



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 126 OF 2008

SIMON NYAGA KIBUTIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1692 of 2005 in the Chief Magistrate's Court at Nairobi – S. Muketi (SPM) on 3rd April 2008)

JUDGMENT

1. The Appellant **Simon Nyaga Kibuti** was charged with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code in count I and with the offence of handling stolen property contrary to **Section 322(2)** of **Penal Code** in the alternative count.
2. Brief particulars of the offence that led to that conviction were that on the 23rd day of May 2005 at Tena Estate Buruburu within Nairobi, jointly with others not before court and while armed with dangerous weapons namely pistols, they robbed Phillip Nyaga Nderi of a motor vehicle registration No. KAD 276 U Toyota Corolla Saloon red in colour, one mobile phone make Siemens, cash Kshs.1,600/= ID card and a driving licence all valued at Kshs.308,300/= and at, or immediately before, or immediately after the time of such robbery they threatened to use actual violence against the said victim.
3. In the alternative count, it had been alleged that on the 12th day of June, 2005 at Kibue trading Centre in Embu District otherwise than in the course of stealing, they jointly received and retained one motor vehicle registration number KAD 276U Toyota Corolla Saloon red in colour, Chassis number EE100-4029852, Engine number 2E-2679873 knowingly or having reasons to believe it to have been stolen, or unlawfully obtained.
4. A summary of the prosecution case is that one Philip Nyaga was robbed of a vehicle in Nairobi, which was later found in the appellant's homestead. The vehicle was vandalized and some parts kept in his store. The evidence was that his co-accused persons in the lower court, went to the appellant's homestead in the company of police officer, picked the engine and the gear box. All three were subsequently arrested and charged.
5. The appellant gave unsworn testimony when he was placed on his defence. He stated that he was

- at his place of work at Embu when he saw three people among them his brother push a motor vehicle and park it on a road which led to his home, blocking access to his home. He enquired from his bar man who told him that the appellant's brother knew the people with whom they pushed the vehicle. The two men owned up and said the vehicle belonged to them and the appellant's brother showed them where to park.
6. He sent for his uncle one Kibara to remove the vehicle which blocked the way to his home but he said that it had mechanical problems and needed some repairs. That on 12th June 2005 he allowed Kibara and one Mutua to collect the vehicle and other items. Sometime later two police officers came and enquired about the motor vehicle. He took them to the store where they picked the remaining parts and took them along with him to Embu Police Station where he recorded a statement and was then locked in the cells. He was later arraigned in Chief Magistrate's court Nairobi.
 7. When the trial ended the appellant was acquitted on the principal count of robbery with violence contrary to **Section 296(2)** of the **Criminal Procedure Code**. He was found guilty and convicted on the alternative count and sentenced to two years imprisonment. It is against that decision that he filed a petition of appeal grounded on arguments to the effect that the court dismissed relevant testimonies and relied on contradictory evidence to convict him. He also faulted the manner in which the evidence was evaluated, asserted that he was not granted the opportunity to ventilate his defence and maintained that the case was not proved beyond reasonable doubt.
 8. The appeal was opposed, by learned state counsel Miss Ndombi on behalf of the state. She stated that according to the evidence of **PW1**, **PW4** and **PW6**, the subject motor vehicle's shell together with the engine were recovered in the appellant's home. That **PW7** a Kenya Revenue Authority officer verified the chassis number and also proved its ownership and that it was violently robbed from **PW2**. Miss Ndombi therefore invited the court to conclude that the appellant assisted in the retention of a motor vehicle which he knew, to have been stolen because it was moving when it came to him, but a few days later its engine and other dismantled parts including its shell were found in his home.
 9. The issues for determination are whether the appellant did handle the motor vehicle which was the subject matter of this case and whether he knew or had reason to believe it to be stolen or dishonestly obtained.
 10. The pertinent evidence is that of **PW1** the then DCIO Embu. From whose evidence I note first, that the shell of the motor vehicle that was later identified to be the one stolen from Nairobi was found on the road leading to the appellant's house and not in his compound. Second, the appellant was said to have been arrested following the discovery of the shell but the Occurrence Book in which he was booked did not indicate what had been recovered from him at the time of arrest and upto the time of giving testimony, **PW1** did not know the registration number of the motor vehicle to which the said shell belonged. There is therefore no evidence to connect the said shell to the motor vehicle registration No. KAD 276 U which was stolen from Mr. Philip Nyaga during a violent robbery in Nairobi earlier on.
 11. Third, even if the motor vehicle had been found inside a compound there was no evidence to indicate whose home or compound it was. Ownership is a matter of evidentiary proof and not a matter of allegation. The evidence of **PW4**, one Bernard Kavari a brother to the appellant added more confusion rather than clarity to the prosecution evidence.
 12. **PW4** testified that a motor vehicle whose registration number he did not give, came to his gate on 8th June 2005 and the occupants asked him for the direction to the house of one Simon whose brother was a scrap metal dealer. Apparently he has two brothers named Simon. One is called Simon Njeru in whose compound he stepped to peep through the fence and see what the police who included Sgt Alusa were doing in the appellant's home. The other is Simon the appellant. It is not evident how he determined which Simon the visitors were looking for on 6th August 2005.

He told the court that he directed them to the home of the appellant but he did not see them go in.

13. **PW4** also told the court that he saw the appellant and his son help the police to load something that he assumed to be a motor vehicle engine into their car on a subsequent date. He did not see what was loaded and this was therefore more conjecture on his part. There is no evidence to indicate that the appellant had any more knowledge that **PW6** IP Maliba who came along with Sgt Alusa and another to retrieve the engine.

14. Lastly, the learned trial magistrate wrote a judgment concerning motor vehicle registration No. KAD 276 U Toyota Corolla Saloon which one Philip Nyaga Nderi was robbed of on 23rd May 2005 at Tena Estate in Nairobi in the main count. In the alternative count of handling stolen property the subject motor vehicle was registration No. KAD 276 J Toyota Corolla and the victim of the robbery was one Jane Kerubo Moseti. The said Jane Kerubo Moseti did not testify and there was no attempt to clarify the identity of the motor vehicle which was the subject matter of this case.

15. After subjecting the evidence on record to a fresh and careful scrutiny I am not persuaded that the prosecution proved the ingredients of **Section 322(2)** of the **Penal Code** to warrant a conviction of the appellant. The appeal therefore succeeds and I quash the conviction entered against him and set aside the attendant sentence.

I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **8th** day of **October 2014**.

.....

L. A. ACHODE

JUDGE