REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.330 OF 2001

(From Original Conviction and Sentence in Criminal Case No.1841 of 1900 of the Chief Magistrate's Court at Mombasa – L. Achode, Mrs. – P.M.)

JOHARI MATAMBAA...…….....…….……APPELLANT

=V E R S U S=

REPUBLIC…….....…….RESPONDENT

JUDGMENT OF COURT

The appellant was charged with stealing a motor vehicle contrary to Section 278(A) of the Penal Code. He was convicted and sentenced to three years imprisonment with one stroke of the cane. He appeals against both the conviction and sentence.

The facts are as follows: That the appellant who was a driver employed by the Ministryof Health and stationed in Kwale Hospital, was sent out on 29.9.2000, to drive motor vehicle GK A752A, Toyota Hilux, valued at Kshs.600,000/- and belonging to the Ministry of Health, to distribute drugs to several health facilities. In the said motor vehicle he carried PW.3, Esther Mpenzwe Machiro the Deputy District Public Head Nurse and PW.4, Hamisi Mwaruma Makote, a Public Health Technician.They were to distribute drugs to several health facilities as earlier mentioned. At the end of the day, PW.3 was dropped at Mombasa to go to her home and Hamisi Mwaruma Makote was at about 5.30 p.m. dropped at her home after returning the remaining stores to Kwale Hospital. It is on record that it was at that time that the appellant approached his immediate boss PW.1, Dr. Phillip Muthoka as he drove the latter home, to let him have the use of the vehicle on the following Sunday, two days following. Dr. Muthoka advised the appellant to revisit the issue on the said Sunday. In the meantime he advised him to take back the motor vehicle No.GK A752A to the parking bay immediately before retiring to his home. It would appear that thereafter the appellant drove the motor vehicle by the Bus-Stage where he met PW.2, Omari Mwakumanya who having failed to get a matatu to take him to his country home was going back to his town residence at about 8 p.m. or thereabout. The appellant indicated that he was traveling to Burani which was also the home of the witness, whereupon the appellant agreed to give PW.2 a lift. But the appellant notified PW.2 that they would leave on the journey soon after some other people he expected would join them. The expected individuals who happened to be six joined the two at about 8.30 p.m. and they then started their journey. They passed Shimba Hills Lodge Gate when the appellant stopped the vehicle on the pretext that he was going to the back of the vehicle which had a double cabin to persuade those sitting at the back to donate some little money to him for buying cigarettes. That is when things began to happen. According to PW.2, Omari Mwakumanya, the occupants in the driver's cabin turned against the witness and threatened him with a knife. One of them sat on the driver's seat and drove the motor vehicle off, leaving the appellant down in the forest. Half a km away they threw out PW.2 who ended up fracturing his legs due to the landing impact.This was along Kongani route near Kidongo gate. He could not walk and so he waited until about 9 p.m. when he was luckily rescued by Hon. Mkalla's car which drove him to Kwale Police Station from where he was taken to Kwale Hospital for treatment. From there he was transferred to Msambweni Hospital. In the meantime, the same evening, PW.1 got information of the loss of the vehicle and reported it to the Police immediately.

In the morning following on 30.9.2000, the appellant showed up at Kwale Hospital and reported to Dr. Muthoka, that he had been robbed of the vehicle the evening before. Dr. Muthoka could not hear of it and sent him to report to the Police who were already handling the matter. Dr. Muthoka's first report to the Police was that the appellant without permission had disappeared with the motor vehicle and that the Police should help to find him and the motor vehicle. PW.6, a police officer No.30853, Sgt. Dominic Mainge of CID Kwale who had been assigned the investigation, was just leaving Kwale Police Station that morning they saw the appellant walking to the Police Station at about 6 a.m. after he had been sent there by Dr. Muthoka. They held him. On inquiry the appellant is said to have stated that he had on 29.9.2000 evening been allowed by Dr. Muthoka to go to his house for food before he could come back to work as a stand-by for the night. His house was at the staff-quarter at the Hospital. He then further stated that he was, at the bus stage stopped by two people who requested that they be taken to Kinango and that as he did so, he was robbed of the vehicle on the way. He was left in the forest where he slept first on a tree, and later in a culvert, and he reported to PW.1, first thing in the morning. When PW.6 took the appellant to scene of the alleged robbery, he saw neither the tree nor the culvert in which the appellant had alleged to have slept. PW.6 also noted that appellant's rural home from the place of the alleged robbery was not further by the road. The vehicle was never recovered.

