



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
Criminal Appeal 385 of 2010

SIMON PETER KINYUA1ST APPELLANT

PATRICK MACHARIA NJOROGE 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.1917 of 2009 of the Chief Magistrate's Court at Nairobi by P.M. Ndwiga – Senior Resident Magistrate)

J U D G M E N T

The appellants, **SIMON PETER KINYUA** and **PATRICK MACHARIA NJOROGE**, were both convicted for the offence of Theft of a Motor Vehicle contrary to **Section 278 (a) of the Penal Code**. Each of them was then sentenced to four (4) years imprisonment.

In their appeal, they have both asserted that the prosecution did not discharge the burden of proof.

The appellants described the evidence adduced against them as being inconclusive and weak.

It was pointed out that all the evidence on record indicated that none of the prosecution witnesses saw the appellants stealing the vehicle in issue. In effect, all the evidence on record was circumstantial.

In the circumstances, the appellants submitted that the taxi drivers who allegedly saw them stealing the vehicle should have given evidence in court.

The said taxi drivers should also have been called upon to attend Identification Parades, to identify the persons who they had seen stealing the vehicle. As the taxi drivers did not testify at the trial, the appellants submitted that the conviction was unsafe.

Another issue that was raised by the appellants was that the prosecution ought to have exhibited photographs showing them when they were inside the stolen vehicle. In their view, the photographs of the empty vehicle failed to demonstrate that they were found inside the said vehicle.

In a nutshell, the appellants believe that the evidence adduced before the trial court fell far short of

the required standard of proof.

Stealing is said to involve the taking away of something that was capable of being stolen, and thus depriving its owner of the said thing. In this case, as none of the prosecution witnesses saw the appellants taking away the vehicle from where it was parked, the appellants submitted that the offence of theft was never established by the prosecution.

Furthermore, because no witness testified that the appellants were seen at the scene of crime, the appellants contended that it was therefore wrong for the learned trial magistrate to convict them for theft when they were never shown to have been at the place where the offence was committed.

The stolen vehicle was intact, in every respect, when it was recovered. The registration number had not been tampered with. The colour of the body-work was the same as before. And documents belonging to the complainant were still inside the vehicle.

In the circumstances, the appellants submitted that those sets of facts were highly unlikely. It was their opinion that a thief was unlikely to steal a vehicle, and thereafter continue using it, publicly, without effecting changes to the said vehicle.

In answer to the appeal, Ms Wang'ele, learned state counsel, submitted that both the conviction and the sentence were well grounded on the evidence and the applicable law.

The respondent summarized the evidence on record, noting that the same formed the foundation for the application of the doctrine of recent possession. It was so said because the stolen vehicle was recovered whilst in the possession of the appellants, some 2 days after it had been stolen.

Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and draw there from my own conclusions.

PW 1, REUBEN NDEGWA WAMWEA, was the owner of a vehicle, make Toyota Town Ace, registration KBC 633V. He had bought it at KShs. 950,000/-.

The vehicle was being used as a matatu, and it was plying the Embu-Nairobi route. The driver was **PW 2, PETERSON MUGWERU MUROGO**.

On 23rd October 2009, **PW 1** handed over the vehicle to **PW 2**, in Kigumo. The time was about 6.00a.m. Later, at about 8.00a.m, **PW 2** set-off from Kigumo. When he had dropped-off the passengers, he joined about four other drivers for breakfast at Tea Room.

Before going for tea **PW 2** locked up the car, and left it parked. But after he had had his breakfast he came out and found the vehicle missing. He immediately informed the owner (**PW 1**). He also reported to the police at the Central Police Station.

On 25th October 2009, **PW 1** and **PW 2** learnt that the police had recovered the vehicle. They identified the vehicle from its registration; engine number; chassis number; and **PW 1's** name which was written on the side.

PW 2 also noted that the TLB sticker as well as the Inspection sticker had not been changed.

However, the Route sticker which had been affixed at the back, had been torn.

PW 2's PSV badge was also still inside the vehicle, where he had left it.

PW 3, RAPHAEL MWANGI is a friend to **PW 1's** son, Joseph Mureithi. Joseph had informed him that **PW 1's** vehicle had been stolen.

On 25th October 2009, he saw the complainant's vehicle when it was being driven towards Dandora, Nairobi. After Joseph confirmed to **PW 3** about the registration number of the stolen vehicle, **PW 3** reported to Huruma Police Station, that he had seen the vehicle.

PW 4, PC NELSON KIRIMI and **PW 5, PC PATRICK NGARI**, were both attached to the Huruma Police Station at the material time.

After **PW 3** reported at the police station that he had spotted the stolen vehicle, the two police officers accompanied him, in the search for the vehicle. They found the vehicle parked at the Kobil Petrol Station situated at the Kariobangi round-about.

Inside the said vehicle they found the two appellants. The 1st appellant was on the driver's seat whilst the 2nd appellant was on the passenger seat. The police officers arrested them.

PW 6, CPL. MARY NGANGOSI, was the Investigating Officer. She charged the appellants in court after verifying the correctness of the information provided by the other witnesses who testified in this case.

After **PW 6** testified, the prosecution closed its case.

When the appellants were put to their defence, each of them gave unsworn testimonies.

The 1st appellant said that he was arrested on a Sunday evening, at about 6.45p.m. He had been drinking alcohol at Pioneer Estate, and was then walking home. His house was at Kariobangi North.

He said that 3 police officers arrested him near the Kariobangi round-about, because they had allegedly identified him as a thug.

Later, the police alleged that he had stolen a car.

On his part, the 2nd appellant also said that he was arrested on a Sunday. Those who arrested him were his friends. They arrested him because he had allegedly refused to pay to the police money for "Security". According to the 2nd appellant, the failure to remit payment of the money demanded every month, earned the person concerned a framed criminal charge.

Having re-evaluated all the evidence on record it is clear that none of the witnesses who testified in court saw the appellants when they were stealing the vehicle. Therefore, there was no direct evidence linking the appellants to the theft.

In these circumstances a conviction could only be sustained if the evidence adduced pointed conclusively at the appellants, as the persons who committed the offence. If there should be any co-existing circumstances that weaken the hypothesis, the benefit of doubt should be given to the appellants.

There is no doubt at all that the complainant, Reuben Ndegwa was the owner of the motor vehicle in issue. There is also no doubt that **PW 2**, Peterson Mugweni Murogo, was employed by **PW 1** as a driver of that vehicle. The vehicle was being used as a matatu plying the Embu-Nairobi route.

On the day in issue after **PW 2** reached Nairobi, he parked the vehicle, and locked it before going for breakfast.

Whilst he was having his breakfast, someone used a key to gain entry into the vehicle, and he then drove-off towards Kirinyaga Road. By the time **PW 2** came out from the place where he had been having breakfast, he found the vehicle missing. He therefore asked the taxi drivers who were operating in that area if they had seen the person who drove away in the vehicle. The taxi drivers told **PW 2** that someone who was wearing a "driver's uniform" had opened the left door, got into the vehicle and then drove off.

In my understanding, the reference to “driver’s uniform” was meant to relay the message that the person who drove-off in the vehicle was wearing the uniform which, by law, the drivers of Public Service Vehicles are required to adorn whilst on duty.

Clearly, therefore, whoever drove-off in that vehicle intended to, and did, create the impression that he was the driver of the matatu. By so doing, he lessened the amount of interest that those seeing him would have in him, because they would assume that he was simply doing the very thing that he was employed to do: drive the matatu.

The genuine driver quickly informed his employer and the police. And, as luck would have it, the information regarding the loss of the vehicle filtered further afield, to the relatives and friends of the owner.

PW 3 is one such person, who got information about the theft of the vehicle in issue. When he saw the vehicle being driven towards Dandora, **PW 3** did not take notice of the persons who were inside it. He only took note of the particulars of the vehicle.

Therefore, when the police were notified, and went along with **PW 3**, they were not searching for any particular person. They were searching for the vehicle.

When the vehicle was located at the Kobil Petrol Station, it had two occupants, the appellants herein. The 1st appellant was on the driver’s seat, whilst the 2nd appellant was on the passenger seat.

When the police asked the appellants to explain the circumstances in which they obtained possession of the vehicle, the 1st appellant said that the vehicle had been given to him to carry passengers.

If taken at face-value that explanation might appear plausible. However, considering that the 1st appellant failed to show to the police, the person who had allegedly given him the vehicle, it becomes obvious that the alleged explanation was simply a lame excuse, designed to try and get the appellant off the hook. If he had been truly given the vehicle by another person, the easiest thing would have been for him to provide the particulars of the said person.

As the particulars of the alleged person would have been within the knowledge of only the appellant, and because he chose to conceal the same, the only plausible conclusion that can be drawn by the court, is that no such person exists.

Of course, it is somewhat strange that the appellants should have been using the stolen vehicle in public, and without taking steps to conceal the identity of the vehicle. We may never understand why they did so, but that, of itself, would not weaken the case against the appellants, as there is no legal requirement for the prosecution to explain the motive of the accused person or his reasons for committing the offence of theft or of robbery.

In **OGETO V REPUBLIC [2004] 2 KLR 14**, at Page 20, the Court of Appeal said;

“The prosecution does not have to prove the motive for the commission of any crime, neither is evidence of motive sufficient, by itself, to prove the commission of a crime by the person who possesses the motive.”

It is noteworthy that the vehicle used to ply the Embu-Nairobi route before it was stolen. Thereafter, it was put on a route within Nairobi.

In particular, it was seen being driven towards Dandora. It is therefore possible that the appellants were confident that the change in the route would provide them with sufficient opportunity to avoid detection. But whether or not that was actually their hope, is not material.

The appellants were found in possession of the stolen vehicle within three (3) days of the theft.

In **MATU V REPUBLIC [2004] 1 KLR 510**, at page 512 to 513, the Court of Appeal, addressed itself thus, in a case in which the conviction was predicated on the doctrine of recent possession;

“The question for decision here is whether this possession was sufficient to sustain a conclusion that the appellant participated in the robbery on the night of 18th/19th August. How proximate in time in relation to the date of the robbery were the goods found in his possession? Before answering this question, it is necessary to state the principle of law germane to a consideration of this matter. In R vs. Loughin 35 Cr. App R 69, the Lord Chief Justice of England said;

‘if it is proved that premises have been broken into and certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker.’

That is the well known doctrine of recent possession.”

In this case, the vehicle was stolen on 23rd October 2009. It was later recovered in the appellants’ possession on 25th October 2009. In the said circumstances, the learned trial magistrate was right to have invoked the doctrine of recent possession, after the appellants failed to offer any acceptable explanation for how they had acquired possession of the stolen vehicle, so soon after it was stolen.

I therefore find no merit in the appeal: It is thus dismissed. I uphold both conviction and sentence for the two (2) appellants.

Dated, Signed and Delivered at Nairobi this 30th day of July, 2012.

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FRED A. OCHIENG
JUDGE