



KENYA REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 35 of 2007

STEPHEN KINYUA MWONGERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Stephen Kinyua, was charged in Mombasa Chief Magistrate's Court (T. Nzioki SRM) Criminal Case No. 2105 of 2006 with the offence of stealing a motor vehicle contrary to Section 278A of the Penal Code. The particulars of the offence were that the appellant, on the 22nd day of January 2006, at Mtongwe Navy Camp Base in Mombasa District within Coast Province, stole a motor vehicle registration number KAM 430S Toyota Corolla 101, grey metallic in color valued at Kshs. 600,000/=, the property of Foreman Kilonzo (hereinafter "the complainant").

The appellant pleaded not guilty and after a full trial the appellant was convicted of the said offence and sentenced to serve seven (7) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant has appealed to this court on various grounds which raise three issues namely that the appellant's trial rights under the constitution were infringed; that the Learned Resident Magistrate erred in convicting the appellant on accomplice evidence and finally that the Learned Resident Magistrate convicted the appellant on inadequate evidence. With regard to sentence the appellant contends that the same is harsh in the circumstances.

The Learned State Counsel, Mr. Onserio, who represented the Republic conceded the appeal and urged a retrial. The basis for conceding the appeal was that part of the evidence on which the Learned Resident Magistrate relied in convicting the appeal was not sworn.

This is a first appeal. 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. (See **Njoroge – v – Republic [1987] 1 KLR 19**).

The facts of the case were straight forward. In brief they were as follows: On 17th January 2006 at 6.00 p.m., the complainant, who testified as PW 1 parked his vehicle registration number KAM 430S at his employer's yard at Mtongwe Navy Base and went home. When he returned on 22nd January 2006, he did not find his vehicle where he had parked it at the parking yard inside the Navy Base. He reported to Likoni Police Station.

On 27th January 2006, at 12.00 noon, PW 2, Morris Otieno who does panel beating at his Jua Kali garage at Ongata Rongai, was approached by the appellant who instructed him to carry out panel beating works and repair the latter's vehicle which carried registration number KAM 485E. The vehicle was at the time of the approach at the appellant's house which was about 200 metres from PW 2's garage where the appellant took him. PW 2 took the vehicle to his garage and the appellant agreed to collect the same the following day but did not.

On 29th January 2006, PW 2 was driving the said vehicle along Kenyatta road opposite Nyayo Stadium in Nairobi when he was arrested at a police road block by PW 3, PC Charles Samagora when the latter found that the said vehicle registration number did not match with the vehicle registration number displayed on the road licence and insurance cover. On enquiry, PW 2 led PW 3 and other police officers to a house in which PW 2 alleged belonged to the appellant but the appellant was not traced at the house.

On 30th January 2006, PW 3 received a signal from Mombasa that the motor vehicle mentioned in the charge sheet had been stolen in Mombasa.

On 6th February 2006 accompanied with PW 5, PC John Namwoso and PC Mutuku the complainant proceeded to Langata Police Station and collected the motor vehicle which had been recovered from PW 2. PW 5, had previously on 24th January 2006 received the complainant's report of the theft of his vehicle. From Nairobi, the said vehicle was received at the Mombasa Provincial CID Headquarters by PW 4 CIP Raphael Mutuku on 7th February 2006.

In his sworn testimony, the appellant stated that on 10th June 2006, he left his house in Kahawa Nairobi for the city centre. At 4.30 p.m. as he conversed with an acquaintance he was arrested and brought to Mombasa after staying the night at Jogoo Police Station in Nairobi. The appellant further testified that he was detained at Mombasa Central Police Station for ten days before being arraigned for an offence he did not commit.

That is in summary the evidence upon which the Learned Resident Magistrate based his conviction of the appellant. The Learned Resident Magistrate found that PW 2 received motor vehicle registration number KAM 430S from the appellant with altered numbers and when he learnt that PW 2 had been arrested he moved out of his house. In the Learned Magistrate's view, the circumstantial evidence was overwhelming and only pointed at the appellant and at no other person.

Having independently re-considered and re-evaluated the evidence which was adduced before the Learned Resident Magistrate, I agree with the Learned State Counsel that this appeal must be allowed. The basis for conceding this appeal as already stated is that the evidence tendered by PW 2 Morris Otieno Okoth during cross-examination was not given on oath. There was therefore clear breach of Section 151 of the Criminal Procedure Code. That is however not the only deficiency of the case. PW 2's evidence in my judgment was clearly accomplice evidence. His testimony that he was given the stolen motor vehicle by the appellant was far from satisfactory. The testimony was not supported by any other independent evidence. The allegation that the mobile phone number of the appellant given to PW 2 indeed belonged to the appellant should have been more positively proved by, for instance, obtaining the testimony of the mobile phone, service provider. PW 2's testimony that the house he alleged belonged to the appellant should also have been subjected to thorough scrutiny before being accepted as true by the police.

There is also an unhealthy haze over the evidence of the arrest of the appellant. PW 5, testified that the appellant was arrested in Nairobi for another offence he had committed in Mombasa. No particulars of the offence were given. Even when he was arrested there was no attempt to establish where the appellant had lived in Nairobi. In the premises, whereas the Learned Resident Magistrate appreciated the conditions of convicting on circumstantial evidence, he, with all due respect, misapplied the same in this case. From my above analysis it cannot be said that the incriminating facts in the case before the Learned Resident Magistrate were incompatible with the innocence of the appellant. The facts which were presented before the Learned Resident Magistrate were obviously capable of explanation upon a hypothesis that even PW 2 and his companions in the stolen vehicle could have been culpable.

Lastly, the appellant has alleged that he was taken to court ten days from the date of his arrest thereby breaching his constitutional rights under Section 72 (3) of the Constitution. If this appeal turned wholly on that complaint, I would have rejected it as the appellant did not complain at his trial which took place nearly three years ago when the prosecution would have been called upon to show that the appellant was brought to court as soon as was reasonably practicable. That is however now academic.

The upshot is that I am not satisfied that the appellant's conviction is safe. I am unable to uphold it. Accordingly, I allow the appeal, quash the conviction, set aside the sentence and order that the appellant be released forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 11TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

11TH MAY 2009