



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Criminal Appeal 598 of 1995**

(From Original Conviction and Sentence in Criminal Case No. 3707 of 1994 of the Chief Magistrate's Court at Mombasa - S. Muketi -Resident Magistrate)

**KENNEDY TUNJE ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant was the 1st accused before Mombasa Resident Magistrate's Court where he together with two others were tried for the offence of theft of motor vehicle parts contrary to Section 275 of the Penal Code. The other two were charged with the alternative charge of handling stolen property contrary to Section 322 of the Penal Code. The Appellant was convicted on the principal offence of theft for which the other two were acquitted but convicted on the alternative charge of Handling. For that conviction he was ordered to serve 24 months in prison. The other two accused were given a suspended sentence of 15 months each. There was no appeal from the two.

But the Appellant Kennedy Tunje (Tunje) filed a petition of Appeal in person on 29.11.95. Apparently unknown to him M/S Stephen Macharia Kimani & Co. Advocates had been instructed to

Appeal on his behalf and another Petition of Appeal was filed on 1.12.95. Both, for unexplained reasons were given the same number by the Registry. At the hearing thereof Mr. Kimani abandoned the petition filed by the Appellant in person and argued the petition filed by his firm. That petition remains dismissed as there is no provision for withdrawal of an Appeal.

Five grounds of Appeal were laid out in the Petition of Appeal filed by the Advocates, namely:

The learned trial Magistrate erred in law in,

- 1) holding that the appellant was involved in the "actual theft allegedly because the vehicle had its spare tyre when it left the port, a fact which is not conclusive in the circumstances and ought not to found a conviction for theft.
- 2) failing to consider the fact that others had the opportunity to gain entry into the subject vehicle given that the keys were in possession of several other parties prior to the discovery of the alleged loss of spare tyre and jack.

3) having found as a fact that "the driver was an outright thief" the court ought to have considered the conduct of the appellant who unflinchingly returned to work as usual, showed the vehicle to his boss and actually assisted in looking for the driver, conduct that is inconsistent with the findings of the court with regard to guilt.

4) the findings of the court are not supported by evidence.

5) the sentence is manifestly harsh given that the appellant was said to be a first offender.

The facts are briefly these:

A Rwandese businessman known as MARCEL MUHIZI (P.W.I) was carrying on CLEARING AND FORWARDING business in Cannon Towers, Moi Avenue. He had employed a messenger and Port Clerk in that office. Tunje was one of the clerks who process documents from customs and Port.

On 3.8.94 he was sent to the Port to clear a Pajero vehicle which was destined for Rwanda. Muhizi went with him to the Port and saw the vehicle. He also observed that it had a spare wheel placed on the back seat. Tunje told him he was about to finish with the clearing process and was assured the car would be out the following day. So Muhizi returned to the office.

The following day 4.8.94 at about 11.45 a.m., Muhizi went to the office and found the car parked outside. He also found the key in the office. But he did not find the driver who brought the car there nor Tunje. He could not see the spare tyre on the back seat. Tunje was said to have gone for lunch. Muhizi then went to the Port-gate and was informed that the car had just passed through and had a jack and a spare tyre. He reported the matter to the Police.

Five days later (on 9.8.94) the driver came to the offices and claimed that Muhizi was defaming him alleging he had taken the tyre. Muhizi took him to Port Police where he was arrested and taken to Central Police Station. The arrested driver was neither charged nor called as a witness.

As the car had to be taken to Rwanda, Muhizi decided to buy another spare tyre and jack for it on 31.8.94. It is the 2nd accused who led him to the shop of 3rd accused, a tyre dealer to buy a tyre. On checking it he found it belonged to the Pajero. He called the police and the 2nd and 3rd accused was arrested. The following day he was walking along Majengo area and found a jack. He saw a Pajero jack which the person selling it said was brought by a person from the Port for him to sell. He went to call the Police but the seller had disappeared when he returned. It is not clear how the jack exhibited in court was recovered or identified.

The only other witness for the prosecution was P.C. David Njuki (P.C. Njuki). He had accompanied Muhizi on 17.8.94 when he was taken to buy the spare tyre from 3rd accused. On asking the 3rd accused he was told the tyre had been sold to him by people with a foreign registered vehicle number. He said when he was arresting the 2nd and 3rd accused and taking charge of the two exhibits, Tunje was also handed over to him.

Tunje on his part denied any involvement and said in his sworn evidence that he did not know how to drive and had to hire a driver to move the Pajero from the Port when it was cleared. When they reached the office, he took the keys to the office and went for lunch. In the afternoon, he showed his boss the vehicle. That is when the boss said it did not have a spare tyre. Both tried to look for the driver but could not trace him. The driver later showed up. He was arrested and taken to Central Police Station.

The 3rd accused said he had bought the tyre from two boys who came to him in a red vehicle saying they were from Zaire and were short of money. He had given the tyre to the 2nd accused to look for a buyer.

The learned trial Magistrate found as a fact that the driver was an outright thief and wondered loudly why he had been released and not even called to court to testify. She recommended his arrest and charging.

In her view there was only one issue, that is whether the accused were involved in the commission of the offence. And she answered it by stating in respect of the Appellant;

"The first accused was involved in the actual theft. When the vehicle left the Port it had its tyre. There was no break in. He is the one who handed the keys to the office people. He is the one together with the driver who took the tyre to the 3rd accused for sale. He was therefore actively involved. He had the opportunity and he fully used this opportunity to steal."

These are the findings which were assailed by Mr. Kimani in his submissions. He surmised that there was no direct evidence that the Appellant stole the items in issue. All there is, is circumstantial evidence.

The available evidence, he submitted, was that there was a vehicle in transit that was cleared at the Port, which vehicle had a tyre and jack when it left the Port. The vehicle reached the offices of the complainant where the keys were handed over. Later it was discovered that a tyre and jack were missing. In his submission a yearning lacuna was left out in the evidence for there is none to show how the keys were delivered to the office; who took custody of the keys in the office from the time the car was brought in the morning and the afternoon when it was inspected; and finally who else had access to the office apart from the Appellant.

In the circumstances the circumstantial evidence Rule should have been considered by the trial Magistrate, as was stated in the case of SIMONI MUSOKE -Vs- REPUBLIC [1958] EA 715. Applying that test, he submitted, it is clear that other explanations are available equally consistent with the innocence of the Appellant and the trial Magistrate should not have convicted. Those explanations included other persons who had access to the keys in the absence of the Appellant and also the mysterious arrest and release of the driver, whom the trial Magistrate found as a fact was an outright thief.

Mr. Kimani further submitted that the evidence was not available as to when in point of time the items disappeared from the car. In the first place the complainant did not see any jack at the Port and cannot testify that it was there and was missing. The only other evidence about the tyre and the jack being in the car was hearsay evidence from the Port-gate. No one from the Gate was called to testify in that respect. The possibility was not eliminated therefore that the items could have disappeared when the vehicle was still within the Port area.

All these doubts coupled with the conduct of the Appellant should have created enough doubts in the trial courts mind to warrant an acquittal. The Appellant he submitted had gone for lunch and returned to the office in the afternoon to show the car to his boss. When they discovered the tyre was missing, the Appellant assisted in tracing the driver who was arrested. He was innocently assisting his boss and did not run away from the office when the tyre was found missing.

The trial Magistrate he concluded did not fully appreciate the law and the evidence and drew irreconcilable conclusions from the evidence which defied logic. Just because the 2nd and 3rd accused were guilty did not make the Appellant guilty also.

As for sentence he submitted that 24 months was excessive in the circumstances.

Mr. Ng'eno for the State did not think so and supported the trial Magistrate's conviction and sentence. In his view the fact that it was the Appellant who had the full responsibility of clearing the vehicle, hiring the driver who was found to be a thief, knew the contents in the vehicle, and took the keys to the office, pointed only to one conclusion that he was responsible for the loss of the items listed in the charge. It matters not that he returned to the office in the afternoon since he was supposed to be working there in any event. Such conduct does not attract a favorable assessment of the Appellant involved. He conceded that the evidence was circumstantial but submitted that there was an unbroken link from the Port to the discovery of the loss which pointed only to the Appellant as the person who stole. He was rightly convicted. The sentence was also lenient.

I have considered the entire matter which I must as an appellate court re-evaluate. It seems to me plainly

clear that this was a case that was poorly investigated, poorly prosecuted, and with utmost respect to the learned trial Magistrate, inadequately evaluated.

The case as rightly submitted by the defence and conceded by the State fell to be decided on circumstantial evidence. There was no direct evidence to show, as the trial Magistrate erroneously found, that it was the Appellant and the driver who took the tyre to the 3rd accused for sale. Neither the two prosecution witnesses nor the 3rd accused purport to give such direct evidence.

The learned trial Magistrate did not make a finding in law that the case depended on circumstantial evidence and if so what standard's should apply for consideration. As was stated in the SIMONI MUSOKE case

"In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

"... The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. "..... It is also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference." In my evaluation of the evidence of the two prosecution witnesses I am not satisfied that the facts satisfy these legal requirements. There were certainly opportunities for other persons to commit the offence charged without the involvement of the Appellant. There is no evidence as to when in point of time the theft took place. The evidence that the two items were in the car as it passed Port gate was hearsay and so inadmissible. There was evidence and the trial Magistrate found as a fact that the car keys were handed over to the office people. There was no evidence to eliminate the possibility of any other person perpetrating the theft before the Appellant returned to the office in the afternoon. The circumstances of this case do not show that his return to the office was actuated by any other motive than the resumption of his normal duties in the office.

The damning finding was that made by the learned trial Magistrate that the driver was an outright thief. Other than lamenting about his release and recommending arrest, the learned Magistrate did not draw the inviting presumption of law that evidence which could be produced and is not produced, would, if produced, be prejudicial to the party who withholds it. Applied to this case, serious doubts would be raised about the culpability of the Appellant who was alleged to have accompanied the driver during the commission of the offence.

On all accounts it was not safe to convict the appellant in this case and I allow the Appeal, quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Mombasa this 7<sup>th</sup> day of November 1997.

P.N WAKI

JUDGE