



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.111 OF 2004

(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.653 of 2004 of the Resident Magistrate's Court at Kwale – S.S. Maindi, RM)

YAYA MWALIMU PARTI APPELLANT

Versus

REPUBLIC RESPONDENT

Coram: Before Hon. Justice Mwera

Mrs. Mwangi for the State

Magolo for appellant

Court clerk – Sango

JUDGEMENT

The appellant was charged under S.279 (c) Penal Code in that on 20.4.04 at Diani he stole one wheel cap of motor vehicle registration No. KAN 554U valued at Sh1,000/-, the property of William Njumwa. He pleaded guilty and the learned Resident Magistrate recorded the proceedings. It transpired that all appeared to accord with S.207 Criminal Procedure Code until it came to the appellant admitting the facts that were reproduced. The learned trial magistrate then omitted to convict the appellant on his own plea of guilty but rather proceeded straight to ask for any past records followed by mitigation and then a sentence of 2 years imprisonment and right of appeal.

That omission to convict rendered the plea defective and the learned State Counsel correctly conceded the appeal on that ground. She however asked the court to order a retrial on the basis that the appellant was found with the wheel cap he stole from the motor vehicle and he had anyway served only one and half months of the 2 years sentence handed down on 22-4-2004.

Mr. Magolo's position was that a retrial would not serve much since only a wheel cap, a small item was stolen and sentence so far served could as well be considered enough punishment. However on the legal aspect Mr. Magolo told the court that the theft envisaged under S.279 Penal Code was that that involves goods or items which are inside a motor vehicle, the goods being in the process of transit or being conveyed. That stealing a part of the motor vehicle could be an offence but that could not fall under S.279 Penal Code.

From all the foregoing this appeal is allowed; the conviction is quashed and the sentence set aside. The plea of guilty was defective in that the learned trial magistrate omitted to record a conviction against the appellant (**see S.202 Criminal Procedure Code and ADAN VS. R [1973]EA 445**)

And a retrial shall not be ordered even if the subject matter was found with the appellant (a well cap) and therefore a conviction can likely result after a retrial A wheel cap worth Sh.1,000/-, it may be said, is still property and its theft is as any other. But having regard to the value and in the light of the fact that the appellant has already served about a month and half for it in prison, one could as well say that that term is sufficient to serve the interests of justice.

This court however says the following about S.279 Penal Code under which the charge fell. It reads:

“279. If the theft is committed under any of the circumstances following, that is to say – (a)
----- (b) -----

(c) If the thing is stolen from any kind of vessel or vehicle or place of deposit used for conveyance or custody of goods in transit from one place to another; (d) ----- (e)
----- (f) ----- (g) ----- the offender is liable to imprisonment for fourteen years.”

In its view the reading of this provision of law should be interpreted to mean that the theft is from inside a vessel including a motor vehicle. That the thing was placed there to be conveyed elsewhere or in transit. It does not appear that the thing stolen be part of the vessel e.g. a wheel cap as the case was here, a wheel, or headlamp etc. If a part of the vessel is stolen then in this court’s view the charge to lay would be one of theft under S.275 Penal Code or other and not S.279 (c) Penal Code.

All in all a retrial is not ordered. The appellant to be set at liberty forthwith
unless otherwise lawfully held.

Judgment delivered on 21st June 2004.

J.W. MWERA

JUDGE