



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 17A OF 2017**

*(From Original conviction and Sentence in Criminal Case No. 199 of 2016 of the Resident Magistrate's Court at Wang'uru).*

**PATRICK KAMANDE KAGETHE.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant was charged and convicted of stealing motor vehicle contrary to Section 278A of the Penal Code. The prosecution called a total of two witnesses and in his defence, the appellant gave sworn evidence and called 3 witnesses. The trial Court sentenced him to 4 years imprisonment.

2. The appellant filed an appeal based on the following grounds, that the learned magistrate erred both in law and fact by;

***1. Convicting and sentencing him while not considering the evidence adduced by the prosecution was very deficient.***

***2. Failing to consider that the particulars of the offence were not proved beyond reasonable doubt.***

***3. Disregarding the existing relationship between him and PW 1.***

***4. Failing to fairly analyze the evidence thereby arriving at an erroneous judgment.***

***5. Not appreciating the fact that he made the first report at Tigoni police station after he was robbed and evidence of the prosecution was single witness testimony.***

***6. That he pleaded not guilty to the charge throughout the entire case.***

3. The appellant filed additional grounds stating that the case was not proved beyond any reasonable doubts, investigations were shoddy, offence was reported at a different place not where it occurred, PW-1- was not truthful and court relied on her testimony when it was not corroborated. It was further stated that the trial Magistrate erred in assuming that he was party to the theft and dismissing his defence without giving reasons. He prays that conviction be quashed, sentence be set aside and he be set at liberty.

4. The State opposed the appeal and filed submissions. They pray that the appeal be dismissed.

5. The brief facts of the case are that the complainant owned motor vehicle registration KBM 365Y Succeed Probox having bought it on 1/7/16 from Mwangi Karanja vide a sale agreement exhibit 1 and was issued with a log book and a transfer. She then hired the accused as driver and to operate the vehicle as a taxi from Kenol to Muranga. On 24/3/16 at 6.00 Pm the appellant informed PW-1- that he was ferrying passengers to Sagana. At 8.00 Pm the appellant informed PW-1- they were at Makutano. The complainant told accused to close the business and return the vehicle. The appellant refused. At 11.00 Pm the phone of the appellant was switched off. PW-1- enquired and was informed that the vehicle was not at Kenol the previous day. The complainant reported the matter to the police. PW-2- investigated after the appellant alleged that he was hijacked. PW-2- found that the appellant was not hijacked. The appellant was then charged. The appellant submitted that the case was not proved beyond any reasonable doubts. It is submitted that the evidence by the two prosecution witnesses was not sufficient that the investigations were shoddy and that the evidence was not sufficient to base a conviction.

6. For the State it was submitted that the prosecution tendered overwhelming evidence to prove the charge. They submitted that the defence was wanting and a conviction of lies to hoodwink the court.

7. I have considered the evidence which was tendered before the trial Magistrate and the submissions which were filed by the appellant and

the State. This is a first appeal which calls on the court to analyse the evidence, evaluate it and make its finding but leave room for the fact that it had no opportunity to see the witnesses when they testified and observe their demeanor and leave room for that. This was so stated in **Okeno –v- R (1972) E. A. 32**. I have considered the evidence tendered and the submissions. I will deal with the issues arising from, the grounds of appeal. Though the appellant has raised various grounds of appeals, I find that they can be collapsed into two issues for determination:-

8. Issues arising;

**1. Relationship between PW 1 and the appellant**

**The appellant claimed to be cohabiting with PW 1. This issue was considered by the trial Magistrate who concluded that it was a none issue as spouses are entitled as of right to own their own individual property and have them registered in their names. Page 42 of the record. The trial Magistrate found that the complainant proved exclusive ownership of the motor vehicle. This was proved with cogent evidence of a sale agreement and a log book. The relationship of husband and wife was not proved. The PW-1- was therefore a competent witness against the appellant.**

**2. Did the prosecution prove its case beyond reasonable doubt?**

It is trite that the burden of proof always lies with the prosecution to prove their case.

9. PW 1 confirmed that the motor vehicle KBM 365Y belonged to her. That she used it for taxi and selling pineapples and the appellant used to operate the vehicle when it was used as a taxi operating from Kenol Murang'a. On the incident date at 6 Pm she called the appellant who informed her he was taking a customer from Kenol to Sagana. Later at 8 Pm, he stated he had reached Makutano and she told him to close business and return the car. She tried to call him thereafter but he was not picking and then he switched it off. The following day, she went to Kenol and was informed the vehicle was not there the previous day. She later received information that the appellant was at Tigoni Police Station reporting of the stolen vehicle.

10. The appellant had not informed her and she reported the matter at Wang'uru police station. 2 days after, appellant informed her he had been hijacked.

11. PW 2 the investigating Officer, stated that the appellant informed him that he had been bought juice by customers, he became confused and later found himself in Tigoni. He went to Makutano motel and discovered appellant's story was a cover up.

12. The appellant stated that on the incident at 5 pm he was introduced to 2 clients who wanted to be taken to Sagana. They waited for other people and then proceeded, at Makutano they stopped to wait for other people. They passengers went to a club and at 10 pm, one of them wanted to drive but he resisted and that was the last he could recall. At 12 am he found himself in a forest alone, he stopped a car and they called PW 1 and he was taken to Tigoni police station. He stayed in Nairobi and returned to Mwea the following day and met PW 1. Later he was detained by the police.

13. DW 2, the appellant mother stated that at 3 pm he was called and informed that the appellant was in Limuru and asking for help. She requested him to assist the appellant and he stated he would take him to Tigoni police station.

14. DW 3, the appellant's father stated that at 3 am, he was called that the appellant had been abandoned at Limuru. He went to Limuru and found appellant seated on the foam and at 4 pm gave him fare to go to Nairobi.

15. DW 4 who works with the appellant confirms that on 03/03/2016 clients came and he talked to them. After about 30 minutes, they called the appellant and 2 days later he heard the appellant had been carjacked.

16. The trial Magistrate analysed the evidence and considered the defence of the appellant. She found that the defence had no basis. She found the evidence of PW-1- convincing.

17. Looking at the whole evidence adduced, the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant lied about being the hijacking and his evidence had a lot of contradictions. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion. The guilt of the appellant was proved beyond reasonable doubt by overwhelming evidence on record. The defence was not plausible and the trial Magistrate was entitled to reject. The trial Magistrate made a finding that the evidence by PW-1- was convincing. She had a chance to see the witness and this court cannot make a contrary finding. The conviction was proper in the circumstances.

18. **In Conclusion:-**

I find no merits in this appeal. I dismiss it.

**Dated at Kerugoya this 7<sup>th</sup> Day of February 2019.**

**L. W. GITARI**

**JUDGE**