



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.118 OF 2010

JOHNSON WAMATU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.3845 of 2005 by Hon C.A. Otieno, Resident Magistrate,

dated 31st March, 2009

JUDGMENT

On 22nd May, 2008, P.W.5, Andrew Mugambi Mureithi, a car dealer in Nairobi imported a Premio Toyota motor vehicle with the following details from Japan:

Engine No.7A-1092225, Chassis No.AT211-0130861 – colour white.

The motor vehicle was sold to Claudius Mwangi on 18th November, 2008 after the motor vehicle had been registered as KBC 087F with log book No.R02362620. Claudius Mwangi Ngugi confirmed this transaction but added that three months later he sold the vehicle to John Njoroge Njuguna (Njoroge).

Njoroge for his part testified that he purchased the vehicle for car-hire business. He leased it to Joyride Car Hire at the rate of Kshs.40,000/= per month. Njoroge also testified that he obtained funds to purchase the vehicle from Molyn Credit Limited, in whose name the vehicle was subsequently registered.

While the vehicle was with Joyride Car Hire, it was reported to him by the owner of Joyride Car Hire that the vehicle was hired out on 12th June, 2009 for four days at the end of which it had not been returned. The owner of Joyride Tours and Safaris (I supposed the same as Joyride Car Hire), **P,W,7 Jackson Gitahi Gitonga (Gitonga)** told the trial court that on 12th June, 2009, a man and a woman went to his place of business intending to hire a vehicle. The man who gave his name as Moses Macharia Honge agreed with Gitonga on the charges. After the formalities and payment he drove away the vehicle. He was to return it after four (4) days but failed to do so forcing both Njoroge and Gitonga to report the matter to the police.

Meanwhile, a day after the hire (on 13th). **P.W.1 Peter Ndirangu Gitonga (Ndirangu)**, another motor vehicle dealer was approached by three people, Elijah Tuiyot (P.W.2) (Tuiyot), Andrew Mugambi and a third person, who according to the evidence of Tuiyot is Ngetich. Ndirangu stated that Andrew Mureithi wanted to sell a motor vehicle. After negotiations, they agreed on the price and terms of payment and reduced this into a written agreement.

Upon being satisfied as to the ownership of the vehicle, Ndirangu paid Kshs.200,000/= and the balance of Kshs.250,000 was to be paid after the following Monday. On Monday, Andrew Mureithi returned and was paid Kshs.150,000/= leaving a balance of Kshs.100,000/= which was to be paid before the end of the month. It is at this stage that Ndirangu decided to do due diligence.

A search at the Registrar of Motor vehicles revealed that the motor vehicle was in the name of Molyn Investments (K) Limited. He became even more concerned when Andrew Mureithi did not come for the balance of the purchase price. Ndirangu decided to lay a trap by luring the said Andrew Mureithi with an offer that there was a buyer for the same vehicle who had made a higher offer; and that Ndirangu would let Andrew Mureithi to take any amount over and above what he had purchased it for (i.e. Kshs.450,000/=).

Ndirangu and Andrew Mureithi met at a restaurant in Nakuru. The police laid an ambush and the appellant in this appeal arrested and subsequently charged with:

Count 1 – **Stealing a motor vehicle** contrary to **Section 278(a)** of the

Penal Code.

Alternative charge for count 1 – **Handling stolen property** contrary to **Section 322(2)** of the **Penal Code**

Count 11 – **Obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**

Count 111 – **Making a document without authority** contrary to **Section 357(a)** of the **Penal Code**

Count IV – **Uttering a false document** contrary to **Section 353** of the **Penal Code**

The appellant in his defence explained that as a dealer in cereals, he travelled to Narok on 18th June, 2009. When he returned to Nakuru, he went to Kokeb Hotel at 3p.m. for a meal. It is while he was there that he was arrested on a mistaken identity.

The learned trial magistrate considered the evidence summarized in the foregoing paragraphs and found that all the charges were proved against the appellant, convicted him and sentenced him to 3 years imprisonment in count 1, a fine of Kshs.50,000/= or in default six (6) months imprisonment in count II, 1 year imprisonment in count III and a fine of Kshs.50,000/= or in default (six) months imprisonment in count IV.

Aggrieved by the conviction and sentence, the appellant has preferred this appeal on the grounds that:

- i) there was contradictory evidence of identification and the particulars of the offence;
- ii) the appellant was a victim of mistaken identity;
- iii) the charges were defective for want of a proper complainant;
- iv) the learned trial magistrate misapprehended the evidence;
- v) the learned trial magistrate shifted the burden of proof to the appellant;
- vi) important prosecution witnesses were not called;
- vii) the prosecution evidence was contradictory;
- viii) the trial court failed to frame the issues and questions for determination, this violating the requirement for a judgment;

ix) the sentence was unlawful and excessive.

Learned counsel for the appellant took issue with the charge under count 1, namely **stealing a motor vehicle** contrary to **Section 278(A)** of the **Penal Code**. She submitted that the section does not create any offence; that there was variance between the charge sheet and evidence with regard to where the offence was committed – Tsavo Road, Nairobi (according to the charge sheet) and Moi Avenue (according to P.W.7).

It was also submitted that the engine numbers given by various witnesses were different, raising the question whether there are more than one motor vehicles involved in this matter.

On the identity of the appellant, counsel submitted that Ngetich who is said to have introduced the appellant to Tuiyot and then to Ndirangu was not called; that there is further discrepancy with the mode of payment of the purchase price and the purpose for which that payment was made. Counsel argued that whereas Ndirangu maintained that the money was the purchase price of the vehicle, Tuiyot was categorical that it was a loan. There is no agreement as to how much was paid on the first day and the subsequent day. There was no evidence of withdrawal of the money allegedly paid. Similarly, it cannot be said that the motor vehicle in the transaction was a Toyota Premio or Corona; the sale agreement did not indicate how much had been paid.

Learned counsel for the respondent conceded the appeal on the same grounds raised by the appellant's counsel and also that the person to whom the motor vehicle was hired, Moses Macharia Honge, ought to have been held responsible for the disappearance of the vehicle. He has never been arrested yet he left all his details with Gitonga. That constitutes in summary the evidence before the trial court and submission before this court.

This court is bound to re-evaluate the evidence on record in order to draw its own independent conclusions, always bearing in mind that it neither saw nor heard the witnesses. The trial raises several questions:

- i) whether the appellant was the man presented to Ndirangu on 13th June, 2009?
- ii) whether the car the subject of a transaction between Ndirangu and the man presented as the appellant the same one which had been hired from Gitonga on 12th June, 2009?
- iii) whether the car was being sold to Ndirangu or was it a security for a loan?

There is no doubt that the person who hired the vehicle from Gitonga was a man by the name Moses Macharia Honge, not the appellant.

The following are the details of the vehicle hired by Moses Macharia Honge from Gitonga :

KBC 087F – Toyota Premio
Engine No.05092225

Chassis No.AE 211-0130861

Log Book No.20081710514.

The following are the details of the vehicle Njoroge delivered to Gitonga:

KBC 087F – Toyota Corolla
Engine No.7A 309225
Chassis No. - AT 211-0130861
Log Book No.RO 2362620

The vehicle that was being sold to Ndirangu was:

KBC 087F – Toyota Premio
Engine No.A5092225

Chassis No.AE 211-0130861

Log Book No.20081710514

According to a sale agreement allegedly drawn between the appellant and Ndirangu the registration number of the vehicle being sold was not disclosed. Chassis and Engine numbers were inserted by hand as EE 211-0130861 and 7A J 092225. The copy of records presented to Ndirangu as evidence of ownership has the following details:

Registration No. – KBC 087F
Make: Toyota Corona
Colour: Beige
Log Book No. RO 2236262U

From the foregoing analysis of the evidence on record, it is apparent that the vehicle presented to Ndirangu is not the same one that was hired from, Gitonga.

Turning to the alleged transaction between the appellant and Ndirangu, it is difficult to tell whether the vehicle was sold to Ndirangu or was only a security for a short-term loan. It is also not clear how payments were made – whether in the presence of Tuiyot or not, whether the first payment was Kshs.100,000/= or Kshs.200,000/= and whether the second installment was Kshs.100,000/= or Kshs.150,000/=. The agreement itself does not, as I have observed earlier, specify the vehicle the subject matter of the transaction.

The appellant denied any role in the transaction yet it is alleged he signed the agreement. Evidence of document examiner would have put that question to rest. It was the duty of the prosecution to prove the charges against the appellant beyond any reasonable doubt. The appellant has no burden to prove his innocence. The prosecution failed in discharging this duty and the learned trial magistrate fell in error by convicting the appellant.

The appeal for these reasons is allowed, conviction quashed and sentence set aside. The appellant shall be set free immediately unless lawfully detained.

Dated, Signed and Delivered at Nakuru this 1st day of March, 2012.

**W. OUKO
JUDGE**