



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL NO. 117 OF 1998

DAVID KURIA WAIYAKIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The Appellant, DAVID KURIA WAIYAKI, was on 11th November 1997 convicted of the offence of handling stolen property Contrary to Section 322(2) of the Penal Code. He was sentenced to serve 18 months imprisonment on 2nd December 1997. It had been alleged that on 17th November 1996 at Waithaka Area in Kiambu District, Otherwise than in the course of stealing, he dishonestly undertook in the retention of motor vehicle Reg. No. KAH 677J, Toyota Corolla Saloon valued at Shs. 370,000/00, the property of one Jared Muruli Mutesh knowing or having reason to believe the same to have been stolen or otherwise unlawfully obtained.

The appellant had also been charged with robbery with violence Contrary to Section 296(2) of the Penal Code and remained in custody since his arrest on 20th November 1996 and throughout his trial. He was however acquitted of this charge in Count 1 as well as of the charge in Count Three. Although the appellant was initially represented by Counsel in the lower Court, during the trial itself he was not represented. At the sentencing, however, he was represented by Mr. Gachomba who also appeared for him in this appeal. At the hearing of the appeal, there was no appearance for the Respondent, who was duly represented at the call-over of 13th July 1998 when the hearing date was taken. The appellant has appealed against both conviction and sentence. He has essentially advanced three grounds of appeal against conviction as is apparent from the petition of appeal and as argued by Mr. Gachomba. They can be paraphrased as follows:-

(i) There was no proper identification of the

alleged stolen motor vehicle as belonging to PW 1.

(ii) There were material discrepancies in the

evidence adduced by the prosecution sufficient to

create a reasonable doubt as to the guilt of the Appellant.

(iii) The defence offered by the appellant was entirely plausible and was not displaced by the prosecution case. In any event, it created a serious doubt as to the appellant's guilt and should not have been rejected

out of hand as it was by the trial magistrate.

This being a first appeal, it is my duty to appraise all the evidence adduced before the lower Court and make my own decision on all questions of that and law. I must draw my own inferences and conclusions, bearing in mind however that I neither saw nor heard the witnesses and make due allowance for that.

Let us then look at the evidence available to the trial court.

On the evening of 13th October 1996 at about 8 p.m. PW1, ERICK MAINGI MUSAU, parked his motor vehicle KAH 677J make Toyota Corolla at the parking bay at the letting flats in the Upper Hill area of Nairobi. He went to sleep in his flat. The parking bay was guarded by PW2, JARED MURULI MUTESHI. At about 3.30 a.m. on the same night PW2 was attacked by some tow men. At gun and sword point they took his torch, gate keys and whistle. They then opened the gate and took him to some kiosks that were about 500 meters away. One of them then went back to the parking bay leaving PW2 guarded by the other. After a while the man who went back to the parking bay came back driving motor vehicle registration KAH 677J. PW2 was locked up in the boot of the car and after it was driven for some time it stopped and he was ejected therefrom after being assaulted with fists. He found himself on Bunyala Road, Nairobi. He ran back to the Letting Flats about 2.5 Km away where he found the gate side open. He woke up two residents of the flats, a Mr. Wamalwa and a Mr. Maingi who telephoned the police. They also woke up PW1 who also reported the matter to the police by telephone. Subsequently PW1 and PW2 recorded their statements with the police.

On the evening of 20th November 1996 PW4, PC MUSOGA TATALA, PW5, SGT. SAMUEL GICHURU and one Senior Sergeant Mutemi, since deceased, were on patrol within Kikuyu area in Kiambu District. Acting on information that Senior Sergeant Mutemi had they proceeded to the home of the Appellant. Although PW4 said they jumped over the gate as the same was locked, PW5 said they knocked on the gate and the same was opened for them. In the compound they found two motor vehicles, one of which was registration No. KAE 978S, a Toyota Corolla. The motor vehicles were not concealed. Suspecting the motor vehicles to be stolen, the Senior Sergeant asked the Appellant to produce documentation for them. According to PW4 and PW5 he did not and was thereby arrested. The motor vehicles were then either driven or towed to the police Flying Squad yard at Pangani. The Appellant did claim, though, that he had bought the motor vehicles.

The matter was then handed over to PW6, PC MICHAEL NJOROGE who was attached to the Anti Motor vehicle Theft Unit at Pangani. He commenced investigations on 21st November 1996 by proceeding to the offices of the Registrar of Motor Vehicles at Nyayo House to check on the particulars of motor vehicle KAE 978S. He found that the particulars of this motor vehicle as kept by the Registrar of Motor Vehicles were as follows:

MAKE : Toyota Saloon

COLOUR : White/Cream

YEAR OF MANUFACTURE: 1988

CHASIS NO. : E80-842101

ENGINE NO. : 78190

OWNER : HIRAM WAINAINA GICHERU,

P.O. BOX 560042,

NAIROBI

On comparing these particulars with those on the motor vehicle KAE 978S itself he found that the chasis

and engine numbers did not tally. In the course of further investigations, PW1 came and he identified the motor vehicle KAE 978S to be his motor vehicle KAH 677J that had been stolen on the early morning of 14th October 1996. He had its registration book No.543068 which showed these particulars:- Regn Number : KAH 677J Chasis No. : AE 826024504 Engine No. : 4A 3060491

According to P W 6 (and it must be remembered that he was the investigating officer of the case) PW1 identified motor vehicle Registration No. KAE 9785 to be infact his motor vehicle registration No. KAH 677J by its dash board which he 9P.W.1) said he had changed before it was stolen. P.W.1 also brought along PW3 who had fixed the dash board for him. According to PW6 there was nothing special about this dash board. PW1 however stated that he identified the motor vehicle as his by the following features and characteristics which he pointed out to court out when it viewed the motor vehicle:

-A radio cassette which he had fitted after the original one was stolen. This new one was not quite the colour of the dash board.

