REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.24 OF 2020

GERALD CLEMENT OCHWADA ....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

J U D G M E N T

[1] The appellant, **GERALD CLEMENT OCHWADA**, appeared before the Resident Magistrate at Busia charged with three counts as follows: -

Count I - Being in possession of uncustomed goods

Contrary to S.200 (c) (iii) of the East African Customs Management Act 2004 in that on the

6th August 2019 at Busia Towship, Busia County, the appellant was found in possession of uncustomed m/v Registration No.KCM 281P chassis No.WDB2110542B234276 make Mercedes Benz white in colour valued at ksh.1,000,000/= knowing it to be uncustomed good.

Count II Having suspected stolen property, contrary to S.323 of the Penal Code, in that on the 6th August 2011 at Busia Township, Busia County the appellant was found in possession of m/v chassis No. WDB2110542B234276 make Mercedez Benz white in colour valued at kshs.1,000,000/= which was suspected to be stolen.

Count III Being in possession of a m/vehicle white fitted with unprescribed registration plate, contrary to S.12 (1) read with S.14 of the Traffic Act in that on the 6th August 2019 at Busia Township, Busia County, being the special owner of a m/v chassis No. WDB2110542B234276 Mercedez Benz saloon white in colour the appellant was found having the said vehicle while filled with unprescribed registration plate to wit KCM 281P nor prescribed for the said vehicle.

[2] After pleading not guilty to all the counts, the appellant was tried and convicted on all the three counts and sentenced for count I to a fine of ksh.200,000/= or twelve (**12**) months imprisonment in default for count II, the appellant was sentenced to a fine of ksh.50,000/= or six (**6**) months imprisonment in default and for count III, to a fine of ksh.50,000/= or six months imprisonment in default. It was ordered that the suspect m/vehicle be accordingly forfeited to the State.

[3] Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds set out in the petition of appeal dated and filed herein on 31st August 2020. Hearing of the appeal was by way of written submissions. In that regard, the appellant's submissions dated 28th August 202, were filed on his behalf by **Ashioya & Co. Advocates**, while the submissions by the respondent dated 24th May 2021, were filed on its behalf by the office of the **Director of Public Prosecution** (**DPP**).

Learned Counsel, **Mr. Ashioya**, appeared for the appellant and orally highlighted parts of his written submissions. The learned Prosecution counsel, **Mr. Mayaba**, appeared for the respondent.

[4] Having given due consideration to the appeal on the basis of the supporting grounds, and the rival submissions for and against the appeal, the duty of this court was to re-visit the evidence availed at the trial and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Okeno vs Republic** [**1972**] **EA 32**).

[5] In brief, the case for the prosecution was that on the material 6th August 2019, **Sgt Kiprotich** (**PW 1**) was notified by his superior officer that a vehicle suspected of being fitted with a fake registration number plate was parked at a club called Quills Annex. The vehicle's registration number was given as **kcm 281p** and its make, **Mercedez Benz**, white in colour.

[6] Accompanied by his colleagues, **P.C Silipo** (**PW 2**) and **P.C Kitio** (**PW 3**), Sgt Kiprotich proceeded to the parking lot at the said club and found the vehicle. It's owner was not available at the time but arrived at the scene later, at about 6.00p.m. He was identified as the appellant herein and after being briefly interrogated by the police officer, including the officer commanding Busia police station (**OCS**), was directed to drive the vehicle to the police station where it was photographed and impounded.

[7] The matter was then handed over to the Directorate of Criminal Investigation (**DCI**) for necessary investigations to be led by D.C.I.O Busia, **BUSIA, SP Agutu (PW 6)**, who engaged the Custom department at the Busia One stop Border office, through its officer **Charles Musimu (PW 5)** and thereafter, concluded that the suspect vehicle was uncustomed property filled with unprescribed registration plates and a suspected stolen vehicle.

[8] The present charges were therefore preferred against the appellant as the owner of the vehicle.

In his defence, the appellant denied the charges and contended that he was the sole director of Cloge Works Infrastructure Ltd and the owner of the material vehicle which was registered under the name Cloge Works Infrastructure Ltd as per the original log-book. He further contended that he was not the maker of the log book and thus not responsible for any problems arising therefrom.

[9] After considering the evidence in its totality, the trial court concluded that the prosecution case against the appellant (**Accused**) had been proved beyond reasonable doubt in all the three counts. The appellant was therefore convicted and sentenced accordingly.

With regard to count one, the trial court relied on the evidence of the customs officer (**PW 5**) and the investigating officer (**PW 6**) to find that in terms of the relevant provisions of the East African Customs Management Act 2004, coupled with the relevant records from the Kenya Revenue Authority (**KRA**) and the National Transport and Safety Authority (**NTSA**), the charge was uncontroverted and in any event, was proved against the appellant as he never tendered any evidence of payment of duty in relation to the vehicle.

