



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 68 OF 2011

BETWEEN

JULIUS KIRIMI MUTHURI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in Embu Criminal Case 155 of 2007 by
Hon. E.K. Nyutu Resident Magistrate on 19th April 2011)*

JUDGMENT

1. Julius Kirimi Muthuri, the appellant was convicted of being in possession of suspected stolen property contrary to **section 323** of the **Penal Code**. The particulars being that on the 27th day of June 2005 at Meru Township in Meru Central District, within Eastern Province, having been detained by senior sergeant Kijana Mutemwa a police officer as a result of exercise of powers conferred to him by **section 26** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** was found in possession of one motor vehicle blue in colour registration No. KAB 005J make Nissan Saloon reasonably suspected to have been stolen or unlawfully obtained.
2. He was also convicted of the charge of obtaining money by false pretences contrary to **section 313** of the **Penal Code**. The details which were that between 27th June 2005 and 4th July 2005 at Meru Township in Meru Central District, within Eastern Province, with intent to defraud, obtained Kshs 120,000/= from Christopher Muriuki Ndei by falsely pretending that a motor vehicle Reg. No. KAB 005J Nissan sunny which he sold to the said Christopher Muriuki Ndei was his and legally registered with the Registrar of Motor Vehicles. The accused pleaded not guilty to all the charges.
3. The prosecution's evidence was as follows. PW1, Chief Inspector Karete Kulova, testified that on 26th February 2007, he received instructions to take particulars of motor vehicle registration KAB 005J to ascertain the rightful owner. A copy of the vehicle indicated that as at 12th January 1991 it was registered in the name of John K. Sang of Eldoret. He went to the office of the Registrar of Motor Vehicles at Nairobi where he requested for a search. The search results did not show these particulars, instead there was a police abstract from Kiambu Police Station dated 22nd April 2006 and a request by the said Sang for a duplicate log book. The registrar had given Sang conditions to fulfil before he was given a duplicate log book. He was required to furnish a sale agreement, vehicle inspection report and a sworn affidavit indicating how he had acquired the motor vehicle. PW1 confirmed that John K. Sang had never fulfilled these requirements and that the motor vehicle had never been registered in any other name. He then inquired whether one Meshack H. Singano, who had been registered as a 2nd owner as appeared in the log book he was holding, was registered. He was informed that there was no transfer recorded to that effect.

PW1 testified that there were no records reflecting the registration status of the KAB 005J.

4. Inspector Ernest Maringa, PW2, testified that when he examined the motor vehicle KAB 005J, Nissan Sunny on 1st February 2007, he discovered that the engine numbers on the engine block had been erased and other number stamped thereon. Some digits were also missing. He knew the owner of the motor vehicle as one Christopher Nderi, the DCIO in Meru.

5. PC Solomon Waweru, PW3, testified that he arrested the appellant in Meru and took him to PCIO Embu acting on directions of the DCIO.

6. Andrew Murenga, PW4, a resident of Meru, testified that he saw the appellant driving the motor vehicle on two different occasions, on 19th July 2004 and 26th July 2004 during which period they were in the process of discussing a business deal. The appellant had told him that the motor vehicle was his. Ephantus Mangori, PW5, also a resident of Meru is the person who accompanied PW4 to meet the appellant over the business deal.

7. James Peter Mburu, PW6, an employee of Kenya Revenue Authority, testified that the records regarding the motor vehicle KAB 005J did not exist. He testified that the log book before court, though bearing the KRA stamp, had been tampered with. He stated that the motor vehicle was either not registered with the KRA or the records may not have been created after registration or they had been misplaced.

8. PW7, Corporal Omanga's testimony concerned the investigation he carried out regarding the last registered owner recorded in the log book which indicated the last owner as Meshack Singano. He found Meshack in remand at Shimo La Tewa where he stated that he purported to sell the vehicle to, SP Ndei, retired DCIO Meru but that he could not sign the transfer forms because he was still owed 30,000/= by the person who bought the vehicle from him. He identified the appellant stating that he had charged him with other cases in Meru.

