



REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL NO. 39 OF 2013
CONSOLIDATED WITH HC CRA NO. 46 OF 2012 &
HC CRA NO. 47 OF 2012

BETWEEN

JOSEPH MURITHI NJERU 1ST APPELLANT

BERNARD KATHUKI NJIRU 2ND APPELLANT

JAMES MACHARIA KAHONGE 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in Embu Criminal Case No. 518 of 2011
by Hon. L.K. Mutai, SPM on 28th February, 2012)*

JUDGMENT

1. These appeals were consolidated as they arise from one judgment where all the appellants were convicted and they now appeal.
2. The appellants in the matters were charged with stealing a motor vehicle contrary to **section 278A** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars were that on 16th March 2011 at Kirimari Shell Petrol Station in Embu Municipality within Embu County the appellants jointly stole motor vehicle registration number KBL 482E, a Toyota Station Wagon valued at Ksh 720,000/= the property of Silvano Njiru Kariuki. They also faced an alternative charge handling stolen goods contrary to **section 322(1)** as read with **section 322(2)** of the *Penal Code*. The particulars were that on 16th March 2011 at Suswa along Mai-Mahiu Nairobi road within Nairobi County otherwise than in the course of stealing, they jointly handled the subject motor vehicle knowing or having reason to believe it was stolen or unlawfully obtained.
3. The prosecution called a total of 6 witnesses. PW 1, the complainant, testified that he was the owner of the car. He produced the logbook and identified it by confirming its chassis and engine number. He testified that on 16th March 2011, he went to the petrol station where he had parked the vehicle the previous night and he found it missing. He was informed by PW 2, the watchman, that his driver, PW 4 had sent for the vehicle and it was released to a person. He suspected foul play as he had not informed his driver to collect the vehicle. He reported the matter at Embu Police Station and also alerted the car tracker.
4. PW 1 later learnt that the vehicle was spotted at Suswa. In the company of police officers, he

- proceeded to Nairobi where the vehicle had been found with the appellants. PW 1 stated that he knew the 1st appellant as his school mate but not the 2nd and 3rd appellants. PW 2, the watchman at the petrol station, testified that PW 1 left the car at the petrol station on 15th March 2011 with the key. The 1st appellant whom he knew came and asked for the car keys so that he could rescue PW 1's driver, PW 4. PW 2 stated that the 1st appellant called PW 4 on phone to confirm that he was taking the car. With the assurance that PW 4 has been informed, PW2 gave the 1st appellant the key and he drove the car away. PW 4 confirmed in evidence that he was PW 1's driver. He denied that that he had sent anyone to collect PW 1's car from the petrol station. He denied receiving any call from the 1st appellant whom he knew as a driver.
5. PW 3, a police officer, testified that he learnt from the DCIO that PW 1's vehicle which had been stolen had been recovered and was at Buru Buruburu Police Station Nairobi. He proceeded there with another officer and the complainant. The appellants were identified and handed over to them and together in the car were brought to Embu Police station.
 6. PW 5, a police officer, who was at the material time attached to the Special Crime Prevention Unit, received information that a car from Embu had been stolen and it was being monitored by a security control gadget. The car was located at Mai Mahiu Narok Road. PW 5 alerted Suswa police who laid a road block while they followed the car. PW 5 followed the car until it was stopped at the road block. PW 5 testified that the 3rd appellant was the driver, the 1st appellant sat on the front passenger seat and the 2nd appellant behind the driver. PW 5 testified that he knew the 2nd appellant from prior incident. He arrested the appellants and escorted them to Embu Police Station. PW 6, a scene of crime officer, took photographs of the car at Embu Police Station and produced them as exhibits.
 7. All the appellants elected to give unsworn statements. The 1st appellant's statement was to the effect that he was in Nairobi at the time the car was stolen and he was arrested while in Nairobi. He was only re-arrested at Buruburu Police Station. He denied knowledge of the offence. The 2nd appellant states that at the time the car was stolen, he was a clothes seller at Mai Mahiu market. On 16th March 2011 at about 7.00 he was on his way to catch a matatu but a vehicle came and he jumped in. When the vehicle was stopped, he was arrested by an officer he knew. He also denied knowledge of the offence. The 3rd appellant states that he was in Nairobi on 16th March 2013 about 6.00 a.m. He had gone to buy milk. He saw some men running and in the course of the commotion he was arrested and taken to Buruburu Police Station. He claims that he knew nothing of the theft of the car.
 8. In her judgment, the learned magistrate found that the prosecution had proved the charge of stealing against the 1st appellant and the offence of handling against the 2nd and 3rd appellant. They were all convicted and sentenced to serve six years in prison. The appellants appeal against conviction and sentence.
 9. In summary, the 1st appellant, in his grounds of appeal, contests the judgment on the grounds that there was insufficient evidence to link him to the offence. He also alleges that his constitutional rights were violated after he was held in police custody for more than 48 hours. The 2nd and 3rd appellants allege that there was insufficient evidence to convict them to offence and in particular they were convicted on the basis of uncorroborated evidence of one officer. The prosecution supports both conviction and sentence.
 10. It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own independent conclusions in deciding whether the judgment of the trial court should be upheld. It must itself weigh conflicting evidence and draw its own decision on the evidence. (See ***Okeno v Republic [1972] EA 32***). In doing so, the first appellate court must also take into account the fact that unlike the trial court, it lacks the privilege of hearing or seeing the witnesses testify.
 11. The evidence against the 1st appellant in my view supports the conviction for stealing. PW 2 testified that he knew him and that he came and requested for the key and drove off with the car. PW 1 did not give him the authority to take the vehicle and PW 4 confirmed that he had not requested anyone to collect the car on his behalf from the petrol station. The 1st appellant was subsequently found in the vehicle on 16th March 2011 along Mai-Mahiu Narok road. All these facts taken together within the span of time the vehicle was recovered point inextricably to the 1st

