



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.332 OF 2011

(An Appeal arising out of the conviction and sentence of K. BIDALI - PM delivered on 6th December 2011 in Nairobi CM. CR. Case No.1675 of 2008)

SAMUEL KIBET.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Samuel Kibet was charged with six (6) counts under the **Penal Code**. He was charged with two (2) counts of **making a document without authority** contrary to **Section 357(a)** of the **Penal Code**. The particulars of the first count were that on diverse dates between 8th day of June 2004 and 26th day of December 2007 at an unknown place within the Republic of Kenya, the Appellant, jointly with another not before court, with intent to defraud and without authority or excuse, made a certain document namely Personal Identification Number Certificate Number A001532451M purporting to be a genuine Personal Identification Certificate of Jeremiah Agira Ongonga issued by Kenya Revenue Authority. The particulars of the second count were that within the same period and in the same place, the Appellant jointly with another not before court with intent to defraud and without authority or excuse, made a certain document namely Identification Card Number 8289044 purporting to be a genuine identification card of Jeremiah Agira Ongonga issued by the Registrar of Persons.

The Appellant was further charged with two (2) counts of the offence of **uttering a document with intent to defraud** contrary to **Section 353** of the **Penal Code**. The particulars of the third count was that on the 26th day of December 2007 at Kericho Town within Rift Valley Province, the Appellant, knowingly and fraudulently uttered a fake Personal Identification Number certificate number A001532451M to Willy Kipchichir Kauria purporting it to be a genuine Personal Identification Number certificate issued by Kenya Revenue Authority. The particulars of the fourth count were that on the same day and place, the Appellant knowingly uttered a fake Identification Card Number 8289044 to Willy Kipchumba Kipchichir Kauria purporting it to be a genuine identification card issued by the Registrar of Persons.

He was also charged with a fifth count of **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on the 26th day of December 2007 at Kericho Town in Kericho District within Rift Valley Province, the Appellant, otherwise than in the course of stealing, dishonestly undertook the disposal of a motor vehicle Registration Number KAL 571P Toyota Corolla, white in colour by selling to Willy Kipchirchir Kauria knowing or having reason to believe it to be stolen

property. Lastly, the Appellant was charged with a sixth count of **obtaining money by false pretence** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on the 26th day of December 2007 at Kericho Township in Kericho District within Rift Valley Province, the Appellant, with intent to defraud, obtained Kshs.275,000/- from Willy Kipchirchir by falsely pretending that he was in a position to sell him a genuine motor vehicle Registration Number KAL 571P Toyota Corolla 100 white in colour, a fact he knew to be false. When the Appellant was arraigned before the trial court, he pleaded not guilty to all the charges. After full trial, he was convicted of all the counts. In respect of each count, he was sentenced to serve one (1) year imprisonment. The sentences were ordered to run concurrently. He was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court had reached the decision to convict him yet the prosecution had not established its case against him to the required standard of proof. He faulted the trial court for shifting the burden of proof and thereby finding him guilty. He was of the view that the trial court relied on extraneous facts which had not been adduced by any witness to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentences that were imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. Mr. Gichuka for the Appellant further made oral submission urging the court to allow the appeal. He submitted that the trial court applied the wrong provisions of law to find the Appellant guilty of the offences that he was charged with. It was his submission that whereas the Appellant was charged with the offence of making a document without authority, the trial court proceeded with the trial of the offence of forgery in mind. Learned counsel for the Appellant further submitted that the prosecution had failed to establish its case against the Appellant to the required standard of proof beyond any reasonable doubt. He submitted that trial court did not consider the Appellant's defence before reaching the decision to convict him. According to learned counsel, the trial court relied on conjecture and mere suspicions to arrive at its findings. He therefore urged the court to allow the Appellant's appeal. Mr. Kabaka for the State conceded the appeal. He agreed that the charges against the Appellant were not supported by evidence. He submitted that the Appellant's conviction had brought about a miscarriage of justice. He therefore urged the court to allow the appeal.

The facts of the case leading to the charges against the Appellant as presented by the prosecution witnesses are as follows: A motor vehicle described as Toyota Corolla 100 with registration letters and numbers KAL 571P, white in colour was impounded by the police on 12th October 2008 at Langas area in Eldoret. PW6 PC Benedict Kioko testified that on the day in question, while he was on patrol duties together with his colleagues, they came across the vehicle driven by PW5, Kipkogei Kiptoo. He testified that their interest in the vehicle was aroused by the fact that its number plates appeared fake. Upon further inspection of the vehicle they observed that its chassis number had been tampered with. They therefore seized the vehicle and retained it in police custody.

