

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

APPELLATE SIDE

CRIMINAL APPEAL NO. 410 OF 2001

(From Original Conviction and Sentence in Criminal Case No.250 of 2001 of the District
Magistrate's Court at Taveta – T.L. Ole Tanchu, DM.II Prof

DANIEL MUTUA KANGUKI.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with Stealing a Motor Vehicle Part contrary to Section 279(c) of the Penal Code. He was convicted and sentenced to imprisonment of 4 years with 2 strokes of the cane. He appeals against both conviction and sentence.

The Prosecution case was that the appellant was on 18th May, 2001 given a lift on motor vehicle – a truck Registration Number KAC 225F from Chumvini to Taveta where they arrived about 6 p.m. The motor vehicle was being driven by PW.2 Paul Kioko. PW.3, Stephen Kisuna Mumo was the turn-boy. At Taveta, the appellant alighted and went his way. PW.2 went to sleep leaving PW.3, the turn-boy to sleep in the motor vehicle to guard the vehicle at night. At about midnight the turn-boy left the motor vehicle without guard and went to some hotel to eat. When he came back, the motor vehicle spare wheel had disappeared. He consulted with PW.4 John Saitoti who was a loader at the bus stage who told him he did not see who took the wheel but had seen the appellant walk close to the motor vehicle and in particular, at the back of the motor vehicle. The next morning he informed the driver of the theft and indicated that Saitoti had seen the appellant walking near the motor vehicle. They went and reported the matter to the Police at Taveta after informing their employer PW.1, Patrice Musya. The appellant was later arrested and charged with the offence. It is also on the record that in the same night, PW.4 had talked with the appellant when he saw him near the motor vehicle. He had asked him of the whereabouts of the driver but appellant answered that he did not know. He also testified that at the time he looked at the motor vehicle and noticed that the same was open at the back. There was also the testimony of PW.5, Saulo Kilambo who was himself a loader at Taveta bus stage. He testified that in the material night he saw appellant with a big truck wheel/tyre which he asked him, PW.5, with others who were loading into Harambee Bus traveling from Nairobi, to help him load the spare wheel onto that bus, but that they had refused, whereupon the appellant had pushed the wheel to the direction of Gateway Bar. The witness reported this to PW.2 and PW.3 the following day when they were in the process of inquiring about the theft.

The appellant in his unsworn defence statement admitted having been given a lift by PW.2 on the motor vehicle Registration No.KAC 225F but denied stealing the spare wheel. He said that on arrival at Taveta, he went to work at his usual place and had no time to go and steal. He left at 7 p.m. to go home. He saw the driver PW.2 make inquiries about the stolen spare wheel but he denied knowledge of the theft or thief although they alleged later that a watchman had seen him with the spare wheel upon which he sought that the watchman be brought to face him but he was not brought. Thus, he argued, the whole story was a concocted one which should not be believed as he was innocent.

The trial Magistrate considered the evidence on the record against the appellant and also considered the defence. According to her there was no eye-witness of the theft but she found the evidence straight-forward and its chain properly linked. She felt certain that the evidence pointed to the accused as the thief. The appellant had knowledge of the presence of the spare tyre or wheel on the motor vehicle since he must have seen it when he was given a lift on it.. He was seen hanging around the motor vehicle by PW.4, John Saitoti sometimes in the material night when the driver and the turnboy were not in the motor

vehicle. But that would not have been enough had not PW.5 Saulo Kilambo been approached by the appellant to load the tyre/wheel onto a bus from Nairobi, which request they refused to accede to. PW.5 noticed that the tyre was a big truck tyre. They saw him push it elsewhere but did not follow him.

I have considered the evidence upon which the trial Magistrate convicted. I am satisfied that the evidence though circumstantial left no other innocent hypothesis than that of the guilt of the appellant. The sequence of events that night irresistibly point to the appellant as the thief. I, however, got a little worried that the learned trial Magistrate first convicted the accused before him before examining his statement of defence for the mere purpose of rejecting it. Indeed this is what the trial Magistrate appears to have done. A careful perusal of her judgment on page 13 will confirm her approach. I, accordingly, on that technical ground alone was going to allow the appeal. I, however, using this court's powers under S.354(d) confirm the judgment, having carefully considered the appellant's defence at the lower court together with the rest of the prosecution evidence and having as did, the trial Magistrate, rejected it. I also believe that confirmation of the conviction will not lead to any prejudice as the evidence on the record was sufficient to base the conviction on.

The upshot is that there was sufficient evidence upon the record which proved the charge beyond a reasonable doubt and there is no reason to interfere with the conviction.

The appeal on conviction is accordingly dismissed.

As touching sentence, the trial Magistrate meted out a prison sentence of 4 year with 2 strokes of the cane. The maximum under the section is 14 years. The appellant stole from those who had helped him earlier the same day. He deserves no sympathy. The item was not recovered. It is my view that the lower court's sentence was fair and just. The appeal must therefore also fail in respect of sentence.

The upshot is that the appeal is hereby dismissed in its entirety.

Dated and delivered at Mombasa this 18th day July, 2002.

D. A. ONYANCHA

J U D G E