REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL 14 OF 2011

ABDULKARIM OSMAN ALIAS

ABUBAKAR OSMAN SAIDI :: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(*Being an original conviction and sentence of M.N. Gicheru - CM in Criminal Case No. 2287 of 2010 delivered on 28th January, 2011 at Kitale.)*

J U D G M E N T.

This appeal is against the conviction and sentence of the appellant, **Abdulkarim Osman Alias abubakar Osaman Said,** by the Chief Magistrate at Kitale for the offence of theft of motor vehicle contrary to section 278 of the penal code. It was alleged that on the night of 25th/26th August, 2010 at Gituamba lodge Trans Nzoia West district, the appellant and another stole a motor vehicle Reg. No. KBB 591 H Toyota Noah Kangaroo valued at Ksh. 650,000/= the property of David Kimathi Kairithia.

After pleading not guilty to the charge, the appellant was tried, convicted and sentenced to five (5) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred twelve (12) grounds of appeal contained in the petition of appeal filed herein on 11th February, 2011. At the hearing of the appeal, the appellant opted to represent himself after previously engaging and withdrawing the services of an advocate.

The appellant also opted to present and argue his appeal by way of written submissions in which he contends that the charge was defective as he was charged under a wrong provision of the penal code. He also contends that he was subjected to an unfair trial and that key witnesses were not called to testify in relation to the recovery of the motor vehicle. The appellant further contends that the evidence by the prosecution was insufficient and lacked clarity for a sound conviction.

The respondent opposed the appeal through the learned prosecution counsel, **M/s. Bartoo**, who submitted that the prosecution case was proved beyond reasonable doubt through the evidence of PW1, PW2, PW4, PW5, PW6 and PW7.

The learned prosecution counsel submitted that PW1 stated how the vehicle was stolen after being hired by the appellant to ferry goods and that PW2 confirmed that the appellant and another booked a room at a lodge but on the following morning, PW2 found the material motor vehicle and the appellant missing.

The learned prosecution counsel further submitted that PW4 confirmed that the appellant had booked two rooms at the lodge and that PW6 was the person to whom the appellant took the vehicle's tyre for repair. The learned prosecution counsel went on to submit that the appellant and PW7 boarded a "Matatu" to Bungoma but were arrested by PW5.

The learned prosecution counsel contended that ownership of the material motor vehicle was proved by PW1 and that the appellant's allegation that he was not found in possession of the motor vehicle was disproved by the prosecution.

The learned prosecution counsel urged this court to dismiss the appeal.

Upon due consideration of the rival submissions by the appellant and the respondent, the duty of this court is to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

In that regard, the case for the prosecution was briefly that the complainant, **David Kimathi (PW1),** was on the 25th August, 2010 at about 9.30 p.m. informed by his driver (appellant's co-accused) that a person wanted to hire his vehicle to transport luggage to Kapenguria. The complainant hired out his motor vehicle Reg. No. KBB 591 11 for the intended purpose but was informed on the following morning that the vehicle had been stolen. The information came from one Ongeri.

The complainant proceeded to the police station and found his driver who told him that the vehicle had gone missing after being parked at a hotel or lodge called Gituamba.

Billy Thande Waweru (PW2), a matatu tout, was engaged by the complainant's driver to load luggage into the material vehicle when the luggage arrived. He was to undertake the chore for a free of Ksh. 500/= and was among those at Gituamba lodge waiting for the luggage. He said that the appellant and his co-accused were also at the lodge where they hired rooms but at about 1.00 a.m. on the material night he could not find the appellant who had been left chewing "Miraa" (Kat) in the night. The vehicle was also missing. He (PW2) reported the matter to the police at 3.00 a.m. but was suspected and locked up. He was released later.

Joseph Wanjala Wasike (PW3), an employee of Gituamba lodge confirmed that the appellant hired two rooms (i.e. Rooms No. 5 and 11) at the lodge and that at about 1.00 a.m. on the material night, he was asked by the co-accused whether he had seen the appellant or whether the appellant had gone with the vehicle. He (PW3) learnt on the following day that the vehicle had been stolen and that the appellant was the suspected thief.

Cleophas Ngaro Mukori (PW4), was on duty as a security guard on the material night at Gituamba lodge when the first appellant left with the vehicle late at night carrying a lady. He later learnt that the vehicle had been taken away without necessary permission.

Meshack Mbutu (PW6), a tyre attendant at Busia was approached by the appellant on 26th August, 2010 at 2.00 p.m. who informed him that the tyre of a vehicle he (appellant) was using to carry cigarettes had a burst.

Meshack (PW6) agreed to give the appellant a tyre on hire. The appellant left with a wheel and tyre in the company of an employee of Meshack. At about 6.00 p.m., the employee informed Meshack that they

did not find the vehicle.

The said employee, **Ibrahim Maganga Ongenga (PW7),** confirmed that he was asked to accompany the appellant to where the vehicle had broken down. He was told by the appellant that the vehicle was at Chwele but they did not find it. Some children told them that the vehicle had been taken away by the police. He (PW7) and the appellant were both arrested by the police while in a public service vehicle (Matatu).

