REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS

Criminal Appeal 162 of 2005

(From original conviction and sentence in criminal case No. 9675 of 2004 of the Chief Magistrate's court at Kibera - MS Muketi PM)

ALEX NYAMU MUTIGA…….....…… APPELLANT

VERSUS

REPUBLIC …….....……..……RESPONDENT

JUDGMENT

ALEX NYAMU MUTIGA was found guilty and convicted of attempted theft of motor vehicle contrary to Section 278 (A) as read together with Section 389 of the Penal Code. He was upon conviction sentenced to serve 5 years imprisonment. He was aggrieved by the conviction and sentence and hence lodged this appeal.

The appellant in his petition of appeal has raised basically three grounds:-

1. THAT the learned magistrate erred in law and fact by failing to hold that crucial witnesses were not called and those who were called were not credible.

2. THAT the case for prosecution was not proved beyond reasonable doubt.

3. THAT the appellant's defence was not properly considered.

The facts of the case were that on 7.12.2004 at 11.45 a.m., the complainant parked his motor vehicle KAH 923D a Nissan Sunny near Ardhi House. He locked the motor vehicle and proceeded to Ardhi house to transact some business. However, he was unable to transact the business as he had left behind in the motor vehicle certain documents. He came back for the same. As he neared his motor vehicle he saw two people inside. He shouted at them. One in the passenger seat opened the door and ran away. However, the appellant who was in the driving seat was not as lucky. He came out but PW1 hit him on the head and fell down. Members of the public joined the fray and administered mob justice on him. He was however saved by the police. He was arrested and subsequently charged.

Put on his defence, the appellant claimed that he knew the complainant. That the complainant had framed him with the case arising from previous personal grudge. In support of his grounds of appeal, the

appellant tendered written submissions that I have carefully read and considered.

The appeal was opposed. Mr. Kimathi learned State Counsel submitted in opposing the appeal that the evidence on record against the appellant was overwhelming. That the appellant was arrested at the *locus in quo.* That the Court had opportunity to observe the motor vehicle during the hearing of the case and noted that the door of the subject motor vehicle had been tampered with.

On sentence, Counsel submitted that the maximum sentence for the offence was seven (7) years imprisonment. An offence which is an attempt would ordinarily attract ½ the sentence of the main offence. The sentence of 5 years that was imposed on the appellant would therefore appear to be illegal. Counsel therefore invited the court to substitute the sentence with the proper sentence.

I have carefully considered this appeal together with the evidence adduced before the trial Court which I have analyzed and evaluated afresh while bearing in mind that I neither saw nor heard the witnesses and giving due allowance. See ***OKENO –V- REPUBLIC (1972) E.A. 32***

The appellant challenges the trustworthiness, and credibility of the prosecution witnesses. It should be recalled that the prosecution only called 2 witnesses, the complainant P.W.1 and a police officer (P.W.2) who rescued the appellant from mob justice. I am aware that a fact may be proved by the evidence of a single witness. However, such evidence requires to be treated with a lot of caution and circumspection. The appellant does not deny being at the scene of crime. So that his identification is not an issue. His line of defence is that yes, I was at the scene of crime, but I did not commit the crime. Rather I was framed by the complainant. The learned magistrate considered this defence and found it wanting. In my view the learned magistrate was right in rejecting the defence. According to the appellant he bumped into the complainant and greeted him but the complainant refused to answer. Later on again he met the complainant in the parking bay near Ardhi House on his way to board a bus and asked the complainant why he had refused to acknowledge his greetings. He then alleges that the complainant told him he was not interested in the issue. They exchanged insults and the complainant hit him and he fell down. People then gathered around him and he was later arrested and taken to the police station. To my mind this story is extremely incredible. If someone does not acknowledge your greetings why should you insist on pursuing the issue? From what is stated above it would appear that the complainant was such an irrational person who for no reason at all started beating up the appellant. From what I can gather from the record, the complainant does not cut the image of such a person. The appellant was subjected of to mob justice and was only rescued by a police officer. The police officer who rescued him testified and at no time did the appellant raise with him the issue of mistaken identity or personal grudge between him and the complainant. In any event apart from the appellant alleging personal grudge, the nature of the personal grudge was not disclosed. Further and as the learned magistrate correctly observed, it would appear that the appellant did not even know where the complainant came from although he claimed they were from the same locality upcountry.

