



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT ELDORET
Criminal Appeal 55 of 2006**

(From the original conviction of in pm'Cr.C.No.5060/2005 by the RM. MRS. ALICE MONG'ARE)

WILSON KIRWA BIRGEN:.....APPLICANT

VERSUS

REPUBLIC:.....RESPONDENT

J U D G E M E N T

Appellant was convicted for the offence of preparation to commit a felony contrary to s.308 (2) Penal Code in that on 25th July 2005 outside Family Finance Bank in Eldoret town he was found with an instrument – kiddler used to open motor vehicles. He was convicted by Resident Magistrate (A.B. Mongare) and sentenced to 4 years imprisonment. He has appealed against that conviction.

The prosecution case was that on that day at 12:30 p.m **BENJAMIN BIWOTT** (PW3) parked his motor vehicle Reg. No. KAN 235T outside Family Finance Bank when he got out he saw appellant bending under the vehicle where the spare wheel was. He started shouting and with help of members of the public amongst them **PATRICK KIDIMA ASHIBINA** (PW1) appellant was arrested. They found him with a kidder, an instrument used to open vehicles. PW1 said that the appellant was arrested. PW1 said that the appellant even demonstrated how to use it. He was taken to police station and charged.

In defence the appellant said he was going to call his sister. His shoe lace got loose and he bent down to tie it. As he was doing so people came and arrested him. He denied he was trying to open the vehicle.

I have considered the appeal and re-evaluated the evidence. I am satisfied that the appellant was convicted on sound evidence. The evidence was overwhelming. He was found bending under the vehicle of PW3 where the spare wheel was. PW1 and PW3 confirmed that. He was found with an instrument normally used to open vehicles. He even demonstrated how it was used. The evidence of PW1 and PW3 was very candid and without any contradiction. The instrument was produced in court and there was no need to produce the car. He had not opened the car before he was arrested. There were no doubts when he was arrested he was preparing to unlock the spare wheel and steal it. That would have been a felony.

In his defence the appellant said PW1 had a grudge against him as they had removed him from their rental house. That evidence was considered by the trial court and properly rejected. He never even raised that issue when cross-examining the PW1. PW1 categorically said he did not know him. PW3 confirmed that indeed appellant was preparing to steal the vehicle.

All in all I find that the conviction was proper and I uphold the same. As the appellant had not appealed against the sentence there is no reason to interfere with the same. I therefore dismiss the appeal.

Dated and Delivered at Eldoret on 7th March, 2008

KABURU BAUNI

JUDGE

IN THE PRESENCE OF:-

C/C - David

Mr. Chirchir for state

Appellant present in person.