



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 150 OF 2011

TOM MBOYA AYIEKOAPPELLANT

VERSUS

REPUBLICRESPONDENT

*Being an appeal from the original sentence and conviction in Kajiado Principal Magistrate's Court
criminal case No. 67 of 2011 by Hon. W.N. Kaberia, SRM on 13/2/2012)*

JUDGMENT

1. The appellant **Tom Mboya Ayeiko** was charged with the offence of stealing a motor-vehicle contrary to **Section 278A** of the **Penal Code**. Particulars thereof being that on the **19th January, 2011**, at **Moi International Airport**, in **Changamwe District**, within **Coast Province**, jointly with others stole a motor-vehicle Registration Number **KBC 762Q Toyota Platz** valued at **Kshs. 650,000/=** the property of **Martin Mumo**.
2. In the alternative he faced a charge of handling stolen goods contrary to **Section 222** of the **Penal Code**. Particulars thereof being that on the **20th day of January, 2011** at **Kiwanja ya ndege** in **Loitoktok District** within **Rift Valley Province**, otherwise than in the course of stealing dishonestly received or obtained a motor-vehicle Registration Number **KBC 762Q** a **Toyota Platz** valued at **Kshs. 650,000/=** knowing or having reasons to believe it had been stolen.
3. According to the prosecution's case PW1, **Martin Mumo** the owner of motor-vehicle Registration Number **KBC 762Q Toyota Platz** purportedly got information that his car had been hired out. Thereafter he got information that the vehicle had been impounded at **Loitoktok**. The occupants of the vehicle had been arrested, the appellant inclusive.
4. In his defence, the appellant said he is a motor-cycle operator. On the **20th November, 2011** he had gone to **Tarakea/Tanzania** to purchase drugs for epilepsy. On his way back he found a motor-vehicle registration **KBC 762Q**. He was stopped by a gentleman who carried a jerrican. He wanted to be taken to **Loitoktok**. As they negotiated a corner a motor-vehicle emerged. The occupants introduced themselves as police officers. They arrested two (2) of the occupants of the **Toyota Platz** vehicle while one escaped. He stated that his motorcycle and drugs remained at the **Loitoktok Police Station**.
5. At the hearing of the appeal, the appellant opted to rely on his written submission. In addition he submitted orally. He stated that the persons who hired out the motor-vehicle as alleged were not called as witnesses. The investigation officer was not called to testify. Further, he alleged that he had a love affair with the trial magistrate's daughter hence he could not have been given a fair trial.
6. In response, thereto the learned State Counsel, **Mr. Mwangi** opposed the appeal arguing that a fair trial was the appellant's constitutional right. The allegation should have been raised at trial. Raising it at an appellate stage was an afterthought. He stated that the motor- vehicle was not

- returned after it was hired. At the time of arrest the appellant was one of the occupants of the motor-vehicle and he failed to give an explanation. He dismissed the defence put up by the appellant as outrageous. He urged the court to uphold the conviction.
7. This being a first appeal, I do remind myself of the need to re-evaluate evidence adduced at trial and come up with my own conclusions bearing in mind the fact that I never had an opportunity of hearing or seeing witnesses who testified. (see *Okeno versus Republic [1972]E.A. 32*).
 8. To prove the charge of stealing the prosecution had a duty of proving that the appellant fraudulently took the motor- vehicle in issue without the consent of the owner or fraudulently converted it to the use of any other person. It was alleged by PW1 that the motor-vehicle was hired out by his driver, **Mr. Juma**. On cross-examination, he said it was hired to one **Roy Allan Odongo**. **Mr. Juma** was not called as a witness; therefore, circumstances under which the motor-vehicle left Mombasa, for how long it had been hired if indeed it was hired remain unclear.
 9. PW2, **No. 59144 Sergeant Charles Muriithi** and PW3, **No. 75036 P.C Charles Maina Muriithi** who intercepted and impounded the motor-vehicle said they were acting on information received. They suspected the motor-vehicle to have been stolen. The motor-vehicle had three (3) occupants. It was being driven by a maasai gentlemen. One of the occupants said they were looking for land to purchase while another one said they were searching for maize that they intended to buy. One of them called **Wambua** stated that he was from Mombasa and claimed ownership of the motor-vehicle.
 10. In his defence, the appellant claimed he was riding a motor-cycle carrying a pillion passenger one of the persons who was in the motor-vehicle. He was going to purchase some fuel for the motor-vehicle. The learned trial magistrate disregarded the defence and formed an opinion that the appellant must have been the person who identified himself as **Roy Allan Odongo**. Having driven the motor-vehicle to Loitoktok instead of Kilifi he must have intended to sneak it out of the county. His opinion was baseless. Without evidence of the person who allegedly hired out the motor vehicle, it could not be said that it was the appellant who hired the vehicle.
 11. It is also important to note that the two (2) persons who were jointly charged with the appellant absconded. The appellant was tried to the end. At the end of trial nobody said he did hire the vehicle and later converted it to the use of another. The duty of proving a case solely lies upon the prosecution. It was an error on the part of the trial magistrate to state thus:-

“It was therefore incumbent upon the accused to explain why he had driven the vehicle all the way from Mombasa to Loitoktok contrary to the agreement that he was going to Kilifi”

12. There having been no evidence that the appellant was the one who hired the motor-vehicle he could not be required to give such an explanation. What the magistrate did was to shift the burden of proof to the appellant which was contrary to the law.
13. In the result no evidence was adduced to prove that the appellant herein fraudulently took the motor-vehicle in issue or converted it as required by the law.
14. Therefore, the appeal has merit and it must succeed. The conviction entered is quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 23RD day of SEPTEMBER, 2014.

L.N. MUTENDE

JUDGE