



IN THE COURT OF APPEAL

AT NYERI

(Coram: Hancox JA, Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL 142 OF 1983

BETWEEN

PAUL NDUNGU MWAURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nyeri, Patel J)

JUDGMENT

The appellant Paul Ndungu Mwaura was convicted of theft of a motor vehicle contrary to section 278A of the Penal Code (cap 63) and sentenced to eighteen months' imprisonment. The High Court dismissed his first appeal and he has appealed to this court on nine grounds which we do not have in reproduce.

The circumstances underlying the appellant's prosecution were as follows. He was charged with the theft of a Bedford lorry registration No KQB 290 in Kerugoya Criminal Case No 1618 of 1981. The complainant in that case was the same as in the present case namely Francis Kiiru Rukungu (PW1). The complaint in the Kerugoya case was withdrawn on August 12, 1982 and the appellant acquitted under section 204 of the Criminal Procedure code (cap 75). We do not have the Kerugoya record to verify, but Kiiru said in this case that the Kerugoya court allowed him to withdraw the complaint so that he could reconcile with the appellant who was to transfer the lorry registration No KVB 154, the subject matter of the present case, to the complainant as compensation.

It was not revealed what, in the meantime, had become of KQB 290, that is, whether it had been recovered and if so who had it then. Kiiru said that after inspecting KVB 154 he accepted it as fair compensation for the value of Kshs 28,000. The lorry was then driven to Embu Police station for custody and according to Kiiru the OCS had allowed him to keep it there. The lorry, KVB 154 was sold to the appellant in July 1979 by Kiiru's brother. In cross-examination Kiiru agreed that he withdrew the complaint in the Kerugoya case unconditionally and that there was no mention by the prosecution that he was given KVB 154. He however told the trial court at Embu that on his instructions the lorry, KVB 154 was removed from the appellant's site by the appellant's driver Muli (DW 2) to the Embu police station and Muli confirmed that that was what happened. The complainant then went to Nairobi.

On August 16, 1982, William Karanja (PW 2) was sent by Kiiru to collect KVB 154 from Embu police station and he saw it there between 11 am and 1 pm but the battery was down so he took it away for charging and when he returned after thirty minutes he found the lorry missing. He reported the matter to the OCS, went to Nairobi and informed Kiiru what had happened. Kiiru later went and complained to

Chief Inspector of Police John Ogutu, OCS Embu police station, that Mwaura had taken the lorry given to him (Kiiru). Ogutu found the lorry at the appellant's place of business and took it to the police station. On October 26, 1982, the appellant was arrested and charged with the offence of stealing the lorry KVB 154 valued Kshs 27,000 the property of Francis Kiiru Rukungu of which he was convicted as we have earlier stated.

It was not in dispute that the lorry belonged to the appellant who had possession. It appears although FT Kagunda signed the transfer form and gave it together with the log book to the appellant the transfer into the appellant's name had not been registered. While Kiiru stated that the appellant gave him the log-book and asked FT Kagunda to sign the transfer form in his favour the appellant denied that and said that when he came from Kerugoya he found his lorry missing and he on information learnt that it was at the police station. The log-book had been stolen and he reported the loss to Embu police station, swore an affidavit and was issued with a duplicate log-book. Chief Inspector Ogutu confirmed that the appellant produced documents namely the purchase agreement, transfer form and the declaration of loss of the log-book in support of his claim of ownership of the lorry. The duplicate copy of the log-book showed that the owner of the lorry was Paul Ndungu Mwaura. Chief Inspector Ogutu said that the appellant had seen him on August 12, 1982 and complained that the lorry had been driven to the station without his consent and he instructed the police not to allow any other person to remove it without his consent. When Karanja went to Chief Inspector Ogutu on August 16, 1982 the chief inspector told him to go and see the appellant. Karanja went away and returned and reported that the appellant had refused to go to the police station, but he had not been sent to call Mwaura. Ogutu said that he told Karanja to take the lorry and it is to be remembered that that was despite Mwaura's complaint and assertion of ownership.

As stated in Archbold *Criminal Pleading Evidence & Practice* 40th edition para 1461 at p 989 a man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be, and for a person to be said to steal a thing or property he must take it fraudulently and without claim of right. In this case the appellant really believed the lorry to be his. He had documents to support his belief. In *Ngavana v Republic* [1972] EA 559 Sir James Wicks CJ correctly, we think, held that where the accused reasonably claims property as his, even if he is mistaken, he must be acquitted. The prosecution had to prove ownership and theft. They did not prove ownership by the complainant Kiiru nor did they prove theft for they did not establish that the taking of the lorry by the appellant was fraudulent and without claim of right. The conviction is unsupportable.

For these reasons we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless he is otherwise lawfully held.

Dated and Delivered at Nyeri this 21st day of May 1984.

A.R.W.HANCOX

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JUDGE OF APPEAL

AG. Z.R.CHESONI

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JUDGE OF APPEAL

AG. J.O.NYARANGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR