



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: BOSIRE, AGANYANYA & NYAMU, J.J.A)
CRIMINAL APPEAL NO. 348 OF 2010

BETWEEN

LEONARD CHEGE NJAGUAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ.) dated 17th March, 2009

in

H.C.C.R.A. NO. 32 OF 2005)

JUDGMENT OF THE COURT

One only main legal question is raised in this second and final appeal, namely whether or not **Leonard Chege Njagu alias Joseph Karanja**, the appellant, was found in possession of a motor vehicle registration number EE 1115029382, a Toyota Corolla, which had been reported as recently stolen.

On 4th October, 2004, a Toyota Corolla motor vehicle registration No. EE 111502938, was stolen from one **Firdaus Mohamed Omari** (PW6) and her husband **Sadique Said Abeid** (PW5) as they were heading to their home. The time of the alleged theft was between 8.45 p.m. and 9.45 p.m. The two were not able to identify the robbers who stole their vehicle. At about 11 p.m. the same day, the appellant was arrested inside room 216 of Perch Hotel, at Kisumu, allegedly in possession of the ignition key of the stolen motor vehicle. The motor vehicle itself was recovered at the basement parking of the said hotel. The appellant admitted he was arrested from the aforesaid room but denied anything was recovered from him. He alleged that the policemen who arrested him beat him up thoroughly before he was presented to court.

The trial magistrate, W. Kiarie, a Principal Magistrate, received evidence from seven prosecution witnesses. The complainant and his wife testified that they were robbed of their vehicle by 3 or 4 men, two who were armed with firearms. The men also stole from them mobile phones, a wedding ring, a

wallet, a purse, a radio wrist watch and some money in cash. A few minutes later **Abraham Odhiambo Munga**, a watchman at Perch Hotel, received the aforesaid motor vehicle at the hotel basement. It had two occupants, but he was not able to identify the driver. He was, however, categorical that he showed the driver where to park the motor vehicle at the hotel basement.

As stated earlier the appellant was arrested from room 216 within the hotel. **Rose Achieng Otieno** a receptionist at the hotel testified how the appellant came to be found in that room. A person other than the appellant had been booked therein. Thereafter he left the room which was on the upper floor. A few minutes later the appellant went to the hotel carrying the key to room 216 and because the witness believed the room had been booked on his behalf, she did not restrain him from proceeding to the room. However, no sooner had he gone upstairs than the man who had booked the room came and he too proceeded to that room. The police came a short while later in search of the two men. The witness led the policemen to that room, knocked at the door and on demand by the person inside she identified herself as the receptionist at the hotel. Only the appellant was inside that room. He was allegedly searched. He was found with the ignition key of the aforesaid motor vehicle. There is a discrepancy in the evidence as to where the key was. Rose testified that the policemen “*searched him and found him with car keys and a mobile phone*” **Pc. Wanjala Wanyonyi**, of C.I.D Office Kisumu, who arrested the person testified that the car keys and two mobile phones were recovered from the top of a stool in the hotel room. Mr. Odhiambo, advocate, who appeared for the appellant submitted, among other things, that the discrepancy was clear evidence that the car keys may not have been found with the appellant. In his view the appellant’s conviction was based on the doctrine of possession of recently stolen property and if the evidence relating to possession is poor the doctrine will not apply. Miss. Oundo for the State, on her part submitted that the discrepancy in the evidence was minor and therefore of little significance on the issue of possession.

Be that as it may, the keys recovered were tried on a Toyota Corolla, motor vehicle which was found parked at the hotel basement. The keys were able to open the car and were used to start the car. The car answered the description of the vehicle that earlier the same day, was robbed from the complainant. The motor vehicle was photographed and two of its photographs were produced in evidence by **Pc. David Wadulo**, of the Scenes of Crime department, Kisumu.

Mr. Odhiambo raised issue with the fact that the motor vehicle was later released to the complainant and later sold to third parties and wondered why it was not produced as an exhibit. His concern is answered by the evidence of the complainant and his wife. They were shown the photograph of the stolen car and they positively identified it as the photograph of the vehicle which was stolen from them. In view of that evidence there would have been no necessity of producing the car as an exhibit.

