



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 108 OF 2010
BETWEEN

ROBERT WANJALA MUNYENYE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of the Senior Resident Magistrate Hon. N. Shiundu dated 8th July, 2010 in Eldoret Chief Magistrate's Court Criminal Case No. 7079 of 2009)

JUDGMENT

The appellant, **Robert Wanjala Munyeny** and **Wilfred Makusi Adrian** (hereinafter “the co-accused”) were charged in Eldoret Chief Magistrate’s Court (**N. Shiundu SRM**) Criminal Case Number 7079 of 2009 with the offence of stealing a motor vehicle contrary to section 278A of the Penal Code. The allegation was that the appellant and his co-accused on 16th September, 2009, at Eldoret Township in Uasin Gishu District within Rift Valley Province, jointly stole a motor vehicle Toyota Corolla Registration No. KBC 692L NZE valued at Kshs. 800,000/- the property of **John Gitau Chege** (hereinafter “the complainant”).

The duo pleaded not guilty and after a full trial the appellant’s co-accused was acquitted of the offence. The appellant was however, convicted and sentence to five (5) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant has appealed to this court on some seven (7) grounds which raise the following issues:-

- 1) Defective charge**
- 2) Failure to prove ownership of the subject motor vehicle**
- 3) Failure to call essential witnesses**
- 4) Reliance on contradictory testimony**
- 5) Breach of fair trial rights.**

At the hearing of the appeal, the appellant appeared in person and orally addressed me on the above issues. Mr. Oluoch, Senior Deputy Prosecution Counsel who represented the state opposed the appeal contending that the appellant was convicted on sound evidence and that the defence preferred at the trial by the appellant was fictitious and was properly rejected. In counsel’s view ownership of the subject motor vehicle was not essential for conviction since the evidence of hiring the same was not contested.

This is a first. That being the case, this court is mandated to re-consider and re-evaluate the evidence which was adduced before the trial court and arrive at its own independent determination on whether to uphold the conviction bearing in mind that the court did not see or hear the witnesses testify and must give allowance for that (**See Njoroge -V- Republic [1957] I KLR 19**)

The basic facts of the case as narrated at the trial were that on the material date of 16th September, 2009 the complainant, who is a taxi operator and also has a car hire business, let out his vehicle registration number KBC 692L Toyota NZE to the appellant. The vehicle was to be returned the evening of the same day. An agreement was executed by the parties and the said vehicle released to the appellant. The vehicle was however not returned as agreed or at all. Alarmed the complainant reported to the police and investigations commenced culminating in the arrest of the appellant in Kisumu on 15th October, 2009.

Stephen Wahenya (PW2) testified that he introduced the appellant to the complainant and witnessed the appellant take the subject vehicle which he did not return. **PC Samuel Jomo** (PW4) of Eldoret CID investigated the case and charged the appellant and the co-accused. He produced the car hire agreement, photo copies of the appellant's ID Card, Driving Licence and an application form from KRA.

Sergeant Nicholas Langat (PW5) of Kisumu CID arrested the appellant at Kisumu after he was pointed out by the complainant.

In his sworn testimony, the appellant, stated that he had known the complainant as a taxi driver prior to the alleged offence and in fact had hired his services extensively in the course of his business some of which was illegitimate. On one of those business trips he allegedly gave Kshs. 1 million to the complainant for the purchase of a vehicle but communication was cut off. He was eventually arrested in Kisumu for an offence he did not commit.

That is, in summary the evidence upon which the Learned Senior Resident Magistrate based his conviction of the appellant. The Learned Senior Resident Magistrate believed that the complainant gave his vehicle to the appellant who never returned it. He accepted the car hire agreement which the complainant produced at the trial. That evidence was buttressed by **Stephen Wahenya** (PW2) who introduced the appellant to the complainant and was an eye witness to the transaction.

Having analysed and re-evaluated the testimony which was adduced at the trial, I agree with the Learned Senior Resident Magistrate that the subject motor vehicle indeed belonged to the complainant even though it may not have been registered in his name at the time of the transaction. The law recognised him as a special owner. He had authority to let it to anyone including the appellant. The appellant dealt with the complainant as the owner of the said motor vehicle and so did PW2. Ownership by registration was in my view not an issue at the trial and was not fatal to the charge upon which the appellant was convicted. The appellant now argues that there is a discrepancy in the description of the vehicle. With all due respect to him he made no such challenge at the trial and the search from KRA in respect of the vehicle was not produced at the trial. He did not apply in this appeal to rely on additional evidence. In my view even if the said search had been produced, it would not have materially affected the evidence presented by the prosecution. The discrepancy in the description of the colour of the vehicle would not have invalidated the charge. In any event such a discrepancy would have caused no prejudice to the appellant.

The appellant has also challenged what he calls, the failure to call essential witnesses; viz a document examiner and KRA officials to prove ownership of the subject motor vehicle. With regard to failure to call a document examiner to testify on whether the appellant signed the car hire agreement, I have come to the conclusion that the absence of his evidence did not affect the case presented by the prosecution before the Learned Senior Resident Magistrate. I say so, because as I have already stated, there was the direct evidence of the complainant himself and PW2 which in my view established to the required standard that the appellant hired the subject motor vehicle from the complainant.

With regard to the failure to call officers of Kenya Revenue Authority to demonstrate the ownership of the vehicle, I have already held that ownership by registration was not necessary to prove the charge against the appellant. It was enough to demonstrate that the complainant was a special owner of the vehicle and in my view the prosecution did so to the required standard.

In the end therefore the failure to call a document examiner or officials of KRA, in my view, in no way made the prosecution case inadequate as would have entitled the court, either to raise an inference that

the evidence of the uncalled witnesses would have tended to be adverse to the prosecution case or to hold that no vehicle was let out by the complainant.

Lastly the appellant alleged breach of his fair trial rights. He alleged that he was not given an opportunity to submit. The challenge in my view has not been well taken. There is no evidence that the appellant was denied the right to make any submission at the trial. The record suggests that if the appellant had wished to address the trial court after his defence he could have done so. He was given sufficient time to state his case and he did so in detail. Obviously if he had wished to address the court further there was no impediment in his way.

In the result, I have come to the conclusion that the appellant was convicted on sound evidence and his appeal against conviction is without merit. It is accordingly dismissed.

The appellant's grounds of appeal do not challenge the sentence imposed upon him by the Learned Senior Resident Magistrate. However, even if the issue had been raised, I would not have been persuaded that the sentence of five (5) years imprisonment imposed upon him is excessive in the circumstances of this case. In my view the same is deserved.

The entire appeal is therefore without merit and is dismissed.

It so ordered.

Right of appeal on matters of law explained.

**DATED AND DELIVERED AT ELDORET
THIS 28TH DAY OF JULY, 2011**

**F. AZANGALALA
JUDGE**

**Read in the presence of:
The Appellant and Mr. Oluoch for the State.**

**F. AZANGALALA
JUDGE
28TH JULY, 2011**