IN THE COURT OF APPEAL

AT NAKURU

(Coram: Masime, Gicheru & Kwach JJ A)

CRIMINAL APPEAL NO 11 OF 1989

Between

KAMENJU MURAYA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(*Appeal from a judgment of the High Court at Nakuru, Omolo J, dated the 25th day of July 1986,*

in

High Court Criminal Appeal No 147 of 1986)

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December 4, 1989 the following Judgment of the Court was delivered.

Section 279 (g) of the Penal Code, the Code, provides that:

> "If the theft is committed under any of the circumstances following, that is to say – if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument, the offender is liable to imprisonment for fourteen years together with corporal punishment."

The appellant, Kamenju Muraya, was charged in the court of first instance with the offence of stealing from a locked motor vehicle contrary to section 279 (g) of the code. The particulars of that offence read as follows:

> "Kamenju Muraya: On the 16th day of February, 1986 at Naivasha Township in the Nakuru Distruct of the Rift Valley Province, stole cash Kshs 14,000/=, 2 pairs of shoes, passport No 8179, one camera, 2,400 U.S.A. dollars, travellers cheques, handbag, pen, identity card, films, 3 trousers, 3 shirts, 3 under pants, one over-roll, one towel, one tin of cheese, 3 pairs of socks, one tooth brush, and a declaration form all valued at KShs 60,000/- the property of David Munyu Rangabo and in order to commit such theft opened a locked motor vehicle registration No. BN 9203 trailer No. BU 1758, Mercedes Benz by breaking the window glass."

The which he was charged, the appellant opened the locked motor vehicle by means of a key or other instrument. Instead, they alleged that in order to commit the said offence he opened the motor vehicle in question by breaking the window glass.

To open a locked motor vehicle by means of a key or other instrumentrequires the unlocking of the lock locking such motor vehicle. Breaking any part of such motor vehicle in order to open it is not the same thing as opening it by means of a key or other instrument.

The entire proceedings in the trial court concerned themselves with the appellant having broken into the motor vehicle referred to above. Indeed, in convicting the appellant, the trial magistrate observed:

> "I am convinced beyond any reasonable doubt that the accused broke into the vehicle of the complainant and accordingly find him guilty as charged and convict him."

The first appellate judge, Omolo, Ag J., as he then was, in upholding the appellant's conviction said:

> "I am satisfied the appellant was convicted on sound evidence which proved beyond all reasonable doubt that he broke into the complainant's vehicle and stole things from that vehicle. I dismiss his appeal against conviction."

Breaking into the motor vehicle mentioned above was not an ingredient of the offence with which the appellant was charged.

The aggravating circumstance of the theft under section 279 (g) for which the appellant was charged, was the opening of the locked motor vehicle registration No BN 9203 trailer No. BU 1758, make, Mercedes Benz by means of a key or other instrument in order to commit that offence. This circumstance was neither charged nor proved against the appellant in the court of first instance. Indeed, neither the trial court nor the first appellate court was alive to this circumstance. Without this circumstance being charged and proved against the appellant, his conviction for the offence under the aforesaid section was unsustainable.

The evidence adduced before the trial court indicated that on 16th February, 1986 at about 8.00 pm. the motor vehicle mentioned above was broken into and a bag containing the items enumerated in the particulars of the charge set out above were stolen therefrom. Amongst these items were a bundle of Kshs 14,000/= in notes of Kshs 100/= and a ball-point labelled "Uniroyal". At about 11.00 p.m. the appellant was arrested at Mirangi Bar in Naivasha Township where he was indiscriminately buying beer to some five women who were with him. On being searched, a total sum of Kshs 5,480/= was recovered from various pockets of the trouser he was wearing. He was also found with the ball-point pen labeled "Uniroyal" which is referred to above. The appellant was unable to give a satisfactory account of how he had obtained these items. His possession of the stolen ball-point pen was very recent indeed. This, together with his conflicting and very unsatisfactory account of how he had obtained it together with the sum of Kshs 5,480/= found in his possession raised a presumption of fact that he broke into the locked motor vehicle mentioned above and stole therefrom the items particularised above.

Theft is a common factor to both sections 279 (g) and 275 of the Code. Section 279 (g), however, has the additional aggravating circumstance as is mentioned above. The maximum penalty provided for an offence under this section is imprisonment for fourteen years together with corporal punishment as is set out above. That under section 275 is imprisonment for three years. The offence under the latter section is therefore minor and cognate to that under section 279 (g). Theft in the charge under the latter section was established but not the aggravating circumstance referred to above. Under section 179 (1) of the Criminal Procedure Code, the appellant could have been convicted of the minor offence under section 275.

Under the provisions of section 361 (4) of the Criminal Procedure Code, we quash the appellant's conviction for the offence of stealing from a locked motor vehicle contrary to section 279 (g) of the Code and substitute therefor a conviction for the offence of stealing contrary to section 275 of the Code. As we have indicated above, the maximum penalty for the latter offence is imprisonment for three years. The

appellant was sentenced to seven years imprisonment together with eight strokes of corporal punishment on 12th March, 1986. To date, he has served more than three years of this term of imprisonment. He was not a first offender. Accordingly we set aside the appellant's sentence of seven years imprisonment together with eight strokes of corporal punishment and substitute therefor a sentence of three years imprisonment. This will mean that the appellant will be set at liberty forthwith unless he is held in custody for any other lawful cause.

To this extent, the appellant's appeal succeeds.

Dated and Delivered at Nakuru this 4th day of December, 1989

J.R.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR