IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 272 of 2004

(From Original Conviction(s) and Sentence(s) in Criminal case No. 14 of 2003 of the Chief Magistrate's court at Kiambu (C. M. Njuguna – SRM)

JOHN BOSCO KARIUKI……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

J U D G M E N T

JOHN BOSCO KARIUKI was charged with **CONSPIRACY TO EFFECT AN UNLAWFUL PURPOSE** contrary to **Section 395(8)** of the **Penal Code.**

It was alleged that on 27th July 1998 at UAP Provincial Insurance Company limited in Nairobi, jointly with others not in court conspired to effect an unlawful purpose namely theft of a motor vehicle.

In the alternative the Appellant was charged with **HANDLING STOLEN PROPERTY** contrary to **Section 322(2)** of the **Penal Code** that on 23rd March 2002 at Norfolk Hotel in Nairobi, otherwise than in the course of stealing dishonestly handled one Motor vehicle make Toyota having reasons to believe it to have been stolen or unlawfully obtained.

After the hearing of the case, the learned trial magistrate convicted the Appellant for the alternative count of **HANDLING STOLEN PROPERTY** and sentenced him to 3 years imprisonment with hard labour on 11th May 2004. The following month this court granted him bail pending the hearing and determination of this appeal.

The Appellant challenges both the conviction and sentence in his petition and grounds of appeal where he cites 15 grounds. These grounds are both argumentative and repetitive and for that reason, I have summarized them as follows:

1. The learned trial magistrate erred in convicting him while all the evidence and documentary exhibits together with the vehicle did not support the prosecution case.

2. The prosecution has a missing link in its case due to the fact the prosecution was unable to call a key witness.

3. That the conviction was based on speculation.

The facts of the prosecution case are as follows: -

PW1, **Paul Owora** said that he bought a motor vehicle registration No. KAC 606 Q Toyota Corolla in 1992. In 1996, he sold it to **Grace** one of his employees. **Paul** had insured the vehicle with UAP Insurance Company the same year the vehicle was involved in an accident and was written off. **Paul** was paid for the vehicle by the Insurance and he released the log book. The log book was the same one shown to him in court by the prosecutor, exhibit 1. In the logbook, he saw a new name **JOHN BOSCO KARIUKI** whom he said he did not know. Paul said that he went to Kiambu Police station after police sent for him in December 2002. He was shown a vehicle and asked if he could identify it as his former vehicle. **Paul** said it looked different because if was model XE Limited while his was SE limited, that it had four gears while his had five gears, that the window buttons were near the gear while his were on the driver's door. **Paul** identified the vehicle's transfer form he had signed for the insurance as exhibit 2

PW2, **PC Dennis** told court that he arrested the motor vehicle KAC 606 Q on 23rd March 2002 which was operating as a taxi at Norfolk Hotel, after receiving information that it was stolen. **PC Daniel** PW3 said that he arrested the Appellant on 25th March 2002 at 12.30 p.m. when the latter went to Karuri Police station to claim back his vehicle.

PW4 Raphael was a KRA officer. He said that on 24th May 2002 he gave the Police particulars of ownership, chassis and engine numbers of motor vehicle KAC 606 Q. He said it was a Toyota Chassis No. AE 91-0111810 and engine No. 3753969 with the first registered owner as **Florence Wanjiku**, second registered owner as **Paul Miari Owara** and third registered owner as **John Bosco Kariuki**. Third registration was done on 8/4/02.

PW5 IP Langat was a scene of crime officer from CID headquarters. He said that on 26/3/02, **PC Daniel** PW3 asked him to restore the engine and Chasis numbers on a motor vehicle KAC 606Q. He said that on physical examination, the engine was No. 5A375 3969 while chassis was No. AB 91-0111810. That he applied chemicals for further examination and formed the opinion that the engine number had been tampered with. However he said he could not read the original numbers. **IP Langat** said further that the area on the chassis where the original number had been was cut and another plate placed on top concealed with body filler and paint.

PW6 **Arthur Njoroge** was Claims Supervisor with UAP Insurance Company. He said that their company had insured motor vehicle KAC 606 Q in 1997, it PW6 said that after the vehicle was involved in an accident on 6/12/97, it was written off and the insured paid indemnity. He said that the insurance company sold the salvage to the highest bidder on 27/7/98 which was **Skyrake Auto spares** to whom they gave the transfer form exhibit 2 and log book exhibit 1. PW8 **James Njuguna Muthama**, an Insurance Broker by name **Jivero** denied having sold any salvage to the Appellant. He said that the Appellant had gone to him in March 2002 asking him for a letter to the effect that his company had sold a salvage to the Appellant which he declined to give.

