REPUBLIC OF KENYA

High Court at Busia

Criminal Appeal 93 of 2012

NICHOLAS MULESIA KITIDINDI …….....…..APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

J U D G M E N T

1) After a trial at the Chief Magistrate's Court sitting in Busia, Nicholas Mulesia Kitidindi (**the Appellant**)was convicted for the offence of Handling stolen property Contrary to Section 322(1) as read with Section 322(2) of the Penal Code. Although it had been alleged that he had on or about the 15th day of June 2011 at Busia Township stolen a motor vehicle Reg. No.UAF 813D the property of Odime Were Jackson, the trial court found that on the proved facts he was guilty of the offence of handling stolen property. The Court would be invoking the provisions of Section 188 of the Criminal Procedure Code which provides:

"When a person is charged with stealing anything and

(a) the facts proved amount to an offence under Section 322 or Section 323 of the Penal Code, he may be convicted of that offence although he was not charged with it."

2) These proceedings were commenced by way of a petition filed on 31st of October 2012 in which it was unclear whether the appeal challenged both conviction and sentence. In the course of hearing the Appellant, who was unrepresented, attacked both the conviction and sentence. The State Counsel responded to those arguments and this Court will treat this appeal as a challenge to the entire decision of the Subordinate Court.

3) The evidence adduced before the trial Court is common cause. Briefly, Dr. Jackson Odimbe Were (PW1) is a retired physician of Ugandan National. On 16th of June 2011 he drove into Busia (Kenya) on a private visit using his motor vehicle Reg. No.UAR 813D. He parked the motor vehicle outside the residence of his patient and attended to the patient for about an hour. On coming out of the residence he was surprised to find his vehicle missing. He reported the incident to the police at Busia (Kenya). About nine months later, in March of the following year he received some encouraging news the vehicle had been seen in Kitale town. He later travelled to Kitale police station where he identified a motor vehicle that had been impounded by the police and was able to prove ownership thereof by producing the original Ugandan log book. The recovered motor vehicle now bore Kenyan Registration KAP 706M.

4) The investigation of the complaint fell to Corp. Benedict Nyakundi (PW2). Some time passed before there was any breakthorough in the matter, but in early March 2012 he received an alert that some two vehicles suspected to have been stolen had been recovered around Kitale. A follow up revealed that the

registration number which had been mounted on the vehicle belonged to a different vehicle. A scrutiny of the Engine and Chassis Numbers further revealed that they marched those on the log book belonging to PW1.

5) The vehicle had been recovered by Corp.Daniel Njoroge (PW3) from one Stevens Musee Mulago (**Mulago**) who was later charged alongside the Appellant. It was the evidence of PW3 that Mulago told him that he had bought the motor vehicle from the Appellant. That the Appellant had been introduced to him by one Zacharia Nemani (**Zacharia**). In support of his story, Mulago surrendered a written agreement which captured the sale of the motor vehicle from the Appellant to himself. The agreement had been executed by both the Appellant and Mulago and witnessed by Zacharia and one other person by the name Andrew N. Natembea (**Natembea**).

6) At the close of the prosecution case, the Learned Magistrate found that Mulago had no case to answer and acquitted him under Section 210 of the Criminal procedure Code. The Appellant was put to his defence and in a short unsworn statement, he denied being involved in the theft of the motor vehicle. He narrated how on 21st of April 2012 at about 4.00p.m., two persons in civilian clothing asked him to accompany them to a place known as Brigadier to repair a motor vehicle. It was then that he was arrested in connection to the theft of PW1's vehicle. He maintained that he was innocent.

7) Although the petition of appeal raises four (4) grounds, in reality it is all a criticism of the sufficiency of the prosecution evidence. The appeal was opposed and the State Counsel sought to justify that the trial Court was entitled to return a conviction on the charge of handling stolen property. It was the argument by the State that the evidence proved that it was the Appellant who sold the stolen vehicle to Mulago. That the defence tendered by the Appellant was a mere denial and could not displace the prosecution case.

