



IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NUMBER 91 OF 2014

CALLEB OCHIENG OLIYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 1900 of 2010 in the Chief Magistrate's Court at Kakamega delivered by Hon. P.Achieng (Ag. PM) on 3rd July, 2014)

JUDGMENT

Background

1. CALLEB OCHIENG OLIYO, the appellant herein has filed this appeal against conviction and 2 year sentence on an alternative charge of handling stolen goods contrary to Section 322 (1) (2) of the Penal Code. The particulars of the charge are that:-

“On 2.10.10 at Nyando Garage, Kisumu Township, Kisumu West District within Nyanza Province otherwise than in the course of stealing arranged the disposal of motor vehicle KAL 768J Toyota Corolla grey in color

The prosecution's case

2. The prosecution called 7 witnesses in support of the charges. **PW1, William Luseno Amadi**, the complainant herein stated that on 17.9.10 he was robbed of motor vehicle KAL 768 J Toyota Corolla grey in color by 4 persons who included one woman and that he was able to identify the appellant among the robbers. He stated that the vehicle was later recovered and he identified the appellant in an identification parade. **PW2 Stephen Okonya** stated that motor vehicle KAL 768 J Toyota Corolla was his and that the vehicle was stolen from PW1 whom he had employed as a driver. He recalled that the vehicle was recovered at Nyando Garage in Kisumu on 21.9.10. **PW3 Moses Odoyo Odero** stated that he was the owner of Nyando Garage in Kisumu. He told court that the appellant took motor vehicle KAE 109 H Toyota Corolla to the garage for repairs on 2.10.10 but it was later towed away by police who claimed that it had been stolen and that its correct number KAL 768J. **PW4 Patricia Imbotio**, the complainant's wife was informed by complainant that he had been robbed. **PW5 Sgt Maurice Amwayi**, the investigating officer testified that on 17.9.10, he received information that motor vehicle KAE 109 H Toyota Corolla had been stolen and its driver hijacked. He recalled that on 5.10.10, the vehicle whose number had been changed to KAE 109 H Toyota Corolla was recovered at Nyando Garage in Kisumu and PW3 the garage owner was arrested and was released when he handed over the appellant to the police and explained that he was the one that took the vehicle to the garage for repairs. PW6 Issac Mukwana, a clinical officer examined complainant on 18.9.10 and filled a P3 form PEXH. 6 which shows that he had deep cuts on occipital region and on left forearm. PW7, IP Andrew Kioko, stated that he conducted an identification parade on 1.10.10 in which PW1 identified the appellant as one of the persons that robbed him.

3. When put on his defence, the appellant gave sworn testimony in which he denied the offence. He conceded that on 2.10.10 in company of his brother Elijah Ouyo, he took motor vehicle KAE 109 H Toyota Corolla to the garage from where it was recovered from but explained that he was acting on instructions of the owner Tobias Omondi Ochayo. He stated that he was later arrested and charged with offences that he did not commit. His witness Elijah Ouyo stated that he was present when the appellant picked motor vehicle motor vehicle KAE 109 H Toyota Corolla from the owner Tobias Omondi Ochayo and when it was taken to the garage from where it was recovered.

4. *In a judgment* 3.7.14, appellant was acquitted of the main count of robbery with violence and was convicted and sentenced to 2 years on the alternative charge of handling stolen goods.

The Appeal

5. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 3.7.17, appellant raised 14 grounds of appeal which I have summarized into 3 grounds as follows:-

1) Was section 200 of the Criminal Procedure Code complied with

2) That the prosecution did not proved that motor vehicle motor vehicle KAE 109 H Toyota Corolla was the same as motor vehicle KAL 768 J Toyota Corolla

3) That his defence of alibi was not considered

6. When the appeal came up for hearing on 5.9.18, Mr. Ombaye, advocate for the appellant relied wholly on the grounds of appeal and submissions filed on 24.4.18.

7. Mr. Juma, learned State Counsel opposed the appeal and stated that he was relying on the evidence on record.

Analysis and Determination

8. *This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that. (See **Okeno v Republic [1972] EA 32**).*

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions on behalf of the appellant.

10. In dealing with this appeal, I will address the 4 grounds summarized above as follows:-

Was section 200 of the Criminal Procedure Code complied with?

11. This issue did not form part of the grounds of appeal. I shall therefore not address myself to it.

Did the prosecution prove that motor vehicle motor vehicle KAE 109H Toyota Corolla was the same as motor vehicle KAL 768J Toyota Corolla

12. Throughout the prosecution case, it was alleged that motor vehicle motor vehicle KAE 109 H Toyota Corolla was the same as motor vehicle KAL 768 J Toyota Corolla. It is trite that other than registration numbers, vehicle have unique chassis and engine numbers. The prosecution had a duty to prove that chassis and engine numbers on the recovered motor vehicle KAE 109 H Toyota Corolla was for motor vehicle KAL 768 J Toyota Corolla and not motor vehicle KAE 109 H Toyota Corolla a duty they failed to discharge.

13. From the above analysis it is apparent to this court that the prosecution did not discharge its burden to prove the case against the appellant beyond any reasonable doubt.

14. As a result, I have come to the conclusion that this appeal has merit. Accordingly, the appellant's conviction is quashed and the sentence set aside and unless otherwise lawfully held appellant who is out on bond pending appeal shall remain a free man.

It is so ordered.

DATED AND SIGNED AT KAKAMEGA THIS 7TH DAY OF SEPTEMBER 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - George & Erick

Appellant - Present

For the State - Mr. Juma