PW9 PC Gichuhi told court that he withdrew the first case against the Appellant in court under **Section 87(a)** of the **Criminal Procedure Code** and re-investigated the case afresh. The witness gave the reason for the withdrawal as the fact that the Appellant had produced the original logbook exhibit 1 and transfer form exhibit 2 in court. **PC Gichuhi** said he was able to trace the name of the persons who had bought the salvage from UAP Insurance, one **James Kirugo.** He produced his death certificate in court dated 11/10/02. PW9 said that he concluded that the vehicle in court was not the salvage.

The Appellant's case which was by a sworn defence was that the vehicle in question belonged to him, the Appellant and that he bought it from PW8 **Jimmy Njuguna.** He said that he first bought a pick-up vehicle from PW8 and he produced the sale agreement as exhibit D1. He said that PW8 had also given him a sale agreement for the Toyota but that it got lost. He said that the Toyota was a salvage when he bought it and that he had extensively repaired it.

The Appellant who represented himself in this appeal submitted that both PW1, **Paul** in whose name the vehicle was registered before it was involved in the accident identified exhibit 1 as the same logbook he had for the vehicle. The Appellant submitted that the effect of PW4's evidence, the KRA Officer evidence was that the records held by KRA tallied with the Chasis and engine numbers on the motor vehicle and with the logbook and transfer forms of the vehicle.

The Appellant submitted that since the vehicle was transferred to him he had never heard any complaints from anyone claiming ownership of the vehicle. The Appellant urged the court to find merit in his appeal, allow it and order for the restitution of the motor vehicle to him.

Mrs. Gakobo, learned State Counsel who represented the State did not oppose the appeal. Counsel submitted that the charge of **HANDLING** was poorly drafted as it did not disclose the mode in which the Appellant handled the vehicle as envisaged under **Section 322(2)** of the **Penal Code** whether through: -

(1) Dishonest receiving; or

(2) Retention; or

(3) Removal; or

(4) Disposal

Counsel submitted that in the circumstances the charge was incurably defective. Counsel submitted that in case the court did not find the defect incurable, Counsel urged the court to find that the evidence adduced by the prosecution proved that the motor vehicle may have been stolen. Counsel submitted that PW5 had on chemical examination of the engine and Chasis found tampering on them. Counsel further submitted that the evidence of PW8 was to effect that he never sold any salvage to the Appellant. Counsel submitted that even though PW1 had said he had no claim over motor vehicle, he was still able to tell the vehicle he owned had 5 gears and that the one he was shown had 4 gears and it was an SE Model while the other he was shown was XE LTD. Counsel submitted however, that there was a breach in the prosecution case following the death of one who may have bought the salvage.

I have carefully considered this appeal, evaluated and analyzed afresh the evidence adduced in court while bearing in mind that I neither saw nor heard any of the witnesses and that therefore I cannot comment on the conduct and demeneaour of the witnesses. See **OKENO vs. REPUBLIC 1972 EA 32**.

The motor vehicle in question was neither produced nor identified in court. That is a fatal omission to the prosecution case. In **KECHEL vs. REPUBLIC [1985] KLR 513 at page 515, Owuor, Ag. J**. held

"There is nowhere on the record to show that that beer was ever seen by the court produced as an exhibit or merely marked for identification before the court and therefore evidence in court upon which the defence could examine the prosecution witness. there wasn't even the inventory taken as the beer was being taken out upon which the appellant signed to confirm what had been taken from the shop. This oversight resulted in a criminal trial going on to the end without the

exhibits or any evidence as to the identity of the exhibits being produced before the court or any record to the effect that the defence had been allowed to view the goods and cross-examine the produce of goods.

Prosecution cannot be heard to say that they proved their case beyond all reasonable doubt. The omission to take evidence of the identity of the goods subject matter of the charge against the appellant in the absence of the actual goods being produced before the court was fatal to the prosecutions' case. There was no way in which they could have proved their case beyond any reasonable doubt."

This authority is persuasive to this court. I am persuaded by it. The cited case gives the correct legal position of a case depending on goods which ought to have been produced in court as exhibits and the effect of failing to have them seen by the court. It was fatal to the prosecution case to fail to produce the motor vehicle the subject matter of the charge in the case. On this ground alone the appeal can succeed.

PW1, **Paul** who owned the vehicle before it was involved in an accident did not identity the vehicle he claimed he was shown by the Police at Kiambu Police Station. The different features **Paul** claimed he noted on the vehicle was therefore not shown to the court. The prosecution in the circumstances failed to prove that the vehicle **Paul** was shown by the Police was the same recovered from the Appellant in this case.

I have noted further that PW4, the KRA officer found that all the documents held by his institution for motor vehicle KAC 606 Q tallied with those owned first by Paul, PW1 and later by the Appellant for the same vehicle. The evidence of PW4 was therefore in favour of the Appellant and weakened further the prosecution case.

