



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NO. 128 OF 2012

GEORGE OMEGA MUDAKI APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of C. Kendagor RM, at Kakamega CM'S Court, Criminal Case No. 163 of 2011)

JUDGEMENT

The appellant was charged before the CM's Court Kakamega with the offence of stealing a motor vehicle contrary to Section 278 of Penal Code. Particulars of the offence are that on 13th December, 2010 at Kakamega Municipality in Kakamega Central District within Western Province stole a motor vehicle Toyota Hiace matatu registration no. KBJ 323L valued at Ksh 1.3 m only the property of James Muchai Maina.

The prosecution called 8 witnesses who testified that the complainant had parked his motor vehicle reg. no. KBJ 323L Hiace Matatu overnight. The vehicle went missing. The complainant was informed that the vehicle was missing by the caretaker. The watchman who was guarding the vehicle confirmed that the vehicle was taken at 4 am by a short man. The complainant suspected the appellant who was his former conductor. A search was mounted for the appellant whose phone was traced in Kisii. The vehicle was also searched for and found in Kisii area with it's number plates removed. The driving licence, identity card, ATM Card and sweater of the appellant was recovered from the vehicle.

PW2 the caretaker of the vehicle gave evidence that the vehicle was driven away on 13.12.2010 and the watchman Simon Nongoi stated that a short brown man who used to drive these vehicle before drove it away. They suspected the appellant. The vehicle was later recovered and appellant's property recovered in it in Kisii area. PW4 confirmed he was the one who took it on 12.12.2010 and parked it just to learn the following day that it was missing.

PW5 recovered the vehicle on 14.12.2010 at 4 pm dumped near Kisii town. They found the ignition key on the driver's seat and drove the vehicle to the police station. They also recovered a sweater in the vehicle and it had a driving licence of the appellant. The PW6 and PW7 were the scene of crime officer who photographed the recovered vehicle and the investigating officer respectively.

Put on his defence the appellant told court that he never stole the vehicle. He told court he was given this vehicle in question by it's driver Nganga to drive to Kisii. Nganga asked him to ferry passengers to Kisii on 13.12.2010. Nganga later took the vehicle from him in Kisii. In January he was arrested. He said that he previously was a conductor of this vehicle and had left his property inside this vehicle.

The trial magistrate heard the evidence presented and found the appellant guilty of the charge and sentenced him to serve 5 years imprisonment.

The appellant has now appealed before this court on both conviction and sentence on the ground that:-

1. **The trial magistrate did not analyze the evidence wholly as there was no proof that the motor vehicle in question belonged to the complainant.**
2. **The trial magistrate failed to consider reasons given by the appellant that he used to work in this vehicle and that is why his sweater was found in the vehicle.**
3. **The appellant has been in custody for 1½ years and his family is suffering and the court should consider a non – custodial sentence.**

The State opposed this appeal and averred that the evidence was considered positively and appellant convicted accordingly.

I have considered the averments from both sides. From the findings of the trial magistrate, the fact that the appellant's sweater were found in the couple vehicle was considered but the court was of the view that this could not shield the appellant that he was given the vehicle by it's driver one Nganga. What however is material is that Nganga gave evidence in court but he was never cross – examined in relation to giving out the vehicle to the appellant that time. The appellant's defence was therefore an afterthought.

On issue of proof that the complainant was owner of the vehicle in question, there was an agreement produced in court to show he bought this vehicle and so this rests this issue. I do find that the conviction was based on sound analysis of evidence and I confirm it. However on sentence, given the mitigation of the appellant and considering he is young with small children, I will consider reducing his sentence to the period already served.

DATED THIS 11TH DAY OF DECEMBER 2013

HELLEN S. WASILWA

JUDGE

DELIVERED THIS 11TH DAY OF DECEMBER 2013.

SAID J. CHITEMBWE

JUDGE