



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NOs. 102 & 103 OF 2011

(From original conviction and sentence in Criminal Case No. 2100 of 2010 of the Chief Magistrate's Court at Nakuru, W. A. Juma {Mrs})

**STEPHEN NDIRANGU KIRAGURI.....1ST
APPELLANT**

**CEPHA NJUGUNA KIGONDU.....2ND
APPELLANT**

VERSUS

**REPUBLIC.....
.....RESPONDENT**

JUDGMENT

The Appellants were charged, and were on the evidence convicted of the offence of stealing a motor vehicle contrary to Section 278A of the Penal Code (*Cap. 63, Laws of Kenya*). They were sentenced to two years imprisonment but are out on bail pending the outcome of their appeal, being this judgment.

Aggrieved with both their conviction and sentence, they came to this court on appeal on the following grounds -

(1) The learned magistrate misdirected herself in fact and law by not appreciating that the Appellant did at no one time steal the subject motor vehicle as corroborated by the Prosecution's witness PW1 Priccilla Wanjiru who admitted having never dealt with the accused nor seen him before.

(2) The learned magistrate misdirected herself in fact and law by not appreciating that the evidence of the prosecution witnesses PW2, James Mwangi clearly contradicted that of PW1 and PW2 both of whom are husband and wife, she faulted the police investigations, she faulted the fact that crucial witnesses were not called and hence there were missing links in the case, she stated that there was outright police negligence in the investigation-but she proceeded to convict and sentence the appellant to 2 years in jail even without the option of a fine; whereas she was having doubt in her mind about the investigations she proceeded to find the appellant guilty of the offence.

(3) The learned magistrate misdirected herself in fact and law by not appreciating that the evidence of prosecution was very weak to sustain a conviction as was stated in her judgment where

she stated that the police having failed to arrest the crucial suspects in the theft left the court with no answers; but it's against this missing links that the appellant was still found guilty.

(4) The learned magistrate misdirected herself in fact and law by not attaching requisite weight on the Defence wherein all supporting documents were produced to show that the appellant was an innocent purchaser who was just duped by the missing suspects and sold a stolen motor vehicle. The court didn't at all consider the appellant's conduct when he was called by the police, he collaborated with them, willingly took themselves and the stolen vehicle to the police and were available at all times in Nairobi and Nakuru to assist the police.

The prosecution's case against the appellants is that on 20th day of March 2010 at Nakuru Town within Nakuru District of the Rift Valley Province, jointly with others not before the court stole a motor vehicle registration No. KBK 704, make Toyota Probox valued at Ksh 600,000/= the property of PRISCILLA WANJIKU MWANGI.

The star witnesses for the prosecution were husband and wife, the said Priscilla Wanjiku Mwangi, who was PW1, and Mr. James Mwangi Kamau (PW2) the husband of PW1.

PW3 was a Police Officer attached to the Police Unit called the Flying Squad Nakuru, on investigations. He is the person who arrested the appellants, had them charged.

PW1 and PW2's evidence begins with the display of the car at Jamhuri Park Car Bazaar on a Sunday on 14th March 2010 in Nairobi. While at the Bazaar, PW1 met a customer who called himself Jimmy Rotich. PW1 struck a deal with this Jimmy Rotich and on 20th March 2010, a Sale Agreement was executed between PW1, and this Jimmy Rotich. The time was about 6.30 p.m., and never minds the time. Jimmy Rotich presented the agreed price in the form of a Banker's Cheque in the sum of Ksh 600,000/=. With the cheque PW1 and PW2 believed, safely in their hands, handed over their vehicle together with the documents of title, the original logbook, a copy of his ID and PIN Numbers, together with a fully signed transfer form.

Jimmy Rotich did not sign the purchaser's part of the transfer telling the sellers (PW1 and PW2) that he had the option of completing the transfer either to himself, or to whoever he decided to sell the vehicle. That practice is not uncommon among motor vehicles dealers, but can be fateful to initiates, like PW1 and PW2. The dealers would usually part only with copies of the documents of title, the log book, until the purchase price is paid in full, or if in cheque form, until the cheque is honoured or paid.

