



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

**AT NYERI**

**Criminal Appeal 316 of 2008**

**IBRAHIM MUNENE WANJOHI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at*

*Karatina in Criminal Case No. 1013 of 2005 dated 19<sup>th</sup> June 2008 by B. M. Kimemia – R.M.).*

**J U D G M E N T**

The appellant, Ibrahim Munene Wanjohi was on 19<sup>th</sup> June 2008 convicted by the Senior Resident Magistrate's court, Karatina for the alternative offence of handling stolen goods contrary to section 322(2) of the Penal Code. It had been alleged in the charge sheet filed by the prosecution that:-

“On the 18<sup>th</sup> day of October 2005 at Karatina road block in Nyeri District within Central Province otherwise than in the course of stealing dishonestly assist (sic) in the disposal of the motor vehicle Registration No. KAP 569S Toyota Corolla 100 Metallic Blue in colour knowing or having reasons to believe it to be stolen good” (sic). The appellant too had faced the main count of theft of motor vehicle contrary to section 278(A) of the Penal Code for which he was acquitted following the trial. Upon conviction as aforesaid, the appellant was sentenced to serve 7 years imprisonment. Aggrieved by both conviction and sentence, the appellant lodged the instant appeal.

The appellant faulted his conviction and sentence on two broad grounds captured in what he referred to as the “Amended grounds of appeal and written submissions.” These were that, the learned magistrate erred in law and fact by convicting him when the case for the prosecution was not proved beyond reasonable doubts and secondly, rejecting his defence without assigning any or any proper reasons.

What are the facts of the case?

On 10<sup>th</sup> October 2006, the complainant (PW1) drove his motor vehicle registration number KAP 569S to his brother's house at Tigoni Limuru and got there at 8.00 p.m. for an overnight sleep. He had purchased the said motor vehicle on 2<sup>nd</sup> February 2004 at Kshs.410,000/=. He tendered in evidence the log book. He had securely locked and parked the said motor vehicle in the brother's compound that was fenced with a barbed wire all round. On waking up at about 5.00 a.m. the following day, he found the motor vehicle missing from where he had parked it. The padlock to the main gate had been cut rendering the gate wide open. His brother who was not called as a witness proceeded to report the missing motor

vehicle to Tigon police station whereas the complainant went to inform his insurers, UAP about the same loss. The insurers advised him to take the log book to Pangani Police Station flying squad for further assistance which he did. On 22<sup>nd</sup> October 2006, he received information that a certain motor vehicle had been recovered and he was required to identify it at Karatina police station. He proceeded there and on inspecting the motor vehicle, it appeared like his but the registration had been altered to KAQ 124F and windows tinted. He tried to open the motor vehicle with his set of keys and they only opened the co-driver's door. The ignition lock was different. His motor vehicle had identity marks and a sticker had blocked one of such marks on the rear windscreen. A police officer gave him a different set of ignition keys and the motor vehicle started. Upon completion of investigations on 28<sup>th</sup> October 2005 he was allowed to take away the motor vehicle.

PW.II, the investigating officer stated that he was on highway patrol duties when on 17<sup>th</sup> October 2005 at about 5.30 p.m. he received information that there was a motor vehicle suspected to be stolen headed for Karatina from Nyeri direction. He went to Jambo area police roadblock in the company of PW4 and motor vehicle KAQ 124F drove by. They stopped the motor vehicle which had two occupants who were brothers. Upon interrogation the appellant claimed ownership of the subject motor vehicle. However they were not satisfied with the explanation and PW4 then drove the motor vehicle to Karatina police station with the two brothers. At the station they demanded from the appellant the log book but the appellant stated that he had not been given the same by the seller as he had not cleared the balance of the purchase price. The police asked the appellant to avail the seller but he was unable to. However he produced an agreement. PW2 checked the motor vehicle and on the rear windscreen saw a sticker. When he removed the same he saw the inscription of KAP 569S. He called Pangani CID and they confirmed to him that a report of the said motor vehicle having been stolen had been received by them. They gave him details of the owner, whom he contacted. The owner came with the log book and he identified the motor vehicle as his. Thereafter photographs of the motor vehicle were taken by PW3. Later he charged the appellant who claimed that he was the owner of the motor vehicle.

Put on his defence, the appellant elected to give a sworn statement of defence and stated that on 15<sup>th</sup> October 2005, he was working at Nanyuki and needed to buy another motor vehicle for his taxi business. He saw an advert in the newspaper and called the owner who gave him an appointment. On 16<sup>th</sup> October 2005 he went to Nairobi and met the owner at gateway hotel. He inspected motor vehicle KAQ 124F. The owner introduced himself as Paul Kimani Wanyoike and they negotiated the price and agreed at Kshs.270,000/=. He paid Kshs.160,000/= and was to pay the balance thereof on 30<sup>th</sup> November when he would get the log book. On 17<sup>th</sup> he went and did a search of the motor vehicle at Times Tower and compared the chasis, engine numbers, the log book and the owner who was said to be auto selection of Mombasa. That the seller said he had not yet transferred the motor vehicle to himself. He tendered in evidence a search certificate. He called his wife DW II to come and witness the agreement for sale which he also tendered in evidence.

On 18<sup>th</sup>, he wasn't feeling well and called his brother to driver him. However they were arrested at Karatina police roadblock. He later called the seller who said he would come the next day but didn't. DW II the appellant's wife stated that on 17<sup>th</sup> the appellant called her to Nairobi and she witnessed the appellant buy the motor vehicle. That the transaction was in an office where they signed the agreement. As already stated the learned magistrate was swayed by the prosecution case and went on to find the appellant guilty.

When the appeal came up for hearing, the appellant elected to argue the same by way of written submissions. I have carefully read and considered them.

The appeal was opposed by Mr. Makura, learned Senior State Counsel. He submitted that there was overwhelming evidence by the prosecution to support the alternative count. The appellant was arrested in possession of the suspect motor vehicle which was positively identified by the owner. PW3 who arrested the appellant investigated the motor vehicle and established that it did not belong to the appellant. Though the appellant contented that he had bought the motor vehicle, he never accounted properly how he had come by the motor vehicle. He was thus handling the motor vehicle with the full knowledge that it

could have been stolen. Though the appellant gave a sworn statement of defence, the same was found to be a sham in the light of overwhelming evidence adduced by the prosecution. The sentence imposed was neither harsh nor excessive. He therefore urged me to dismiss the appeal.

As this is a first appeal, I must subject the evidence on record to my own evaluation and assessment and come to my own independent decision on the issues submitted before me. In so doing however, I must have due regard and make allowance for the findings and conclusions made by the learned magistrate who had the added advantage of seeing and hearing the witnesses testify before her – *Okeno v/s Republic (1972) E.A. 32*.

This case was anchored on circumstantial evidence. However the identification of the subject motor vehicle left a lot to be desired.

The complainant claimed that, on the fateful day he had visited his brother for an overnight stay. However the following day he found the motor vehicle missing from the parking. PW1's brother who was not a witness in this case went to make the report at Tigoni police station.

However that testimony was of no evidential value as none of the witnesses at Tigoni police station nor the reportee came before court to prove the allegation. Accordingly the same remained mere allegation of which the court should not have acted upon. In actual fact, it was hearsay evidence.

The complainant (PW1) also stated that the vehicle which he alleged to be his had different ignition switch and even number plates, and that when he tried to start the same with his original ignition key the motor vehicle failed to start. If indeed the said motor vehicle was his and the ignition lock had been interfered with then the only logical thing that the prosecution side could have done was to introduce in evidence the same original keys considering that there was no any other independent witness who testified before court to have witnessed the testing with the ignition key by the complainant. Remember that P.W.1 had testified that:-

“The motor vehicle was in the flying squad yard, I checked it. My motor vehicle was KAP 569S. The motor vehicle looked like mine but the registration was different.”

From the above, it is apparent that even PW1 himself was not sure if the said motor vehicle was really his. He was only guessing, meaning therefore that, the same could as well have not been his. PW1 states further that:-

“I pressed the key alarm and it did not open. I tried to open with my keys, they refused. I tried the Co-driver's door and it open (sic). The driver's seat had a scratch. I tried to ignite but the ignition lock was different.”

The only thing the prosecution could have done to prove beyond peradventure that the motor vehicle belonged to the complainant was to tender in evidence documents in respect of the motor vehicle from registrar of motor vehicles which could have been compared with the details in the logbook. Failure to summon such evidence left the ownership for the said motor vehicle not proved beyond reasonable doubt. It was not enough for the trial court to simply rely on the log book produced by the complainant before court. It is possible that, the said log book was not even genuine. How many log books are manufactured a long river road?

The court also believed the identification of the motor vehicle by PW1 through the photographs that were tendered in evidence. However we should not forget that, the complainant told the court that when he checked in the said motor vehicle he found that some parts had been removed and changed. So the question that calls for answer is how did the court come to believe PW1's testimony on the issue when the prosecution failed to produce in court the said motor vehicle so that the court could view it by itself and satisfy itself as to what PW1 was alleging as aforesaid. Photographs did not show the parts that were allegedly changed and or tampered with. After all PW1 had testified that:

“The motor vehicle looked like mine but the registration was different.” In my view the prosecution erred when it released the motor vehicle to PW1 before the court had not finalised with the same. The court at the time was yet to determine the question of ownership.

The police further allowed the complainant to remove some parts in the motor vehicle which he alleged to have been changed. In the process PW1 tampered with the ignition lock, starter, alarm system and number plates before the motor vehicle was inspected. This was wrong as one might rightly argue as indeed the appellant has, that, that action was calculated to enable the complainant manufacture evidence. To make the situation worse, the prosecution alleged that, the scenes of crime personnel were called, but it would appear that no inspection of the on motor vehicle before the photographs were taken. On this issue PW4 state in cross-examination that:-

“The scenes of crime was called, but no inspection was done on a motor vehicle.” If the motor vehicle was not inspected of what value were the photographs? I cannot think of any.

The appellant in my view led credible evidence as to how he had come by the motor vehicle. He tendered in evidence the necessary documents save for the log book. He explained to court his failure to produce it as he needed to pay the balance of the purchase price to the seller before he could release the log book to him. He could not have produced it during the hearing as it was still with the owner. That explanation was plausible and sufficed. In my view the production of those documents raised the necessary doubt in the prosecution case which doubts ought to have been resolved in favour of the appellant.

This is one of those cases where vital witnesses were not called by the prosecution. Sample this, the following witness ought to have been called. However they were not:

- (1) The police officers from Tigoni police station
- (2) Motor vehicle registrars from Nyayo house
- (3) Motor vehicle inspectors
- (4) Brother to PW1 (complainant) and etc.

Why? Is it possible that their evidence would have been adverse to the prosecution case? Perhaps!

When the prosecution closed its case after calling four (4) witnesses, the appellant was put on his defence. The appellant I think explained in detail how he came by the motor vehicle contrary to the submissions by Mr. Makura. He did not deny that the motor vehicle could have been stolen. However he denied that he could have been among those who stole it. In fact his defence if I understood it correctly was that he was just a victim of circumstances. The trial magistrate to my mind never considered and or evaluated that evidence. Instead she seems to have been

so impressed with the prosecution case without whatsoever considering the defence advanced as aforesaid. In the case of *Jane Nyamuthi v/s Republic (1957) EACA 21* it was held:-

“The court should not reject the defence of the defendant but if it wishes to reject the same then it must explain the same in detail or put in light to why the defence was not accepted”.

In this case the trial magistrate failed to explain why the defence was found wanting yet to my mind it was plausible.

Having carefully considered and re-evaluated the evidence, I have no hesitation in coming to the inevitable conclusion that the appellant’s appeal against conviction and sentence must succeed. Accordingly the appeal is allowed, conviction quashed and sentence imposed set aside. The appellant

should forthwith be set at liberty unless otherwise lawfully held.

*Dated and delivered at Nyeri this 31<sup>st</sup> day of July 2009*

**M. S. A. MAKHANDIA**

**JUDGE**