- A logoor mark with the letters EFI which he said was not common and meant "Efficient fuel injection" It no doubt more likely meant "electronic fuel injection". -A cigarette burn on the driver's seat which had been there when he bought the car.

-A crack on the left rear light. -Some wires that were left hanging at the back where a doll had been removed when the new radio cassette was fitted. -A cassette console which was fitted later as the original one had been stolen with the original radio cassette.

PW1 also stated that he noticed that the chasis number place had been removed and another one fitted with different chasis number. The engine number had also been interfered with. The motor vehicle also now had seat covers and a spoiler on the boot lid. These it did not have when it was stolen. The cover on the ignition had also been changed as well as the solex door lock.

It is to be noted that PW1 did not give evidence as to where he had purchased his motor vehicle, or whether or not, at the time of purchase, he checked the chasis and engine numbers to ensure that they tallied with those on the registration book. PW3 also identified the motor vehicle by more or less the same features and characteristics as PW1. In cross-examination by the Appellant, PW6 stated that he got a log book from senior sergeant Mutemi for motor vehicle KAE 978J. This was Exh. D1, and it was confirmed by PW7, RAPHAEL MUTISYA KITAVI from the office of the Registrar of Motor vehicles, to be the original log book of motor vehicle KAE 978S. It was No. 536318, and it disclosed the following particulars:-

Make of M/V : Toyota E80

Chasis No. : E80-842101

Engine No. : 781980

Owner : HIRAM WAINAIA GICHERU These particulars were confirmed by the file on m/v KAE 978S produced by PW7 as Exh.7.

If, as stated by PW6, he got this log book Ex.J1 from Senior Sergeant Mutemi, then what was stated by PW4 and PW5, that when asked to produce documents for motor vehicle KAE 978s the Appellant had none, cannot be true. Where could Senior Sergeant Mutemi have got Exh D1, except from the Appellant? The Appellant's defence was that he had bought motor vehicle KAE 978S on 4th October 1996 for Shs.300,000/00 from one Samuel Mwangi Kamau. In addition to the log book which he had given to Senior Sergeant Mutemi (Exh. D1) he produced a sale agreement (Exh.D2) duly witnessed by an advocate. Attached to this sale agreement was a copy of the national identity card of the said Samuel Mwangi Kamau. The Appellant also produced a transfer from the said motor vehicle which bears the name of the owner, one HIRAM WAINAINA GICHERU, his address and signature. The transfer is dated 8th August, 1996 and had been given to the Appellant by the aforesaid Samuel Mwangi Kamau. It had

been open as to the name and address of the new owner. There is nothing sinister in this as it is a common practice among people who dispose of motor vehicles frequently. Further, there is no evidence that HIRAM WAINAINA GICHERU has ever reported either his motor vehicle Registration No. KAE 978S or its log book stolen.

The learned trial magistrate rejected the Appellant defence because she had already held the motor vehicle KAE 978S to be infact PW1's stolen M/v KAH 677J. She did not reject the log book Exh. D1 produced by the Appellant as being forged or otherwise fake. She could not have done so as the same had been declared genuine by PW7. She also did not reject in terms the sale agreement (Exh. D2) and the other documents, that is the transfer form and the copy of the national identity card of the seller. She simply said that the Appellant was lying as he said he bought the motor vehicle on 4th October, 1996 whereas it was stolen subsequently, on the morning of 14th October, 1996. With due respect, the learned trial magistrate's mind was necessarily closed to the Appellant's defence by her acceptance that PW1 and PW3 had positively identified motor vehicle KAE 978S to be infact PW's stolen motor vehicle KAH 677J. But had they? PW6 was emphatic both in his evidence-in-chief and in crossexamination by the Appellant that PW (and by inference PW3 whom he had brought along) had identified the motor vehicle by its dash board which he had changed shortly before the motor vehicle was stolen. As pointed out earlier, PW6 was the investigating officer. PW1 and PW3 on the other hand stated that they identified the motor vehicle by other features and characteristics, not by its dash-board. This was a very serious discrepancy in the case of the prosecution which ought to have raised a reasonable doubt in the mind of the learned trial magistrate.

On my own evaluation of the evidence I hold that PW1 and PW3 did not positively identify motor vehicle KAE 978S to be infact the PW's stolen motor vehicle KAH 677J. The evidence of PW8 regarding the alteration of the chasis and engine numbers does not assist the prosecution case as PW1 never stated that when he acquired his motor vehicle he checked its chasis and engine numbers and that they tallied with those in the log book. The Appellant's defence was entirely plausible and should not have been rejected. It was displaced by the prosecution case and in any event raised a reasonable doubt as to the guilt of the Appellant.

It will also be noticed that the evidence produced by the prosecution regarding the ownership of motor vehicle KAH 677J was as variance with the particulars given in the charge which stated that the motor vehicle was the property of one JARED MURULI MUTESHI (who gave evidence as PW2). The prosecution case on the other hand was that the motor vehicle was the property of PW1, ERICK MWANGI MUSAU. I saw no evidence in the record of amendment of the charge under section 214 of the CPC.

The conviction was not safe and cannot be left to stand. I shall therefore allow the appeal, quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. - **DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST, 1998.**

WAWERU

JUDGE