Cpl. Daniel Njoroge (PW5), of C.I.D. Kitale investigated the case and in the course of the investigations arrested the appellant inside a matatu headed for Bungoma. He also arrested the complainant's driver (appellant's co-accused) and later charged them with the present offence after concluding that the two had met earlier and arranged the theft of the vehicle.

When put on his defence, the appellant had nothing to say alleging that the court had denied him his rights.

The learned trial magistrate considered all the evidence placed before himself and concluded that the offence of theft of a motor vehicle contrary to section 278 A of the penal code had been established against the appellant. Consequently, the appellant was convicted and sentenced to five (5) years imprisonment.

Having re-considered the evidence before the trial court, this court is satisfied that the ingredients of the offence of theft of motor vehicle in terms of section 278 A of the penal code were duly established by the evidence of the complainant (PW1), the matatu tout (PW2) and the security guard (PW4).

The particulars of the charge were absolutely certain with regard to the offence committed. The appellant was informed of the charge and the particulars thereof in a language understood by him. He pleaded not guilty and fully participated in the trial that followed until such time that he was put on his defence when he declined to further participate saying that he needed to make an application in the High court due to a suspicion harboured by himself after learning that both the prosecuting officer and the complainant were from the same ethnic group i.e. Meru.

In effect, the appellant wanted his defence deferred pending his intended application to the High Court.

The learned trial magistrate considered the sentiments expressed by the appellant and declined to defer the appellant's defence. Nonetheless, the matter was adjourned to the 14th January, 2011 for defence hearing on which date the appellant indicated that he had filed an application in the High Court but there was no order to stay the proceedings in the trial court. He refused to say anything in his defence on ground that he was denied his rights by the trial court.

In this court's opinion, although a wrong provision of the penal code was used by the prosecution i.e. 278 instead of section 278 A of the penal code, the particulars of the charge left no doubt even in the mind of the appellant that the charge was theft of a motor vehicle and not stock theft in terms of section 278 of the penal code. It was therefore obvious that the omission of letter "A" from the number "278" was a typographical error which did not invalidate the actual charge and its particulars.

The error did not occasion a failure of justice and may be overlooked by dint of section 382 of the Criminal Procedure Code.

As regards the ruling by the learned trial magistrate declining to allow the appellant's application to have his defence deferred, this court has no reason to fault the learned trial magistrate especially after considering the reasons for the appellant's application. A proper and judicious exercise of discretion would not amount to a denial of an accused's right to fair trial.

The next thing expected of the prosecution after establishing the ingredients of the charge, was to establish that the material motor vehicle was stolen by the appellant. In that regard, there was evidence

from the complainant (PW1) showing that he was led to believe that the vehicle was to be hired to transport luggage to Kapenguria. The vehicle was in possession of the complainant before he released it to his driver (co-accused) to facilitate the hire. This was clear demonstration that the vehicle belonged to the complainant either as the actual owner or constructive owner.

In any event, the complainant's ownership of the vehicle was not disputed. A sale agreement was produced to show that the vehicle was purchased by the complainant on hire purchase.

There was further evidence from the matatu tout (PW2) that the vehicle was driven and parked at Gituamba lodge to await the luggage. The lodge attendant (PW3) and the security guard (PW4) confirmed that the appellant was at the said lodge at the material time.

The security guard further confirmed that the vehicle was driven out of the lodge late in the night by the appellant who alleged that he had gone to collect the luggage. Soon thereafter, the guard learnt from two other lodgers that the vehicle had been driven away without permission. Since the vehicle was never returned to the lodge, there was strong indication that it was stolen by the appellant. This was confirmed by the appropriate report made to the police.

The evidence by the security guard was direct evidence of theft of the vehicle by the appellant. This had the effect of showing that the alleged hire of the vehicle by the appellant or any other person was a ploy to fraudulently and unlawfully take away the vehicle from its owner. There was evidence from the complainant (PW1) and the tout (PW2) that the vehicle was to be hired to transport luggage to Kapenguria.

However, the vehicle was not found at Kapenguria after being driven away by the appellant. It was found and recovered by the investigating officer (PW5) and his team at Kimilili where it had broken down following a tyre burst.

The tyre repairer (PW6) and his employee (PW7) confirmed that the appellant had sought their help to obtain a tyre and wheel and have it fixed in a vehicle allegedly transporting cigarettes.

Although the appellant was not found in actual possession of the vehicle at the time it was recovered by the police, the evidence by the security guard (PW4), the investigating officer (PW5) and to some extent by the tyre repairer (PW6) and his employee (PW7) showed that the appellant was in the immediate possession of the vehicle after it was driven away from the Gituamba lodge and prior to being recovered by the police at Kimilili.

It was apparent that if the appellant was an innocent hirer of the vehicle he would not have driven it towards Kimilili but Kapenguria, his designated point for his "luggage".

There was enough direct and circumstantial evidence availed by the prosecution to show and prove that the appellant was the person who stole the material motor vehicle. His conviction by the learned trial magistrate was proper and sound.

Although the sentence meted out by the learned trial magistrate was lawful, it was rather on a higher side for a first offender. It is therefore and is hereby reduced to two and a half (2 ½) years imprisonment.

Other than the alteration in the sentence, the appeal is dismissed for want of merit.

[Delivered and signed this 24th day of May, 2012.]

J.R. KARANJA.
JUDGE.