9. The appellant elected to give sworn testimony. He stated that on 23rd January 2007, he was summoned by the DCIO Meru Central, Christopher Ndei. On arrival, the PCIO told him that there was an allegation that he had given Ndei a car as a bribe for protection. He denied that allegation stating that he had sold to Ndei the car. He was then informed that the Deputy PCIO Eastern Province had taken the car away to the Provincial Headquarters at Embu. He was sent by the DCIO to the police headquarters where he found the deputy PCIO Mr Ndambuki who wanted to know how he was connected to motor vehicle registration KAB 005J. The appellant said he sold the vehicle to Christopher Ndei and that he had confirmed the particulars of the motor vehicle to be genuine.

10. The trial court assessed this evidence and concluded that the appellant was guilty of possession of the suspected stolen vehicle without explanation and that he had obtained money from Christopher Ndei by false pretences. He was therefore convicted on both counts and sentenced to a fine of Ksh. 80,000/= in default of which he would serve three years imprisonment.

11. The appellant grounds his appeal on various points. First, that the trial court erred in law and fact in that the previous and current registered owners of the motor vehicle in question were not called by the prosecution to prove that motor vehicle was stolen or indeed unlawfully obtained. Second, that the trial court failed to appreciate the fact that the arrest of the appellant and subsequent incarceration by the police from 23rd January 2011 to 1st February 2011 a clear breach of his constitutional rights. Third, that by failing to call Mr Christopher Ndeti to testify yet he was the complainant, the charge of obtaining by false pretences could not be proved. Fourth, that the trial court failed to appreciate the evidence of the KRA that the loss of a log-book could not be conclusively blamed on the appellant. According to the appellant, the prosecution case had not been proved to the required standards.

12. The State supports both conviction and sentence on the ground that the appellant was found in possession of the motor vehicle which was proved to be stolen and he did not give a reasonable explanation for its possession.

13. The grounds of appeal outlined above call upon the court to evaluate the evidence which is the duty of the first appellate court. This being the first appellate court, it is my duty to reconsider the evidence and draw independent conclusions from it in determining whether to uphold or quash the conviction, taking into account the fact that I lack the privilege of hearing or seeing the witnesses testify.

14. **Section 323** of the **Penal Code** reads as follows; “Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.” [Emphasis mine]. It shows that for the accused to be convicted he has to be found, at the time of arrest and detention, in possession of or conveying the thing that is suspected to be stole. This conclusion is buttressed by reference in that provision to **section 26(1)(c)** of the **Criminal Procedure Code** which empowers the police to search, arrest and detain, “any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.” [Emphasis mine]

15. I have scrutinized the evidence and it is clear that the appellant was not found in possession of the motor vehicle KAB 005J at the time of his arrest and detention. The evidence of PW3 demonstrates that the appellant was not arrested in possession of the motor vehicle while PW1 testified that the vehicle had been brought to the Embu Provincial Headquarters by the PCIO. The totality of this evidence is that in the circumstances there was no basis upon which to convict the appellant of the offence under **Section 323** of the **Penal Code**. The conviction is therefore quashed.

16. The offence of obtaining by false pretence charged related to the sale of the motor vehicle KAB 005J to Christopher Ndei. The prosecution witnesses’ testimony was geared towards establishing that there was a problem with the registration status of the motor vehicle. However, none of them gave direct evidence as to the transaction between the appellant and Christopher Ndei. While there was evidence from PW7 that the vehicle was sold by Mashaka to Ndei, neither Mashaka nor Ndei was called to testify. The only way the offence could be proved in these circumstances would be to call Christopher Ndei as a witness to testify to the sale. The purported sale by Mashaka ought to have been proved to show that the appellant was not capable of selling the vehicle to Ndei. The net effect of the failure to call Mashaka and Ndei as witness is that the appellant could not be convicted of obtaining money by false pretence from Ndei.

17. As regards the ground regarding pre-trial detention, the law 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**.

18. For the reasons stated, I allow the appeal. Both the conviction and sentence are quashed and the appellant shall be refunded the fine paid.

DATED and DELIVERED at EMBU this 16th December 2013.

D.S. MAJANJA

JUDGE