



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 1 OF 2013

GREGORY AMBISA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 676B of 2011 of the Chief Magistrate's Court at Malindi – M. Njagi, RM)

JUDGEMENT

The appellant was charged with the offence of theft of a motor vehicle contrary to section 278 (A) of the Penal Code. The particulars of the offence are that the appellant, on the 29.4.2011 at Caltex petrol station in Malindi District within Kilifi County, stole a motor vehicle registration number KBK 627F Toyota Caldina Silver in colour valued at Kshs.870,000/= the property of James Elegwa Charles.

The trial court convicted the appellant and sentenced him to serve seven (7) years imprisonment. The grounds of appeal are that the charge sheet was incurably defective. That the prosecution evidence is full of contradictions. That the case was not proved beyond reasonable doubt since no agreement or mobile phone communication information were produced. That essential witnesses were not called and that the appellant's sworn defence was overwhelming but was dismissed for no apparent reason

The appellant submitted that the sentence of seven years is not within the requirements of the law and denies the appellant the opportunity to reform. The appellant is a first offender and the sentence is harsh given the circumstances. He has served four years in prison and the sentence is not in line with the nature of the crime. Appellant relies on the case of **THOMAS GILBERT CHOMONDELEY VS REPUBLIC** where the accused was sentenced to eight months imprisonment for the offence of manslaughter. The appellant is remorseful and would like the sentence to be set aside and reduced as he has served a substantial part of it.

The State opposed the appeal. Mr. Fedha, prosecution counsel, submitted that the evidence on record was consistent. The complainant knew the appellant and the other witnesses corroborated the complainant's evidence. The appellant was given the vehicle. He disappeared and was later traced and arrested.

This is the first appeal and the court is expected to evaluate the evidence and make its own conclusion. Before the trial court PW1 JAMES ELEGWA CHARLES was the complainant. He operates a tax business in Malindi. He has several vehicles. On the 28.4.2011 he was in Vihiga County when the appellant who was known to him as a tax driver asked for a vehicle. The appellant told him that he wanted a vehicle to take his clients to Mombasa. It was about 6.20 am. PW1 called Rashid (PW2) who

was his driver operating motor vehicle No. KBK 627F in Malindi to give the appellant the vehicle. The agreed fee was Kshs.9,000/= and the vehicle was to be returned at 6.00 pm. At around 6.30 pm PW1 called the appellant to find out whether he had returned the vehicle. The appellant told him that his clients were having dinner at a restaurant. At about 9.30 pm he called the appellant but his mobile phone was off. In the morning, he tried to reach the appellant but he could not be reached. In the evening, he called Josephat (PW3) and asked him to report the matter at the Malindi police station. PW1 later came to Malindi and reported the incident. In June 2011, he got a mobile number from the appellant's friend and it was used to trace the appellant. The appellant was traced in Bungoma but was arrested in Eldoret. He was brought to Malindi and charged with the offence. PW1 had bought the vehicle for Kshs.870,000/=.

PW2 RASHID JUMA MWAGANDI is a tax driver. He was having the stolen vehicle on 28.4.2011. PW1 called him to give the vehicle to the appellant who was to return it at 6.00 pm. He gave the appellant the vehicle. PW2 knew the appellant as a tax driver. At 6.00 pm PW1 called him to find out whether the vehicle had been returned. The vehicle was not returned and to date has not been recovered.

PW3 JOSEPHAT ONZERE is a mechanic in Malindi. He was called by PW1 and asked to report the theft of the vehicle at the Malindi station. He went to the police station and made the report on behalf of PW1. This was on 30.4.2011. PW3 knew the appellant. PW4 MOSES TAIFA testified that he is a car washer at Malindi near Kenya Commercial Bank area. On 28.4.2011 he was at his place of work. The appellant went there and asked for PW1. He informed him that PW1 had travelled. The appellant went back and talked to PW2. He saw the appellant leaving with the stolen vehicle Toyota Caldina silver in colour. He knew the appellant as PW1 he used to give him a vehicle to operate as a tax.

PW5 ROBERT KITSAO CHENGO is a tax driver. On 28.4.2011 at about 9.30 am he was at his place of work together with PW2. The appellant went there and talked to PW2. He saw PW2 giving the stolen vehicle to the appellant. He later heard that the vehicle was not returned. PW6 P.C. ROBERT KINUTHIA was stationed at Malindi police station. On 22.10.2011 he was briefed about the case and asked to go to Bungoma where the appellant was being kept at Bungoma police station. He went there and the DCIO told him that the appellant had already been arraigned before the Bungoma Court on charges of theft of motor vehicle. He took the appellant and brought him to Malindi.

