



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 1 of 1995

STEPHEN KYALO

APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Mr. Justice Oguk) dated 29th October, 1993

IN

H. C. CR. A NO. 187 OF 1993

JUDGEMENT OF THE COURT

The appellant was charged in the Chief Magistrate's court at Nairobi of stealing a motor vehicle contrary to section 279(A) of the Penal Code, the particulars of the offence being that on the 2nd day of June, 1991 at Langata Police Station yard in Langata within Nairobi stole m/v Registration No. GK S966 make Peugeot 504 station wagon valued at Shs. 600,000/-, the property of Ministry of Health. In a trial before the Senior Principal Magistrate, he was found guilty and convicted of the said charge and sentenced to three years' imprisonment together with four strokes of the cane. From that conviction and sentence he appealed to the superior court which dismissed his appeal. He now comes to this court by way of second appeal.

On 16th may, 1991 a m/v Registration No. GK S966 make Peugeot 504 station wagon belonging to the Ministry of Health was involved in an accident along Nairobi/Mombasa Road while being driven by one James Mbau Nganga. It was towed to Langata Police Station yard after the said accident. Whilst there PC Francis Kubo (PW3) who was guarding the vehicles parked at the said yard testified that on 2nd June, 1991 PC Mutune who was attached to the said Police Station with three other men came to the yard and he opened the gate for them to go in and to examine the vehicle. One of these men was the appellant whom he saw quite clearly. The appellant had told John Samuel Gachuma (PW7) that he wanted to sell to him a motor vehicle which was then lying at Langata Police Station as scrap. He agreed to go there with his neighbour Munderu Wahome (PW 8) to see the vehicle. Both PW7 and PW8 testified that the appellant in their company showed them the vehicle at the Langata Police Station yard. After bargaining PW7 agreed to pay Shs. 20,000/- for the vehicle and told the appellant to have it towed to his garage at

Komorok bridge. In the evening the appellant confirmed to PW7 that he had delivered the vehicle and got paid shs. 20,000/-. At the request of the appellant, Geoffrey Njenga Kinuthia (PW5) had towed the said vehicle to the garage of PW7 for which he had charged and had been paid Shs. 600/-.

On 4th June, 1992 the Transport Officer in the Ministry of Health learnt that the said vehicle was missing from the Langata police Station. Police investigations commenced and the vehicle was found at the garage of PW7.

The appellant denied the charge and alleged that PW3, PW6, PW7 and PW8 had testified falsely against him. He had gone to PW7 to ask for an ox-cart differential and not to sell the said vehicle. He denied the receipt of shs. 20, 000/- and of having paid the towing charges of 600/- to PW3.

The learned Senior Principal Magistrate analysed the evidence before him and was satisfied that the prosecution had proved its case beyond reasonable doubt. He found the appellant guilty as charged and convicted him.

On appeal to the superior court the learned Judge reviewed the evidence carefully, considered the same and having been satisfied of the guilt of the appellant dismissed the appeal.

The judgment of the superior court has been attacked on four main grounds.

First, it was submitted that the section under which the appellant was charged did not exist and the appellant cannot be presumed to have pleaded to any other charge. We see no merit in this submission. Whilst it is true that section 279(A) does not exist, an offence was disclosed under section 278 (a) of the Penal Code. The particulars alleged clearly disclose the offence and the appellant pleaded not to the section but to the particulars of the offence. In any event, he pleaded not guilty.

Secondly, it was argued that there was no corroboration of the admitted accomplice evidence. Again, the Senior Principal Magistrate directed himself on this issue specifically as also did the learned judge in the superior court. We find no misdirection on the issue as to the accomplice evidence or of the corroboration found by the two courts below.

Thirdly, it was argued that an identification parade ought to have been held. Once again, both the learned Senior Principal Magistrate and the Judge in the superior court considered this issue and did not find it necessary that there should have been a parade where the circumstances were such that the identifying witness had good reason to well remember the appellant. On our part, we find nothing in the evidence to establish circumstances that may weaken the identification testified to by the prosecution witness or render it unsafe to rely on the identification evidence having regard to the facts of this case.

Finally, it was alleged that there was conflict amongst the prosecution witnesses in their testimony and between them. The appeal lies to this court only on law and not on facts. The main question we have to decide is whether there was any evidence on which the learned magistrate could find as he did.

Taking the whole evidence in the case, we are unable to hold that the learned principal magistrate was wrong in finding that the charge as laid was proved beyond reasonable doubt. In our judgment we find that the superior court was not also in error. We have evaluated the whole evidence adduced at the trial court and we certainly cannot hold that there was insufficient evidence to support the conviction and that being so we must dismiss this appeal. It is dismissed accordingly.

That disposes of the appeal save for one matter. We must place it on record that we were deprived of the advantage of the submissions on behalf of the Republic as there was no appearance at the hearing of the Respondent although the hearing date was fixed in court and in the presence of Mr. Metho, the Senior Principal State Counsel. No courtesy of any explanation whatsoever was extended to the Court as to the absence of counsel from the Attorney General's Chambers and, accordingly, we direct that a copy of this judgment be submitted to the Hon. the Attorney General for his personal attention and for such necessary action as he may consider, in the circumstances, to be appropriate.

Dated and delivered at Nairobi this 14th day of July, 1995.

J. E. GICHERU

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL