REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 17 OF 2011

ESTHER WAHU MWANGI……....APPELLANT

VERSUS

REPUBLIC…….…….…….....RESPONDENT

(An appeal from original conviction and sentence in Nakuru criminal case No.1719 of 2010 by Hon. W. Juma Chief Magistrate ,Nakuru dated 25th January 2011).

JUDGMENT

The appellant, Esther Wahu Mwangi, was charged that on 15th March, 2010, at Marigiti in Nakuru town jointly with others not before court, they stole motor vehicle registration number KBH 974W Nissan Sunny B15 silver grey in colour valued at Kshs. 680,000/= the property of Elizabeth Wangechi Mabaria, contrary to **Section 298A** of the **Penal Code**. She also faced an alternative charge of **handling stolen property** contrary to **Section 322(2)** of the **Penal Code.**

In respect of the alternative charge it is alleged that on 19th day of March, 2010 at Kayole in Nairobi, the appellant, otherwise than in the course of stealing dishonestly retained motor vehicle registration number KBH 974W, Nissan Sunny B15 silver grey in colour having reason to believe it to be stolen property.

The trial court upon consideration of the evidence presented before it found it incapable of proving the main offence but found proved the alternative charge and upon convicting the appellant of that offence sentenced her to serve six (6) years imprisonment.

Aggrieved by the decision of trial court the appellant filed this Appeal challenging the decision of the trial court on six grounds that can be condensed to three, namely:-

1. That the learned trial Magistrate failed to find that the evidence presented before him was insufficient to prove the offence of handling stolen property;

2. That the learned trial Magistrate erred in law by requiring her to prove her innocence when the legal duty of proving the charge lay with the prosecution; and

3. That the learned trial court failed to consider her defence.

In arguing the appeal learned counsel for the appellant submitted that the charge of handling stolen property was not proved beyond reasonable doubt; that there was no conclusive evidence that the changes to the motor vehicle were done at the appellant\'s home; that the appellant explained how the motor vehicle got to her place; that the finding of the trial court was only based on suspicion, which alone

cannot form the basis of inferring guilt and that Samson Obonyo who had been given the motor vehicle by the complainant was not called to testify.

Learned counsel for the State while supporting the conviction, submitted that as the motor vehicle was found at premises occupied by the appellant and the appellant having failed to give a reasonable account of how it came to be at her premises, the trial court was justified to conclude that she was either the thief or the handler of the motor vehicle.

I have considered the appellant\'s submissions alongside those of the respondent. This being a first appeal, it is my duty to re-evaluate the evidence adduced during trial in order to arrive at my own independent conclusion, bearing in mind that I did not hear or see the witnesses testify.

It was the prosecution case that on 15th March, 2010 P.W.1, Elizabeth Wangechi Mbaria, the complainant, gave her motor vehicle registration number KBH 974W Nissan Sunny, to her business colleague, Samson Obonyo, to go and carry some goods at Njoro. She did this on the understanding that Samson would return it immediately he returned from Njoro. To her surprise Samson never returned the motor vehicle at the appointed time or at all. This led her to seek the assistance of the company that had fitted a tracking machine on the vehicle to assist her in tracking the motor vehicle.

Officers from the car tracking company led by P.W.2, Joseph Musembi Kiiru, tracked the car at a place called Miyango in Kayole in a compound they concluded was the appellant\'s home. They got the assistance of police officers from Miyango Police Station in tracing the car. When they visited the scene of the crime they found that the car had been tampered with. It bore a different number plate and several of its parts had been changed to as was the insurance details. The Chassis number had been changed from FB 15-332694 to FB 15-014420 but the engine was intact. P.W.3, Charles Cheruiyot, together with P.W.2 arrested the appellant. P.W.7, P.C. Pasian Stephen who investigated the crime discovered that the number plate found on the motor vehicle was fake as it belonged to Nissan Datsun as opposed to Nissan Sunny. P.W.6, Githae Mutunga, upon examination of the stolen motor vehicle noted that despite some parts having being tampered with, the engine number remained that of motor vehicle KBH 973H which had been purchased by the complainant from the registered owner.

To that extent, I am satisfied and find that the motor vehicle in question was the same one which has been taken from the complainant by Samson Obonyo. It was also conceded by the appellant that the motor vehicle was found in her compound. She, however, denied either having stolen the motor vehicle or having had knowledge that it was stolen and maintained that the motor vehicle found at her home was KAV 726W and not KBH 973W. She explained that the motor vehicle was brought to her premises by her cousin, whose details she gave the police; that her cousin had never been in touch with her since he left the motor vehicle at the premises.

Without the evidence of Samson Obonyo, who disappeared after getting the motor vehicle from the complainant, it is safe to conclude that he (Samson Obonyo) was the thief. No evidence, as the trial court correctly found, linked the appellant with the theft of the motor vehicle.

The sole question is whether the appellant handled the motor vehicle having reason to believe that the same was stolen property. The offence is committed when, otherwise than in the course of stealing, a person

“knowingly or having reason to believe the goods to be stolen, dishonestly receives or retains them or dishonestly undertakes or assists in the retention, removal, disposal or realization by or for the benefit of another person or if he arranges to do so.“

The key words are *“knowingly”* or *“having reasons to believe.”* Although it is common ground that the motor vehicle was found in premises occupied by the appellant, the evidence does not point to the appellant as having known that it had been stolen or that she has any reason to believe that it was stolen. There is no conclusive evidence that the changes to the motor vehicle were done at the appellant’s premises or with her knowledge.

The appellant in her defence gave a plausible explanation as to how the motor vehicle ended up in her premises. P.W.1 and P.W.4 in their evidence told the court that the appellant cooperated with the police in their investigations and was shocked when she learnt that the motor vehicle was stolen.

The learned magistrate imported into evidence her own theories to the effect that it was unbelievable that the appellant did not have keys to the motor vehicle, yet in the normal course of things a person who leaves a motor vehicle in another\'s compound must leave the key in case of fire. That theory lacked any empirical basis and was unnecessary.

For the above reasons I allow the appeal, quash the conviction, set aside the sentence and order that the appellant be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Nakuru this 21st day of September, 2012.

W. OUKO
JUDGE