REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 58 & 60 OF 2013

PAUL GITHINJI MAINA.....1ST APPELLANT

PAUL KASAU SIMBA..... 2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Senior Resident Magistrate's Court,

Karatina (Hon. H.M.Onkwani Ag. SRM) delivered on 24th April, 2013

in Criminal Case No. 1235 of 2012)

JUDGMENT

FACTS

1. The appellants, **Paul Githinji Maina** and **Paul Kasau Simba,** were jointly charged with the offence of Stealing a motor vehicle contrary to **Section 278(A)** of the **Penal Code** and in the alternative Handling Stolen Goods contrary to **Section 322(1) & (2)** of the **Penal Code.**

2. The particulars of the main charge was that on the 25th day of October, 2012 at Ndaro-ini in Mathira East District within Nyeri County, the appellants stole motor vehicle registration number KAW 936H valued at Kshs.600,000/-.

3. The particulars of the alternative count was that on the 18/11/2012 at Kariobangi Round-about within Nairobi County, the appellants, jointly and otherwise in the course of stealing dishonestly retained a motor vehicle registration number KAW 936H knowing or having reasons to believe it to have been stolen or unlawfully obtained.

4. The appellants were tried and convicted on the alternative charge of handling stolen property contrary to section 322(2) of the Penal Code and were sentenced to seven (7) years imprisonment, each without hard labour.

5. Being aggrieved by the convictions and sentences, the appellants filed their respective Petitions of Appeal; the 1st appellant later withdrew his appeal and opted to serve and complete his sentence; the appeal No.58 of 2012 was therefore marked as having been withdrawn; the 2nd Appellants Grounds of

Appeal are summarized hereunder;

i. The trial court convicted the 2nd appellant on a defective Charge Sheet;

ii. The offence of theft of the motor vehicle was not proved;

iii. The 2nd appellant ought to have been a prosecution witness;

iv. Possession of stolen property is a rebuttable presumption of fact;

v. The trial court disbelieved the defence and explanation offered by the 2nd appellant.

6. At the hearing of the appeal the 2nd appellant was represented by Learned Counsel Mr. Gachuba whereas Prosecuting Counsel for the State was Mrs. Gicheha; both Counsel made oral presentations which are summarized hereunder;

2nd APPELLANTS SUBMISSIONS

7. Counsel made the following submissions; that to prove handling four (4) ingredients ought to be proved; these were not proved beyond reasonable doubt; refer to case of **Hamisi Bakari & Anor vs R [2015] eKLR**

i. **Intention**; there was no evidence that the 2nd appellant had retained the vehicle; the 2nd appellant explained why he was in the motor vehicle KAW 936H on the day he was arrested; that he had been hired by the 1st appellant as a tout; no evidence was adduced by the prosecution in rebuttal; Reference was made to the case of **Eddie Odongo vs R 1983 eKLR;** where it was held that receivership had to be proved;

ii. **Knowledge:** No evidence was led by the prosecution to demonstrate that the appellant had knowledge/ belief that the vehicle was stolen; or that it was unlawfully obtained; Refer to the case of **Emmanuel Mutegi vs R 2015 eKLR;** it was held that the trial court needs to have been convinced that the appellant had reason to believe that the property was stolen;

iii. That the lower court record shows that the prosecution did not prove that the vehicle was stolen; that is why the appellant was acquitted of theft; Counsel relied on the case of **John Bosco Kariuki vs R 2006 eKLR;** where the court held that there cannot be handling without theft; there was doubt that the motor vehicle was stolen therefore the appellant was not properly convicted;

iv. That the motor vehicle was not produced as an exhibit; photographs were produced; that the photos were not sufficient evidence; the court ought to have verified the Chassis number; that there was no evidence to relate the log book produced to the vehicle; that the omission to produce the vehicle was fatal to the prosecutions' case; reliance was on the case of **John Bosco (supra**) which cites **Kechel vs R 1985 KLR 513** with approval; that stolen goods must be produced.

v. **Doctrine of recent possession;** the vehicle was stolen on the 25/10/2012; and the appellant arrested on the 18/11/2012 almost a month from the date of the theft; that three (3) weeks not recent and therefor doctrine of recent possession cannot be invoked;

vi. The appellant discharged his duty by explaining how he came to be in the vehicle**;** the reason was that he was an employee which reason was sufficient; refer to the case of **David Langat Kipkoech vs R 2009 eKLR.;** it was held that the doctrine of recent possession cannot stand where time has passed and the accused gave an explanation on why he handled the goods;

vii. That the prosecution failed to prove beyond reasonable doubt that the appellant was found with stolen property;

viii. That the trial court failed to inform the appellant of his right to be represented by Counsel as provided by Article 50(g)(h); that the appellant did not get a fair trial; he suffered prejudice as he did not understand the gravity of the offence; this can be discerned from the proceedings; the Constitution was very clear in that failure to comply with the aforementioned Article rendered the trial a nullity;

ix. Counsel prayed that the appeal be allowed and the appellant be set free; the conviction be quashed and sentence set aside.

RESPONDENTS SUBMISSIONS

8. In response Prosecuting Counsel for the State made the following submissions;

i. **On Theft; PW1's** evidence was that the vehicle went missing in his compound; that he made a report to the police; and they embarked on an exercise in search of the motor vehicle through-out the country; which vehicle was found in Kariobangi in Nairobi; it was being driven by the 1st appellant and the 2nd appellant was the tout; the fact that the appellant was not found to have stolen the motor vehicle and was acquitted on the charge of stealing; this does not negate the fact that the vehicle was stolen;

ii. **Exhibits;** None production of the motor vehicle was not contested at the trial by the appellant; the court was satisfied with the photographs produced in court; the failure was not fatal to the prosecutions' case;

iii. **Doctrine of Recent Possession;** the trial court did not arrive at its decision based on this doctrine; Counsel conceded that the trial court ought to have addressed the explanation given by the appellant that he was hired by the 1st appellant; and that when he enquired from the 1st appellant as to the vehicles ownership he was told that the vehicle belonged to his brother; this evidence was not countered;

iv. **On legal representation;** the right was not automatic but qualified; the accused must satisfy certain criteria before accorded the right; it must be demonstrated that the accused faces a complex case in issues of law and fact; that the appeal case referred to by the 2nd appellant of **Joseph Ndungu Kagiri [2016] eKLR** had many underlying issues and that it did not succeed based on lack of legal representation;

v. Counsel prayed that this court upholds the decision of the lower court as the appeal had no merit.

REJOINDER

9. Counsel reiterated;

i. Section 278(a) it was not proved that the motor vehicle was stolen;

ii. The appellant did not get a chance to investigate the motor vehicle;

iii. On recent possession the State conceded the issue of rebuttal; then this case should fail;

iv. On legal representation Article 50 (2)(h) must be read with (g) which gives the accused right to choose counsel; this right was withheld therefore the trial a nullity;

v. That the charge of handling was not proved beyond reasonable doubt; therefore the court was urged to find in favour of the appellant.

ISSUES FOR DETERMINATION

10. After taking into consideration the forgoing submissions made by both Counsel for the 2nd appellant and the State, this court has framed the following issues for determination;

i. Whether the prosecution proved that the 2nd appellant knew the property was stolen;

ii. Whether the circumstances of possession was sufficient proof that the stolen property was handled with any knowledge;

ANALYSIS

11. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA 32.**

Whether the prosecution proved that the 2nd appellant knew the property was stolen; whether the circumstances of possession was sufficient proof that the stolen property was handled with that knowledge;

12. The 2nd appellants contention is that the prosecution did not adduce any evidence to demonstrate that the 2nd appellant retained the motor vehicle KAW 936H or that he knew or had reason to believe that it had been stolen or unlawfully obtained; that the trial court in its judgment therefore misdirected itself in law and fact by convicting the 2nd appellant for handling stolen property;

13. It is not in dispute that the 2nd appellant was found in possession of the motor vehicle; the evidence of **PW1** was that when the vehicle was eventually traced at Kariobangi Round- About the 2nd appellant was found inside operating as a tout; this evidence was corroborated by **PW3** who was the arresting officer and **PW4** a friend of **PW1; PW3** and **PW4** were both present when the vehicle was recovered; and the trial court also correctly found that the 2nd appellant was in possession and noted this in its judgment by stating;

> **"Later on 18th November 2012, in the company of the police and PW4 he searched for his motor vehicle and recovered at Dandora round about. First accused was driving it and second accused was the conductor.**
>
> **Both accused persons were in physical possession of the motor vehicle"**

14. There being no direct evidence linking the 2nd appellant to the theft and the trial court having found the 2nd appellant to be in possession it was incumbent upon the trial court to examine the circumstances of the 2nd appellants' possession for the purposes of ascertaining or for drawing an inference that the 2nd appellant handled or retained the property knowing it to have been stolen or unlawfully obtained.

15. The condition precedent that must be established is knowledge; the question that must be answered to ascertain whether the trial courts' decision was right is whether from the facts and circumstances of the case knowledge was proved or can be inferred from the 2nd appellants circumstances of possession;

16. It is trite law that when circumstantial evidence is applicable the circumstances must be such as to convince any reasonable person that no other conclusion was reasonably possible;

17. The trial court in its judgment made the following finding;

> **"First accused being the driver and the second accused being the conductor thereof. I have no reason to doubt this evidence. It is watertight.**
>
> **Accused person's explanation as to how to handle property is not plausible. I do find that**

they handled stolen property and retained it. The motor vehicle did not belong to any of them.

First accused merely denies everything. Second accused explanation a mere sham"

18. From the above extract this court finds that the trial court failed to direct and address its mind sufficiently to the facts, the law on circumstantial evidence and the explanation given by the 2nd appellant; the State also conceded that the trial court failed to address the explanation given by the 2nd appellant;

19. Having considered the prosecutions' evidence in totality this court is satisfied the answer to the question posed earlier can only be in the negative; that knowledge by the 2nd appellant that the property was stolen or unlawfully obtained was not proved; neither can an inference of such knowledge be drawn from the 2nd appellants circumstances of possession;

20. There is therefore need to interfere with the trial courts conclusion that the 2nd appellant was guilty of handling stolen property;

21. This ground of appeal is the cornerstone of the appeal; it is found to be meritorious and is hereby allowed.

FINDINGS

22. In the light of the forgoing this court makes the following findings and determination;

i. The prosecution failed to prove that the 2nd appellant knew the property was stolen and or unlawfully obtained;

ii. The circumstances of possession was not sufficient proof that the stolen property was handled with any knowledge;

DETERMINATION

23. The appeal No.58 of 2012 is hereby marked as having been withdrawn;

24. The appeal No.60 of 2012 is found to be with merit and is hereby allowed.

25. The conviction is quashed and sentence set aside.

26. The 2nd appellant be set at liberty forthwith unless otherwise lawfully held.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 30th day of March, 2017.

HON.A.MSHILA

JUDGE