An issue was raised as to how the prosecution was able to get the car keys if the motor vehicle had been sold. The issue is not significant in this appeal as there is nothing which would prevent the prosecution from obtaining the keys from whoever had bought the car. Besides, that is a matter of credibility which was within the province of the trial and first appellate courts.

The appellant in his defence stated that he is a businessman based in Nairobi. He buys Omena fish in Kisumu for sale in Nairobi. He arrived at night and booked himself at Perch Hotel from where he was arrested by a contingent of 15 policemen. They beat him up thoroughly on suspicion that he had stolen a motor vehicle. He denied having committed the offence.

The trial court believed the prosecution witnesses and found as fact that the appellant is the one who drove the stolen car into the parking at the basement of Perch Hotel, he was found in possession of the ignition key of the car and on the basis of the doctrine of possession of recently stolen property, held that the appellant was among the people who committed the two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. He found the appellant guilty, convicted him of the two counts and proceeded to sentence him to death.

In his first appeal to the superior court, that court on its part held that the conviction of the appellant was based on circumstantial evidence. That is evidence of surrounding circumstances from which an inference may be drawn to establish beyond reasonable doubt that the accused committed the offence

charged. The court then considered the evidence and it was its view that the watchman could not be relied upon on the issue of identification of the person who drove the stolen car into the hotel compound as evidence as to the quality of light at the entrance was unclear. That court was, however, satisfied that the car keys were recovered from the appellant. In coming to that conclusion the court relied on the evidence of the receptionist and the arresting officer. Like the trial court, the superior court relying on that evidence came to the conclusion that the appellant was one of the people who stole the subject motor vehicle. It therefore dismissed the appellant's appeal.

In the appeal before us seven grounds of appeal were raised. Three of those grounds, the 3rd, 4th and 7th in the appellant's memorandum of appeal, raise issues of fact. By *dint* of the provisions of **section 361 (1)** of the Criminal Procedure Code, this being a second appeal, those issues do not fall for our consideration. As stated at the beginning of this judgment the main issue is whether the appellant was found in possession of the stolen motor vehicle. The subsidiary grounds relate to the alleged failure by the first appellate court to re-evaluate the evidence; that the appellant was not identified as one of the robbers, and that the burden was improperly shifted to the appellant to prove his innocence.

It cannot be gainsaid that the appellant was arrested from room 216 of Perch Hotel. Another person booked the room for his own occupation but he surrendered the room to the appellant. The receptionist's evidence is clear that the appellant is the person who eventually was arrested from that room, while alone. There are concurrent findings of fact by the trial and first appellate courts that the ignition key of the stolen motor vehicle was recovered from the appellant, either on his body or on a stool by his bed side. The discrepancy in the evidence, we think, is not a fundamental issue. The two witnesses who testified on the matter may not have seen all that happened before the recovery of the ignition key considering the manner in which the police raided the room. It also depends on the number of policemen who may have conducted the raid. The receptionist said the policemen who approached her were two. However, the appellant said there were about 15 of them. Regardless of what the circumstances were, the trial and first appellate courts made a finding of fact that the ignition key of the stolen motor vehicle was found with the appellant in his hotel room. The trial court which had advantage of seeing and hearing witnesses testify was better placed to assess the credibility of the eye-witnesses. In a second and final appeal, the Court may only interfere if the conclusion reached is either not supported by evidence, is based on extraneous matter, or that the court below overlooked important matter which, on an objective view of the matter, would have led to a different finding.

On the basis of the material before the trial court the appellant had the onus of giving a reasonable explanation as to how he came to be in possession of the ignition key of the stolen vehicle, and by extension the stolen vehicle itself only two or so hours after it was reported stolen. He did not offer any explanation on the matter and in those circumstances a rebuttable presumption arises under **section 119** of the Evidence Act, **Cap 80** Laws of Kenya, presumes that he was either the thief or a guilty receiver. It is however, our view that considering the lapse of time, between the time of the theft and the time the motor vehicle was recovered, it cannot be said that the vehicle had changed hands. The inference to draw is that the appellant stole the vehicle. In the circumstances we have no basis for interfering with the decision of the superior court. Accordingly we dismiss the appellant's appeal in its entirety. It is so ordered.

Dated and delivered at Kisumu this 2nd day of December, .2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR