



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 281 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 1986 of 2009 Chief Magistrate's Court at Mombasa: E. Michieka – R.M.)

NGUNGA MUNYALO 1ST APPELLANT
CHARLES KANJA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

This is the appeal of **NGUNGA MUNYALO** (hereinafter referred to as the 1st Appellant) and **CHARLES KANJA** (hereinafter referred to as the 2nd Appellant) against their conviction and sentence by the learned Resident Magistrate sitting at Mombasa Law Courts. The two Appellants were both arraigned before the subordinate court on 20th July 2009 on a charge of **THEFT OF A MOTOR VEHICLE CONTRARY TO SECTION 278A OF THE PENAL CODE**. The particulars of the charge were that:-

“On the 12th day of May 2009 at Bombolulu area in Mombasa District of the Coast Province jointly with others not before court stole a motor vehicle Reg. No. KBD 484D Nissan matatu valued at Kshs.930,000/- the property of ABEID AWADH OMAR”

Both Appellants pleaded **‘not guilty’** to the charge. Their trial commenced on 20th July 2009 and the prosecution called a total of five (5) witnesses in support of their case. **PW1** Abeid Awadh Omar (otherwise referred to as the complainant) told the court that he is the owner of a Nissan Matatu registration number KBD 484D. On 12th May 2009 his driver one **GEOFFREY MBUGUA NJENGA** (who testified as **PW2**) came to the complainant's home in old town at 4.00 A.M. and collected the matatu to start the day's business. At about 10.00 A.M. the driver called **PW1** and requested to stop work as it was raining heavily and business was slow. **PW1** acceded to this request and told **PW2** to return the matatu to him. The matatu was never returned. The complainant waited until 10.00 p.m. but his driver failed to show up with the matatu. **PW1** then called his driver to find out what had gone wrong. **PW2** told him that he had handed over the matatu to the 2nd Appellant one **CHARLES KANJA alias MAPANGALA** at 12.00 noon to continue with business and that the 2nd Appellant never returned the

matatu to him. The matter was reported to police who launched a search for the matatu but failed to trace it. The 1st Appellant who was the conductor of said matatu allegedly informed **PW2** that some people who had hired the matatu later robbed he and the 2nd Appellant of it. The 2nd accused was traced to Kikuyu town where he was arrested. Both were then arraigned in court and charged with the theft of the matatu.

At the close of the prosecution case both Appellants were found to have a case to answer and were placed on their defence. They each made statements in defence, denying any and all involvement in the theft of the said vehicle. On 17th December 2009 the learned trial magistrate delivered his judgement in which he convicted both Appellants of theft of a vehicle and after listening to mitigation, the trial court sentenced each Appellant to serve four (4) years imprisonment.

The Appellants who were unrepresented at the hearing of their appeal relied entirely upon their written submissions which had duly been filed in court. **MR. ONDARI** who appeared for the Respondent State conceded the two appeals. As a court of first appeal I will proceed to re-evaluate and re-examine the evidence adduced by the prosecution in order to determine whether it met the legal standard of proof in criminal cases – proof beyond a reasonable doubt.

At the outset I wish to state that I am in agreement with the reservations expressed by Mr. Ondari, about the trial court's reliance on the testimony of **PW2** as a basis for a conviction. From the evidence on record **PW2** was in actual fact a key suspect in the loss/theft of this motor vehicle. **PW1** told the court that it was actually **PW2** whom he had employed as his driver. Indeed on the date when the vehicle went missing it was **PW2** who had collected the vehicle from the home of the complainant in Old Town at 4.00 A.M. Therefore the person who had possession of the vehicle with the full authority and consent of the owner was the driver who was **PW2**. **PW1** told the court that at about 10.00 A.M. **PW2** called him and requested to stop work since business was slow due to the rain. **PW1** agreed to this request and instructed **PW2** to return the vehicle to his (the complainant's) house. **PW1** waited until 10.00 p.m. but the vehicle was never returned to his home as instructed. It was not until **PW1** called **PW2** to enquire about the whereabouts of the vehicle, that **PW2** said he had handed over the vehicle to Kanja alias Mapangala 2nd accused. The question that immediately comes to mind is why would **PW2** a mere employee ignore instructions to take his employer's vehicle to his home and instead hand over said vehicle to a third party. The 2nd accused was not an employee of the complainant. **PW2** did not bother to seek the permission of **PW1** before handing over the vehicle, neither did he bother to inform **PW1** that he had done so. The behaviour of **PW2** is quite at odds with his status as an employee. He was acting as if the vehicle belonged to him. By what authority did **PW2** decide to hand over the complainant's vehicle to a third party? In my view **PW2** was a chief suspect in the theft of this vehicle yet police did not arrest him. Instead they treated him as a witness. The reason given by police for this action is mind-boggling! **PW5 PC. DAVID CHUNA** who was the investigating officer tells the court at page 16 line 3 that:

