



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 528 OF 2009**

**AUGUSTINE GICHANE CHEGE.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 2863 of 2004 of the Chief Magistrate's Court*

*at Nairobi by E.C.Cherono (Mrs) –Senior Resident Magistrate)*

**JUDGMENT**

The appellant, **AUGUSTINE GICHANE CHEGE**, was convicted for the offence of Handling Stolen Property **contrary to section 322 of the Penal Code**. He was then sentenced to 12 years imprisonment.

He has raised 8 issues on his appeal to the High Court. The issues can be summarized as follows;

**(i) The charge sheet was incurably defective as it names the complainant as MICHAEL KARIUKI NJOROGI, yet the complainant who testified was MICHAEL WAINAINA MUNGAI.**

**(ii) Part of the prosecution was conducted by an unqualified public prosecutor or by a prosecutor whose qualification remained unknown.**

**(iii) The photographic exhibits were produced by a person who was not gazetted. He was thus not**

*qualified to produce the said exhibits.*

*Secondly, he did not produce a certificate to verify the authenticity of the photos.*

*Thirdly, there was no explanation by the prosecution for the failure to exhibit the vehicle which had been recovered.*

*(iv) Essential witnesses failed to testify. In particular, the members of the public who allegedly arrested the appellant, should have testified.*

*(v) The evidence was inconsistent, contradictory and un-corroborated.*

*The witnesses cited different makes of the vehicle which the appellant was allegedly found to have been handling.*

*Secondly, the appellant was shown to have been at a police station in Nakuru whereas the witnesses alleged that the appellant was taken to Gigiri Police Station.*

*(vi) The case was not proved to the required standards. The vehicle was not dusted for fingerprints, so as to prove that the appellant had handled it whilst driving it, as alleged by the prosecution.*

*(vii) The defence was most pragmatic. The trial court was wrong to have dismissed it for no good reason.*

In answer to the appeal, Mr. Mulati, Learned State Counsel, submitted that the conviction was well-founded. He summarized the evidence tendered by the 4 prosecution witnesses to demonstrate that they established that the appellant was arrested whilst running away from **PW 1's** vehicle, when he encountered a vehicle that had blocked the road. The road had been blocked by a vehicle belonging to a company that had fitted a tracking device in the matatu belonging to **PW 1**. The said device enabled the company to track down the vehicle after they learnt that it had been car-jacked from **PW 1's** driver.

As regards the rank of the prosecutor, the Respondent submitted that at no time did an unqualified prosecutor undertake prosecution of the appellant.

Before I commence the task of determining the various issues raised in this appeal, it is important that I make it clear that the appeal arises from a re-trial of the appellant.

The appellant was first tried by Hon. M. Odero SPM (as she then was). That trial culminated in a conviction on 9<sup>th</sup> February 2006.

After the appellant prosecuted his appeal against that conviction, the High Court allowed the appeal on 11<sup>th</sup> March 2008. However, the High Court ordered for a retrial.

The retrial was presided over by Hon. E.C. Cherono SRM. During the retrial 4 witnesses testified for the prosecution. That number was in contrast to the 6 witnesses who testified at the first trial.

Whilst the first court convicted the appellant for the offence of Robbery with violence **contrary to section 296 (2) of the Penal Code**, the second court convicted him for handling Stolen property **contrary to section 322 of the Penal Code**.

The main reason for the discrepancy in the findings between the 2 courts can be traced to the failure by 2 witnesses to testify at the retrial. Those 2 witnesses are the persons who were the driver and the conductor, respectively, at the time the vehicle belonging to **PW 1** was car-jacked.

Clearly, as the 2 persons who had been robbed of the vehicle did not testify, the trial court could not have convicted the appellant for the offence of Robbery with violence.

The person who was driving the vehicle at the time robbers snatched it was MICHAEL KARIUKI NJOROGI. Therefore, when the charge sheet was drawn up, the prosecution were right to have cited him as the complainant.

When the owner of the vehicle, MICHAEL WAINAINA MUNGAI, testified, he did not purport to be the new complainant. He simply testified that he was the owner of the vehicle in issue. He produced the logbook to prove that he was the registered owner.

Therefore, there is no merit at all in the appellant's contention that there was a variance between the charge and the evidence tendered at the trial.

MICHAEL KARIUKI NJOROGI had been cited as the complainant in relation to the offence of Robbery with violence because it is he who was allegedly robbed of the vehicle.

As he did not testify, the trial court held that the charge was not proved. However, the law does permit the trial court to convict an accused person for a cognate offence of lesser seriousness, if the evidence adduced proved the guilt of the accused to the required standard.

I have already pointed out that the conviction which is being currently challenged before us, arose from the appellant's retrial. That retrial commenced with the taking of a plea on 24<sup>th</sup> September 2008.

By that date, the provisions of **section 85 (2) of the Criminal Procedure Code** had long been amended. The said amendment was effected through Act No. 7 of 2007, resulting in that section reading as follows;

***“The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service to be a public prosecutor for the purposes of any case.”***

It therefore follows that as the time when the appellant was prosecuted, the law no longer limited the Attorney-General to appointing, as a public prosecutor, a police officer whose rank was not below that of an Assistant Inspector.

Therefore, I find and hold that at no time was the prosecution handled by an unqualified person as alleged by the appellant.

In any event, the record shows that on all the dates questioned by the appellant the prosecutor was Chief Inspector Mutie.

Thus even if the law had not yet been amended, the prosecutor would have met the requisite qualifications.

