

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 1390 OF 1991

JOHN AWITI KADO APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No 1359)

JUDGMENT

The appellant, John Awiti Kado, was charged with and convicted of the offence of false swearing contrary to section 114 of the Penal Code. The particulars of the charge were that on the 30th of August, 1989 at the Nairobi Law Courts in Nairobi within Nairobi Area before Christine Wanjiku Muibau, a Resident Magistrate, a person authorized to administer an oath, swore falsely an affidavit upon a matter of public concern namely that he bought a Toyota Corolla Reg No KQZ 513 from Jaloophy Motor Spares of PO Box 32390 Nairobi and the engine No 509300 and chassis No 145943 were obtained from the auctioneers information he knew to be false. He denied the offence and after trial, he was convicted of the offence and sentenced to a fine of Shs 5,000/- or in default to serve 6 months imprisonment. There was further an order that the registration of the said vehicle by the Registrar of Motor Vehicles be cancelled and fresh registration be done. The appellant now comes to this Court challenging his conviction and sentence and also the order for cancellation of the registration of the vehicle.

For the prosecution case to succeed, it was incumbent upon the prosecution to prove that each and every averment of fact contained in the affidavit of the appellant complained of was false and in particular as regards of purchase of the vehicle which was subsequently registered as KQZ 573. The appellant stood by his averments as being correct. The situation obtaining is that appellant had indeed bought the body of a motor vehicle (ex 11) from Thomas Kimotho Gachuhi (PW -2) of Jalopy Motor Spares who deal in second hand motor vehicles and scrap metals along Komorock Road in Kariobangi area. He bought it for shs 30,000/-. PW2 on the other hand, had also bought the same from Excellent Auctioneers in Limuru for Shs 8,000/- The said body did not have any engine then. He subsequently bought from PW2 a complete engine for a Toyota vehicle engine No 5093800. This engine had been obtained by PW2 from Marathon Auto-parts. The appellant then assembled the said body and engine and tilled the same into a moving vehicle. He then checked with Toyota Kenya who are dealers in Toyota vehicles and was informed that the body of the vehicle he had bought was from motor vehicle Reg No KQZ 573. This was confirmed by a representative of Toyota Kenya, John Kabue (DW2). Having checked the register, he even gave the appellant the chassis and Engine number of the said vehicle. The chassis was KE 30 145943 while the Engine was No 3K – 2278829. As the appellant had bought the body and engine of his vehicle separately from PW2 and having got the correct engine number of the vehicle Reg No KQZ 573 which he believed was the Reg No of the body he had bought, he sworn an affidavit complained of and caused the Registrar of motor vehicle to change the chassis number of the said vehicle as shown in their records to reflect No 509 3800 which he had bought. This ws done and he was issued with duplicate log book for this vehicle. It later came to the attention of the police that there was a motor vehicle belonging to one Benjamin Nasive Mukibo (PW3) who had a similar Reg No as that of the appellant Reg No KQZ 573, Toyota Corolla. They took up the investigation of the matter and caused the appellant to be arrested and charged.

The learned trial magistrate considered the evidence adduced before her and in examination such evidence, she found the evidence of the investigation officer, Cpl Mustafa Musa Muslim (PW9) “a little

mixed up as to what in the affidavit (the appellant) was false.” As I have already stated, the appellant stood by each and every event of fact in his affidavit. When the trial magistrate find that there was no clear evidence asto the falsely in his affidavit then that was sufficient to entitle the appellant to be acquitted as the onus was on the prosecution to prove its case beyond all reasonable doubts. Be that as it may, it is plain that there was a case where there 2 different vehicles with similar Reg numbers, KQZ 573. PW3 had the original log book while the appellant had the duplicate log book. As the appellant had clearly explained how he acquired and assembled the parts of his vehicle, this was a matter which at best could have been left to the discretion of the Registrar of Motor Vehicles asto how best he could register these vehicles. I am satisfied that it was not proved beyond reasonable doubts that the affidavit of the appellant was false in any material respect hence his conviction was not safe. Learned state counsel concedes this appeal against conviction and I think it rightly so.

For reasons given, I allow this appeal. I quash the conviction of the appellant and set aside the sentence that was imposed. I order that he shall be set free and be released forthwith. If any fines were paid, then the same shall be refunded. It is so ordered. I would vary the order made by the learned trial magistrate concerning the 1st registration of the appellant’s vehicle and instead, leave it to his discretion to see how best he could register separately the two vehicles that were the subject matter in this case so that each of them could have distinct registration numbers.

Order accordingly.

Dated and Delivered at Nairobi this 16th day of June, 1993

S.O. OGUK

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JUDGE