



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Thumbi (Criminal Appeal E145 of 2021)
[2023] KEHC 2391 (KLR) (Crim) (13 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E145 OF 2021
JM BWONWONG'A, J
MARCH 13, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

JOHN WAWERU THUMBI RESPONDENT

(Being an appeal against an judgement of acquittal delivered on 9th December 2021 by the Hon. N.A Nazushi P.M in Milimani Chief Magistrate's Court criminal case no. 4572 of 2020 Republic vs John Waweru Thumbi)

JUDGMENT

1. This is an appeal by the Republic (state) against the acquittal of the respondent by the trial court, filed pursuant to section 348A of the *Criminal Procedure Code* (cap 75) Laws of Kenya.
2. The respondent had been charged with the offence of stealing motor vehicle contrary to section 278 A of the *Penal Code* (cap 63) of the Laws of Kenya.
3. In count II, he was charged with obtaining registration by false pretences contrary to section 320 of the *Penal Code* (cap 63) of the Laws of Kenya.
4. Being dissatisfied by the acquittal, the appellant filed a petition of appeal dated December 10, 2021 raising nine grounds.
5. The main grounds raised are as follows. In a coalized form in grounds 1, 2, 3, 4 and 5, the appellant argues that the trial court misapprehended the facts, the law and the totality of the prosecution evidence thus reached a wrong conclusion.



6. In a coalized form in grounds 6 and 9, the appellant complained that the trial magistrate erred by denying the prosecution a chance to call rebuttal witnesses contrary to the provisions of section 212 of the Criminal Procedure Code.
7. In ground 7 the appellant argued that the trial court failed to comply with the provisions of section 169 (2) of the Criminal Procedure Code. In ground 8 the appellant challenged the decision of the trial court to order the release of the motor vehicle exhibit KCR 360L to the respondent.
8. As this is the appellant's first appeal, the role of this appellate court of is well settled. It was held in the case of *Okeno vs. Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose v R* [2013] e-KLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
9. Damaris Muthoni Mwololo (Pw 1) testified that she knew the respondent in 2016, while he was a matatu driver. When she was interested in starting a matatu business, she sought his advice. She bought KAL 630J for Kshs. 700,000, which amount was deposited in the seller's account. When she was unwell and was at the hospital, she discovered that the motor vehicle had been transferred into the names of the appellant. She also bought another vehicle KAV 408D which was being managed by the respondent.
10. She told the court that she opened a joint account with the respondent in December 2016. Later on, she sold the two motor vehicles and the funds remitted in the joint account. That she bought another vehicle KCR 360L. The agreement was signed by the respondent. The vehicle was also in possession of the vehicle which operated under the Manchester Sacco. She later discovered that the logbook was in the respondent's name. When a scuffle ensued between the respondent and his wife, he transferred the logbook to her name and resigned as her driver.
11. The complainant testified that the respondent never contributed any money for the purchase of the said vehicle. That he had illegally transferred it into his name without her knowledge. In cross-examination, she indicated that she gave him the TIMS account password to enable him transfer the motor vehicle. She told the court that she reported the incident to the police, after the respondent failed to remit monthly contributions of Kshs. 142,000.
12. Philip Ken Amboko (Pw 2) testified that he was introduced to the complainant in 2019, when she needed a driver. He was informed that the complainant had differed with her driver of KCR 360L which at the time was being driven by the respondent. They agreed that he would send money to the complainant at the end of every day. He told the court that he noticed that there was a conflict between the complainant and the respondent, on who should receive the proceeds from the motor vehicle.
13. Jane Njoki Ngwai (Pw 3) testified that on October 20, 2018, the respondent asked her for a loan. He told her that he could not service the loan for the motor vehicle KCR 360L, which he co-owned with the complainant. She followed up and gave him the amount sought.
14. Antony Nyota (Pw 4) a legal officer at Equity Bank told the court that he received warrants to produced documents relating to two bank accounts owned by the complainant and the respondent. He produced the bank statements of the two accounts namely No. 02xxxxxxxxx2 – Damaris Muthoni Mwololo and No. 0xxxxxxxxxxx4 – John Waweru Damaris Muthoni.
15. Irungu Evan (Pw 5) a security officer at Cooperative Bank testified that he received warrants to produce account opening documents and statements. This is in respect to account number 0xxxxxxxxxxx0 opened by Damaris Mwololo.