IP Langat the scenes of crime officer said he saw numbers after applying chemicals on the area where the chasis and engine numbers of the vehicle were. He did not however read any numbers which was different from those in the documents held by PW4 and those initially owned by **Paul** and later by the Appellant. **IP Langat** took six photographs of the vehicle. He took rear and front view photograph 1 and 2, chases and engine areas before any examination, photograph 3 and 4 and the engine and chasis numbers he found photo 5 and 6. **IP Langat** did not however produce any photos of the engine and chasis numbers he claims appeared on application of chemical substances. Given his evidence that he could not read them, and his allegation that they were the original numbers of the engine and chasis of the vehicle, taken together with his failure to take photographs of them, I find the evidence if **IP Langat** that there were any other numbers than those he photographed a myth. That evidence cannot be true and is not acceptable in the circumstances. If such numbers existed, **IP Langat** must have known that these were the most important numbers he should have photographed as evidence. Otherwise it is highly negligent and irresponsible of him to have failed to photograph them. I find that the prosecution did not adduce evidence to prove any tampering on the chasis and engine numbers of the vehicles.

The evidence of PW8 was another which left questions. PW9 the re-investigating officer produced exhibit 8, a sale of motor vehicle salvage form stamped "Ivory Motors Ltd" which he said he obtained from PW8 even though PW8 did not mention it. That form was similar to the one the Appellant produced in defence to prove that PW8 had sold him a pick-up salvage earlier before the Toyota the subject matter of this case. The learned trial magistrate disbelieved the Appellant's evidence on the loss of the transfer form on the Toyota and dismissed the one the Appellant produced on the pick-up. I find that the learned trial magistrate did not give due weight to the evidence of PW8. The evidence of PW8 was worthless in that all he said was "I could not remember selling salvage to the accused." The burden was on the

prosecution to prove its case against the Appellant beyond any reasonable doubt. What the prosecution should have done is to adduce evidence to prove to whom the salvage of PW1's vehicle was sold to. PW9, the investigating officer alleged that the one who bought the salvage died in 2000. That evidence was however hearsay evidence whose source remained undisclosed. There is no evidence to show who bought the salvage in issue and definitely none to show that the Appellant never bought it.

The learned trial magistrate shifted the burden of proof against the Appellant when he found at page J4 of the judgment that the Appellant failed to explain the changes of features on the motor vehicle as explained by the Complainant. As I have already stated, the vehicle in question was not in court and the court therefore did not see for itself the alleged differences between Paul's vehicle and the one allegedly recovered from the Appellant. Secondly, the court grossly misdirected itself when it held that the Appellant should have explained the different features found in the recovered vehicle as in so doing, it shifted the burden of proof against the Appellant.

The learned trial magistrate also grossly misdirected himself when he found that one, the vehicle had been damaged beyond repair attributing that finding to the evidence of PW1 and PW9 at page J5 of judgment which is incorrect as they never said so in their evidence; and two when the court required the Appellant to call the garage owner who repaired the salvage to prove that he had repaired it, as that was tantamount to asking the Appellant to prove his innocence, a burden the Appellant was not expected in law to carry.

Finally, I find that both charges against the Appellant were not supported in evidence. The main charge was not supported in evidence since the prosecution failed to adduce any evidence to show that the Appellant conspired with anyone to effect an unlawful purpose of theft of the motor vehicle. In any event, as the learned trial magistrate correctly found, there was no evidence that any vehicle was stolen at all whether the salvage Paul released to insurance or the vehicle found with the Appellant. In any case, the vehicle was not produced in court as an exhibit.

As regards the **HANDLING CHARGE,** as learned State Counsel observed, the manner of the alleged handling was not specified. Most importantly the vehicle allegedly stolen was not specified in the charge which was fatal to the charge. Vehicles have identification marks. If the registration mark of the vehicle handled was not specified in the charge, the Appellant was prejudiced as he could not tell what vehicle he was alleged to have handled and that failure to identity it was fatally defective to the charge. Finally and more important there was no evidence of a stolen vehicle. There can be no handling without stealing. The Appellant was charged of handling a vehicle, the court found was not proved to have been stolen. Upon finding that the vehicle had not been stolen, the learned trial magistrate ought to have acquitted the Appellant of all charges. The learned trial magistrate grossly misdirected himself when he found the handling charge proved therefore falling into error. The conviction had no basis whatsoever, was not supported on evidence and evidence adduced by the prosecution was based on hearsay evidence, information recovered from persons whose identity was never disclosed and was based purely on suspicion. Suspicion however strong cannot be sufficient to sustain any charge.

I find merit in the appeal, quash the conviction and set aside the sentence. The Appellant's vehicle which police did not produce before court, but kept it in the Police station, since its detention on 23rd March 2002, should be restituted to the Appellant forthwith. These are the orders of the court.

Dated at Nairobi this 22nd day of November 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in presence of;

Appellant

Mrs. Gakobo for State

Tabitha – Court clerk

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LESIIT, J.

JUDGE