



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 49 OF 2012

DAVID MWASYA MUSYOKA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 290 of 2011 by Hon. S. K Mutai on 30/3/2012)

JUDGMENT

1. The Appellant was charged jointly with another with the offence of stealing from a locked motor vehicle contrary to **Section 279 (g)** of the **Penal Code**.

Particulars of the offence being that on the **2nd** and **3rd** night of **November, 2011** at unknown time at **Ikutha Boys High school** at **Ikutha Location, Ikutha District** in **Kitui County** stole power steering engine valued at **Kshs. 250,000/=** the property of **Ikutha Boys High School** and in order to commit such theft opened the locked motor-vehicle **KBB 410s School Bus** with a spanner.

In the alternative the appellant was charged with neglect to prevent commission of a felony contrary to **Section 392** of the **Penal Code**.

The particulars thereof being that on the **2nd** and **3rd** day of **November 2011** at unknown time at **Ikutha Boys Ikutha Location, Ikutha District** in **Kitui County** being watchmen of the said school failed to use reasonable means to prevent a commission of a felony namely theft.

2. He was tried, found guilty and convicted on the alternative count. Being dissatisfied with the conviction and sentence he now appeals on the grounds that the trial magistrate erred and misdirected himself in law and fact when he disregarded the evidence of the school administration and the appellant that searches were not conducted on school workers and accompanied visitors and thereby erroneously convicted him; he applied selective bits of evidence in convicting the appellant while disregarding the exonerating evidence and convicted yet no negligence was proved.
3. Briefly the facts were that the appellant was a watchman at **Ikutha Boys Secondary School**. On the **2nd November, 2011** while on duty the bus driver went to the compound accompanied by a person alleged to be a mechanic. The driver who had the key to the motor-vehicle opened it. They serviced the motor-vehicle. PW1 **Felix Musyoka** the **Deputy Principal** at the school found them working on the vehicle. The vehicle was on and honking. He left them to go and check on students.
4. On **3rd November, 2011** at **5.00am** the driver reported to him that the motor-vehicle's part was

- missing. He went to check on it and found the driver and a police officer. PW2, **Samuel Kithome** the **School Principal** was called. He joined them. They found the power steering engine missing. Investigations carried out culminated into the arrest of the appellant and his co-accused. They were charged.
5. In his defence the appellant stated that he reported on duty at **6.00pm** and found the motor-vehicle already parked at the yard. At **7.00pm** the school driver, **Kilonzo Muli** arrived with a person whom he introduced as a Mechanic. The person had a tool box. He assisted them with a torch. They worked on the bus for one hour. They returned his torch and left. The following morning he handed over to his colleague. Thereafter he was summoned. It turned out that the driver had no authority to repair the motor-vehicle. He was charged. In his submissions, counsel for the appellant **Mr. Mwalimu** argued that the evidence that visitors accompanied by workers were never searched was not controverted. The driver should have been held responsible for the motor-vehicle that was tampered with.
 6. The appeal was opposed by the State. The learned State Counsel **Mrs Abuga** argued that all witnesses confirmed that the accused was on duty. He had a duty to guard the school compound. The trial magistrate was justified in reaching a finding that he neglected to prevent a felony. The sentence meted out was also within the law.
 7. This being the first appeal, the court is required to reconsider the evidence adduced at the trial with a view to coming up with its own conclusions, bearing in mind that the trial court had the advantage of seeing and hearing the witnesses who testified. (*see Okeno versus Republic [1972] E.A. 32*).
 8. In reaching his findings the trial magistrate stated that the bus driver was to be held responsible for the loss of the power steering engine but the appellant failed to conduct a search on the mechanic who repaired the bus in darkness.
 9. To prove the charge the prosecution had a duty of proving beyond reasonable doubt that the appellant had knowledge that the person who committed the felony designed to commit it or was committing it but failed to use all reasonable means to prevent the commission.
 10. It is not in doubt that the appellant was on duty on the material night. It is also admitted by PW5, **Kilonzo Muli**, the driver that he took a mechanic to repair the vehicle. PW2 said the driver had no authority to repair the vehicle. He also failed to notify him of any mechanical problem the vehicle had. The name of the mechanic who worked on the motor-vehicle was divulged by PW5. He was one **Isaiah Omondi**. PW1 the Deputy School Principal saw the person, apparently working on the vehicle but took no action. What was happening seemed procedural. In the premises the appellant should be believed when he says that it was not a requirement for an accompanied visitor to be searched.
 11. The mechanic who repaired the vehicle with PW5 was the only person who could tell the court what exactly was done to the vehicle. On cross-examination the driver (PW5) said a person without mechanical skills could not remove the power steering cartridge. Only a mechanic could do so. It was not suggested that the appellant, a watchman had such skills.
 12. When PW5 and the mechanic worked on the vehicle, it was not suggested that the appellant had knowledge that they had an intention of taking away part of the steering cartridge. Further, it has not been suggested that he saw them taking it away and failed to act by deterring them. In the premises he cannot be said to have neglected to prevent a felony.
 13. Having re-evaluated the evidence adduced, I find the appeal having merit, it is allowed. The conviction entered is quashed. The sentence passed is hereby set aside. If the fine imposed was paid the same shall be refunded forthwith.

DATED, SIGNED and DELIVERED at KITUI this 13TH day of MAY, 2014.

L.N. MUTENDE

JUDGE