REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 160 OF 2010

GEORGE MULAMA LUTTA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in Criminal Case number 185 of 2010 of the Chief Magistrate's Court at Kisumu)

JUDGMENT

The appellant was charged in the lower court with the offence of stealing a motor vehicle contrary to Section 278 A of the Penal Code in that **"on the 10th day of April 2010 at about 5:30 p.m. at Kano plains in Kisumu East District within Nyanza Province, stole a motor vehicle Toyota Saloon Registration number KAV 317 L valued at Kshs. 448,000/= the property of David Odira Okumu**". The appellant denied the charge and was tried by the lower court.

The evidence adduced in a summary form is that PW1 stated that he had travelled with the appellant to Kisumu where him PW1 was attending a burial. At some point in time the appellant asked for the car keys to get water from the car. When PW1 gave him the keys he then left with the car. PW1 had been given the said vehicle as a car hire. This was on 10th day of April 2010. PW1 tried to contact the appellant through his mobile but he was off the air. Information from Safaricom stated that the appellant was operating in Mumias. Efforts were made and appellant was traced on April 13, 2010 and brought to Kisumu. PW1 saw the car and appellant in Kisumu on 14th April 2010. The appellant was wearing PW1's clothes when cross – examined PW1 denied the suggestion that the car was lend to appellant and he maintained that the car was stolen.

PW2 had traveled to Kisumu in the same car as PW1 and the appellant. He was present when the

appellant asked for keys to the car to get water. PW2 confirmed PW1's evidence that, later in the evening they discovered the car was missing and appellant was off the air. The matter was reported to the police. PW2 confirmed PW1's evidence that he saw the vehicle on 14th April 2010 at the homestead of the appellant's aunt .PW3 had seen the appellant and a girl in the mentioned car.

PW4 a Police Officer took photographs of the motor vehicle registration number KAV 317 L allegedly stolen and produced then as exhibits. PW5 acting on information went to Mumias and on the way arrested appellant in possession of the subject car. He was in the company of his brothers wife. Both appellant and the car were taken to Kisumu where the appellant was charged with the offence charged. PW6 another Police officer had received a complaint of theft of the motor vehicle and he commenced investigations. The appellants number was notified to safaricom for surveillance and was said to be operational and at Mumias where by police were sent to patrol the place which led to the arresting of the appellant in possession of the car on 14th April 2010 PW6 recalled on 15th April 2010, the car was photographed and released to the owner where as the appellant was charged in connection with the offence.

The appellant gave sworn evidence and in response to the subject of these proceedings, it is his testimony that he knew the owner of the car one David through a friend. The said David and his wife came to know that appellant prays for people and they requested for the appellants' prayers. It is appellants' testimony that he was in Mombasa then. An arrangement was made for the appellant to reach their home. He was picked up at the bus stage by the wife of David who took them to their home (David's home). He stayed there for six (6) days praying for the couple while here is when he requested David to assist him appellant with their vehicle (David's) since they had another car in their compound to enable appellant go to his father's home to sort out an issue of land distribution. David agreed and allowed him the use of the said car for one week. Him appellant was then informed that a friend of David was traveling the same direction to attend to his father's funeral and that appellant would leave them at the funeral and then take the car for a week and return it. It is his testimony that David and his wife knew that he would stay with the car for one week and then return it to them on 14th day of April 2010 David called him and inquired where he was and him appellant informed them and since David wanted to know their home he came but it turned out that he had been accompanied by an unknown person who turned out to be a police officer. It is when David told him that the car belonged to another who had given him the car for one day for David to go to Machakos, but instead David used it to go to Kisumu and since he had delayed the owner had reported the loss to Buru Buru Police station David said he would sort out the issue at Mumias and on reaching Mumias is when he appellant was locked up in the cells and later he was taken to Kisumu Police station and locked up.
When cross – examined, he admitted to have had the vehicle for five (5) days, the vehicle was not his and he had not differed with David.

Against the afore said evidence the learned trial magistrate made the following findings:-

- **The accused pleaded not guilty to the charge.**

- **The car belonged to Mary Maguke.**

- **The point for determination before the learned trial magistrate was whether the accused stole the motor vehicle in question.**

- **Quoted with approval the decision of <u>Mwaura =versus= Republic [1984] KLR 644</u> where it was held inter alia that:- "For a person to be said to**

steal a thing he must take it fraudulently and without claim of right".

