Howo Tipper registration number KBN 012N valued at Kshs. 8,500,000/= the property of China Wuyi Road Construction Company Ltd.

2). The alternative charge was handling stolen goods contrary to section 322 (2) of the Penal Code.

The particulars were that on the 21st day May 2012 at Alupe sub location in South Teso district within Western province otherwise than in the course of stealing, jointly dishonestly retained a motor vehicle make Howo Sinotrack registration number KBN 012 knowing or having reason to believe them to be stolen goods.

3). The appellant and his accomplices were convicted and sentenced to 5 years imprisonment hence this appeal.

4). **PW1, Jackson Madibo** is the security officer at China Wuyi company. He told the court that he received a report on 27-5-2012 at 6 p.m that the company motor vehicle which was used to transport workers did not come back on 26-5-2012. He then went to Bondo and got two police officers who assisted him with the search. They went as far as Siaya where they were informed that the said vehicle had been traced on its way to Busia.

5). They went towards Busia and at Alupe area they found the lorry parked in a bush away from road. They managed to arrest the appellant and his co-accused who were inside the lorry.

6). **PW2, corporal Nelson Mwaniki** was with PW1 when they made the arrest and recovery. He told the court the chronology of the events as narrated by PW1. He did produce the photos of the lorry and

other items as exhibits.

7). **PW3, PC James Ledama** was the investigating officer and he was equally involved in the arrest and the recovery as explained by the rest of the witnesses.

The appellant gave sworn testimony and denied the charge. He told the court that he was called by the 2nd co-accused person and when he went to where he was he was equally arrested. He vehemently denied the charge.

Analysis and Determination

8). The summary of the petition raised by the appellant are that crucial witnesses were never called to testify and that there were contradictory testimonies by the prosecution. He also argued that no photographs which shows him at the scene were produced by the police.

9). This being the first appeal there is need to re-evaluate the evidence afresh with a view to arriving at a fresh and independent finding. There is no doubt that the motor vehicle in question belonged to China Wuyi construction company.

Equally, there is no doubt that the appellant was arrested otherwise than in the course of investigation.

10). The argument therefore is the circumstances of the appellant's arrest. PW1, PW3 and PW3 confirmed that both of them were in the said lorry at the time of the arrest.

The 2nd accused person told the trial court that: **“When I got to Busia I was called by the 3rd accused person”**.

On the other hand the appellant told the court that: **“On 27-5-2012 at 2 p.m I was in church then the 2nd accused person called me that he was in Busia and he was through. He told me that he did not want to go immediately”**.

11). The two testimonies are contradictory. The same do not add up. I do not think that there was any malice on the part of the prosecution witnesses nor the assistant chief in arresting the two persons who were in the lorry who included the appellant. I do not see any reason why the appellant was arrested merely because he had been called by accused two. In any case what was he doing inside a lorry?

12). The appellant has raised the issues regarding his names being interchanged in the main charge as George and in the alternative charge Geoffrey. He further argued that there were discrepancies in the prosecution witnesses description of the lorry's registration number.

13). I respectfully do not find this argument meritorious. Ultimately the prosecution established the ownership of the lorry and its registration documents were produced.

Further, section 382 of the Criminal Procedure Code is handy in curing such deficits which materially does not affect the outcome of the suit.

14). By virtue of the doctrine of recent possession the vehicle was positively identified, the same was found with the appellant and the same had recently been stolen. See **Isaac Nganga Kahiga alias Peter Nganga Kahiga, Criminal Appeal No. 82 of 2004** (unreported).

In the premises, I find no merit in the appeal and hereby dismiss it.

Dated, signed and delivered at Kisumu this 20th day of January, 2014.

**H.K.
JUDGE**

CHEMITEI