PW4 CPL Evans Mose of the Scene of Crime inspected the vehicle on 12th November 2008. His evidence was that he inspected the vehicle's chassis number and noticed that it had been tampered with. He testified that he placed the surface area on which the chassis numbers were marked on a fire wall and noticed that fillers were peeling off. According to him, this was an indication that the numbers had been repainted. He further testified that he noted that the numbers were not even in terms of spacing and the depth of the punch. On inspecting the vehicle's engine, PW4 testified that he noted that the engine had grinding marks. He also observed that the engine numbers appeared faint and were not also evenly spaced. He concluded that the chassis and engine numbers on the vehicle had been falsified. He prepared a report on his findings which he produced into evidence as **Prosecution's exhibit No. 15a**.

PW6 Benedict Kioko was assigned to investigate the case. He testified that when PW5 was interrogated he disclosed that he purchased the vehicle from PW2 Willy Kipchirchir. PW5 testified that he met PW2 who was selling the vehicle in Eldoret on 16th September 2008. He testified that PW2 explained to him that he had not transferred ownership of the vehicle to his name and that the vehicle was still registered in the name of the previous owner. They entered into a written agreement for the sale of the vehicle for

Kshs.285,000. He paid a deposit of Kshs. 20,000 on the same day and took possession of the vehicle. The sale agreement was produced into evidence as **Prosecution's Exhibit No.7**. He testified that he later paid the remainder of the purchase price to PW2 who in turn gave him the vehicle's original logbook Serial No.596297 which identified Jeremiah Agira Ongonga as the registered owner of the vehicle, copy of the official search certificate in respect of the vehicle, a transfer form duly filled by the owner of the vehicle, a copy of the owner's identification card No.8289044 and his Personal Identification Number Certificate Number A001532451M. The documents were produced into evidence as **Prosecution's Exhibits Nos. 23 (a) - (e)**.

On his part, PW2 testified that he purchased the vehicle from the Appellant's car dealership business in Kericho Town. He testified that he met the Appellant on 26th December 2007 at his business premises. He showed him the vehicle. He was also shown a copy of the vehicle's logbook which identified the vehicle as a white Toyota Corolla AE registered as KAL 571P with chassis numbers AE1003114861 and engine numbers 5A 010835 registered in the name of Jeremiah Agira Ongonga. He testified that the Appellant also had in his possession a Search Certificate in respect of the motor vehicle, copies of the registered owner's identification card No.8289044, Personal Identification Number Certificate Number A001532451M and a duly filled transfer form by the alleged owner of the vehicle. He testified that he entered into an agreement for the sale of the vehicle with PW2 on the basis of the documents he showed him. The sale agreement was produced into evidence as **Prosecution's Exhibit No. 6**. PW2 testified that he paid a deposit of Kshs.20,000 for the vehicle on the same day and took possession of the car. He testified that he went back to the Appellant to collect the original logbook when he later sold the vehicle to PW5. He testified that the Appellant took him to the office of the DCIO, Kericho where he collected the original logbook together with the other documents the Appellant had shown him which he later handed over to PW5.

PW6 testified that in the course of his investigations, he traced another vehicle that bore the very registration number as the seized vehicle. The owner of the vehicle was identified as PW3 Patrick Bosweti Wafula. PW3 had in his possession the vehicle's logbook which described him as the owner of the vehicle. The logbook was produced into evidence as **Prosecution Exhibit No. 13**. The evidence of PW3 was that he purchased his vehicle from one Adam Gichuhi Mwangi who ran a car dealership business in the name Gachewa Motors. The evidence of PW1 Jeremiah Ongonga Agira was that he initially owned the vehicle but later sold it to the said Adam Gichuhi Mwangi in the year 2009. He testified that he gave out a duplicate copy of the logbook, copies of his Identity Card No.8289044 (**Prosecution Exhibit No.19**) and Personal Identification Number Certificate Number A001532451M (**Prosecution Exhibit No.20**) to the said Adam Gichuhi Mwangi to facilitate the transfer of ownership to the new owner. PW1 explained that he provided a duplicate copy of the logbook at the time since he had lost the original logbook sometime in May, 2008. He testified that he reported the loss of the original logbook at Kajiado Police Station. He applied and was issued with a duplicate copy of the logbook which was used during the transaction. PW1's application for a duplicate copy of the logbook was produced into evidence as **Prosecution's Exhibit No. 21**. The vehicle was also inspected by PW4 on 8th April 2009. PW4 confirmed that the vehicle's particulars correlated with the details of the data that appeared on the vehicle's logbook. According to PW4, the vehicle was genuine.

He prepared a report in respect to the vehicle which was produced into evidence as **Prosecution's Exhibit No.17**. The evidence of PW7 John Vareni, a fingerprint officer at the Registrar of Persons department was to the effect that he received a letter from Pangani Flying Squad Unit requesting for the identity of the holder of identification card Number 12662937. He testified that he checked in their data base and confirmed that the identification card was issued to Peter Wainaina Njau. He prepared his report and certificate on the request which were produced into evidence as **Prosecution's Exhibits Nos. 27 and 28**.

