



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Criminal Appeal 3 of 2010

SAMUEL KIARIE GATHOGOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of stealing a Motor Vehicle contrary to Section 278 A of the Penal Code. In the alternative he was charged with the offence of handling suspected stolen property contrary to Section 322 (2) of the Penal Code. In count 2 he was charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal code. In count 3 he was charged with the offence of making a document without authority contrary to section 357 (a) of the Penal Code. Finally, in count 4 the accused was charged with the offence of uttering a document with intent to defraud. The appellant denied all these offences but after a full trial he was convicted and sentenced to 6 years imprisonment in count 1, two years imprisonment in count 2, 2 years imprisonment in count 3 and 4 years imprisonment in count 4. The sentences were ordered to run concurrently.

This is an appeal against the conviction and sentences. The appellant has filed a written submission which I have gone through and the learned counsel for the Republic has made a reply thereto. In the cause of the proceedings the charge was amended and the appellant asked to plead thereto. This was on 1st April, 2009 when the charge was substituted and put to the appellant. This related to count 2, 3 and 4. The record shows that the appellant was represented by one Mr. G. Kamau who observed that that was the fourth time the charge sheet was being amended. He then reserved the right to recall any witness. The court accepted the amended charge sheet which was then read over and explained to the appellant in English.

The record shows that he pleaded to count 2 and count 4 by denying the same. I have looked at both the original and the typed record. Count 3 was never put to the appellant and therefore he never replied to the same. That notwithstanding, the learned trial magistrate convicted him thereon and sentenced him to 2 years imprisonment. The learned counsel for the Republic rightly concedes the appeal in respect of count 3. The conviction and sentence relating thereto is quashed and set aside.

The appellant has raised some technical issues in his submission but I believe the evidence adduced answers some of those technical issues. The right to recall witnesses is statutory. His learned counsel on record reserved the right to do so. He never exercised that right.

Back to the evidence, the prosecution established beyond doubt that the Motor Vehicle alleged to have been stolen was actually stolen from the complainant. The owner of this motor vehicle registration No. KAR 802 J gave evidence that he parked his Motor Vehicle overnight and on the following day did not find it. On asking the watchman at his gate he was informed that the record showed the car had left the premises at 5.15 a.m. He never recovered it until almost a year later when he was informed by the police about its recovery whereupon he identified it and took possession thereof.

There is evidence that P.W. 2 bought a Motor Vehicle from one Goerge Njoroge Kanyote. The total price was Kshs. 350,000/= An agreement was drawn by an advocate whereby a sum of Kshs. 250,000/= was paid. The balance was to be paid later which was allegedly paid. That was the basis of the 2nd charge. To facilitate the transaction a log book serial No. 598713 was presented to the advocate on behalf of John Odour Owino. That log book turned out to be a false document because the right document in respect of that Motor Vehicle. The log book of that vehicle was serial no. 667527. This confirmed that the log book given by the said George Njoroge Kanyote to facilitate the transfer of motor vehicle registration No. of KAR 802 J was a false document.

The question that arises is whether the appellant herein was the same person who was at the centre of the transfer of this motor vehicle and who passed as or impersonated George Njoroge Kanyote. The appellant was known to P.W. 3 .He had in fact sold him some cars before. He was his contact person in this transaction. Indeed he called him in respect of this motor vehicle. All along P.W. 3 knew the appellant by face and by name as George Njoroge Kanyote. It is P.W. 3 who facilitated the arrest of the appellant herein. P.W. 5 confirmed the identity of the appellant herein. He is a finger print expert who examined the impressions forwarded to him. He also confirmed that the identity card No. 11803492 belonged to the appellant.

On the other hand, identity card No. [particulars withheld] belonged to George Njoroge Kanyote. The defence of the appellant was considered by the learned trial magistrate. It was however assessed and weighed against the prosecution evidence and found to be a mere denial and a sham. The learned trial magistrate found that the prosecution had proved the case against the appellant beyond any reasonable doubt.

As the first appellate court I have made an independent evaluation of the evidence adduced against the appellant. With respect, I agree with learned trial magistrate that the charges were proved against the appellant beyond any reasonable doubt. The motor vehicle registration No. KAR 8 O2J was stolen from Nairobi on the night of 3rd and 4th October, 2005. On the following day the car was sold to P.W. 2 and the appellant was at the centre of this transaction. The theft of the motor vehicle can only be attributed to him and nobody else.

The appellant was sufficiently identified by P.W 2 and P.W. 3. This was not a case of mistaken identity. In fact, in respect of P.W. 3 NO doubt can be cast about his identity. There is evidence that he received this money from P.W. 2 in the presence of P.W. 3 and the advocate who drew the agreement for sale in respect of that motor vehicle. The log book presented to the advocate to facilitate the transfer of the motor vehicle did not relate to this motor vehicle. It was a false document. Therefore the offences relating to count 1, count 2 and count 4 were proved beyond any reasonable doubt.

I have looked at provisions relating to the sentence. With respect, the sentences were well merited and justified in the circumstances of this case. Accordingly this appeal is hereby dismissed.

Orders accordingly.

Signed and delivered at Nairobi this 31st day of July, 2011.

A. MBOGHOLI MSAGHA

JUDGE