



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT MALINDI
Criminal Appeal 1 of 2009**

CHARO KAZUNGU BAMBAYA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

**(From original conviction and in Criminal Case No. 1770 of 2008 sentence of the
Chief Magistrate's Court at Malindi before D. W. Nyambu - PM)**

JUDGMENT

The appellant Charo Kazungu Bambaya was convicted on a charge of theft of a motor vehicle contrary to section 278 (A) of the Penal Code. He had been jointly charged with one Raphael Muia Muli who pleaded guilty later on and was sentenced to six years imprisonment. The prosecution's case was that on 30th day of November 2008 at Francisca Villas in Malindi District, jointly with others not before the court, they stole one motor vehicle registration number KAU 963Z make Toyota Prado valued at Kshs. 2.4million, the property of Abdallah Athman Juma.

Appellant pleaded guilty to the charge and was sentenced to six (6) years imprisonment.

The charge was read over and explained to the appellant in Kiswahili and he replied as follows:-

“True”

The prosecution then narrated the facts to the effect that on 30th November 2008 at 10.00pm, the sentry response team located at Casuarina area received a distress alarm call from Francisca Villas. They called Police officers who rushed to the scene. The police were informed that motor vehicle registration number KAV 963Z, a Toyota Prado, was parked within the compound had been stolen. Police officers tracked the motor vehicle towards Watamu where the motor vehicle was said to be headed with two occupants, but were unable to trace it. Investigation led to the arrest of the appellant. Appellant stated:

“Facts are correct”

In mitigation appellant pleaded for mercy, saying he had a wife and four children and that the wife was expectant, and his parents were old.

The trial court considered his mitigation and noted that he appeared remorseful but also took into account that the offence was serious and the stolen motor vehicle had not been recovered.

Appellant cited eight grounds of appeal saying that:

- (1) The reasons for changing his plea at a later stage was not recorded.
- (2) His co-accused did not implicate him in the offence.
- (3) The charge sheet did not show the time of the alleged offence.
- (4) He registration number of the motor vehicle given in the charge sheet was not the same as what was narrated by the prosecution.
- (5) The six year jail term is harsh.

Two of the grounds are inter-related to the ones I have listed and I need not reproduce them.

In his written submissions, the appellant states that he is hypertensive and this coupled with the stressful environment at the police station caused him to change his plea so as to avoid the harsh conditions.

That from the court record, during the trial which proceeded in respect of his co-accused, no witness adversely mentioned him.

He fears that the six years sentence meted out will ruin him as it is too harsh and both his health and business stand to suffer. The appeal is opposed – both on conviction and sentence. Miss Waigera submitted on behalf of the State that appellant pleaded guilty to the charge and the sentence meted was appropriate bearing in mind that the stolen motor vehicle was not recovered, and the offence attracts a maximum sentence of seven years in jail.

I have looked at the particulars of the charges which refer to the motor vehicle registration as KAU 963Z – however in an attempt to decipher the true record I have read the facts as recorded by the trial magistrate in the handwritten form and I realize that her letter V greatly resembles letter U and vice versa. In fact the V looks more like U.

- see M/V (which she writes as M/u) and villa and vehicle (which she writes as uilla and uehicle) – I am persuaded there was no mistake by the prosecution as regards the registration number – it is the typed record of proceedings which has a mistake in the motor vehicle registration.

From the record the plea was unequivocal and here is nothing whatsoever to suggest that appellant was coerced into admitting the charge.

The trial magistrate duly considered appellant's mitigation, taking into account the fact that the motor vehicle worth Kshs. 2.4million was not recovered and I concur with Miss Waigera that under the circumstances the penalty meted was appropriate. I find no reason whatsoever to interfere with the findings of the trial court. I uphold the conviction and confirm the sentence. The upshot is that the appeal is dismissed.

Delivered and dated this **13th May 2010** at Malindi.

H. A. Omondi
LADY JUSTICE

Miss Waigera for State
Appellant in person

