REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 714 OF 2007

EVANS OKOTH OPIYO…………………………………..........APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(From original conviction and sentence in criminal case Number 782 of 2007 in the Chief Magistrate's court at Nairobi – S. Muketi (Ag.SRM) on 31/10/2007)

JUDGMENT

1. This is an appeal against conviction and sentence in **Cr. Case no. 782 of 2007**. The appellant was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. It was alleged that on 15th day of July 2004 at City Centre, the appellant together with others not before court, while armed with dangerous weapons namely, pistols they robbed Phillip Kibuchi Kinyua of motor vehicle registration No. KAQ 845Q Toyota Corolla Station Wagon, one mobile phone make Nokia 1100, and Kshs. 1,500/= all valued at Kshs. 350,000/=. That at the time of such robbery they used personal violence against the said victim.

2. In the alternative he was charged with handling stolen goods contrary to section **322(2)** of the **Penal Code**. It was alleged that on the 31st of March 2006, at Homa Bay in Nyanza, otherwise than in the course of stealing, he arranged the disposal of motor vehicle registration No. KAQ 845Q Toyota Corolla Station Wagon, valued at Kshs.350,000/= the property of Ismael Gitau knowing or having reason to believe it to be stolen.

3. The gist of the prosecution case was that on 19th July 2004, **PW1** a taxi driver, was in the motor vehicle registration No. KAQ 845Q Toyota Corolla, a taxi at the City Hall parking where he went to pay a water bill. That as he was reversing out he felt a gun against his head. Four men entered the car and forced him to drive upto Karura forest at Muthaiga where he was robbed and abandoned. He was robbed of the car, Kshs.5000/= and a Nokia 1110 phone. He hitched a lift from the forest to Muthaiga Police Station where he made a report. **PW2** the owner received a letter from someone inquiring about the vehicle which he bought. Investigations led to the arrest of the appellant and the recovery of the motor vehicle. The appellant was charged as read.

4. In his defence the appellant gave a sworn statement and stated that he operated a taxi business using taxi registration No. KAS 322 R, Toyota Corolla station Wagon at Sondu Shopping Centre. That on

19th July 2004, he was at Homabay and not Nairobi as alleged, and did not rob anyone. That on 21st March 2006 **PW5** Francis Wainaina Maina a friend of his called him. They met in Homabay where **PW5** inquired about a vehicle registration No. KAQ 845Q which had a sticker for sale on it, since he had found a buyer.

5. The appellant who knew the owner arranged to connect them. He located one Mr. Joseph Omolo Otieno Ogolla the owner of the motor vehicle and they converged at **PW5**'s house together with other people. They negotiated the purchase price and agreed on Kshs.250,000/=. That the appellant drew up the agreement at the behest of Mr. Ogolla who had poor eyesight.

6. The appellant stated further that the agreement was between Mr. Ogolla and James Njenga Kamau as the buyer, the rest signed as witnesses. After one year and two months, on 9th September 2007, **PW5**, called him and came with three people, among them was PC Williman Mark Ombua whom he knew. They inquired and explained his involvement in the transaction concerning motor vehicle registration No. KAQ 845Q. He was arrested and taken to Homabay Police Station where he gave out Mr. Ogolla's particulars. He was later taken to Nairobi where an identification parade was conducted but nobody identified him. He was later charged in court with the present case.

7. The appellant was convicted in the alternative count following a full trial and sentenced to serve two years imprisonment. Being dissatisfied he filed an appeal based on grounds that the doctrine of recent possession was not applicable in the case, the investigations were inconclusive, a vital witness was not summoned and that the prosecution case was not proved to the required standard.

8. Mr. Adala learned counsel argued for the appellant that he was a mere witness and had explained that Ogolla did not know English and had poor eyesight. That besides tending to shift the burden of proof in a criminal case the learned trial magistrate ignored several vital parts of the prosecution evidence. In Mr. Adala's view the appellant gave sworn evidence in his defence, which was not materially shaken by prosecution in cross-examination.

9. Mr. Adala also contended that the vehicle was stolen on 15th July 2004 while the appellant was accused to have dishonestly received, handled and arranged the disposal thereof on 31st March 2006. That the prosecution witnesses **PW4** and **PW5** confirmed the appellant's sworn evidence that there was an agreement for sale signed by the appellant only as a witness and that the actual owner of the vehicle, one Joseph Otieno Ogolla was physically present, gave his identity card and signed the agreement as the vendor.

10. Mr. Adala argued further that the evidence of Sgt Malon Mwangangi, **PW11** clearly shows that there was a lapse in, or failure to complete the investigations by his admission in examination-in-chief that he got a sale agreement signed by Joseph Otieno Ogolla. He asserted that the evidence adduced by the prosecution in this case did not support the conviction of the appellant for the offence of dishonestly arranging for the disposal of the motor vehicle. That the charge sheet and the prosecution witnesses indicate that the vehicle registration No. KAQ 845 Q was a Toyota Corolla Station Wagon, while **PW6** indicated that the vehicle bearing those details was in fact a Toyota Corolla Saloon, thus casting doubt on the correct identity of the subject matter and hence the substratum of the whole charge.