It was a grave error for PW1 and PW2 to part with their vehicle and title thereto, the logbook, in exchange for an uncleared cheque. For PW1 and PW2 however, that was the first part of the deception. Jimmy Rotich gave them a dud cheque for their motor vehicle. That was the first point of the fraud in this sordid affair.

The second part of the fraud lies in the evidence of the appellants. According to the testimony of (DW1) Simon Ndirangu Kiraguri (*the 1st Appellant*) the motor vehicle was sold to one Joseph Otieno on 20th February 2010 for the price of Shs 600,000/=. There is however no way, Priscilla Mwangi (PW1) could have sold the motor vehicle to this fictitious Joseph Odhiambo, on that date while she had possession of the vehicle together with the documents of title until 20th March 2010, a month later.

It is quite obvious this Joseph Odhiambo who could not be traced (*as he was allegedly in a lorry*), was either the same as Jimmy Rotich, or part of the car sales racket in which the appellants were involved. There is no way a vehicle bought at Shs 600,000/= could be sold and bought at shs 429,000/= or 330,000/= on 25th March 2010, barely 5 days after the sale by the owner. It an abuse of the seller's intelligence, and completely unreasonable to suggest that the vehicle could depreciate by over shs 170,000/= in five days. It must mean, the buyer (*Jimmy Rotich*) or (*Joseph Odhiambo*) knew well enough that the cheque issued to PW1 was a worthless piece of paper, and they had a motor vehicle for free, and they could hawk it at any price, after all they got it for no price. That was part of a grand fraud

by the appellants and their associates, Jimmy Rotich, Joseph Odhiambo, (and Anne Manyasia - Odhiambo's alleged wife).

The term "**stealing**" and its cognates is defined in Section 268 of the Penal Code -

"268 (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say;

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) ... (e)

Mr. Kanyiri learned counsel for the appellants submitted that the ingredients of theft were not proved by the prosecution, that there was no intention to deprive the owner of her property, that the vehicle was willingly given by the owner in exchange for a cheque, that the appellants were not a party to the first transaction, that they were innocent purchasers for value, that there was no direct evidence to connect the appellants with the alleged theft of the vehicle, and that in any event there was no alternate charge such as handling stolen property.

With respect to learned counsel for the appellants that is giving the expression "**stealing**" a very narrow meaning. The charge has to be read as a whole together with the particulars, the appellants, **jointly with others not before the court.**"

From the discussion above, there was certainly intent to permanently deprive the complainants (PW1 and PW2) of their vehicle. There was certainly fraudulent conversion of the vehicle by Jimmy Rotich, perhaps alias Joseph Odhiambo, through the agency of Anne Munyasia alleged recipient of the purchase price of Ksh 330,000/= and the 2nd Appellant who received a commission of Ksh 99,000/= to make the ridiculous sale price of Ksh 429,000/= after taking possession of the vehicle for Shs 600,000/= five days earlier.

What is fraudulent conversion? It is no more than obtaining another person's property by deception, and converting such property either to one's use or to one's benefit.

The acts by officials of Registrar of Motor Vehicles in tearing the caveat lodged by PW1 and PW2 in order to facilitate the registration of the transfer in favour of the appellant's racket was no more than part of that racket of deception to deprive the owners of their vehicle, the consideration having wholly failed through the non-payment of the cheque of shs. 600,000/=.

The purported registration of the transfer to the appellants, by officials of the Registrar of Motor Vehicles was no more than legitimization of fraud, and what is fraudulent is illegal and contrary to law, and cannot be legitimized. It has no effect or validity in law. It is null and void.

The learned Chief Magistrate was therefore correct in finding the appellants guilty and convicting them of the offence of stealing a motor vehicle contrary to Section 278(A) of the Penal Code.

The appellants were sentenced to two years imprisonment without the option of a fine as the appellants sought. The punishment prescribed under Section 278(A) for stealing a motor vehicle is a term of imprisonment for seven years. I think the term of 2 years was too lenient. In terms of Section 354(3)

(a)(ii) of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*), I substitute that sentence by increasing it to four years imprisonment.

Save as aforesaid, the appeal herein has no merit at all. I confirm the conviction, increase the sentence as aforesaid to four years imprisonment and dismiss the appeal herein as having no merit at all.

Dated, signed and delivered at Nakuru this 3rd day of February, 2012

M. J. ANYARA EMUKULE

JUDGE