appellant's involvement in the theft. The facts satisfy the doctrine of recent possession which was outlined by the Court of Appeal in *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic CA Criminal Appeal No. 272 of 2005 (unreported)* as follows, "...It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

12. The 1st appellant was found in the vehicle by PW 5 which he was seen driving off by PW 2. His defence that he was in Nairobi at the material time was rightly dismissed by the learned magistrate in view of the overwhelming evidence against him. Having reviewed the evidence, I am satisfied that the prosecution proved its case.
13. The 1st appellant has raised the ground that he was detained for more than 48 hours beyond the time allowed by **Article 49** of the Constitution. It is now settled that even if such violation was proved, it would not immunize the appellant from trial. This issue was settled by the Court of Appeal in the case of *Julius Kamau Mbugua v Republic, CA Criminal Appeal No. 50 of 2008[2010] eKLR*.
14. The evidence connecting the 2nd and 3rd appellants to the offence is that of PW 5 who arrested the appellants at the road block along Mai-Mahiu Narok road. The 2nd appellant was behind the driver's seat while the 3rd appellant was on the driver's seat. In order for the learned magistrate to convict them, there had to be evidence connecting them to the stealing. In my view, 2nd appellant could not be convicted because he was only in the motor vehicle. Although he knew PW 5, that fact alone could be the basis of the conviction. In the absence of any other evidence, I find his conviction unsafe. The fact that he was seating at the back seat is consistent with his unsworn statement that he had sought a lift in the motor vehicle. The prosecution did not provide any other evidence connecting or establishing any other relationship between the 2nd appellant and the 1st and 3rd appellant. In the circumstances I find his conviction unsafe.
15. The evidence of PW5 against the 3rd appellant was that he was in the driver's seat when the car was stopped at the roadblock. In light of evidence of the vehicle having been stolen, he did not provide a reasonable explanation as to why he was driving the car which was not his and which had recently been reported a stolen a day before. The inference here is that he knew the vehicle was stolen. In the circumstances I conclude that he was properly convicted.
16. Having evaluated the entire evidence, I am satisfied that the conviction of the 1st and 3rd appellant was safe and it is upheld. The sentence imposed on them was neither harsh nor excessive to warrant interference. It is also upheld.
17. As regards the 2nd appellant, there is insufficient evidence to connect him to the offence and his appeal is therefore allowed and his conviction and sentence are quashed. He is set free unless otherwise lawfully held.

DATED and DELIVERED at EMBU this 30th day of April 2014

D.S. MAJANJA

JUDGE

Appellants appearing in person.

Ms Mbai, State Counsel, instructed by the Directorate of Public Prosecutions for the respondent.