[10] This court does not find any cogent legal and factual reason to fault the trial court in its finding with regard to the first count. It was without doubt that the vehicle was a dutable item and as such its owner was required to produce the necessary records of payment of duty when required to do so by the relevant authority such as the KRA or show that the vehicle was not amendable to payment of duty for one reason or the other. The burden to prove that duty was paid or was not required to be paid fell on the appellant in as much as he admitted that the vehicle belonged to him or his company and that he was in possession of its logbook and in as much as he failed to produce any documents showing that duty was paid as stated in his defence.

[11] Although the burden to prove a charge against an accused person lies squarely with the prosecution, there are certain instances where the burden to prove a fact lies with an accused on matters within his knowledge, (see, **S.III** of the **Evidence Act**). Herein, the appellant failed to prove that he paid duty for the vehicle or that it was exempted from payment of duty. It would therefore follow that as credibly alleged and proved by the prosecution, he was indeed in possession of uncustomed vehicle. His conviction by the trial court in court one was thus proper and sound and is hereby upheld.

[12] With regard to the second court, the trial court found that the ingredients of S.323 of the Penal Code were duly established by the prosecution against the appellant. That, the appellant failed to give any account of how the material m/vehicle was acquired. In arriving at this finding, the trial court relied on the case of **Kiondo Hamisi VS Rep (1963) E.A 209**, which set down the circumstances under which a charge under S.323 of the Penal Code could hold and be said to have been proved against an accused person beyond reasonable doubt.

[13] Herein, the evidence with regard to the charge came from the police officers and in particular, Sgt Kiprotich (**PW 1**), P.C Silipo (**PW 2**) and P.C Kitio (**PW 3**). None of them indicated that they found the appellant in possession of the vehicle at the time they proceeded to a parking lot where they had been directed by their superior officer. The vehicle had no occupant and owner at the time. The appellant showed up much later and lay a claim to the vehicle. He was not stopped while in the vehicle in the process of a journey and when he showed up where it was parked he claimed ownership of the vehicle and was asked to drive it to the police station. He later produced a log book which established his ownership of the vehicle through his company.

[14] However, the log book particulars did not match with the actual chassis number of the vehicle. The chassis number indicated in the log book was incorrect and so was the body type of the vehicle. Apparently, this is what aroused the suspicion of the police officers that the vehicle was a stolen vehicle. This was mere suspicion unsupported by cogent evidence and indeed, rebutted by the very log book which showed that the appellants company was the actual owner of the vehicle. How could the appellant be suspected of having stolen his own property??? The fact that he was in possession of a vehicle whose duty had not been paid was enough to extinguish any suspicion that the vehicle was stolen. In any event, any discrepancy in the particulars of the log books could not be construed against the appellant but the government agency responsible for issuance of such log books.

[15] Clearly, the second count against the appellant was a misconception and was, in any event, unproved by the prosecution evidence. It would therefore follow that the trial court misdirected itself on the principles set out in the case of **Kiondo Hanisi**(**supra**) and ended up wrongly convicting the appellant on the charge and sentencing him to a fine of ksh.50,000/=, in default, six (**6**) months imprisonment. The conviction was thus neither proper nor sound and is hereby quashed.

[16] With regard to the third count, it is clear that the trial court based its conviction of the appellant on the fact that prescribed identification plates had been fitted on a wrong rainer than the actual vehicle. There was no finding whether or not the number plates were compatible with the prescribed manner design and colour as required by S.12 (**1**) of the Traffic Act. It would therefore follow that although the number plates were of the prescribed design and colour and were fitted on the vehicle in the presented manner, they were nonetheless fitted on a wrong vehicle.

[17] Such omission or act would not constitute an offence in terms of S.12 (1) of the Traffic Act. The position would be different if the number plate were not fitted in the prescribed manner or were not of the prescribed design and colour.

Therefore, the appellant's conviction on the third count was also not proper and sound and is hereby quashed.

[18] In sum, the appeal partly succeeds to the extent that the appellant's conviction on count two (**II**) and three (**III**) be and is hereby quashed and the resultant sentences set aside.

Any fine paid by the appellant in respect of the two counts be refunded to him. It is instructive to note that the fine of ksh.50,000/= imposed by the trial court on count three was unlawful as S.14 of the Traffic Act which is the punishment provision provides for a maximum of ksh.1000/= for a first offender.

[19] Otherwise, the appeal on count one is wanting in merit and is hereby dismissed. The forfeiture order accruing from the charge is upheld with variation that the subject vehicle be released to the appellant on condition that unless duly exempted, necessary duty be paid within the next thirty (30) days from this date hereof. In default, the vehicle be disposed of in any other lawful manner thought the State agency responsible for Customs and related matter.

Ordered accordingly.

J.R. KARANJAH

<u>J U D G E</u>

[DATED AND DELIVERED THIS 9TH DAY OF JUNE 2021]