



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL NO 155 OF 1988

ALIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 2251 of 1987 at Malindi, JN Nyaga Esq DM II)

JUDGMENT

The appellant was convicted for the offence of theft of motor vehicle parts contrary to section 279 (c) of the Penal Code. He was sentenced to 2 years imprisonment and 2 strokes of the cane.

He appeals against conviction and sentence.

The complainant's one indicator light was removed from his parked car in his absence. The indicator was not recovered.

The only evidence against accused is that one Abdu Mohamed Sadiq, appellant, and another person passing near where he was resting and carrying a vehicle indicator light. Appellant stated that PW 2 had grudge against him as they had quarreled at a Night Club. PW 2 did not see the indicator light being removed from the vehicle and did not see the person or persons who removed it.

PW 2's evidence is not specific as to whether it was the appellant or his colleague who was carrying the indicator light. His evidence lacks precision e.g. he says:-

“I said I had first seen some people pass carrying a vehicle indicator.

The indicator of the vehicle is similar to the one I saw being carried by the two people.”

It is PW 2 who on his own took appellant to police station. Appellant stated that PW 2 told him that appellant's girl-friend had reported him to the police and he and PW 2 went there. It is appellant that the appellant went to the police station on his own. Even if PW2 had said that it was the appellant who was carrying the indicator light, the indicator light was not recovered and was not there identified as the one stolen from the complainant's vehicle. Without the positive identification of the indicator light, it cannot be said that the appellant was in possession of the complainant's stolen indicator light.

The evidence against appellant was circumstantial. The learned magistrate did not direct himself as to the tests which circumstantial evidence must be subjected to before it can form a basis for a conviction. The incuplatory facts relied on as circumstantial evidence must be incompatible with the innocence of the

accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. See *Andrea Obongo & Others v R*, [1962] EA 542 and *Kigoye & Another v Uganda*, [1970] EA 402.

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – *Simon Musoke v R*, [1958] EA 715.

Had the learned magistrate directed himself as above, he would have come to the conclusion that the circumstantial evidence at best proved and suspicion could not prove the guilt of the appellant beyond all reasonable doubt. The State does not support conviction.

For reasons stated above, I allow the appeal against conviction, quash the conviction and set aside the sentence. Appellant to be released forthwith unless lawfully held for another offence.

Dated and Delivered at Mombasa this 17th Day of March, 1989

E.M. GITHINJI

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JUDGE