



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 4 OF 2016**

**PHILIP SYENGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in **Kyuso Principal Magistrate's Court Traffic Case No. 18 of 2013** by **Hon. E. M. Mutunga R M** on **01/07/15**)*

**J U D G M E N T**

1. **Philip Syengo**, the Appellant, was charged with the offence of **Taking a Motor-vehicle Without the Consent of the Owner** contrary to **Section 65(1)** as read with **Section 65(3)** of the **Traffic Amendment Act No. 38 of 2012 Cap 403 Laws of Kenya**. Particulars of the offence were that on the **29<sup>th</sup> day of November, 2013** at around **1800 hours** along **Kyuso-Kimangao Road** in **Kyuso District** within **Kitui County** drove the motor vehicle of **Registration No. KBQ 967Z** make **Mitsubishi** without the consent of the owner and in the process damaged the windscreen, the cabin and the left side mirror all valued at **Kshs. 148,500/=**.

2. The brief facts supporting the charge were that on the **29<sup>th</sup> November, 2013** **PW1, Solomon Kelia Mutunga** authorized the Appellant to drive motor vehicle **Registration No. KBQ 967Z FH Mitsubishi Lorry/Truck** owned by **Manzi Vaati** and **Co-operative Bank of Kenya** to **Katse** where they were selling cereals. He was accompanied by **PW2, Ruth Kanini Mwendwa** who was selling cereals and the Conductor. In the course of the journey the Appellant who seemed disturbed was reckless in his manner of driving. He left **PW2** at her shop at **Katse** and drove away the motor vehicle without her knowledge. She sought the assistance of the police. They found the Appellant with the motor vehicle at **Kyuso** where he was not authorized to go. The motor vehicle had a damaged windscreen and side mirror.

3. When put on his defence the Appellant stated that the owner of the motor vehicle owed him **Kshs. 30,000/=**. Further, he stated that on the material date while in company of **PW2** they left **Kimangao** after selling cereals. On the way to **Mwingi** he was stopped by the **Ukueti Police**. **PW1** arrived and claimed that he had damaged the motor vehicle. He was arrested. He called a witness **DW2 Wilson Kilonzi Maithya** who testified that the motor vehicle was parked in a place where he sells from **Miraa** until **5.00 p.m.**

4. The learned trial Magistrate analyzed evidence adduced and concluded that the offence was committed. Consequently the Appellant was convicted and sentenced to pay a fine of **Kshs. 10,000/=** or serve **three (3) months imprisonment** in default.

5. Being aggrieved by the conviction and sentence, the Appellant appealed on grounds that:

- (i) He took the motor vehicle with instructions and authority of the Complainant.
- (ii) There was no evidence of ownership of the motor vehicle.
- (iii) The offence as per charge sheet was not proved to the required standard.
- (iv) The learned Magistrate misdirected himself in law by drawing wrong issues for determination.

6. The Appeal was canvassed by way of oral submissions. **Mr. Kilonzi** for the Appellant submitted that the Appellant had authority to drive the motor vehicle to **Katse** and **Kimangao**. In the course of the journey the Complainant called the police and instructed them to arrest the Appellant. The Complaint made to the police was of malicious damage to property as the Appellant was alleged to have hit the windscreen and damaged it. His manner of driving having been reckless made the motor vehicle end up in a ditch per the allegation but the motor vehicle was not inspected.

7. Further he argued that the Registration Book of the motor vehicle was sneaked into the file as it was not produced by the Investigation Officer. As a result the charge was not proved to the required standard.

8. The State through the Prosecuting Counsel, **Mr. Wanjala** opposed the Appeal. He submitted that the motor vehicle was with the Appellant at **Katse**. PW1 relayed express instructions to him to return to **Mwingi** after selling cereals with PW2 at **Katse**. However he proceeded to **Kyuso** and **Kimangao** without any consent from PW1. He took the route of **Kyuso** instead of **Kirio – Mwingi** which could have been direct. The motor vehicle was intercepted at **Kyuso** having been damaged. He called upon the Court to uphold the conviction and dismiss the Appeal.

9. This being the first Appellate Court, I am duty bound to re-evaluate, re-assess and re-analyze evidence adduced before the trial Court bearing in mind I had no opportunity to seeing and hearing witnesses who testified at trial then come up with my own conclusions. **(See Okeno vs. Republic (1972) EA 32).**

10. **Section 65(1)** of the **Traffic Act, 2012** provides thus:

***“(1) If any person, whether employed by the owner or not, takes and drives away any motor vehicle without the consent of the owner thereof or other lawful authority, he shall be guilty of an offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding fifty thousand shillings or to both:***

***Provided that if the court is satisfied that the accused acted in the reasonable belief that he had lawful authority, or in the reasonable belief that the owner would, in the circumstances of the case, have given his consent if he had been asked therefore, the accused shall not be liable to be convicted of an offence.”***

11. In that regard considering the way the charge is framed and ingredients of the offence presented, the Prosecution had a duty to establish:

- (i) Whether the Appellant drove the motor vehicle Registration No. **KBQ 967Z**.
- (ii) Whether he did it without the consent of the owner.

12. It was not in doubt that the Appellant herein drove motor vehicle Registration No. **KBQ 967Z** in the course of his duties. PW1 stated thus:

***“I remember 29.11.2013 at around 4.00 p.m. I was at work in Mwingi and my vehicle was with the driver in Katse Market with the accused who is the driver.”***

PW2 was the one selling cereals that were carried aboard the motor vehicle. She testified that the Appellant was the one in control of the motor vehicle, confirming the fact that the Appellant did drive the

motor vehicle.

13. The particulars of the offence as presented are silent on the owner of the motor vehicle. In his evidence PW1 referred to the motor vehicle as his. However, he adduced nothing in evidence to confirm ownership of the motor vehicle. There is a document on record, a copy of record, the Registrar of Motor-vehicles which has information of ownership of motor vehicle Registration Number **KBQ 967Z**. The owners are **Manzi Vaati** and **Co-operative Bank of Kenya**. What is not clear is how it was made part of the record. None of the witnesses identified it.

14. This brings in the question whether the offence was proved to the required standard. The State that came up with the allegations herein was duty bound to prove it (**See Section 107 of the Evidence Act**).

15. PW3 the Police Officer who arrested the Appellant was instructed by the **OCS Kyuso Police Station** to act following a Complaint over malicious damage of a vehicle. On arrival he found the vehicle damaged on the windscreen and a side mirror. The officer found that the Appellant had authority to drive the motor vehicle from PW1.

16. The argument raised was that the Appellant was not supposed to go to **Kyuso**. Without proof of ownership of the motor vehicle, it would be difficult to tell what instructions were given to the Appellant and which route he was to use in the course of sale of cereals.

17. From the foregoing it is apparent that the Prosecution failed to prove the case. In the result the Appeal succeeds. The conviction is quashed and sentence imposed is set aside. The Appellant shall be refunded the sum paid as fine.

18. It is so ordered.

**Dated, Signed and Delivered at Kitui this 11<sup>th</sup> day of May, 2017.**

**L. N. MUTENDE**

**JUDGE**