



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 151 of 2008

BENSON MUTUKU MUTUAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Principal Magistrate's Court Criminal Case No. 1086/2005 by Hon. S.A Okato, PM on 25/7/2008)

JUDGMENT

The appellant, **Benson Mutuku Mutua** was charged before the Chief Magistrate's Court at Machakos with stealing of motor vehicle parts contrary to section 27(c) of the Penal Code. Particulars being that on diverse dates between 16th December, 2004 and 27th March, 2005 at Machakos town within Eastern Province jointly with another not before court he stole one alternator, one carburetor, 5 tyres, one rim, one crankshaft and cylinder head all valued at Kshs. 70,000/= from motor vehicle KAJ 445 Toyota DX the Property of **Daniel Musau**. The appellant denied the charge and was soon thereafter put on trial.

In brief the prosecution case was that PW1, **Daniel Musau Nzioka** "the complainant" on diverse dates between 16th December, 2004 and 27th March, 2005 hired his motor vehicle registration No. KAJ 445P Toyota Corolla DX herein referred to as "the vehicle" to the appellant to do business with it and pay him Kshs. 1200/= per day at the end of every week. The appellant complied with the terms of the contract until January, 2005 when he disappeared with the motor vehicle. He reported the matter to the CID Machakos who traced the vehicle at Kibwezi, parked at a bar christened Bonden Bar & Restaurant. He went to see the vehicle and found the following parts missing; 4 spare wheels, one rim and a spare wheel, the starter, the distributor and carburetor. The appellant came to the scene and showed them a few parts which the police photographed. The appellant then promised to pay him for the missing parts but he reneged on the undertaking.

PW2, **Cpl Timothy Korir** of the Scene of Crime Section Nairobi , on 17th April 2005 arrived at Machakos Police Station accompanied by **P.C. Luvi** (now deceased) who was the investigating officer in the case. He led him to Kibwezi outside Bondeni Bar & Restaurant where he took 8 photographs which he produced as exhibits.

PW3, **Evans Wambua** was the driver of the vehicle. In September, 2004 the complainant hired him to be driving the appellant to wherever he wanted to go for his business. In March, 2005 when they reached Masinga town the vehicle developed a mechanical problem and he had it towed to Kibwezi where he packed it outside Bondeni Bar. The appellant and himself lodged at the bar and when he woke up next morning he found the appellant overseeing the engine of the vehicle being dismantled and when he asked him why he was doing so he said that he has already bought the vehicle from the owner and had the right to have it cleaned. The two men whom the appellant was supervising removed the entire engine

and closed the bonnet. The appellant directed them to carry the engine components to room no. 1 where he had lodged. The appellant then locked the room, hired another vehicle which he asked him to be driving him in. They went to Kitui where they stayed for 3 weeks after which the appellant left. For a whole 2 weeks they were stranded in Kitui and when he returned he asked him to accompany him back to Kibwezi where they had parked the vehicle. The appellant invited him to the room No. 1 where he had left the vehicle parts and informed him that those parts were missing. The appellant promised to trace the “things” and they stayed at Kibwezi for another 2 weeks, later the complainant arrived accompanied by two police officers who went to room No. 1 and recovered some engine parts and took them and the vehicle to Machakos and after one month the spare wheel the accused had sold at Makueni (Wote) was recovered. The accused had sold it to one **Musembi**.

PW4, **Abednego Mwanthi Musembi**, he operated as a taxi. The appellant approached him and hired the taxi for Kshs. 1,000/= per day and used it to ferry herbal drugs from one place to another. One day while they were at Wote the appellant emerged with a tyre and told him to fix it on his taxi. While still at Wote the taxi developed a mechanical problem and he and the appellant went to Machakos to look for a mechanic. The taxi could not be fixed and so the appellant sent for a white vehicle and they offloaded the herbal medicine from his taxi to the white vehicle but since the boot of the white vehicle was full the appellant left the tyre in his taxi on the understanding that he could drop it to him at Machakos when his taxi was fixed. As he now had two tyres in his taxi he kept the appellant’s tyre at his home. However every time he asked the appellant to take it he always told him that he would take it later. After some time the police summoned him to Machakos Police Station where he recorded his statement and released the tyre to the police.

Put on his defence the appellant in a sworn statement stated that he had hired the complainant’s vehicle in December 2004 who also provided the driver(PW3) at a daily rate of Kshs. 1200/=. PW3 used to drive him to different market places so sell herbs. He used to pay the complainant through the driver (PW3) whenever they got late he could sleep in the market place with the vehicle under PW3. They worked for 6 months without any problems until 1st March, 2005 when the engine of the vehicle knocked because PW3 had not filled the water. PW3 caused the vehicle to be towed to Kibwezi and he called the complainant who did not turn up. He wrote a letter to the complainant on 3rd March, 2005 which the complainant did not respond to. He produced the letter as an exhibit. He was forced to hire another vehicle registration No. KXX 445 salon car. On 13th April, 2005 he met the complainant at Makindu and he demanded Kshs. 43,000/= which was for the period he had not been using the vehicle. Before the vehicle stalled he owned him some money which was part of the Kshs. 43,000/=. He agreed with the complainant that he should be paying him Kshs. 10,000/= a month. He produced the agreement to that effect as an exhibit. On 9th March, 2005, he received a demand notice from **Kimeu Advocate** for Kshs. 50,200/= being the arrears or the car hire charges upto and including 13th May of 2005. He produced the demand notice as an exhibit as well. He did not pay the money because the business prospects were poor. Later the complainant threatened him with court action if he did not pay the money. He denied stealing spare parts adding that the complainant should be asking him for his money and not spare parts. On 27th March, 2005, he was arrested and kept in police until 18th April, 2005 so that he could pay the money which was Kshs. 101,000/=. The police were forcing him to pay. He claimed that PW3 should have been charged with him too.