- **That in the circumstances of the case before him the accused took the car keys pretending that he was going to pick up water from the car and then drove off and he was later found with the car and wearing clothes belonging to PW1.**

- **Opined that if PW1 had given the car to appellant there was no reason for PW1 to announce to all and sundry to that the car was missing.**

- **Drew support for the evidence of PW1 from the statement of Mary Maguke which had been produced as a defence exhibit.**

- **Appellant had stayed with the family of PW1. Appellant was allegedly praying for them and there was no reason why they should turn against him.**

- **Drew inspiration with approval from the definition of the offence in Section 268 (1) A which reads:- " A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property".**

- **Opined that the appellant took the car keys fraudulently pretending that he was to take water from the car, he took the same without permission of the special owner David Okumu .**

- **He was satisfied the appellant stole the vehicle, found him guilty, and convicted appellant.**

- **On sentencing the learned trial magistrate observed that though the appellant was a first offender, he was not remorseful for the commission of the offence. Noted that the offence was grave and sentenced the appellant to serve four (4) years imprisonment.**

The appellant became aggrieved and appealed to this court citing eight (8) grounds of appeal to the effect that the learned trial magistrate erred in law and fact;-

- **By failing to note that he was charged with the offence of stealing a motor vehicle but instead he was convicted of committing an offence he was not charged with.**

- **Failed to consider that the motor vehicle was not stolen as it is PW1 who released the ignition keys to him.**

- **Failed to note that the prosecution failed to avail the owner of the vehicle Mary Maguke and the people who were at the funeral.**

- **Failed to observe that the charge sheet was defective as he was not charged with an alternative count of handling suspected stolen motor vehicle.**

- **Failing to observe that he claimed his property which had been taken by the police officers during his arrest namely, i.e. Nokia N 70 and Kshs. 3,400.00 which were not returned to him despite the promise that they would be returned to him .**

- **By failing to consider that the investigation done in the matter was shoddy and could not sustain a conviction.**

- **By failing to evaluate the strength and weight of the appellants' sworn defence which was not challenged by the prosecution hence rejected it without congruent reasons.**

In his oral submissions to court, the appellant reiterated the grounds of appeal and then stressed the following:-

- **He did not steal the vehicle. He was given the vehicle.**

- **David and his wife knew that he would use the vehicle and that is why he stayed with the vehicle for one week.**

- **That the owner of the vehicle did not come to testify.**

- **The charge sheet is defective.**

The State opposed the appeal for the following reasons:-

- **The evidence on the record support that the appellant was known to PW1, travelled with them, took keys to get water and then drove off, switched off his mobile, he was arrested while in possession of the vehicle, he had no right to drive off the vehicle, PW1 rightly complained because he was the special owner as he had been given the vehicle by the owner of the vehicle.**

In response, the State Counsels submissions to the appellant still reiterated his earlier submissions and ground of appeal. This court has given due consideration to the above rival arguments and in its opinion the following are the undisputed facts of this case:-

(i) In relation to circumstance which led to the proceedings herein, PW1, PW2 and appellant agree to have travelled together from Nairobi to Kisumu for whatever reason. It is alleged that appellant was supposed to have alighted at Ahero but changed his mind and accompanied them to the funeral according to PW1 and PW2. But according to the appellant, he was to proceed to the funeral place where he was to be handed the vehicle for his use for five (5) days to the knowledge of PW1 and his wife as agreed.

(ii) Indeed the appellant did not steal the car keys but he was given the car keys. It is the reason for him being handed the keys which is in dispute. According to PW1 and PW2, appellant was

handed keys to pick up a bottle of water. Where as according to the appellant, he was handed keys for him to use the said vehicle to go to his fathers home to sort out a land issue at the invitation of his father (appellant's).

(iii) The stand of PW1 and PW2 is that appellant was off the air from the time he drove off the car. It is noted from the record that there is no mention by the appellant that he bid PW1 and PW2 bye when he drove off with the vehicle. Nor that he was in constant touch with them through his mobile.

(iv) Indeed there is mention that PW1 had only been allowed by the owner of the vehicle, Mary Maguke, to use the said vehicle to go to Machakos, but then he headed to Kisumu. It was alleged that the owner had reported the loss of the said vehicle to Buru Buru Police Station. It is on record that the said Mary Maguke did not testify but her statement was produced as an exhibit. A perusal of the same, reveals, that Mary Maguke's statement in relation to the loss of the vehicle subject to these proceedings from PW1 to appellant at Kisumu was based on information PW1 had passed on to her. Indeed appellant took issue with her failure to testify as being fatal to the prosecution's case. In this courts opinion the said evidence would have been material to the lawfulness of the possession of the vehicle as between the said owner and PW1 and not the lawfulness of the possession of the vehicle as between PW1 and the appellant.