16. No. 70110 CPL Tunachi Land (Pw 6) testified that he works at Safaricom having been seconded by DCI. On November 20, 2020 he received an order to provide account opening documents and Mpesa statements for 0723783972. He told the court that the mpesa number was registered to John Waweru Thumbi, the respondent herein. He produced the statements in court.
17. No. 85579 PC Chrispinus Lumachi (Pw 7) told the court that a complaint was made by Pw 1 that the respondent had illegally transferred motor vehicle KCR 360L into his name. He was tasked to investigate. He told the court that the complainant transferred Kshs. 1,283,000 for the purchase of the motor vehicle from a joint account (Damaris and Waweru account). That in the course of his investigations, he learnt that the vehicle was registered in the respondent's name. This was despite the fact that the respondent never deposited any money into the joint account. He told the court that the respondent lied to the complainant that the vehicle was going for inspection yet he intended to transfer it to himself. In cross-examination, he testified that the motor vehicle was purchased by the respondent on behalf of the complainant. However, there were no agreements between the complainant and the respondent.
18. PC Cleophas Muringa (Pw 8) testified that he took photographs of the subject motor vehicle. The photographs were produced in court as exhibits.
19. After the close of the prosecution's case, the trial court made a determination that the accused had a case to answer. He was put on his defence and gave sworn testimony and called one witness. In his defence, Dw 1 stated that he had a romantic relationship with the complainant between 2015 and 2020. In the course of their relationship, they did business together including purchase of the motor vehicle in dispute. That since they were lovers, he would deposit money into her account since he did not have an individual account.
20. He told the court that he purchased the vehicle from Planet Motors in Mombasa. He executed the sale agreement and paid Kshs. 1.7/- million as a deposit, which money he had acquired from a Sacco Loan. Further, he offset the balance on a monthly basis of Kshs. 142,000/- which was remitted from the joint account. Given the relationship between himself and the complainant, he gave her the logbook when secure a loan. However, after 3 months, he learnt that the vehicle was in her name. After their relationship ended, she reported that the vehicle as stolen and reported him. He denied ever working for the complainant or stealing the motor vehicle. He also denied illegally transferring the vehicle into his name.
21. Paul Gituyi Njuguna (Dw 2) told the court that he worked as a caretaker in Thogoto, where the complainant and the respondent lived as husband and wife.

Analysis and determination

22. In grounds 1, 2, 3, 4 and 5 the appellant argued that the learned trial misapprehended the facts, the law and the totality of the prosecution evidence thus reached a wrong conclusion. On the offence of stealing of motor vehicle, the appellant submitted that the respondent had access to and was in possession of the motor vehicle with the knowledge of the owner, the complainant. That the appellant proved all the ingredients of the offence of stealing and the court should substitute the order of acquittal with an order of conviction. The respondent submitted that the prosecution failed to prove beyond reasonable doubt that he stole the motor vehicle.
23. In her decision to acquit the respondent of the offence of stealing a motor vehicle, the trial court noted that the vehicle was bought by proceeds from a joint account held by the complainant and the



- respondent. The sale agreement was executed by the respondent. If indeed there was indeed theft, the complainant should have reported in the first instance to the police.
24. From the record, there is no evidence that the complainant purchased the motor vehicle. The complainant laboured to prove her ownership of the vehicle. There was no sale agreement between herself and any individual for the purchase of the motor vehicle. The narrative that the respondent was her employee was also not supported by any documentary evidence.
 25. In respect of the offence of obtaining registration by false pretences, the complainant argued that she did not give consent to the respondent to transfer the vehicle into his name. On the other hand, the respondent argued that he was the legitimate owner of the motor vehicle. In acquitting the respondent for this offence, the trial court noted that the matter was of a civil nature as the parties were disputing the ownership of the vehicle. The complainant tried to prove her contribution, for the purchase of the motor vehicle. Further, the issue before the court was whether the respondent obtained registration of the vehicle by false pretences. The prosecution witnesses failed to adduce sufficient evidence to prove beyond reasonable doubt the charge. They could not prove that the respondent did not own the vehicle and by false pretences transferred it to his name. These grounds of appeal therefore fail and I dismissed them for lacking in merit.
 26. In grounds 6 and 9, the appellant complained that the trial court erred by denying the prosecution a chance to call rebuttal witnesses contrary to the provisions of section 212 of the *Criminal Procedure Code*. In this regard, I find that the evidence must be evidence that is relevant to the issue. Furthermore, it must be evidence which was not available before the prosecution closed their case after exercising due diligence.
 27. I find that the trial court considered this issue and rightly found that the prosecution failed to exercise due diligence in respect of that evidence; since it was available during the prosecution case. I therefore dismiss this ground for lacking in merit.
 28. In ground 7 the appellant argued that the trial court failed to comply with the provisions of section 169 (2) of the *Criminal Procedure Code*. The provision of that law provides as follows:

“In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.”
 29. This provision does not apply to this appeal since the respondent was acquitted. The ground of appeal fails and is hereby dismissed for lacking in merit.
 30. In ground 8, the appellant challenged the decision of the trial court to order the release of the motor vehicle exhibit KCR 360L to the respondent. The ownership of the subject motor vehicle is in dispute. It therefore follows that this is a matter for the civil court to decide. In this regard, I find as persuasive the decision of the Court of Appeal in *Alinyo & another v Republic* (1974) EA 544, in which that court held that disputes concerning the ownership of property should be litigated in in a civil court and not in a criminal court.

This ground fails and I therefore dismiss it for lacking in merit.
 31. After re-evaluating the entire evidence as a first appeal court, I find that the prosecution did not prove beyond reasonable doubt that the motor vehicle was stolen by the respondent.
 32. The trial court was therefore right in acquitting the respondent in respect of the offence of stealing of motor vehicle and that of obtaining registration by false pretences.



33. The upshot of the above analysis is that the appeal is found to be devoid of merit and is hereby dismissed.

Judgement signed, dated and delivered in open court at Nairobi this 13th day of March 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Mutuma for the Republic/appellant

Mr. Kusow for the accused/respondent