8) It is the duty of an Appellant Court to look afresh at the evidence adduced before the trial Court and to exhaustively re-evaluate it. The Appellant Court must nevertheless bear in mind that unlike the trial Court it does not have the advantage of seeing and hearing the witnesses testify. (**Okeno –vs- Republic [1972] E.A 32**)

9) It is surprising that apart from the complainant and **Henry Masinde Wanyama (PW4)** who escorted the motor vehicle from Kitale police station to Busia police station, the only other prosecution witnesses were the officers who investigated the crime. These two (2) officers, (PW 2) and (PW3), gave a narration of how the motor vehicle was impounded from Mulago. They told Court that Mulago informed them that it was the Appellant who had sold the vehicle to him. Mulago gave the officers a sale agreement as proof of this. He told the officers that he was introduced to the Appellant by Zacharia. He further told (PW2) and (PW3) that one other person, Natembea, was present during the sale and witnessed the signing of the agreement. All this information given to (PW2) and (PW3) in the course of investigation was rehashed by them in their evidence at trial. Section 63 of the Evidence Act (Chapter 80 Laws of Kenya) requires that oral evidence must in all cases be direct evidence. The evidence of the conversation between them and Mulago on the one hand and between them and Zacharia on the other hand would merely be direct evidence of the conversation itself but not of its contents. What they were told would be hearsay accounts.

10) They would be three (3) persons whose evidence would have been invaluable in proving the charge against the Appellant. This would be Mulago himself, Zacharia and Natembea. The police chose to charge Mulago alongside the Appellant, but in the end the Court found that he had no case to answer. When pressed to give reasons for bringing charges against a person who on all accounts would be an innocent buyer, PW2 said,

"During the arrest, accordingly(sic) to Arresting Officers, Accused tried to flee…His behavior at first was that of one who had knowledge the motor vehicle was stolen"

This is in total contrast with what PW3 who impounded the vehicle told court. His testimony was that;

"That day we only impounded the motor vehicle. We did not arrest him as we informed (sic) that

he was merely a purchaser of the motor vehicle. The next day Accused 2 availed himself to the police station for interview…I am not able to tell whether Accused 2 knew for sure whether the motor vehicle was stolen or not .Thereafter Accused 2 continued to come to the police station to follow up the motor vehicle"

Given this evidence, one would question the wisdom of the police in charging Mulago. The unfortunate result is that by doing so, the prosecution lost an opportunity of availing him as a witness.

11) As for Zacharia and Natembea, the trial Court was not told why they were not called to testify. The trial Court did appreciate that Zacharia was indeed a crucial witness and said as follows:-

"It is however not lost to this court that prosecution failed to call a crucial witness in the form of the broker who brokered the car deal between accused 1 and accused 2."

This handicap perhaps explains why the trial Court relied entirely on the hearsay accounts of the investigating officers to return a conviction.

12) It might also explain why the Learned Magistrate shifted the burden of proof from the prosecution to the Appellant. Hear what the Magistrate says in this passage:

"Further, the prosecution evidence that accused 1 is the one who sold the motor vehicle to accused 2 is not challenged in any way by accused 1. The sale/purchase took place in Kitale where also accused 1 was also arrested. Accused 1 did not also dispute that he received money from the sale of the motor vehicle…Even so, it is clear that several persons were witnesses to the agreement and the authenticity of the same was not raised as an issue."

The prosecution had failed to lead any evidence, other than hearsay accounts, connecting the Appellant to the offence. A recital by the investigating officers of what they had been told by persons who are said to have dealt with the Appellant directly remained hearsay for as long as those persons were not called to testify. It is the view of this Court that nothing had been proved against the Appellant that required an answer of him. He did not need to disapprove that he had sold the vehicle to Mulago as Mulago did not testify to this effect in Court. He did not have to controvert that he had received the purchase price because no evidence was adduced that he had done so. He did not need to question the veracity of the agreement because it had not been proved by the other persons said to be party thereto.

13) It is appalling as it is regrettable that, without explanation, the prosecution did not call such decisive witnesses. This Court is left with no alternative but to reach the result that the prosecution failed to prove its case against the Appellant to the degree required by the law. The complainant would be disappointed with this outcome because it has been occasioned, perhaps wholly, by inept prosecution. I hereby set aside the conviction and sentence. The Appellant shall be set at liberty unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 15TH DAY OF APRIL, 2013.

F. TUIYOTT

J U D G E