11. Learned state counsel, Miss Kimiri opposed the appeal on behalf of the state asserting that the prosecution proved its case beyond reasonable doubt. She argued that the appellant arranged for the sale of the subject motor vehicle KAQ 845Q Toyota corolla Station Wagon to **PW4** despite his knowledge that the motor vehicle did not belong to him.

12. Miss Kimiri contended further that the appellant said he was a witness for one Joseph Otieno Ogolla as the purported seller but it was he that gave to **PW4** the duplicate logbook and told him that the original logbook would come later, which did not happen. That it was also he who received Kshs.250,000/= from **PW4** as purchase price for the subject motor vehicle. She argued that the appellant in his defence did not deny having received the Kshs.250,000/= from **PW4**, and failed to produce the purported principal, Joseph Otieno Ogolla for whom he acted as seller's witness. That the document

examiner **PW12** confirmed that the handwriting on the sale agreement was that of the appellant. In her view the burden of proof was therefore discharged.

13. The undisputed facts of this case are that motor vehicle registration No. KAQ 845Q belonged to **PW2**, Ishmael Gitau Gichohi and that on 15th July 2007 **PW1** his driver was robbed of it at gun point in Nairobi. On 20th April 2007 **PW2** was informed of the recovery of the motor vehicle by the police. He saw the motor vehicle and identified it as his missing one. It was also not disputed that the appellant was not identified by **PW1** as one of his attackers, nor was it disputed that the appellant was involved in the sale of the said motor vehicle to **PW4** in March of the year 2006.

14. The question for determination is whether the appellant was an innocent witness to the sale of the motor vehicle in question, by one Joseph Otieno Ogolla to **PW4**, or was himself the seller and dishonestly so, knowing or having reason to believe that the motor vehicle was stolen.

15. Section 322(1) of the Penal Code defines the offence of handling stolen goods as follows:

> **"A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so."**

This being a charge of handling stolen property however, it is not enough merely to show that the appellant knew something about the origin of the stolen property. The act of handling and the knowledge or reason to believe that it was stolen goods must be proved beyond reasonable doubt.

16. The elements that are required to be established before the prosecution can be said to have proved an offence of handling stolen goods, were set out in the case of **Ratilal & Another v R[1971] EA 575.** This position was reiterated in the more recent case of **Thahabu Ibrahim v Republic Cr. App No. 727 and 728 [1983] KLR pg. 608** as follows:

> **(a) that the handling was otherwise than in the course of stealing;**
>
> **(b) that the appellants had received the goods knowing or having reason to believe that they were stolen;**
>
> **(c) or that the appellants dishonestly undertook or assisted in the retention, removal or disposal or realisation of the goods by or for the benefit of another person.**

In the case before me there was no dispute that the appellant handled the motor vehicle in question otherwise than in the course of stealing it and that he undertook or assisted in the disposal thereof. The question remains as set out above, whether he did so dishonestly, knowing or having reason to believe that it was stolen and to determine this I reassessed the evidence on his demeanor during the transaction.

17. **PW4** testified that the appellant sold him the motor vehicle in question for Kshs.250,000/=. That it was the appellant who gave him a copy of the log book thereto promising to avail the original document but failed to do so. That it was also the appellant who reduced the agreement into writing and inserted the vendor name of one Joseph Otieno Ogolla whom he said had an identification card with him because the appellant did not have his identification card with him.

18. This evidence was corroborated by the testimony of **PW5** who testified that, when he asked around for the owner of the taxi KAQ 845Q that had a "for" sale sticker on it, he was led to the appellant who was known to him as a taxi driver. He connected him to **PW4** who was looking for a motor vehicle to buy. He confirmed that it was the appellant with whom they negotiated the purchase price and to whom they paid it and not someone else. He also confirmed that it was the appellant who drafted the agreement

and inserted the name of someone else as vendor, because he did not have his identification card on him. He stated as follows:

> **"He brought someone to step in as the owner. The boy's name was written. Evans was to be the witness. Evans was given money and he left"**.

PW12, the Document Examiner that the specimen handwriting taken from the appellant and the questioned document, a copy of the agreement were of the same author.

19. In light of all the evidence on record the appellant's defence is not tenable. His actions are indicative of a person who was aware that the transaction was unlawful and sought to cover his tracks, rather than a good Samaritan assisting one Joseph Otieno Ogolla. The evidence indicates that it was the appellant who was the one using the young lad Joseph Otieno Ogolla in the dishonest disposal of a motor vehicle. That was not demeanor compatible with his innocence.

Upon re-evaluation of the evidence as a whole I find that I can reach no other conclusion other than that the appellant was properly convicted on the merits of the case.

The appeal is therefore found to be lacking in merit and is dismissed accordingly.

SIGNED DATED and **DELIVERED** in open court this **15th** day of **October 2014.**

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L. A. ACHODE

JUDGE