The appellant then called one witness **John Kioki Mutua** (DW2) who confirmed what he had stated.

The learned magistrate having considered the evidence on record found that the prosecution had proved its case against the appellant beyond reasonable doubt and accordingly convicted him as charged. Following the conviction, the appellant was sentenced to 18 month’s imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal through **Messrs Wambua Kilonzo & Company Advocates** on 13 grounds to wit;

“1. The learned magistrate erred in law and fact by finding the prosecution had proved their case beyond any reasonable doubt when it was evident that the prosecution testimonies were contradicting.

2. *The learned magistrate erred in law and fact by imposing a harsh and excessive sentence.*
3. *The learned trial magistrate erred in law and fact by disregarding the mitigation by the accused.*
4. *The learned magistrate erred in law and fact by failing to appreciate that the issues raised were civil nature.*
5. *The learned trial magistrate erred in law and fact by failing to appreciate that the appellants constitutional rights had been violated having been detained in police cell for 21 days before being arraigned in court.*
6. *The learned magistrate erred in law and fact by admitting evidence of photographs when an order had been made the witness be recalled for cross examination but the prosecution did not do so.*
7. *The learned magistrate erred in law and fact by failing to appreciate that failure by prosecution to recall a witness for cross-examination prejudiced the appellant and did not result to a fair trial.*
8. *The learned magistrate erred and in law and fact by convicting the accused on a defective charge sheet.*
9. *The learned magistrate erred in law and fact by admitting the evidence of PW3 when it was clear that he was present in court in all previous hearings when other witnesses testified.*
10. *The learned magistrate erred in law and fact by disregarding the appellant's testimony together with that of his witnesses.*
11. *The learned magistrate erred in law and fact by admitting the evidence of PW3 an accomplice and or suspect.*
12. *The learned magistrate erred in law and fact by convicting the appellant when no mechanic had been called to prove what was missing in the motor vehicle engine.*
13. *The learned magistrate erred in law and fact by holding that the stealing was a process which started at Machakos when it was clear the alleged theft took place at Kibwezi.*

Subsequent to the lodging of the appeal, the appellant successfully applied to be released on bond pending the hearing and determination of the appeal. When the appeal came before me on 17th May, 2012 for hearing, **Mr. Kilonzo** learned counsel for the appellant and **Mr. Mukofu**, learned State Counsel agreed to canvass the same by way of written submissions. They subsequently filed and exchanged the same. I have carefully read and considered them.

As a first appellate court, it is my duty to subject the evidence tendered before the trial court to a fresh and exhaustive examination and or evaluation so as to reach my own independent verdict as to whether the conviction of the appellant can suffice.

I must say at once that from the evidence on record, the dispute herein was of a civil nature. I think that the criminal process was being used or invoked for ulterior motives; to compel the appellant to pay a civil debt. This is not the role of our criminal justice system. The police and indeed the criminal justice system was being turned into debt collection agencies. There are letters of demand from the complainant to the appellant tendered in evidence. There was also a letter from the appellant to the complainant about the vehicle. These letters are dated 3rd and 9th March, 2005, as well as 13th February, 2005 respectively. There is no mention of stolen vehicle parts in these letters and in particular, the complainants demand letter; yet the charge sheet talks of the appellant having stolen the motor parts between 16th December, 2004 and 27th March 2005.

The complainant testified that he hired his vehicle to the appellant on 16th December, 2004 at Kshs. 1200/= per day payable weekly though. The appellant defaulted in January, 2005 prompting the complainant to report to CID. The motor vehicle was to be under the control and management of his driver, **Wambua Musau** (PW3). Subsequently, the complainant traced the vehicle at Kibwezi . On 9th March, 2005, he caused a demand letter to be written to the appellant demanding Kshs. 50,200/= being arrears of car hire charges for the period upto and including 13th March, 2005. As already stated the charge sheet suggests that the motor vehicle parts were stolen between 16th December, 2004 and 27th March, 2005. One wonders then how the appellant could have stolen the parts when the complainant was demanding from him car hire charges. Indeed by the complainant's own testimony, when he traced his vehicle to Bondeni Bar & Restaurant in Kibwezi, he called the appellant who readily came and showed him the dismantled parts of the engine. Some were missing. The appellant was subsequently arrested and locked up. Upon his undertaking to pay for the missing parts, the appellant was released from police custody. However, the appellant refused to pay and hence his arrest and subsequent prosecution. This is a clear case where the appellant was being pressured to settle a civil matter. His being kept in police custody between 27th March, 2005 to 18th April, 2005 and which was illegal should be seen in the same light. He was being pressured to pay. In my view, this amounted to abuse of court process. I am surprised that the trial court refused to appreciate the defence evidence regarding the civil nature of the Matter.

This being my take on the matter, I am satisfied that the conviction of the appellant cannot be sustained. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER 2012.

ASIKE MAKHANDIA
JUDGE