

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 379 OF 2002

(Being an Appeal against Conviction and Sentence in Criminal Case No. 1884 of 2002 by the Resident Magistrate’s Court at Mombasa, R. Ndubi)

KALAMA KAZUNGU APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

The Appellant was charged and convicted for the offence of Theft of a Motor Vehicle Contrary to Section 278 (a) of the Penal Code. He was sentenced to serve 6 years imprisonment plus 3 strokes.

The evidence before the trial Court was that on the material date the Complainant had opened the gate to his compound and started the Engine to his motor vehicle Registration KAN 611. He went into the house to pick up his glasses only to hear the sound of his vehicle and on checking saw it being driven out of the compound. He didn’t see the person driving it and called the Police and neighbours. After about 20 minutes, some youths from the Tudor area where he lived informed him his vehicle had been abandoned near Tudor Secondary School – not far from his home. He went there accompanied by a crowd and found the vehicle Minus a driver and ignition keys. He then informed the Police of the recovery. After a while the police went to his house with a youth who was identified by another unidentified youth as the Thief.

PW2, a 16 year old youth saw the vehicle being driven at high speed and recognized it as that of his neighbour. A crowd of people were shouting it had been stolen and PW2, began to run after it only to find it parked near the Tutor secondary school. He said there was a crowd and in the crowd he saw the accused wearing a hat and he recognized him as the person he had seen driving the vehicle. The accused however wore a hat.

PW3, said he was working in a neighbouring compound when he heard the motor vehicle drive away and shouts of Thief! Thief!. He saw the person driving and identified him as the accused. PC Zachary Mumanyi of Makupa Police went to the scene on receiving a report from the Complainant and found the accused had been arrested by members of the Public. The Appeal raises grounds on identification, corroboration, extraneous matters and the sentence. Counsel for appellant submitted that no proper identification was available as PW2’s evidence was not corroborated and it was unlikely that he could identify the culprit when the motor vehicle was moving at high speed. He had never seen the accused before but picked him because he had a bold head and had shaved his beard. There were no other identifying features. While PW3, identified the accused on the Dock.

The State did concede the appeal on the issue of identification and also for lack of any direct evidence to connect the appellant with the theft.

I have read the record and are in agreement, the identification was shaky as PW2, had never seen

the accused before save for the brief time he saw him while in a speeding motor vehicle. For PW3, it was a similar senario and no identification parade was carried out.

The Appeal for these reasons will succeed and conviction is quashed and sentence set aside. The Appellant shall be set free unless held for other lawful reasons.

Dated and Delivered at Mombasa this 16th day of July 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE