REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Criminal Appeal 53 of 2000

SIMION KIPKOROS KETER ……. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

JUDGMENT

I: Criminal Appeal

1. Simion Kipkoros Keter was charged in the subordinate court with the offence of stealing a motor vehicle contrary to **section 278A** of the Penal code.

2. The particulars of the charge being that

"On the 20th April, 2000 at Kapsuser market in Kericho district within Rift Valley Province, stole a motor vehicle Nissan Sahara Pick-up registration No. KAB 480R valued at Kshs. 320,000/= the property of Erick Kirui".

3. The said Simon Kipkoros Keter pleaded not guilty to the charge. He was sentenced after trial having been duly convicted for the offence to five years imprisonment and two strokes of the cane. He gave and said nothing in mitigation.

II: Facts of case

4. The complainant a businessman who operates a wholesale had parked his motor vehicle outside his shop or the 20th April, 2000 at about 6.30p.m. He returned at 10.30p.m and found his vehicle stolen being registration No. KAB 480R. He received information that the vehicle had been seen along the Sotik route but did not find it. He received information from one Jonathan Kipkoech Langat that vehicle was seen being driven at 11.00a.m. The said person then identified the accused, a car dealt broken as the one who had the vehicle.

5. The said Jonathan Kipkoech Langat stated that on 20th April, 2000 at 11.00p.m he saw PW1's vehicle packed with the accused seated there. He knocked the window and flashed his torch but the accused

declined to roll down the window. He refused to talk and kept quite. He went home.

6. After three days he heard and received information that the vehicle had been stolen. He then gave PW1 the information of what he saw. A description to PW1 was given. PW1 claimed he knew the person and identified him as one Kapsuser. The accused was arrested.

7. In cross-examination he stated that he knew the accused.

8. The accused was arrested on information received by PW1 to the police.

9. The vehicle had never been recovered.

10. The appellant was placed on his defence but requested the matter adjourned because his father had passed away.

11. He nonetheless gave unsworn evidence stating he was a matatu (Omnibus tout). He had an alibhai at 5.00p.m he went to a hotel with the owner, at 7.30p.m they went to watch a video up to 8.00a.m. He played pool. Went and watched video up to 11.00a.m. He slept in lodging that day. On 21st April, 2000 at 7.00a.m he was informed the complaint vehicle was stolen. He claimed he never heard it as he was asleep. The result was his arrest of 22nd April, 2000 at 3.00p.m. It was not true that he had been seen.

12. The trial magistrate held that the appellant was properly identified and was properly seen by the witness PW2. He was accordingly convicted under Section 278A of the Penal Code and sentenced to five years imprisonment and two strokes of the cane.

III: Appeal

13. Being dissatisfied with the appeal the appellant appealed and stated the evidence relied on was hearsay evidence.

14. That no exhibit was displaced to Court. There was no positive identification.

15. The sentence imposed was harsh as he was aged twenty two (22) years old.

IV: <u>Opinion</u>

16. Only three witnesses were heard on this case. PW1, the complainant whose motor vehicle was stolen by unknown person PW3 the arresting officer who was pointed out by PW1 the accused. The key witness who said he saw the accused in the vehicle. What is of importance is a lapse of three days went by before he met with PW1 to inform him of who he saw.

17. An identification parade was crucial in this case for PW2 to identify the accused. It was dark. He shone his torch and the person refused to speak to him. The prosecution should have led evidence to show that the witness was at the vehicle for a certain length of time.

18. The evidence before court is hearsay. PW1 relied on PW2 description and told the court the person was a car broker. The appellant was then aged twenty two (22) yeas old. He in fact stated that he was a matatu tout.

19. A defence of alibibhai was raised by the appellant namely, that he was elsewhere when the crime was being committed. The prosecution failed to call rebuttal evidence. This would have been the person claimed to have been with the accused person to come to court and deny or otherwise that the accused was indeed with them.

20. The said appeal is unsafe to rely on the evidence. The offence provides that

"***If the thing stolen is a motor vehicle within the meaning of the Traffic Act, the offender is liable to imprisonment for seven years"***

21. There is no corporal punishment provided and this is illegal.

22. This court accordingly quash and sets aside the conviction and sentence respectively.

23. The Appellant is at liberty unless otherwise lawfully held.

DATED this 14th day of July, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

P. Kiprop – state counsel instructed by the Attorney General for the Respondent – present

No appearance for the Appellant