REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 113 OF 2013

JOSEPH MWANGI NJOMO ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT AT BARICHO (E.H. KEAGO – P.M)

IN CRIMINAL CASE NO. 709 OF 2012 DELIVERED ON 6TH JUNE 2013)

JUDGMENT

This appeal was placed before me for hearing pursuant to the Honourble Chief Justice's Circular No. 13601 dated 4th October 2013.

The appellant was convicted on 6th June 2013 with the offence of stealing from a motor vehicle contrary to ***Section 279 (g) of the Penal Code*** and sentenced to serve 4 years imprisonment. His co-accused was acquitted. He has now appealed to this Court against both the sentence and conviction although in his oral submissions before me, he urged me to consider the sentence adding that indeed he stole.

The State Counsel Ms Kambanga supports both the conviction and sentence.

This being the first appellate Court, I must reconsider the evidence, evaluate it and draw my own independent conclusions on whether or not to up-hold the conviction and sentence imposed by the trial Court. But I must also bear in mind that I neither saw nor heard the witnesses – ***OKENO VS REPUBLIC 1972 E.A 32.*** and ***PANDYA VS REPUBLIC 1957 E.A 336.***

I have re-evaluated the evidence as I ought to and I have also looked at the appellant's grounds of appeal. In his appeal, the appellant states that the phone which was part of the items stolen from him was taken to him by his girlfriend called Nancy Wairimu. He also adds that the car was not broken into and it was wrong that Nancy Wairimu never testified. The evidence of the complainant was that on 3rd July 2012 he parked his car near a shop where he went to purchase some items and he noticed the appellant and another nearby and when he returned to the car, he found his phone and cash Ksh. 2,500/= missing. He reported to police and next day he was informed that the phone was found on the appellant and his accomplice. He identified the phone.

Police Sergeant Wesula of Rukanga A.P. Camp told the Court that following the report of the complainant who had said that he saw the appellant and another near his car, appellant was arrested the

following day and the phone was found on him.

In his defence, the appellant said the phone was left in his house by a visiting girlfriend.

Clearly, the appellant admits that the phone was recovered on him the day following it's theft from the complainant's vehicle. He says the phone was brought to his house by his girlfriend but the trial magistrate did not believe him. The trial magistrate was right in the conclusion that he arrived at. Having admitted that indeed he was in possession of the complainant's phone a day after it's disappearance from the vehicle, the appellant was in recent possession of stolen property. When a person is found in possession of recently stolen property, a strong presumption arises that the person must have stolen the property unless he gives a satisfactory explanation of how he came to be in possession of the item. This principle of law was set out as far back as 1951 in the case of ***R.V. LOUGHIN 35 CR. APP R 69 1951*** where the Lord Chief Justice of England stated as follows:-

"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker"

That principle has been followed in this country and it is now settled law that evidence of recent possession, though circumstantial, is enough to support a conviction on any charge depending on the circumstances of each case – see ***ANDREA OBONYO VS REPUBLIC 1962 E.A 592*** and ***ODHIAMBO VS REPUBLIC 2002 I K.L.R 241*** among other cases. In this case, the appellant was not only found in possession of the complainant's phone a day after it was stolen from his vehicle but he was infact seen by the complainant near the vehicle moments before the phone was stolen. Under those circumstances, his explanation that the phone was brought to him by Wairimu could not possibly be true and the trial Court was right in rejecting it as he did.

The appellant also takes issue with the fact that the car was not broken into. But he did not have to break into the car. It was sufficient for purposes of ***Section 279 (9) of the Penal Code*** if he opened the vehicle door by whatever means. His conviction was on sound evidence and I dismiss his appeal on conviction.

With regard to sentence, it is clear from the record that at the time of conviction, he was serving a one year sentence in Criminal Case No. 284 of 2013 and so he was not a first offender. The maximum sentence for that offence is fourteen (14) years. No doubt the law regards this offence as a serious one. Bearing in mind his previous record and the value of the goods stolen, I reduce the sentence to two (2) years from date of conviction.

B.N. OLAO

JUDGE

18TH OCTOBER, 2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant

Mr. Omayo State Counsel

Judgment deliverd this 18th October 2013.

Mr. Omayo State Counsel present

Muriithi Court clerk present

Appellant present