“The motor vehicle was in the possession of PW2 Mbugua. I had intended to charge Mbugua (PW2) but the owner intervened, he told me he trusted him”

PW1 in his evidence confirms that indeed it was he who dissuaded the police from charging **PW2**. He states at page 5 line 24:

“I am the one who stopped the police from charging Geoffrey Mbugua [PW2] with a criminal offence”

It is extremely odd that **PW5** a police officer who is supposed to be conducting independent investigations, make a decision to charge **PW2** but is “*dissuaded*” by **PW1** from doing so. Why would police be acting at the behest of the complainant in this matter? Why were the police taking instructions from **PW1** on whom to charge in the matter? This amounts to a total abdication by the police of their constitutional duties. These actions of the police lead me to conclude that their actions were not free from

influence. **PW2** was in actual fact be termed an accomplice in the theft of this vehicle. Yet it is he who the police decide to rely upon to nail the two accuseds. The evidence of a co-accused [which is exactly what **PW2** ought to have been] cannot in law form the basis for a conviction. The court cannot rule out the very real possibility that the police were influenced by **PW1** and **PW2** (who appear to have been leading this investigation) to lay unfounded charges against the 2 accuseds.

PW2 claims that one '**Masai**' was present and witnessed him handing over the vehicle to the 2nd accused. Not surprisingly this '**Masai**' was not called as a witness. Thus this fact cannot be independently corroborated. The learned trial magistrate erred in convicting the two accuseds based on the evidence of an accomplice.

Aside from this glaring anomaly a look at the record reveals other material inconsistencies and contradictions. In his evidence at page 4 line 14 **PW1** implies that he knew the 2nd accused when he says:

"The 2nd accused used to help Geoffrey Mbugua to drive the matatu. The 2nd accused and Geoffrey Mbugua were friends and workmates"

PW2 however contradicts this testimony when he states at page 9 line 26:

"The owner of the motor vehicle [PW1] did not know the 2nd accused"

Likewise whereas **PW1** tells the court that **PW2** phoned him at 10.00 A.M. on the material day. **PW2** in his evidence contradicts this by saying, ***"I never called the owner of the motor vehicle on the phone at about 10.00 A.M. on that day."*** The testimony of **PW1** and **PW2** is totally at odds with each other and cannot be relied upon.

In his judgement at page 29 line 27 observes thus:

"Consequently, I find that the accused persons were the last known persons who were in possession of motor vehicle matatu KBD 484D which they now cannot account for."

In this finding the learned trial magistrate with respect misdirected himself. Firstly there exists absolutely no independent evidence that the 2 accused were ever in possession of the vehicle in question. The only evidence in that regard is the testimony of **PW2** who was an accomplice and whose evidence cannot be relied upon to implicate the 2 accuseds. Secondly the learned trial magistrate is in effect shifting the burden of proof to the accuseds. This is a misdirection in law as the burden **at all times lies** on the prosecution to prove their case beyond a reasonable doubt. On the whole I find that the police in this case acted in total disregard of their constitutional obligations. The prosecution failed to prove the case to the required legal standard, and the conviction of the 2 accuseds by the trial court had no basis. As such I do quash both convictions. The subsequent 4 year prison sentences are also set aside. This appeal succeeds. Both accused persons are to be set free forthwith unless they are otherwise lawfully held.

Dated and Delivered at Mombasa this 10th day of March 2011.

M. ODERO
JUDGE

In the presence of:
Both Appellants in person
Mr. Muteti for State