



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 37 OF 2016

(Appeal from original Conviction and Sentence in Kigumo SPM Criminal Case No 28 of 2014 – A Mwangi, SRM)

DANIEL NDUBI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Daniel Ndubi Kamau**, was convicted after trial of ***stealing a motor vehicle*** contrary to **section 278A** of the **Penal Code**. It was alleged in the charge that on 05/01/2014 at the Kangari Chief's camp in Kigumo District within Murang'a County, jointly with others not before the court, he stole motor vehicle registration number KBU 082 T, make Isuzu FSR lorry valued at KShs 7 million, the property of ***Nyayo Tea Zone Development Corporation***. On 29/03/2016 he was sentenced to serve four (4) years imprisonment. He has appealed against both conviction and sentence.
2. The grounds of appeal in the petition of appeal dated 08/04/2016 drawn by the Appellant's advocates are to the effect that the Appellant was not positively identified; that the evidence adduced by the prosecution was inconsistent, contradictory and ambiguous; that some documents were admitted in evidence contrary to rules of evidence; that the evidence placed before the trial court was weak and could not properly found the conviction; and that the sentence was manifestly harsh and excessive. Learned counsel for the Appellant argued all the grounds of appeal together.
3. On his part, learned prosecution counsel did not support the conviction upon the main ground that the Appellant was not positively identified, and that, generally, the evidence placed before the trial court by the prosecution did not prove the offence charged beyond reasonable doubt.
4. I have read the record of the trial court in order to appraise the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have however borne in mind that I did not see and hear the witnesses, and have given due allowance for that fact.
5. At about midnight in the night of 4th and 5th January 2014 PW2 (***Geoffrey Otieno***), the official driver of the motor vehicle subject of the charge, parked it at the usual place in the Chief's camp at Kangari and went home. At about 3 a.m. in the morning PW4 (***APC Tois Lemoli***), one of the administration police officers guarding the camp, saw a man come, enter the subject motor vehicle and drive off the lorry. He stated that he identified that person as the Appellant.
6. Later that morning the lorry was found abandoned at Ruiru, about 80 or 90 km away. Its blue parastatal number plates had been replaced with civilian number plates reading KBS 620 V. It had been

vandalized in the dashboard and its radio and other items removed. The vehicle was taken to Ruiru Police Station. Its work-ticket (where any trip the vehicle made was entered) was recovered from the lorry.

7. The last entry in the work ticket was not by the persons who would ordinarily enter and sign the work-ticket (PW3 – **David Njoroge Mariga** or PW5 – **Kipng'etich Kipsory**). That last entry authorized a journey from Kangari to Nairobi and back.

8. The last entry in the work ticket was compared with the known writings of the Appellant by one CIP Odiwuor who did not testify. His report was admitted in evidence despite the objections of the Appellant. The report was produced in evidence by PW10 (**CIP Daniel Gatu**). CIP Odiwuor's opinion was that the last entry in the work ticket was in the Appellant's hand.

9. It is clear that the Appellant was convicted upon two pieces of evidence: his identification by PW4 and the document examiner's opinion that the incriminating last entry in the vehicle's work-ticket was by him.

10. Regarding the identification by PW4, it is to be noted that it was at night and it was drizzling. PW4 stated that when he saw the Appellant enter the subject lorry and drive it away he was himself seated in the cabin of another motor vehicle. He never testified whether he saw the Appellant through the front windshield of the lorry or through a door window. If it was drizzling as he testified, naturally the glasses of the windshield and the door windows would have had water on them, severely obstructing his view. He never stated that he had the ignition key to be able to run the windscreen wipers; he also never stated that he opened any door window glass in order to better see.

11. PW4 also stated that he was able to see the Appellant by some security lights in the compound. But he did not describe these lights, their intensity or how far they were from him or the subject vehicle. It is also to be noted that PW4 never bothered to challenge the Appellant, a person he said he knew well, and ask him why he was driving off the lorry at 3 a.m.

12. Corroboration of PW4's identification of the Appellant could have been found in the document examiner's opinion that the incriminating last entry in the work-ticket was by the Appellant. However, the document examiner's report was produced in evidence by someone else despite objection by the Appellant. Under **section 77** of the **Evidence Act, Cap 80**, the report was indeed properly admitted in evidence. The bottom line here however, is that the document examiner was not availed for cross-examination by the Appellant, and no proper reasons were given for failure to call him. The mere fact of his retirement was not sufficient.

13. Upon my own evaluation of the evidence placed before the trial court, I am not satisfied that the Appellant's conviction is safe. Learned prosecution counsel properly conceded the appeal.

14. I will allow this appeal in its entirety. The appellant's conviction is hereby quashed and the sentence of 4 years imprisonment set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF FEBRUARY 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 17TH DAY OF FEBRUARY 2017