



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Criminal Appeal 135 of 2004**

**(From Original conviction (s) and Sentence (s) in Criminal Case No. 46 of 2004 of  
the Resident Magistrate's Court at Wajir Wakumile on 30/3/03)**

**BISHAR HASSAN MOHAMED ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The appellant Bishar Hassan Mohamed, was charged with the offences of being in possession of uncustomed goods Contrary to Section 185 (d) and Section 196 (c) as read with Section 197 (1) of the Custom and Excise Act, Cap 472 of the Laws of Kenya. He was in the alternative, charged with Fraudulent Evasion of Payment of Duty Contrary to Section 187 (8) of the same Act. During his plea, he replied in respect of each count "It is true". The prosecutor then gave the facts. He narrated that on 29/3/04, at about 23.50 hours C.I.D. officers from Wajir, on being given information to that end, went to the appellant's house and found him in possession of a motor vehicle – Nissan Terrano Turbo Registration Number 67830, at his compound. The motor vehicle was said to have been stolen from Somalia or was uncustomed. The appellant on being asked to explain whether he had documents to prove ownership of the vehicle, said that the motor vehicle was his and that he had not paid duty for it. He was arrested and charged with the offences. When these facts were put to the appellant then, he replied thus, "*Facts are true. MFI2 (the motor vehicle) belongs to me and I had the intention of selling it*". The court then proceeded to convict the appellant of the main charge and discharged him of the alternative charge. This means that the court convicted the appellant of "Being in possession of uncustomed goods"

It will however be observed that the prosecutor tried to confuse the situation by including facts to the effect that the appellant may have stolen the motor vehicle in Somalia since theft was not in issue. The theft issue was not indeed required to prove the offence before the court. Infact, the appellant himself corrected and clarified the situation by admitting that the motor vehicle was uncustomed, notwithstanding the manner it may have been brought into Kenya. In my understanding from the manner the plea was taken, the appellant appears to have understood the plea and properly responded to it by his own words by categorically stating that the motor vehicle in question was his own for sale. This he had said after the prosecutor had clearly stated that the motor vehicle had been brought across from Somalia, (whether stolen or legally purchased there), and that it was uncustomed. Both Mr O'Mirera, and Mr Konya, indicated that the appellant may not have understood the plea and/or the facts that were stated by the prosecutor because the language used to read the charge was not indicated in the record. I have however perused the record. It clearly shows that the proceedings were conducted in Kisomali. And if the accused was not understanding Kisomali he could not have been so clearly recorded on what he said in response. I am perturbed by the manner this appeal has been handled because the plea was clearly unequivocal despite the stand taken by both defence and state counsel. It is my view, therefore, that the conviction was proper and there is no reason to interfere with it.

Mr Konya, for the 3rd party was unhappy about the order of forfeiture of the motor vehicle. That was in relation to the sentence. However, this court was not seriously addressed on the sentence, probably because both counsels believed and/or hoped that the conviction was going to be quashed. That having not happened, and to be fair to them, I will give both counsel a fresh chance to address the court on sentence.

For the above reasons, the appellant's appeal on conviction is hereby rejected and the conviction confirmed. Orders are that the appellant may if he so wishes, address the court on sentence. It

is so ordered.

Dated and delivered at Machakos on 18th day of November 2005.

**D.A. ONYANCHA**

**JUDGE**