The learned magistrate found the complainant to be a very credible and consistent witness. It is an established principle that an appellate court will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence, or on misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings it did. See ***CHEMAGONG –VS- REPUBLIC (1984) KLR 611.*** The learned magistrate found as a fact that the complainant was a credible, truthful and consistent witness. I have no basis to interfere with that finding of fact. The learned trial magistrate had the opportunity and indeed did observe the demeanor of this witness before the reaching the finding aforesaid. I cannot disturb such a finding as I was not as lucky as the trial court.

The appellant claims his conviction was based on scanty evidence as crucial witnesses were not called. According to the appellant members of the public, presumably those that administered mob justice on him or one of them should have been called to testify so as to paint a clear picture of what transpired at the scene of the crime. I do not think that the evidence of any member of public could in any way have advanced the prosecution case any further. The evidence of P.W.1 and P.W.2 was in my view sufficient, I think that the appellant is being presumptuous by assuming that any number of the public

who participated in meting out mob justice on him would have been available and readily willing to testify. The court is aware that in situation of mob-justice, it is rare that the police, would be in a position to trace and record statements from such people to enable them testify later. At the end of the day it was the word of the appellant against the complainant. The court opted to believe the complainant, and rightly so in my view as against the appellant. The appellant's story does not just jell.

The appellant also maintains that the Court should not have relied on the evidence of P.W.2 who claimed to be a police officer but never produced any documents to back up his claim. He also accuses this witness of having an interest in the matter as he was called all the way from Ngong when there were other police officers nearby. These submissions are superfluous in my view. The appellant did not challenge the witness regarding his profession during his cross-examination of the witness. In any event the witness did give his force number and where he was stationed when he testified. To my mind therefore the allegation that P.W.2 was not a police officer and could have been picked from the streets to merely bolster the complainant's case is a mirage and an afterthought. What would the complainant benefit by going that far for manufacture a witness? As to the allegation, that this particular witness was called all the way from Ngong and yet there were other police officers nearby, this allegation too is not borne out by the record of evidence. All that the witness said is that he comes from Ngong. However, at the time of the incident, he was attached to Kilimani Police Station. It was while they were on the beat on the material day that they received a report through the control room that a person was being subjected to mob justice proceeded to the scene. It is therefore not correct as the appellant has made it appear that P.W.2 was summoned by the complainant all the way from Ngong to come and attend to the case and bear false testimony against the appellant.

Coming to the defence of the appellant the appellant cannot be heard to say that the learned magistrate erred in law and fact in overlooking the same. The learned trial magistrate considered the defence advanced by the appellant and rejected it. In rejecting the same, the learned trial magistrate had the following to say:

"…….***There is no credible evidence of prior grudge between the accused and the complainant for the court to infer that the accused was being framed. During cross-examination the accused did not even know which part of Ngong the complainant came from and was merely on a fishing expedition. Though under no obligation to prove anything the accused's defence did not cast any doubt on the prosecution evidence……..***"

I entirely agree and endorse the learned magistrate's evaluation of the Appellant's defence. The defence offered did not outweigh the prosecution case. The direct and circumstantial evidence places the appellant right at the scene of the crime. The defence was clearly meant to mislead the court.

Taking all the foregoing into account, I am satisfied that the appellant was convicted on sound evidence. I would therefore dismiss the appeal on conviction.

As for sentence, I hold that the appellant was convicted for the offence of attempted theft of a motor vehicle. Under Section 389 of the Penal Code:-

"……..***Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one half of such punishment as may be provided for the offence attempted….".***

The offence of stealing a motor vehicle under Section 278A of the penal code carries a maximum sentence of 7 years. The appellant having been charged with an attempt, he was liable to be imprisoned for a maximum term of 3 ½ years and not the 5 years imposed. The sentence imposed was therefore clearly illegal as correctly pointed out by the learned State Counsel. Accordingly I will interfere with it to the extent of making it legal.

For that reason I will reduce the sentence imposed on the appellant from five (5) years to three (3) years and order that the said sentence shall be served from 23rd March 2005 when he was convicted.

Otherwise the appeal on conviction is dismissed. That shall be my judgment.

Dated at Nairobi this 25th day of September, 2006.

……

MAKHANDIA

JUDGE