



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 434 OF 1983

JOHN NJOROGE NJUGUNA.....APPELLANT

(original accused No.1)

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO 377 OF 1983

(From: original conviction of the second class District Magistrate and sentence of the Chief Magistrate in Criminal Case No 80 of 1983 of the Chief Magistrate's court at Nairobi: Ole Kipury, Esq. And A. Rauf Esq.)

STEPHEN KAMAU.....APPELLANT

(Original Accused No 2)

Versus

REPUBLIC.....RESPONDENT

CORAM: TODD, J

(Appellant absent, not wishing to be present and unrepresented, C W Gatonye (Senior State Counsel) for Respondent)

JUDGMENT

The two appellants John Njoroge Njuguna and Stephen Kamau whose appeals have been consolidated were jointly charged with attempting theft of a motor vehicle contrary to Section 278 A & 389 of the Penal Code (cap 63), that they on 9th date of January, 1983 at Industrial Area Nairobi Jointly broke and

entered the motor vehicle Reg, No[^] KQZ 919 Alfa Romeo valued at shs 140,000/= with latent to steal the said motor vehicle the property of Morris Ochola.

The evidence for the prosecution was given by the complainant who said that on 9.1.83 at about 1.30 p.m. he parked his Alfa Romeo KQY 919 outside Portways along Bunyala Road, locked his car and went with his children to "buy bread," milk and soda. On coming out of the shop with his purchases he saw that two people had entered his car and were trying to start it. Whereupon he took his children back into the shop where he left them and started shouting for help. He came out and he saw 2 factory guards come running for help. He told them what was happening and Joseph Sakungi (PW 2) one of the guards said he saw the two accused come out of the complainant's car RXY 919 an Alfa Romeo and start running. When the other factory guard John Mulela came up the complainant told the two guards to get into his car to give chase.

The complainant had some difficulty in starting his car because the ignition switch had been tampered with. However, he soon was able to give chase in the car after starting it. Then according to Joseph Sakungi near Bunyala Police Station the two accused were seen to run where there was a space between 2 buildings. The car was stopped and the chase continued on foot. The 1st accused John Njoroge was caught first at Shimo Latewa Road while the 2nd accused Stephen Kamau turned into Lusaka Road and ran into a kiosk where there he was also arrested. Joseph Sakungi said he kept his eyes on both the accused the whole time. It appears from the evidence of John Mulela that he was able to keep his eyes on the two men until they were arrested.

Another factory guard Francis Mwangi (P W 4) joined in the chase from a petrol station outside of which he was standing since he knew the complainant Mr. Ochilla. He testified to the first accused being arrested first while the 2nd accused had run into a kiosk where he was arrested. Both accused were taken to Industrial Area Police Station where they were charged. Both appellants elected to make statutory statements in their defence.

JOHN NJOROGE said:

"I left home at about 11.30 going to visit a friend at Maranani. I got into a bus I walk to .. I took a matatu upto C & Cl. I dropped and crossed to a place known as Elaphus Scap. When I reached the bridge I saw a car with the claim on it came and stopped behind me and 2 people came out from behind and another in front. The .. in as one of the people. That is all"

While Stephen Kamau said:

"On 9.1. 82 I was at home I went to the South B Station. When we reach Lusaka road our vehicle broke down. The driver told me to stay in it while he went for a mechanic. I closed the door and windows and went to a nearby kiosk. I asked for soda and drank it when I finished I came out as I came out I saw a group of people, one of them shouted thief. I was then told to stop. I did so. Another came and hit me on the head. I fell down, after 5 minutes a security car came,, I was taken to Industrial Area police station. At the station the officer said that I be taken to hospital. I was taken to Kenyatta National Hospital, where I was treated. I was taken to the phone and talks to the caller. The next day I was returned to the caller and put in the office. The charge was road to me I denied. I was then charged with the offence."

Both appellants defences were denials of the prosecution story and amounted to cases of mistaken identity.

The "trial magistrate did deal with and consider the question of mistaken identity. He did correctly take

judicial notice of the fact that the 9th January, 1983 was a Sunday when it would be correct to say that the area of the Industrial Area in Nairobi would be relatively deserted and so it would be so much easier to be following the two persons as it was said the 2 appellants were followed, before they were caught. The trial magistrate after considering the matter of mistaken identity ruled it out. He found and held that the two appellants were same people who forced their way into the complainant 's car and who subsequently ran away and were chased and arrested and charged for the offence charged.. And he found that the case of attempted theft of a motor vehicle had been proved beyond reasonable doubt against the two appellants and convicted them of the offence charged.

Making my own assessment of the recorded word I also agree that the prosecution case against the two appellants was proved beyond reasonable doubt as I do the defences of the 2 appellants and so their appeals against convictions are hereby dismissed.

As regards sentences the two appellants had each previous Convictions John Njoroge had two, namely stealing contrary to section 275 of the Penal Code and assault contrary to section 251 of the Penal Code though no custodial sentences would appeal to have been awarded though he was awarded 4 and 8 strokes of the cane. While Stephen Kamau had one previous conviction for stealing for which he was awarded one years imprisonment in 1974.

The custodial sentences are very near the maximum to which they could have been punished under the offence charged and so I think that the custodial sentences imposed are excessive. I do appreciate what was said in the case of R V Mahasedali Jamal [1948] 15 E A C A 126, but notwithstanding I think a more appropriate sentence would be one of 2 years imprisonment to each appellant together with 6 strokes of the cane each and to this extent the sentences are varied. I set aside the order of 3 years police supervision imposed on the two appellants.

Dated and delivered at Nairobi this 16th day of December, 1983,.

J H S TODD

JUDGE



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