REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Criminal Appeal 60 of 2005

KOMBO OMAR KWAKA……..…….…… APPELLANT

-AND-

REPUBLIC ……... RESPONDENT

(An appeal from the judgment of Senior Resident Magistrate L.N. Mbatia dated 17th February, 2005 in Criminal Case No. 1642 of 2004 at Kwale Law Courts)

JUDGMENT

The appellant herein had been charged with robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya); and he faced the alternative charge of handling stolen property contrary to s. 322(2) of the Penal Code.

In the alternative charge, which was the basis of conviction and sentence, it was alleged that on divers dates between 26th and 29th June, 2004 at Kitele Village, Ng'omeni Location in Kwale District in Coast Province, the appellant, otherwise than in the course of stealing, dishonestly handled one motor vehicle, Reg. No. KAK 537Z Toyota Corolla, the property of ***Ng'ang'a Daniel***, knowing or having reason to believe it to be stolen property or property unlawfully obtained.

The appellant was arrested at his house on 31st August, 2004, on the ground that he had taken a motor vehicle stolen from the complainant, to the home of his (the appellant's) father-in-law, one ***Suleiman Swaleh Dodi*** (PW1). PW1 testified that the appellant took the motor vehicle to him at the beginning of June, 2004 at about 3.00a.m., telling him that the motor vehicle was a taxi and he wanted to leave it with his father-in-law overnight, and on the following day he would secure an insurance cover for it. On the following evening PW1 found the said motor vehicle still at his home; and on the next day after, the area chief visited his home in the company of Police Officers; and when they asked questions about the motor vehicle, he told them it belonged to his son-in-law. PW1 was then arrested and held in the Police cells and later required to report on the whereabouts of his said son-in-law. After the Police arrested the

appellant, PW1 went to Diani Police Station and confirmed that he (the appellant) was his son-in-law aforementioned. The appellant was subsequently charged.

In his defence, the appellant said what he faced were trumped-up charges; and he claimed there was malice on the part of his father-in-law, directed at him.

The trial Court acquitted the appellant of the charge of robbery with violence: in particular for the reason that when the complainant attended the identification parade, he could not identify the suspect. With regard to the alternative charge, the learned Magistrate thus held:

"….***I have no doubts that it is the accused who took the motor vehicle in issue to PW1….who is his father-in-law. The evidence of PW1 [was] corroborated by that of the accused's ex-wife*** *Mariam Suleiman* ***(PW4) who was at her father's place……when the accused delivered the motor vehicle. The fact that the accused delivered the motor vehicle in the wee hours of the morning, at 3.00a.m, is very suspicious. The reason he gave to PW1 ….., that he wanted to get an insurance cover for it, is even more suspicious. The accused did not go for the motor vehicle the next day as he had promised PW1. In fact, he did not go back for the motor vehicle until the same was towed away by the Police. This was a stolen motor vehicle. It was stolen from the complainant on 26th June, 2004 ……I have no doubt…., taking into account all the surrounding circumstances, [that] the accused definitely knew the motor vehicle was stolen. Two days after it was stolen at gun-point he was taking it to PW1 at 3.00a.m., and giving flimsy reasons [as to] why he wanted to leave it there. The accused was hiding the motor vehicle away from the police."***

The trial Court found the appellant guilty on the alternative count, and convicted him, sentencing him to a ten-year prison term.

In his petition of appeal, the appellant contended that the trial Court should not have relied on the evidence from PW1 and PW4; that the trial Court was wrong in rejecting his defence; that proof beyond reasonable doubt had not been achieved.

The appellant took up his grounds of appeal in written submissions; and in the oral submissions he contended that there was contradiction in the evidence, as to the exact time when he had delivered the subject motor vehicle at the home of his father-in-law; he also urged that the motor vehicle was not found in his possession. The appellant contended that the trial had been a frame-up.

Learned respondent's counsel, ***Mr. Monda***, however, supported both conviction and sentence. Counsel urged that the chain of events had quite properly linked the appellant to the offence. It was submitted that the sentence imposed was neither harsh nor excessive, as the maximum punishment prescribed by law was fourteen years' imprisonment.

After systematically following the evidence, and its mode of analysis by the trial Court, I have come to the conclusion that that Court properly evaluated the evidence, the critical aspects of which showed the appellant to be guilty on the alternative charge.

I dismiss the appeal; uphold the conviction; and affirm the sentence imposed by the learned Magistrate.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this 23rd day of November, 2009.

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the Respondent: ***Mr. Monda***

Appellant in person