



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 5 OF 2011

ZULFIKAR alias SIDIQUE ABDUL..... APPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentencing in Criminal Case No. 538 OF 2000 of the Chief Magistrate's Court at Nairobi by L. Nyambura on 29th September 2010)

J U D G M E N T

The appellant was convicted of 3 offences.

- a) Stealing a motor vehicle contrary to Section 278 of the Penal Code
- b) Making a document without authority contrary to section 357(a) of the Penal Code and
- c) Obtaining money by false pretences contrary to Section 313 of the Penal Code.

He was then sentenced to 2 years imprisonment for the offence of stealing a motor vehicle and for one year imprisonment each for offences of making a document without authority and obtaining money by false pretences. Aggrieved by the said conviction and sentences, he lodged an appeal.

In his petition of appeal, the appellant faulted the learned trial magistrate for relying on circumstantial evidence which did not point to his guilt and that he was convicted on a document produced by PW2 which did not connect him with the offence. He further alleged that the court did not satisfy itself that PW2 the complainant, had Ksh. 500,000/- which he allegedly gave the appellant. He also complained that the court failed to take into consideration material contradictions in the evidence of the prosecution witnesses which could have led to his acquittal. Further, the court failed to take into consideration his defence which was steadfast and not contradictory unlike the prosecution evidence.

In the pendance of this appeal, the appellant applied to be released on bail pending the hearing. Ochieng J, heard this application on being satisfied that the appeal was arguable released the appellant on cash bail of Ksh. 400,000/-

This appeal was argued by way of written submissions on behalf of the appellant and a reply by the State. I have read the submissions on record. I do not deem it necessary to go through the entire evidence because when the application for bail pending appeal was being argued before Ochieng J, the learned counsel for the Republic conceded that the appeal had overwhelming chances of success and set out the

reasons for so believing.

I can only observe her position is contrary to her learned colleague from the same office has taken during the hearing of this appeal. That notwithstanding, I am persuaded by the observations raised by the learned counsel for the Republic when the application for bail pending appeal was being prosecuted.

The offence of making a document without authority was not proved as the document examiner was not called to testify. The theft of the motor vehicle was not proved beyond any reasonable doubt because in the first place, there was no evidence that the appellant had any connection whatsoever with the removal of the motor vehicle from its parking where the same was under guard by a watchman who was never called to testify.

There were also inconsistencies about the evidence of registration particulars of the vehicle allegedly stolen by the appellant. The connection of the appellant to the amount said to have been obtained is also in doubt, in view of the fact that the document upon which the same was alleged to have been advanced has been cast in doubt.

Additionally, this appears to have been a civil transaction which for some reason which is not relevant in this appeal has led to the criminal prosecution of the appellant. Whatever the case, the offences leveled against the appellant were never proved beyond any reasonable doubt and therefore his conviction of the three offences was unsafe.

Having said so, this appeal is allowed, conviction quashed and sentences set aside. I note that the appellant is out on bail pending the determination of his appeal. The appeal having been allowed, the terms of his release on bail are hereby vacated.

Orders accordingly.

SIGNED, DATED and DELIVERED in open Court this 24th day of October, 2013.

A. MBOGHOLI MSAGHA

JUDGE