



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.374 OF 2000

(From Original Conviction and Sentence in Criminal Case No.1664 of 1999 of the Principal Magistrate's Court at Malindi – J. Manyasi, Ms – Ag. P.M.)

JOHN NJUGUNA MURAYA.....APPELLANT

V E R S U S

REPUBLICRESPONDENT

J U D G E M E N T

The Appellant was charged and convicted with the offence of theft of a motor vehicle contrary to Section 278(a) of the Penal Code. He was sentenced to 3 years imprisonment with 4 strokes of the cane. His appeal to this court is against both conviction and sentence.

Briefly the facts which led to this charge were as follows. The Appellant is an auctioneer practicing in the name and style of Sunshine Auctioneers. The Defendant who was the registered owner of motor vehicle registration number KAD 163A was sued by Formax Insurance Brokers Ltd in Mombasa SRMCC No.4025 of 1997 which was heard and Judgement was given in favour of the Plaintiff who was then being represented by a firm of Advocates known as Timamy and Company, Advocates for Kshs.207,845/-. The complainant who was the Defendant failed to satisfy the decree and the Plaintiff through its Advocates applied for Warrant of Attachment and Sale against the Defendant who is the complainant in this Criminal Case. PW.6 Abdalla an Advocate in the firm of the Timamy & Co. Advocates forwarded the said Warrants of Attachment and Sale to the Appellant on 16th June, 1998 with instructions that he proceeds expeditiously and execute the said Warrants in accordance with the provisions of the Auctioneers Act.

The Appellant proceeded to Malindi where the complainant resides to effect the execution. The Complainant paid the decretal sum by cheque and he also paid the auctioneers' costs. But the said cheque was later dishonoured. The Appellant went back and attached the complainant's motor vehicle registration number KAD 163A the subject matter of this theft case.

In the meantime while the said Warrants were still in force, the complainant went and paid the whole of the decretal amount directly to the Advocates acting for the Plaintiff but the Advocates did not write to the Appellant to withdraw the Warrants.

It is also conceded that the said Warrants did not bear the court seal and signature. This is what seems to have weighed heavily on the mind of the Trial Magistrate when she made a finding of guilty. But taking into account the sequency of events, this was an oversight on the part of the Appellant but which did not amount to a criminal act.

The Learned State Counsel does not support the conviction and rightly so and adds that the Appellant ought to have been dealt with under the provisions of the Auctioneers Act.

For the reasons above stated, I consider the conviction unsafe and give the Appellant the benefit of doubt.

I quash the conviction, set aside the sentence and order that unless the Appellant is otherwise lawfully held, he shall be set at liberty forthwith.

Dated and delivered at Mombasa this 21st day of September, 2001.

J.L.A. OSIEMO

J U D G E