



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: Madan, Miller and Potter JJA)

CRIMINAL APPEAL NO 89 OF 1981

BETWEEN

PAUL NYARIKI GETENGEAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Mead J) dated 10th

April, 1981

in

Criminal Appeal No.192 of 1980

REASONS FOR JUDGMENT OF THE COURT

We are now stating our reason for quashing the conviction and setting aside the sentence, of this appellant for the offence of handling stolen property, contrary to section 322(2) of the Penal Code. His appeal to the High Court was dismissed.

On January 25, 1980, Frederick Ngugi gave a lift to one Joseph Mokuia in his pickup registration number KVD 739. He stopped on the way to relieve himself leaving the key in the ignition. When he returned the vehicle was gone. He reported the theft of the vehicle to the police.

On the morning of January 29, the appellant went to the garage of Joseph Odhiambo in Sotik and asked him to come out to repair his vehicle which, he said, had come up with mechanical problems about seventeen miles from Sotik. Odhiambo refused. The appellant returned about two hours later. Odhiambo still refused. The appellant came again in the afternoon with another person who was later one of the three accused in the appellant's trial. They did not identify the vehicle to Odhiambo but asked him to lend them some money. Odhiambo told them to meet him at 5 pm. All three accused came. Odhiambo, who had alerted the police in the meantime, took them to a hotel where the three of them were arrested.

In the meantime, also on January 29, a member of the public reported to PC Karanja at Sotik Police Station that a vehicle was lying abandoned in the bush. Karanja went out with PC Onyango. They came to vehicle KVD 739 about seven miles from Sotik. There was no one in it. They set up an ambush and waited. A man came there and opened the door of the vehicle. He saw Karanja and Onyango and ran away. Although chased he was not caught. Both Karanja and Onyango said the man was the appellant.

The appellant and the two co-accused were convicted of handling stolen property, contrary to section 322(1) of the Penal Code. The convictions of the two co-accused were quashed and their sentences set aside on appeal to the High Court. This is the appellant's second appeal.

The question that arose upon the appeal before us was whether both Karanja and Onyango were in a position to see the appellant from a distance of about fifty yards in the bush, making conditions for identification unfavourable, so as to identify the appellant satisfactorily. No identification parade was held. The vehicle was also not tested for fingerprints.

We were of the opinion that the appellant's identification of the appellant could not be relied upon. In fact neither of them said that the appellant was the man they had seen opening the door of the vehicle. But for his arrest in the hotel, we doubt very much that Karanja and Onyango would have connected him with the vehicle.

State counsel Mr Chunga did not support the conviction.

Dated at Nairobi this 19th day of April, 1982.

CB MADAN

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JUDGE OF APPEAL

CHE MILLER

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JUDGE OF APPEAL

KD POTTER

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JUDGE OF APPEAL