

exhibits. The Appellants had been arrested by members of public and handed over to the police. The 1st Appellant Job Wamalwa worked as a car washer near the garage while the 2nd Appellant Dan Omuse was a watchman in some premises near the garage.

PW3 was the eye witness in this case. He testified that he was tipped by a customer at sunset Bar that he had seen some people in the neighbouring garage unbolting a tyre from a vehicle around 5.00 a.m. PW3 went there with two people and they found one person removing the tyre. He was immediately joined by another person. PW2 the owner of the garage also arrived at the scene after he was telephoned. The Appellants were arrested at the scene.

PW4 testified that in the material morning, he had gone to collect his vehicle which he had parked near the garage around 4.00 a.m. The witness saw someone removing a tyre from a vehicle parked inside the garage. He informed PW3 who called two other people and they all went to the scene. PW1 also telephoned the owner of the garage PW2 and briefed him of the situation.

PW5 was the police officer who received the two Appellants at Bungoma Police Station together with exhibits – a jerk, a wheel spanner and nuts. PW5 also visited the scene of crime and was shown the vehicle in question. He produced photographs of the vehicle in court.

The 1st Appellant said in defence that he was arrested sleeping in a motor vehicle near the one belonging to that of PW1. He was arrested on suspicion that he had stolen a tyre from the other vehicle.

The 2nd Appellant said he was at his place of work where he worked as a watchman. He found PW1 washing his motor vehicle there. The Appellant tried to stop PW1 who resisted. The Appellant then gave up and left. Around 5.00 a.m the 2nd Appellant was arrested by a group of people who alleged that he had stolen a tyre.

The evidence of PW3 and PW4 is crucial in this case. PW4 saw a person unbolting (loosening) nuts in order to remove the tyre from the vehicle of PW1. He called the owner of the garage. He also informed PW3 a watchman in the neighbouring premises.

PW3 came to the scene and saw the same person removing the wheel. He said the jerk slid and the vehicle touched the ground with its body. They saw a second person join the first one. PW3 managed to arrest the 1st Appellant. PW2 came to the scene immediately after both Appellants had been arrested. The two Appellants must have been at the garage of PW2 with a common intention, that is, to steal spare parts from PW1's vehicle. The two were found by PW3 executing their common purpose and arrested. The 1st appellant was a car washer in the garage. The time was 4.00 to 5.00 a.m. He said he was just sleeping in one of the vehicles in the garage when he was arrested. Cars are not washed at night and the garage was not his sleeping place. The 2nd appellant had left his place of duty next door where he worked as a watchman and entered the garage. None of the Appellants was able to explain what they were doing in the garage of PW2 at that odd hour. They were found in the act of stealing by PW3 and arrested at the scene. They were found with the exhibit (the tyre) red-handed and also with the jerk, wheel spanner and three wheel nuts.

The trial magistrate found that the Appellants were found with the jerk and the wheel spanner which proved that they had intention to steal the tyre. The magistrate then convicted the Appellants on attempted theft of motor vehicle parts contrary to section 279 (g) as read

with section 389 of the Penal Code.

I find that the evidence on record proves attempted theft of the tyre. The Appellants were found in the act of removing the tyre. The overt act required to prove attempted theft had already taken place. Three wheel nuts had been removed in preparation to remove the tyre and take off with it.

The prosecution's evidence was overwhelming and was not shaken by the mere denials in the defence of the appellants. It is my finding that the Appellants were properly convicted. The sentence for attempted theft of motor vehicle parts is fourteen (14) years imprisonment. The sentence imposed of five (5) years imprisonment was not manifestly excessive as claimed. However, the value of the property stolen was negligible and the accused persons were first offenders. These factors ought to have been considered in sentencing.

On the issue of violation of rights, the accused were arrested on 29/08/2009. The period of remand in custody was five (5) days. The prescribed period under section 72 (3) (b) is 24 hours for an offence of this nature. They were therefore over-detained for three (3) days. This issue was not raised before the trial court in order to give the prosecution a chance to explain the delay. However, the remedy of suing for damages under section 72 (6) of the Constitution is available to the Appellants. The issue does not affect the conviction herein.

The 2nd appellant told the court that he is suffering from some illness but did not produce a medical report. It is not possible to confirm that information in the circumstances.

I find the conviction safe and uphold it accordingly. As for the sentence, I find that the court failed to take into consideration some crucial factors above mentioned. For this reason, I set aside the five (5) year imprisonment sentence and substitute it with three (3) years imprisonment.

**F. N. MUCHEMI
JUDGE**

Judgment dated and delivered on the 26th day of October, 2010 in the presence of the Appellants and the State Counsel Mrs. Leting.

**F. N. MUCHEMI
JUDGE**