The appellant's story was a little different is some important aspects.He alleged that he was given permission to drive the motor vehicle to his house at the Kwale Hospital for dinner. That the people who entered the vehicle at the bus stage including PW.2, were in company of PW.2 and not his own friends whom he waited for to come after PW.2 sought for a lift home. He stated that he was himself thrown out of the motor vehicle by the robbers and not that he walked out himself to try and get some money from them. He did not explain why he decided to drive to the bus stage and why he agreed to carry them to Kinango when he had only been allowed to go to his staff quarter house to eat and go back to the Hospital to be on duty as a stand-by. He failed to explain why if he was thrown out of a moving car he did not sustain any serious injuries as would be expected or why if he sustained some bruises as he claimed he did not seek or find need to seek immediate medical treatment. He failed to explain why PW.6, a Police Investigating Officer could not see the tree he climbed on to escape from the wild animals nor the culvert he finally settled in and why he had finally to take the risk to climb down to the culvert to risk being attacked by the walking wild animals. Or why he had decided to drive past his rural home before he was attacked by the robbers. Dr. Muthoka denied authorizing the appellant to take the relevant motor vehicle that evening and did not therefore sign the work-ticket. He denied assigning the appellant to work on night shift as a stand-by as that never happened nor was practical for an employee who had been on duty during the same day. The appellant on the other hand alleged that the story of PW.2 is not true because he was in company of the robbers and that his evidence should not be believed.

It is this court's view that there is no direct evidence which would justify the conclusion that the appellant had arranged for the robbery with the robbers. Any conclusion that he did so would entirely depend on the circumstantial evidence on the record. The trial Magistrate was alive to this situation. She indeed was fully aware of the principle and practice and law that is applicable in a case such as this. She applied the principle reiterated in the case of Kipkering Koske and Another –v- R., [1952] A.C. page 135 where it was stated as follows:-

> *"1. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts mu st be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonab le hypothesis of innocence is always on the prosecution and never shifts to the accused."*

The trial Magistrate in this matter before this court was also conscious of the fact that there must be no co-existing circumstances which might weaken or destroy the circumstantial evidence leading to the conclusion that the accused is nothing else but guilty. She came to the conclusion that the facts before her were not explainable on any other hypothesis other than that of the guilt of the accused; that they irresistibly pointed to the appellant's guilt.

I have considered the same facts contained in evidence before the trial Magistrate. I come to the same

conclusion she did. The appellant was advised by his boss Dr. Muthoka to park the relevant motor vehicle at the parking bay at about 7.30 p.m. He instead proceeded to the bus stage where he met PW.2 and waited for other people who joined them later that evening.He proceeded to drive them to Kinango knowing that he had instructions to park the vehicle but deliberately disobeying those instructions. Even if his version of facts could be accepted, that he was given permission to drive to his house at the Kwale Hospital Quarters to eat, he nevertheless failed to drive there. He instead drove to the bus stage and from there drove to Kinango with those, who the lower court believed, were thereafter to assist him in the crime he had planned to commit. I have no hesitation to conclude also that the appellant knew what he was doing and knew what the end result would be. He drove even past his rural home without stopping. He drove past the KWS Warden Post without raising an alarm if he was really being car-jacked or being forced to drive. The evidence of PW.2 established that where the motor vehicle was taken away from the driver, was a place the driver himself chose to stop and not as stated by appellant, to collect some money for cigarettes. But the appellant alleged that he was forcefully thrown out of the moving vehicle. The trial Magistrate clearly did not believe that the appellant was thrown out of the moving motor vehicle. Nor does this court believe his story. The trial Magistrate believed that the appellant was not thrown out but believed PW.2's story that he deliberately stopped and that his purpose to stop where he did was to give his coplanners a chance to take over the driving and the control of the motor vehicle itself and this was all according to an earlier plan. I once more entirely agree with that conclusion. What it more, although not highlighted by the trial Magistrate, the appellant must have left the ignition key in place to enable the car-jacker to just start the motor vehicle and drive off.

Otherwise there is no clear explanation from the evidence as to how the car jacker managed to start the motor vehicle. The appellant's story of having been thrown from the moving motor vehicle does not also make sense insofar as the appellant failed to sustain the likely injuries. That would have been the logical or natural result. Clearly, he had no injuries when he reported the next morning and did not therefore need to go for medical treatment. This confirms the story of PW.2 who said that the appellant was merely left in the forest or jungle but not thrown out of the moving motor vehicle.

In conclusion this court agrees entirely with the conclusions and judgment of the trial Magistrate. The facts on the record of evidence irresistibly lead to the conclusion that the appellant that night simply executed a plan he had earlier made with those who later appeared to rob him of the motor vehicle. The explanation, express or implied, by the appellant that he was truly, without prior knowledge of the plan, car-jacked, does not in any logical sequence of facts, fit in. The circumstantial evidence in this case therefore, justify an inference of the guilt of the appellant. The inculpatory facts in the evidence are incompatible with the innocence of the appellant. They are incapable of explanation upon any other reasonable hypothesis than that of the appellant's guilt. The prosecution had the burden to prove these facts. It did so beyond a reasonable doubt as the trial Magistrate felt. This court agrees with the conclusions aforesaid and finds no adequate reasons to interfere with the said court's conviction, which it hereby confirms.

The trial Magistrate meted out a sentence of 3 years and one stroke of a cane. This court notes that the maximum sentence under the section is 7 years with corporal punishment. It is the view of this court that the sentence meted out was also fair and just considering the fact that the motor vehicle was never recovered, and that the appellant's conduct as established by the evidence was heinous. He was lucky to have escaped a harsher sentence and luckier that this court did not enhance the sentence as the Respondent did not appeal or seek for it. This appeal is dismissed.

Dated and delivered at Mombasa this 16th day of July, 2002.

D. A. ONYANCHA

J U D G E