(v) Besides what has been observed in number four (4) above, there is nothing to demonstrate that PW1 was in unlawful possession of the said motor vehicle in order to oust his title of a special owner.

(vi) By reason of him being a special owner he had a lawful title to determine and direct the movement of the said motor vehicle.

(vii) A part from the assertion of PW1 and PW2, that appellant had no authority to drive away the said motor vehicle as against the appellants assertion that he had authority to drive off the said vehicle to the knowledge of PW1 and PW2, neither side has shown any justification for appellant to be framed with the offence charged.

(viii) It is not disputed that appellant was found in possession of the said motor vehicle, taken to Mumias Police Station and later transferred to Kisumu Police Station where he was charged with the offence which led to the conviction subject of this appeal.

(ix) It is on record that appellant raised the issue of items recovered from him by police at the time of arrest which complaint led to the summoning to the lower court of one number 32154 Police Constable Reuben Tambaa whose representations are found at page 2 of the typed proceedings where he mentioned the items that were recovered at Kisumu Police Station along side the appellant namely Kshs. 1000/= mobile phone make G-tide and two (2) books. PW5 denied knowledge of items appellant was claiming but conceded 200/= given to him by another man.

(x) The stand of the appellant in relation to these proceedings is that he wants to fault the proceedings and conviction on two fronts namely that the charge was defective on the one hand and on the other hand he was convicted and sentenced in connection with an offence he was not charged with and lastly that the facts tendered do not disclose the commission of the offence. Where as the stand of the prosecution's is that the charge is well and properly laid, the facts support it and the

conviction is sound and the same should be confirmed.

This court has made due consideration of the afore set out common grounds or undisputed facts of the case and the same considered in the light of the rival arguments herein. In this courts opinion it is apparent that the appellant has attacked the conviction on two fronts namely the technical point and the merit front. The technical front arises from the appellants argument that he was convicted for an offence which was not charged whereas the merit front a rises because of the appellants argument that the facts do not disclose the commission of the offence alleged by reason of him having been given the vehicle.

On the technical front, this court has revisited both the charge sheet and the learned trial magistrate remarks at the time of handing out the conviction. A revisit of the charge sheet at page B of the record reveals that appellant faced, the charge of stealing of motor vehicle contrary to Section 278 of the penal code. Section 278 A of the penal code reads:- **" If the thing stolen is a motor vehicle within the meaning of the Traffic Act, the offender is liable to imprisonment for seven (7) years".** It is clear from a construction of this section that Section 278 A 15 the penal Section. It does not prescribe the offence. This court has no doubt that the learned trial magistrate had this in mind when he made observations on the record at page 19 of the proceedings with regard to Section 268 (1) of the penal code where stealing is defined. It reads **"Section 268 (1) A person who fraudulently and without a claim of right takes anything capable of being stolen or fraudulently converts to the use of any person other than the general or special owner thereof, any property is said to steal that thing or property".**

A special owner is defined in the same Section 268 (2) (e) as:- **" and special owner includes any person who has any charge or lien upon the thing in question or any right arising from or dependant upon holding possession of the thing in question".**

This court has no doubt the learned trial magistrate was alive to the intentional purport of the said provision and that is why he set them out on the record. As to whether he applied that construction properly to the facts before him or not is for this court to determine. It is observed at page 19 of the record from line 13 from the bottom that the learned trial magistrate after setting out the provisions of the said Section made the following observations on the record:- **" Accused took the car fraudulently pretending he was to fetch water from the car. He took the same without permission of the special owner. David Okumu (PW1) was the special owner of the car. I find the accused stole the car. I find the accused, guilty as charged. I convict the accused under Section 215 of the criminal procedure code".**

This court has revisited those remarks and it is of the opinion that the offence disclosed in the mind of the learned trial magistrate was the offence described in Section 268 (1) of the penal. But this was not the offence that the appellant faced. I have no doubt that the learned trial magistrate realized this anomaly and that is why he stated that appellant is found guilty as charged. It is to be noted that fraudulent taking of the motor vehicle is not part of the ingredients of the offence charged in Section 278 A of the penal code. It therefore follows that the appellant has a genuine complaint. What the learned trial magistrate should have done upon realizing the error is that he should have declared the proceedings mistrial and then asked the prosecution to start afresh if they so wished but not to shy away from an illegality.

This court is alive to the provisions of Section 134 of the criminal procedure code. It reads:- "**Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.** Side by side with this goes the provision of Section 214 (1) which deals with variance between the charge and evidence and amendment of the charge". It reads "**Section 214 (1) where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective either in substance or in form the court may make such order for the alteration of the charge, either, by way of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case provided that:- "Where a charge is so altered the court shall thereupon call upon the accused person to plead to the altered charge……."**

This kind of situation was encountered by Warsame J in the case of **Jon Cardon Wagner =vs= Republic Nairobi HCCRA 404 of 2009**. It is noted that this decision is a decision of a court of concurrent jurisdiction and therefore not binding on this court. However the reason why this court has resorted to it is because the learned judge quoted with approval in it a decision of the court of appeal which defined guidelines on what amounts to a defective charge and how the same should be treated when disclosed. This is found at page two (2) of the ruling where the learned judge had quoted with approval the case of Yongo =vs= Republic Criminal Appeal No. 1 of 1993 where the court of appeal held inter alia that:- "**A charge is defective under Section 214 (1) of the Criminal Procedure Code (Cap 75) where:**

(a) It does not accord with the evidence in committal, proceedings because of in accuracies or deficiencies or the charge because it charges offence in the charge not disclosed in such evidence or failsto charge an offence which the evidence in the committal proceedings disclose or

(b) It does not for such reason accord with the evidence given at the trial or

(c) It gives a misdescription of the alleged offence in the particulars.

(2) Where the charge is defective either by misdescription or at variance with the evidence at the trial, the court has the power to order an amendment or alteration of the charge provided:-

(a) The court shall call upon the accused to plead to the altered charge and

(b) The court shall permit the accused if he so requests to be examined and recall witnesses

(2) It is a mandatory requirement that the court must not only comply with the above condition but it shall record that it has so complied. The trial magistrate failed in not recording whether there had been compliance with the provisal to Section 214 of the Criminal Procedure Code (Cap 75).

(3) The appellant should have been given the opportunity to further question the prosecution witnesses and it could not be said whether the failure to give him that opportunity occasioned no prejudice to him as such further questioning might have caused the trial magistrate to form a different view of the witness evidence".

This court has on its own construed section 134 and 214 (1) of the Criminal Procedure Code and the same considered in the light of the appellants complaint that he was convicted on a defective charge. It has also given consideration to the construction given to Section 214 (1) of the Criminal Procedure Code by the court of appeal as reflected by Warsame J in the cited case as well as the observations made by the learned trial magistrate just before conviction with regard to the content of Section 268 (1) of the penal code and the attendant observations by the learned trial magistrate just before conviction, and this court proceeds to make the following finding on the appellants complaint:-

(i) That a reading of Section 278 A under which the appellant was charged reveals that this is the penal provision. It is not the Section prescribing the offence. It therefore follows that the appellant was charged with the offence of committing the penalty and not the offence. This was irregular.

(ii) **The correct offence that the appellant should have been charged with should have been the offence described under Section 268 (1) of the penal code. It is also the offence that the learned trial magistrate found to have been disclosed and that is why he stated in his judgment that the appellant fraudulently took the car by pretending that he was going to get water from** the car……"

But instead of convicting the appellant on the disclosed offence convicted him as charged. The reason for doing so has not been given. But in this courts' opinion, the learned trial magistrate discovered that there had been an error and if substituted it would have amounted to a mis trial. In this courts opinion that is the most reasonable step that the lower court should have done not to shy away from an illegality but take a bold step to rectify it and declare the trial a mis trial.

This is a further call to courts may they be subordinate or superior that where such courts are seized of a criminal jurisdiction, care should be taken to ensure that the charge is well founded before proceeding with the trial. Failure to do so render the trial a nullity and this is the position herein.

Having faulted the trial and conviction on a technicality there is an option for quashing the appeal, setting a side the sentence and then setting the appellant at liberty or in the alternative order retrial. Herein the appellant had the vehicle for one week, there is no allegation that it was damaged in any way. He was arrested on 14th April 2010. It appears he was not admitted to bail. He has therefore been incarcerated for a period of eleven (11) months. In this courts opinion that is sufficient punishment and so a retrial will not be ordered.

As regards items held by the police, in view of the stand taken by the police, there is no way this court can compel them to release that which they allege they do not have. The appellant can purse that on his own.

For the reason given in the assessment the appeal is allowed.

(1) **Conviction quashed and sentence set aside. Appellant is ordered to be set at liberty in connection with the offence which led to this appeal.**

(2) There will be no retrial ordered for the reasons given.

(3) The court will not order the police to surrender the items sought by appellant in view of their representations on the record regarding the same. The appellant is at liberty to pursue that claim once he is released from custody.

Dated, signed and delivered at Kisumu this 16th day of March 2011.

R. N. NAMBUYE

JUDGE

RNN/aao