



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.76 OF 2014**

*(An Appeal arising out of the conviction and sentence of HON. E. JUMA – Ag. SPM*

*delivered on 25<sup>th</sup> April 2014 in Kibera CMC. CR. Case No.1712 of 2014)*

**WYCLIFFE ANYONA NYABUTO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Wycliffe Anyona Nyabuto, was charged with the offence of **Stealing a Motor Vehicle** contrary to **Section 268(1)** as read with **Section 278A** of the **Penal Code**. The particulars of the offence were that on 4<sup>th</sup> April 2014 at the parking of Co-Op Trust Plaza along Lower Hill Road, Upperhill Area Nairobi County, the Appellant jointly with another not before court, stole motor vehicle Registration No. KBS 165F Toyota Probox valued at Kshs.590,000/-, the property of Richard Ogega Bwonda (hereinafter referred to as the complainant). He was alternatively charged with the offence of **Handling Stolen Property** contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on 22<sup>nd</sup> April 2014 at Aitong area along Narok Mararienda Road within Narok County, otherwise than in the course of stealing, dishonestly handled the suit motor vehicle belonging to the complainant, having reason to believe it to be stolen property. When the Appellant was arraigned before the trial court, he pleaded guilty to the main charge. He was convicted as charged. He was sentenced to four (4) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted after he had been duped by the complainant, the police and the prosecutor. He was of the view that the facts set out as supporting the charge did not in fact support the charge of stealing. He was aggrieved that he was sentenced to serve a custodial sentence that was harsh and excessive in the circumstances. At the hearing of the appeal, Mr. Kabaka for the State conceded to the appeal. He submitted that the plea taken was equivocal. He stated that the facts narrated to the court disclosed a lesser but cognate offence of **Misuse of a motor vehicle** under **Section 294** of the **Penal Code** instead of the offence of **theft**. He was of the view that the sentence imposed by the trial court was harsh in the circumstances. On his part, the Appellant submitted that the motor vehicle was given to him by the complainant. It was his case that he used the motor vehicle with the permission of the complainant. He urged the court to reduce the sentence that was imposed on him because he was a first offender.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court, and thereafter reach its own independent determination. The court is also aware that, the hearing of an appeal is in form of a re-hearing. The court should keep in mind that it cannot recreate the proceedings before the trial court. In the present appeal, the issue for determination is whether the plea of guilty taken before the trial court was equivocal. The procedure guiding the trial court when recording

a plea of guilty were set out in the landmark case of **Adan –vs- Republic [1973] EA 445**. In the present appeal, it was clear that the Appellant understood the language in which the charge was read. He pleaded guilty to the main charge of theft. The prosecutor read the facts. The Appellant confirmed the facts to be correct. The motor vehicle that was stolen was produced as an exhibit. The Appellant did not object to its production. The Appellant was convicted on his own plea of guilty. He was given an opportunity to give his mitigation before he was sentenced. The trial court took into consideration his mitigation when it sentenced the Appellant to serve a custodial term in prison. Now the Appellant states that he was duped into pleading guilty to the charge. There was no evidence placed on record to suggest that the Appellant was under any form of compulsion or intimidation or undue influence that made him plead guilty to the charge. The Appellant, on his own free will, pleaded guilty to the charge. The trial court, correctly in this court's view, recorded the plea of guilty.

As to the concession of appeal by the State, this court is not persuaded that the facts narrated by the prosecutor did not disclose the offence of theft. It was clear from the said facts that the Appellant borrowed the key of the motor vehicle from the complainant. He was supposed to get a file from the motor vehicle. Instead, the Appellant drove off the motor vehicle. When the complainant contacted him on phone, the Appellant promised to return the motor vehicle the following day. He did not return the motor vehicle as promised. The Appellant failed to return the motor vehicle within the stipulated period. Effort by the complainant to get back the motor vehicle from the Appellant proved futile. This was on 4<sup>th</sup> April 2014. The complainant reported the matter to the police. The police recovered the motor vehicle in the Appellant's possession on 22<sup>nd</sup> April 2014. In this court's considered view, the charge of theft was established. **Section 268(1)** of the **Penal Code** defines theft thus:

***“A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property. “***

The essential element in a charge of theft is that the person accused fraudulently converts a property which is capable of being owned so as to deprive the owner of such property. In the present appeal, it was clear that the Appellant did in fact steal the motor vehicle from the complainant. This court does not agree with the position taken by the State that the offence disclosed was the lesser charge of misuse of a motor vehicle. All the ingredients of theft were established in the facts narrated to the court by the prosecutor. The Appellant admitted the facts as correct. His appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence, the Appellant is a first offender. The stolen motor vehicle was recovered fairly intact. The Appellant pleaded guilty to the charge. He saved the court's time from undertaking a full hearing of the case. The Appellant was remorseful. It was apparent that he has learnt his lesson from his foray into criminality. This court is of the opinion that the sentence of four (4) years imprisonment that was imposed was manifestly harsh and excessive in the circumstances. That sentence is hereby set aside. It is substituted by a sentence of this court. The Appellant is sentenced to serve two (2) years imprisonment. The sentence shall take effect from the date the Appellant was convicted by the trial court. The Appellant's appeal on sentence therefore partially succeeds. It is so ordered.

**DATED AT NAIROBI THIS 12<sup>TH</sup> DAY OF NOVEMBER 2014.**

**L. KIMARU**

**JUDGE**