



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 71 of 2004

EPHRAIM KINYUA WAWERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **EPHRAIM KINYUA WAWERU** is charged with **STEALING OF A MOTOR VEHICLE** contrary to Section 78A of the Penal Code. It is alleged that on 21st June 2004 at Railways Stage in Nairobi, the Appellant stole a motor vehicle Reg. No. KYA 430 Peugeot 504 Saloon valued at Kshs.360,000/- the property of **JULIUS KAWA LALA**. The Appellant was convicted for the said offence and was sentenced to three years and six months imprisonment. He now appeals against the conviction and the sentence.

There are thirteen paragraphs in the Appellant's grounds of appeal. However on considering them, I found that they could be summarized as follows: -

1. The charge was defective.
2. The Complainant, PW1 was not a reliable or credible witness.
3. The Complainant could not prove he owned the motor vehicle the subject matter of the case.

The learned counsel for the State, **MRS. TOIGAT**, submitted that the State was conceding to the Appeal.

In brief, the Complainant in the case alleges that the Appellant stole his motor vehicle. He said that on 21st June 2001, he gave the motor vehicle to the Appellant to use it as a taxi out of which he was to pay him (the Complainant) Kshs.5,000/- every month. He said that the Appellant was to operate the taxi between April 2001 and 31st December 2001. That the Appellant just disappeared with the vehicle until 11th April 2003 when he was found.

In his submission, the Appellant stated that the evidence adduced by the prosecution witness did not prove the charges and the case against him. The Appellant submitted that the Complainant informed the Court that he was the one who gave him, the Appellant, the motor vehicle. That PW3 who sold the motor vehicle to the Complainant in his evidence said that he went with the Appellant to Central Police Station where PW1 authorized him, PW3, to surrender the log book and transfer forms to him, the Appellant. That therefore, submitted the Appellant, the Complainant was well aware that the Appellant was the rightful owner of the vehicle. The Appellant further submitted that he adduced evidence to prove that the

Complainant had a deal with him in which he was paying him, the Appellant, some money in addition to the vehicle in question.

MRS. TOIGAT's submissions are very much in line with the Appellant's submission. **MRS. TOIGAT** submitted that the evidence adduced before the trial court proved that the Appellant was the rightful owner of the vehicle. The learned counsel submitted that PW7, the officer from the Motor Vehicle Registry brought proof that the motor vehicle in question had been registered in five different owners. That the fourth owner was the Appellant. That the fifth owner was PW4 who bought it from the Appellant. That nowhere during the proceedings was any evidence adduced which showed that the Complainant ever owned the motor vehicle in question. She submitted that there was no evidence of fraud against the Appellant and that to the contrary the Appellant had a claim of right over the vehicle.

The Court has re-evaluated the evidence adduced before the trial Court as is the duty of the first appellate court to do. I find that there are undisputed facts in this case. It is not disputed that PW3 bought the vehicle in question from PW5, **APOLLO**. **APOLLO** was the second and third registered owner of the vehicle according to PW7, Maina from Registrar of Vehicles. PW3 did not register the vehicle in his name. Instead in June 2001, when the Appellant who is his step-brother took the Complainant to him, PW3 requested PW5, **APOLLO**, to transfer the vehicle to the Complainant.

The transfer form was not exhibited in Court. **APOLLO** signed the form which PW3 kept together with the logbook until the payment cheque paid to him by the Complainant went through. After the cheque went through, while at Central Police Station, in the presence of a Police Officer, the Appellant and PW3, the Complainant authorized PW3 to give the vehicle's logbook and transfer form to the Appellant. He eventually gave the Appellant both documents. The logbook was exhibit one. PW4 said that he bought the vehicle from the Appellant and used it for sometime before the police, led by **PC NDERITU**, PW2, seized it. The vehicle was exhibit 2. After PW2 investigated the case the Appellant was charged with this offence. PW6, **CPL MATEI** received the report of theft of motor vehicle from the Complainant on 11th April 2003. He also arrested the Appellant for the said offence.

