REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

(CORAM:NYARANGI, GACHUHI & APALOO JJA)

CRIMINAL APPEAL 202 OF 1986

LAWRENCE CHANGAMU OSIEMO……APPELLANT

V

REPUBLIC……..……..RESPONDENT

JUDGMENT

On August 29, 1985, the appellant was convicted by the senior resident magistrate, Kisii of stealing a motor vehicle and was sentenced to 4 years imprisonment. He appealed against that conviction to the High Court which summarily dismissed the appeal. He now appeals to this court and urged us to quash the conviction on no fewer than nine homemade grounds.

The facts are simple. A man called Jackson Obeiro owned a Datsun pick up No KSU 535. The evidence shows that at the close of business each day, he parks this vehicle in the enclosed compound of the Esani Farmers Co-operative Society. The compound was enclosed by a barbed wire fence to which was a gate. He himself lived half a mile away.

At 5.00 pm on May 15, 1984, Obeiro, as was his habit, parked his vehicle in the Society's compound for the night. When he returned for it 6.30 am the next day, the vehicle was no where to be found. Nobody knew who had taken it. So he reported the loss to the police.

At 6.00 am on May 16, a watchman called Kendo employed by John Mwangi, a vehicle workshop owner, received into the latters workshop, a Datsun pick-up whose description fitted Obeiro's missing vehicle. It was brought there ostensibly for repairs by the appellant. Among the job which the appellant required to be done on the vehicle, was to repaint its body colour from white to yellow.

While the work was taken in hand by Mwangi, the garage owner, the appellant took the number plate to Joseph Mwangi and requested the number changed form KSU 535, which was Obeiro's number, to KUB 535. The latter had some misgiving about this and refused to undertake that job.

In the meantime, Obeiro located the vehicle in Mwangi's workshop and reported this to the police. This was on June 5. The police removed the vehicle to the police station that very day. Mwangi must have learnt that day that the police were interested in that vehicle. So when the appellant returned on the next day to enquire after the vehicle, he was apprehended.

Meanwhile, the appellant confided in one Zablon his friend, that he had b ought a vehicle, a pick-up No

KUB which was being serviced at a garage in Eldoret. He offered to give Zablon a lift in the vehicle, presumably when he recovered it from the garage. Zablon must have believed the appellant because he said he visited the garage to see the vehicle for himself but it was taken out on test.

The position therefore was this: This vehicle disappeared from the Society's yard between the night of May 15 and the morning of May 16. Early that morning, the appellant took it to a garage and required work to be done on it. That work included changing the body colour from white to yellow. He also sought to change the alphabets on the number plate. Shortly afterwards, he confided in a friend that he had bought a pick-up whose description peculiarly fitted Obeiro's missing car. The upshot of all this, was that not only was the appellant in possession of a recently stolen vehicle, but he represented that vehicle as his own.

When put on his trial, the appellant did not speak directly on the facts testified to by the witnesses. According to him, on the day of his arrest, he paid a visit to Eldoret to purchase spares. When he finished doing this, he went to a hotel and had a meal. Shortly after doing this, the garage owner came there with a policeman who arrested him. He was then taken to the police station, where he saw the stolen vehicle for the first time.

So on the facts, the learned magistrate did not have a difficult or complicated set of facts to deal with. Having reviewed the evidence, the court expressed itself as satisfied that this was the type of case that could properly be disposed of under section 352(2) of the Criminal Procedure Code. Indeed, counsel for the State while arguing for affirming the conviction, was prepared to let this appeal be remitted to the High Court for that court to deal with in the first instance. But as there was no serious factual issue joined between the State and the appellant on which we considered the High Court's prior resolution was essential or desirable, we thought the ends of justice would be met, if we considered and dealt with the appellant's grievance once and for all.

As we said, the appellant listed in his memorandum of appeal, nine grounds of appeal. Most of these made trifling complaints both against the conviction and the conduct of the trial. In ground 2, the appellant complained that:-

> "That I have never seen the complainant prior to the day in court."

But there was no issue on that because the complainaq ant also said he had never before seen the appellant. The person who identified him as one of two who brought the vehicle to the garage, was the night watchman. Against him, the appellant complained in ground 4;

"That the evidence of PW 1 (watchman) was shallow inconsistent and contradictory in that he told the court that he saw the vehicle driven to the garage, me being the passenger."

There was nothing contradictory about that evidence. The watchman said, he saw two persons bring the vehicle. Somebody other than the appellant drove it. But the person who appeared to own the vehicle was the appellant. He gave instructions for the work to be done on it. He paid a deposit for the work and held himself out to Mwangi as the owner. It was the selfsame appellant who sought to persuade Joseph Mwangi to change the alphabets on the number plate. And lastly, it was the appellant who told his friend Zablon that he had bought a Datsun pick-up. So there was ample corroboration of the watchman's testimony.

The appellant also complained in ground 7,

"That the garage owner was supposed to appear before the court charged with handling stolen property and not as a witness."

But the prosecution were interested in the actual culprit – the thief. And the evidence shows that that culprit was the appellant. If Mwangi was also guilty of dishonestly receiving stolen property, it affords the appellant no defence, and was not a matter on which he can properly complain.

It would appear that because Zablon also made enquiries about the vehicle form the garage, Mwangi gave this information to the police. So he was arrested with the appellant but was later made a prosecution witness. The appellant took exception to this and complained in ground 8:-

“That the sixth PW (ie Zablon) whom we were arrested together at Eldoret was released at Keroka police station and made to be a prosecution witness.”

Beyond enquiring after the vehicle, there was no evidence of Zablon’s association with the theft. He was not identified as the driver of the vehicle on the day the vehicle was driven to the garage. He did not accompany the appellant to give instructions on the work to be done on the vehicle nor was he in the company of the appellant when he sought to change the number plate. So there is hardly any evidence to connect him with the theft. The police thought he did not participate in the theft. We cannot see how this fact absolves the appellant or affords him a legitimate ground of complaint.

The only complaint directed at the conduct of the trial is contained in ground 5 which was formulated as follows:-

“That the learned magistrate erred in denying me right to ask questions the prosecution witnesses.” This complaint is not borne out by the record. The record shows that the appellant cross-examined all the prosecution witnesses including the two police witnesses. And it is not shown why, the learned magistrate would wish to deny the appellant his elementary right to put questions to the witnesses who gave evidence against him. We found no substance in this complaint.

In our opinion, there was overwhelming evidence that it was the appellant who either singly or jointly with one other person, stole the vehicle on the day in question. He was, we think, rightly convicted of the offence charged. It follows that this appeal fails and ought to be dismissed. We do so dismiss it.

June 10, 1987.

NYARANGI, GACHUHI & APALOO JJA