



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Appeal 29 of 2006

IBRAHIM NYAOSI OMBUNA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the Chief Magistrate's Court at Kisii,

Criminal Case No.3459 of 2004 by L. ARIKA, RM)

JUDGMENT

The appellant was charged with the offence of stealing a motor vehicle contrary to **section 278A** of the **Penal Code**. The particulars of the offence are that on the 11th day of December, 2004 at Kisii Township in Kisii District, the appellant stole a motor vehicle make Toyota Hiace registration No.KAP 449F, valued at Kshs.700,000/= the property of Joseph Gacheru Mbugua.

After a full trial, the appellant was found guilty, convicted and sentenced to four years' imprisonment. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. In his petition of appeal, he stated that there was insufficient evidence to warrant a conviction and faulted the trial magistrate for relying on evidence which he said contained serious contradictions. He further stated that his defence was not duly considered by the trial court.

During the hearing of the appeal, the appellant did not make any oral submissions but opted to rely entirely on his petition of appeal.

Mr. Kemo, Principal State Counsel, opposed the appeal. He took the court through the evidence that was adduced by the trial court in an effort to show that the conviction was warranted.

This being the first appellate court, it is mandated to

re- examine the evidence that was adduced before the trial, court, re-evaluate the same and arrive at its own conclusion as to whether the judgment that was delivered by the trial court should be upheld or not; see **OKENO VS REPUBLIC** [1972] E.A. 32.

The brief facts of the case were as follows: **Sammy Kabue Githaiga, PW3**, was the authorized driver of motor vehicle registration Number KAP 449F, which belonged to **Joseph Gacheru Mbugua, PW2**. PW3 testified that on the material day while they were picking passengers near Mwalimu Hotel, Kisii, a person whom he later came to realize was the appellant, jumped into the motor vehicle and sped off. He reported the theft to the police and a search was commenced. After about an hour the motor vehicle was

spotted. The police flagged down the motor vehicle but the driver (who was the appellant) refused to stop. The police gave chase and the stolen motor vehicle overturned. Some people who were in the motor vehicle alighted and fled away but were apprehended by the police.

Kosley Omat Ogero, PW4, Erick Gichana Manduku, PW5 and Hicks Gichana, PW6, were all young men who testified that they knew the appellant and that on the material day, he picked them up in the stolen motor vehicle and went to buy them chang'aa. They corroborated the evidence of PW3 as to how the police tried to stop the appellant but he refused to stop and shortly thereafter the motor vehicle rolled. The three witnesses were arrested by the police. They said that they did not know where the appellant had obtained the motor vehicle from.

In his defence, the appellant testified that he was given the motor vehicle by PW3 to go and pick chang'aa from some place. He did not deny that he was driving the motor vehicle when he was stopped by the police but decided to speed away past them before the vehicle overturned.

Having carefully re-evaluated the above evidence, I do not see any contradictions in the prosecution evidence. The appellant did not deny that he was found in possession of the subject motor vehicle. He had driven it from the place where it was stolen up to the time it rolled. PW4, PW5 and PW6 had no reason to testify against the appellant. The appellant's defence was rightly rejected. The sentence that was handed down was neither harsh nor excessive.

I find no merit in this appeal and dismiss the same.

DATED, SIGNED and DELIVERED at KISII this 13th day of May, 2008.

D. MUSINGA

JUDGE

Delivered in the open court in the presence of

The appellant and Mr. Kemo, Principal State Counsel for the Republic

D. MUSINGA

JUDGE