On the issue of the admissibility of photographic evidence, the applicable provision is **Section 78 of the Evidence Act**. That section provides as follows;

***“(i) In criminal proceedings a certificate in the form in the Schedule to this Act, given under the hand of the officer appointed by order of the Attorney-General for that purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.”***

In the light of that provision, the appellant submitted that the photographs which were produced by an employee of Track-it Limited were inadmissible.

With all due respect, **section 78 of the Evidence Act** does not stipulate that the only photographs that will be admissible in evidence were those that were taken by an officer appointed by the Attorney General.

That section enables the prosecution to produce photographs in evidence if the photographs are accompanied by a certificate showing that they were prepared from films presented to the officer who had been duly appointed by the Attorney General.

Once the certificate is produced, the court would be entitled to presume, (pursuant to **section 78(2) of the Evidence Act**) that the signature on it was genuine.

In other words, that procedure would make it possible for photographs to be admitted in evidence even if the officer who printed them did not testify in court.

However, by dint of **sub-section (3) of Section 78**, the court could, if it thought that it was necessary to do so, summon and examine the person who gave the certificate.

It cannot have been the intention of the legislature to shut out from the courts any photos that were not printed by officers appointed by the Attorney-General.

In this case, the photographs were produced from the digital camera of the witness who gave evidence in court. There was thereof no legal basis upon which the said photographs could be locked out from evidence.

Five (5) of the photographs showed the vehicle which belonged to **PW 1**. The registration number of the vehicle is clearly visible.

The said registration particulars matched those on the logbook that was produced by the owner of the vehicle. Therefore, the vehicle was sufficiently identified through the photographic evidence that had been tendered.

Although the best piece of evidence would have been the physical vehicle, the use of the log book together with the photographs of the vehicle did not and could not have occasioned any prejudice to the appellant.

As the vehicle’s photographs were produced at the trial, and because the particulars thereof match those in the charge-sheet, there can be no doubt that the vehicle that was the subject-matter of the criminal case was a Toyota Hiace. The said vehicle was being used as a “matatu”, therefore any reference to a “matatu” cannot have led anybody to think that that was a different vehicle from the Toyota Hiace.

From the photographs it is clear that the vehicle was embossed with the nickname “Shark”. Therefore, when **PW 2** made reference to “Toyota Shark”, he was simply describing the same vehicle as that cited in the charge sheet. I so find because **PW 2** was at the scene where the vehicle was recovered, and he later confirmed from the photographs that that was the same vehicle.

**PW 3** also referred to the vehicle as a Toyota Hiace. Later, he cited it as “the Nissan vehicle”.

He testified how he tracked down the vehicle using the tracking device fitted on the said vehicle. **PW 3** drove and overtook the vehicle. He then blocked its path.

It is then that the vehicle was driven off the road and then abandoned. All these happened in the presence of **PW 3**.

He then joined the members of the public, who pursued the appellant, as he was running away from the vehicle. **PW 3**, together with the members of the public arrested the appellant.

**PW 3** took photos of the vehicle and also of the appellant and his accomplice. The photos were taken at the scene. Those photos placed the appellant firmly at the scene, in the vicinity of the vehicle which had been earlier car-jacked from the driver.

As regards the claim that the vehicle should have been dusted for finger-prints, **PW 4** explained that that was not done because the vehicle came into contact with water.

Regrettably, **PW 4** was not asked whether or not the steering-wheel, which had allegedly been handled by the appellant, had also come into contact with water. In those circumstances, this court cannot be called upon to determine either that steering wheel did or did not get into contact with water.

Suffice it to say that the explanation provided by **PW 4** was plausible.

The appellant submitted that he could not have been at the Gigiri Police Station at the time alleged by the prosecution because he was then booked in at the Bondeni Police Station, which was over 100 kilometres away from Gigiri.

First, it is clear that when **PW 2** testified that the appellant was taken to Gigiri Police Station, the appellant did not raise any questions in that respect, when he cross-examined **PW 2**.

**PW3** also testified that he accompanied the police when they escorted the appellant from the scene of crime upto Gigiri Police Station. Again, the appellant did not challenge that evidence during cross-examination.

The first time that the appellant mentioned Bondeni Police Station was when he was giving his defence.

In my considered view, the failure to raise that line of his alleged defence at an early stage of the trial implied that the appellant simply raised it as an after-thought.

Having re-evaluated all the evidence on record, I am satisfied that the appellant was inside the Toyota Hiace registration Number KAR 974W, when it was taken from the driver. The appellant was not an employee of the owner of that vehicle.

Indeed, the appellant was driving the said vehicle when **PW 3** intercepted it. He was accompanied with one other person.

When the vehicle was intercepted, the appellant and his accomplice abandoned it, and started running away.

However, **PW 3** was assisted by members of the public, to pursue the appellant and his accomplice, until the 2 were arrested. The members of the public beat up the two suspects. Thereafter, the police arrived and re-arrested them.

The suspects' photographs were taken at the scene. The vehicle was also photographed. The said photos together with the logbook established not only the existence of the vehicle in question but also its

ownership, and the nexus between the appellant and the said vehicle.

As the appellant was driving the vehicle a few hours after it had been stolen, his conviction was based on sound evidence.

The said evidence was so overwhelming that the appellant's alleged alibi did not cast any doubts on it.

Accordingly, I find no merit in the appeal. It is dismissed. I uphold both the conviction and sentence.

**Dated, Signed and Delivered at Nairobi this 1<sup>st</sup> day of February, 2012**

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**FRED A. OCHIENG**  
**JUDGE**