

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 2 OF 1993

JOHN MWENDO NZUNGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 996 of 1992 of the Senior Resident Magistrate's Court at Nairobi: U P Kidula (Mrs))

JUDGMENT

The appellant, John Mwendo Nzungi was convicted after trial by the learned Senior Resident Magistrate, Nairobi, on a charge comprising two counts namely: stealing by servant contrary section 281 of the Penal Code (count 1); and forgery contrary to section 349 of the Penal Code (count 2). Upon this conviction, he was sentenced to pay a fine of Shs 10,000/- or in default to serve 6 months imprisonment in respect of count 1; and to a fine of Shs 5,000/- or in default to serve 3 months imprisonment in respect of count 2. His appeal to this Court is against conviction and sentence.

The facts leading to the charges that were preferred against the appellant are well set out in the judgment of the court below. The charges revolves around the purchase and subsequent registration of motor vehicle Reg No KRP 780, a Peugeot 304 in the name of the appellant and not in the name of his employer who had provided the finances for the purchase of the said vehicle. The evidence shows that the employers of the appellant found it necessary that he should have a vehicle as field sales representative to enable him to discharge his duties quickly and effectively than when he was using public transport. They then permitted him to look for a vehicle and he found motor vehicle Reg No KRP 780 from M/S Electrical Rewinders. He negotiated the price with them and reported back the position to his employers who confirmed the position with the owners of the vehicle. Funds were then made available to the appellant for the purchase of the said vehicle, and it was thereafter registered in his own name and insurance cover was taken out and paid for by his employers in his own name. Thereafter he started using the vehicle for his official duties and also as a private car for his own purposes. A disagreement later arose between him and his employers who now wanted to take back the car and actually repossessed the car but the appellant resisted and took away the car. His contention was that his employers only acted as the financiers for the purchase of the car which for all intent and purposes remained his own property and that his employers were entitled to no more than recovery of the balance of the money advanced.

Basically, the appellant was laying a claim of right over the said car which he was alleged to have stolen from his employers and fraudulently caused to be registered in his own name. The issues in dispute between the appellant and his employers, the complainants, appears to have been of a civil nature, which at best, could have been referred to a civil Court for determination. Both the learned state counsel and counsel for the appellant are of the view that this was a civil dispute I respectfully agree.

Upon my own consideration and evaluation of the recorded evidence, I am satisfied that the evidence relied upon was insufficient to support the offences that were laid against the appellant. I am satisfied that his guilt was not proved beyond all reasonable doubts. This was a case which, I believe the police ought to have left to the parties themselves to sort out in a civil suit. Intent to steal was not proved.

For reasons given, I allow this appeal. I quash the conviction of the appellant in respect of count 1 and 2 and set aside the sentences that were imposed. I order that he shall be set free and be released forthwith unless otherwise lawfully held. If any fines were paid, the same shall be refunded. It is so ordered.

Dated and Delivered at Nairobi this 13th day of April 1994.

S.O.OGUK

JUDGE