PW7 P.C. JOHN MWITHIA was stationed at Malindi police station. The case was reported at the station on 30.4.2011 by PW3. He investigated the case. He sent signals to all other police stations in Kenya about the stolen vehicle. The Malindi DCIO got information that the appellant had been seen in Bungoma. The appellant was arrested in October 2011 and brought to Malindi where he was charged with the offence.

In his sworn defence the appellant denied committing the offence. He testified that on 9.10.2011 he was in Eldoret in a bar called Springs. PW1 went there and asked him if he remembered him. He told him he remembered him as he had separated him with one Tanui when they were fighting in Malindi. PW1 told him that he would know that he was a well known figure in Eldoret. The appellant moved to another bar called Keringeti. A lady by the name Juliet joined him. They started drinking and they were shortly surrounded by three armed police officers. They were arrested and taken to the police station. The following morning Juliet was released on a cash bail. At 2.00 pm PW1 went to the Eldoret police station and alledged that he had stolen his motor vehicle. He was taken to Bungoma police station and on 11.10.2011 he was charged with theft of a motor vehicle before the Bungoma Court. On 23.10.2011 a police officer took him from Bungoma police station to Malindi police station. He was then charged with the offence.

The evidence on record shows that PW1 owned the stolen motor vehicle registration number KBK 627F Toyota Caldina. PW1 produced the ownership documents. The evidence does prove that the vehicle was in possession of PW2 for determination in whether the appellant stole the motor vehicle.

It is the evidence of PW1 that he knew the appellant. It is established that PW1 used to give the appellant vehicles to drive as a taxi driver. The evidence of PW2 is that on the 28.4.2011 he was in possession of

the vehicle. He was called by the owner, PW1, and asked to give the vehicle to the appellant. There is the evidence of PW4, Moses Taifa and PW5 Robert Kitsao Chengo who saw PW2 giving the vehicle to the appellant. The evidence on record does prove that the appellant was given the vehicle on 28.4.2011 by PW2. He was seen driving away the vehicle by both PW4 and PW5.

It is PW1's evidence that the vehicle was to be returned at 6.00 pm. By 6.30 pm it had not been returned. According to PW1, the appellant switched off his phone and could not be found. The vehicle was not returned and has not been traced. The appellant was arrested on 9.10.2011. The defence evidence dwells on how the appellant was arrested in Eldoret and taken to Bungoma. The appellant knew PW1. The defence evidence does not raise any doubt on the prosecution case.

The charge sheet is quite clear. The appellant was charged with stealing the motor vehicle contrary to section 278 A of the Penal Code. The punishment under that section is seven (7) years imprisonment. The particulars of the offence are clearly stated on the charge sheet. There are no defects on the charge sheet.

The appellant submit that the case was not proved beyond reasonable doubt and that the prosecution evidence was full of contradiction. The evidence on record gives the sequence of events. The vehicle was with PW2 who gave it to the appellant. PW1 talked to the appellant and PW2 on phone. PW4 and PW5 saw PW2 giving the appellant the vehicle. PW3 was sent to report the loss of the vehicle. There are no contradictions.

It is evidence that the appellant was given the stolen vehicle. He disappeared from Malindi from 28.4.2011 until 9.10.2011 when he was arrested in Eldoret as per his evidence. The charge sheet shows that he was arrested on 25.10.2011 and taken to court the following day. There are no contradictions as the Malindi police officers went for the appellant who was in Bungoma.

I am satisfied that the appellant stole the motor vehicle. The sentence meted out is the maximum. The vehicle was not recovered. The appellant breached the confidence PW1 had on him. He was given the vehicle in good faith and decided to betray PW1. The loss suffered by PW1 is painful. The circumstances of the case does not call for a lenient sentence. The seven year imprisonment is appropriate even if the appellant is a first offender.

In the end, I do find that the prosecution proved its case beyond reasonable doubt. The appeal lacks merit and is hereby disallowed.

Dated and delivered in Malindi this 6th day of February, 2017.

S.J. CHITEMBWE

JUDGE