Having re-evaluated the evidence before the trial Court, it was very curious that the Complainant willingly gave the Appellant the vehicle, exhibit 2, the log book, exhibit 1, and the transfer form merely to enable the Appellant do business with it. At the time the Appellant took the vehicle and its documents, the vehicle was registered in the names of **APOLLO**, PW4, the one who sold the vehicle to PW3. There is no reasonable explanation given by the Complainant why he did not register the vehicle in his name before giving it to the Appellant to use in business. The Complainant did not also explain why it took him two years to report this case against the Appellant.

I also considered the line of cross-examination of the Complainant by the Appellant. Not only did the Appellant question the Complainant concerning money the Complainant owed him but also asked him whether the Complainant did not give him the vehicle as part of payment for money that the Complainant owed him. The Appellant produced two documents. Defence exhibit 1 was a deposit slip of Kshs.550,000/- dated 10th May 2001 from Post Bank Savings. Defence exhibit 2 was a cheque receipt from Akiba Bank Ltd. in sum of Kshs.260,000/-. Both were in favour of the Appellant. The Appellant stated in defence that the two deposits were payments made by the Complainant to him in 2001. That they were in payment of a debt of 1.3million the Complainant owed him since 1995. The Appellant stated that the vehicle was also part of the same payment and that the Complainant still owed him Kshs.130,000/-.

At J9 and J10, the learned trial magistrate has misdirected herself thus:

“The Complainant has explained why he did not take time to first register the car in his name before handing the document over to the accused. The accused on his part makes it appear as if PW1 was on the logbook and he was transferring the motor vehicle to him. The next registered owner is therefore the accused. The accused subsequently transferred the vehicle to his brother-in-law who trusted him with the vehicle the way PW1 claims to have trusted the accused.”

The misdirection of the trial magistrate is blatant. Nowhere does the evidence adduced in Court show that the Complainant ever explained why he did not register the vehicle in his name before giving it to the Appellant. Also nowhere is it shown that the Appellant tried to make it appear as if the Complainant even registered the vehicle to him. The learned trial magistrate had demonstrated bias in the case by using such words as ***“The accused has put up a spirited defence but it was all meant to cover up the fact that he conned PW1 out of his vehicle by appearing to be too close to him while at the same time eating him up.... The accused took this vehicle from PW1 before PW1 could even taste the sweetness of the motor vehicle..”***

There were issues that the learned trial magistrate did not address in her judgment and which, the learned counsel for the State submitted were important. The issue of fraud is one of them. STEALING is defined under S.268 (1) of the Penal Code thus:

“268(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”

Having considered this case, I find that the Complainant did not prove ownership of the vehicle. He paid its value to PW3 and then surrendered the vehicle, the logbook and the transfer form to the Appellant in the presence of witnesses including PW3 and a Police Officer. There is no explanation given for the surrender except that the Complainant trusted the Appellant. That is neither reasonable nor plausible. The Appellant’s explanation was that the Complainant was paying back part of a debt he owed him. The lapse of two years before the Complainant took any action against the Appellant added credibility to the Appellant’s defence. I also considered the transfer of the vehicle by the Appellant to himself as evidence of the fact that he had nothing to hide concerning the transaction. Had he wanted to conceal something, he would not have put his name in the logbook. Further, the Complainant willingly gave him the vehicle documents. The only reasonable explanation for that action can only be that the Complainant was giving away the vehicle and any claim of ownership over it.

Having considered this Appeal, I find that the prosecution failed to prove the Complainant owned the vehicle. The basis of conviction is that the Appellant converted the vehicle to himself. However, the evidence adduced fell short of establishing that the transfer of the vehicle to the Appellant amounted to conversion. The Appellant established that he had a claim of right over the vehicle. He could not be said in law to have stolen the vehicle at any stage of this case.

MRS. TOIGAT submitted that the conviction was against the weight of evidence. I agree that the evidence adduced by the prosecution could not have sustained any conviction. The conviction herein is unsafe and cannot be allowed to stand. I will quash the conviction and set aside the sentence. The Appellant submitted that the release of the motor vehicle to the Complainant by the Court in his absence was wrong. I agree with him. The vehicle was rightly owned by the Appellant who later transferred it to PW4. The Complainant never owned it and the learned trial magistrate ought not to have released it to him. The Appellant can pursue that aspect of the case through other proceedings. The upshot of this appeal is that the same is allowed. The Appellant should be set at liberty unless he is otherwise lawfully held.

Dated this 8th day of June 2005.

LESIIT, J.

JUDGE