When the Appellant was put on his defence, he denied committing the offences. He explained how he came to be in possession to the vehicle subject of the case. The Appellant testified that he owned a motor vehicle yard that sold secondhand vehicles. He testified that he met Peter Wainaina in 1999. They entered into a business arrangement whereby the Appellant agreed to sell vehicles on his behalf. According to the Appellant, the said Peter Wainaina brought the motor vehicle in question to his yard on 20th August 2007 for the purpose of the same to be sold. He delivered the vehicle with its original logbook which showed

that the vehicle was registered in the name of Jeremiah Agira Ongonga. He testified that he also brought copies of the owner's national identification card, his Personal Identification Number certificate and a duly completed transfer form by the owner. He testified that they agreed that he could purchase the vehicle himself if he was not able to sell it within three (3) weeks. The Appellant testified that he was not able to get a buyer within three (3) weeks and he therefore negotiated with the said Peter Wainaina to purchase the same. He agreed to sell the vehicle at Kshs.250,000/-. The Appellant paid the sum.

The Appellant testified that he took the documents obtained from the said Peter Wainaina to CID Office in Kericho for verification. He later obtained a certificate of official search confirming ownership of the vehicle as per the logbook. He testified that on 26th December 2007 he came to know through his business network that PW2 was looking to purchase a car. He testified that PW2 came to the yard on the same day. He showed him the vehicle. He showed him the documents he had obtained from Peter Wainaina and inspected them and was satisfied that they appeared genuine. They entered into an agreement for the sale of the vehicle. PW2 paid a deposit of the purchase price before he took possession of the vehicle. The Appellant testified that he was later arrested and charged with the present offence which he denied any involvement.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (**See Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has carefully evaluated the evidence adduced by the prosecution witnesses before the trial court. It has also considered the defence that was put forward by the Appellant. The court has also considered the grounds of appeal that the Appellant sought to rely on in support of his appeal. It has also evaluated the oral submission made by both the Appellant and Mr. Kabaka on behalf of the State. The thrust of the Appellant's appeal is to the effect that the prosecution did not establish the charges that were brought against him to the required standard of proof. The Appellant did not dispute the fact that he sold the suit motor vehicle to the complainant. He did not challenge the prosecution's assertion that he gave to the complainant the logbook, copy of identity card and copy of the PIN certificate of Jeremiah Agira Ongonga. The Appellant told the court that he was satisfied that the suit motor vehicle which he had purchased from one Peter Wainaina was genuine. Evidence was adduced which indeed established that the Appellant was a motor vehicle dealer of repute at Kericho. He is therefore presumed to know the documentation involved in the transfer of a motor vehicle. He is also presumed to know how to inspect a motor vehicle to establish the authenticity of the chassis and the engine numbers.

In the present appeal, it was clear that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant committed the offences for which he was charged and convicted. Why this holding? As motor vehicle dealer of repute, the Appellant was required to perform due diligence before he purchased a motor vehicle for onward sale to his customers. The prosecution was able to establish that there existed a motor vehicle with the same number plates, the same chassis and engine numbers as the one that was sold to the complainant. The prosecution further established that the chassis and engine numbers of the motor vehicle found in the complainant's possession had been tampered with. It was apparent that a successful attempt was made to file off the chassis and engine numbers of the suit motor vehicle. The chassis and the engine numbers of the motor vehicle could not be ascertained. It was apparent from the prosecution's evidence that an attempt was made to transfer the particulars that were in the logbook that was handed over to the complainant to suit motor vehicle. The evidence adduced by the prosecution clearly pointed to the fact that the Appellant, being an experienced motor dealer, knew that he was selling a motor vehicle to the complainant that did not have genuine particulars. The ownership documents handed over to the complainant by the Appellant were forgeries. These documents were made and uttered to the complainant with a view to convincing him that he was purchasing a motor vehicle whose particulars were genuine.

The defence by the Appellant to the effect that he was unaware that the particulars of the suit motor vehicle had been tampered with is incredible in view of the fact that the Appellant was an experienced second-hand motor vehicle dealer. This court, just like the trial court, is not persuaded that the Appellant was unaware that he was passing a bad title to the complainant. It was clear to this court that the suit motor vehicle was most probably was stolen. The particulars of the motor vehicle previously owned by Jeremiah Agira Ongonga were used because that motor vehicle was of a similar make and similar colour to the motor vehicle that was sold to the complainant.

The upshot of the above reason is that this court finds no merit with the appeal lodged by the Appellant. The prosecution adduced strong culpatory evidence which established the Appellant's guilt to the required standard of proof on the charges that were brought against the Appellant. Despite concession by the State of the appeal, upon re-evaluation of the evidence adduced at trial and the submission made to this court on this appeal, this court formed the opinion that the prosecution established its case against the Appellant on all the counts that he was convicted to the required standard of proof beyond any reasonable doubt. The appeal is hereby dismissed. The conviction and sentence imposed on the Appellant is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS DAY OF 1ST FEBRUARY 2017

L. KIMARU

JUDGE