REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 598 of 1995

(From Original Conviction and Sentence in Criminal Case No. 3707 of1994 of the Chief Magistrate's Court at Mombasa - S. Muketi -Resident Magistrate)

KENNEDY TUNJE .... APPELLANT

- Versus -

REPUBLIC .... RESPONDENT

JUDGMENT

The Appellant was the 1st accused before Mombasa ResidentMagistrate's Court where he together with two others were tried forthe offence of theft of motor vehicle parts contrary to Section 275of the Penal Code. The other two were charged with the alternativecharge of handling stolen property contrary to Section 322 of thePenal Code. The Appellant was convicted on the principal offenceof theft for which the other two were acquitted but convicted onthe alternative charge of Handling. For that conviction he wasordered to serve 24 months in prison. The other two accused weregiven a suspended sentence of 15 months each. There was no appealfrom the two.

But the Appellant Kennedy Tunje (Tunje) filed a petition ofAppeal in person on 29.11.95. Apparently unknown to him M/SStephen Macharia Kimani & Co. Advocates had been instructed to2

Appeal on his behalf and another Petition of Appeal was filed on1.12.95. Both, for unexplained reasons were given the same numberby the Registry. At the hearing thereof Mr. Kimani abandoned thepetition filed by the Appellant in person and argued the petitionfiled by his firm. That petition remains dismissed as there is noprovision for withdrawal of an Appeal.

Five grounds of Appeal were laid out in the Petition of Appealfiled by the Advocates, namely:

The learned trial Magistrate erred in law in,

1) holding that the appellant was involved in the"actual theft allegedly because the vehicle had itsspare tyre when it left the port, a fact which isnot conclusive in the circumstances and ought notto found a conviction for theft.

2) failing to consider the fact that others had theopportunity to gain entry into the subject vehiclegiven

that the keys were in possession of severalother parties prior to the discovery of the allegedloss of spare tyre and jack.

3) having found as a fact that "the driver was anoutright thief" the court ought to have consideredthe conduct of the appellant who unflinchinglyreturned to work as usual, showed the vehicle tohis boss and actually assisted in looking for thedriver, conduct that is inconsistent with thefindings of the court with regard to guilt.

4) the findings of the court are not supported byevidence.

5) the sentence is manifestly harsh given that theappellant was said to be a first offender.

The facts are briefly these:

A Rwandese businessman known as MARCEL MUHIZI (P.W.I) wascarrying on CLEARING AND FORWARDING business in Cannon Towers, MoiAvenue. He had employed a messenger and Port Clerk in that office.Tunje was one of the clerks who process documents from customs andPort.

On 3.8.94 he was sent to the Port to clear a Pajero vehiclewhich was destined for Rwanda. Muhizi went with him to the Portand saw the vehicle. He also observed that it had a spare wheelplaced on the back seat.Tunje told him he was about to finishwith the clearing process and was assured the car would be out thefollowing day. So Muhizi returned to the office.

The following day 4.8.94 at about 11.45 a.m., Muhizi went tothe office and found the car parked outside. He also found the keyin the office. But he did not find the driver who brought the carthere nor Tunje. He could not see the spare tyre on the back seat.Tunje was said to have gone for lunch. Muhizi then went to thePort-gate and was informed that the car had just passed through andhad a jack and a spare tyre. He reported the matter to the Police.

Five days later (on 9.8.94) the driver came to the offices andclaimed that Muhizi was defaming him alleging he had taken thetyre. Muhizi took him to Port Police where he was arrested andtaken to Central Police Station. The arrested driver was neithercharged nor called as a witness.

As the car had to be taken to Rwanda, Muhizi decided to buy another spare tyre and jack for it on 31.8.94. It is the 2ndaccused who led him to the shop of 3rd accused, a tyre dealer tobuy a tyre. On checking it he found it belonged to the Pajero. Hecalled the police and the 2nd and 3rd accused was arrested. Thefollowing day he was walking along Majengo area and found a jack.He saw a Pajero jack which the person selling it said was broughtby a person from the Port for him to sell. He went to call thePolice but the seller had disappeared when he returned. It is notclear how the jack exhibited in court was recovered or identified.

The only other witness for the prosecution was P.C. DavidNjuki (P.C. Njuki). He had accompanied Muhizi on 17.8.94 when hewas taken to buy the spare tyre from 3rd accused. On asking the3rd accused he was told the tyre had been sold to him by peoplewith a foreign registered vehicle number. He said when he wasarresting the 2nd and 3rd accused and taking charge of the twoexhibits, Tunje was also handed over to him.

Tunje on his part denied any involvement and said in hisunsworn evidence that he did not know how to drive and had to hirea driver to move the Pajero from the Port when it was cleared.When they reached the office, he took the keys to the office andwent for lunch. In the afternoon, he showed his boss the

vehicle.That is when the boss said it did not have a spare tyre. Bothtried to look for the driver but could not trace him. The driverlater showed up. He was arrested and taken to Central PoliceStation.

The 3rd accused said he had bought the tyre from two boys whocame to him in a red vehicle saying they were from Zaire and wereshort of money. He had given the tyre to the 2nd accused to lookfor a buyer.

The learned trial Magistrate found as a fact that the driverwas an outright thief and wondered loudly why he had been releasedand not even called to court to testify. She recommended hisarrest and charging.

In her view there was only one issue, that is whether the accused were involved in the commission of the offence. And she answered it by stating in respect of the Appellant;

"The first accused was involved in the actual theft.When the vehicle left the Port it had its tyre. Therewas no break in. He is the one who handed the keys tothe office people. He is the one together with thedriver who took the tyre to the 3rd accused for sale. Hewas therefore actively involved. He had the opportunityand he fully used this opportunity to steal."

These are the findings which were assailed by Mr. Kimani in his submissions. He surmised that there was no direct evidence that the Appellant stole the items in issue. All there is, is circumstantial evidence.

The available evidence, he submitted, was that there was a vehicle in transit that was cleared at the Port, which vehicle had a tyre and jack when it left the Port. The vehicle reached the offices of the complainant where the keys were handed over. Later it was discovered that a tyre and jack were missing. In his submission a yearning lacuna was left out in the evidence for thereis none to show how the keys were delivered to the office; who tookcustody of the keys in the office from the time the car was broughtin the morning and the afternoon when it was inspected; and finallywho else had access to the office apart from the Appellant.

In the circumstances the circumstantial evidence Rule shouldhave been considered by the trial Magistrate, as was stated in thecase of SIMONI MUSOKE -Vs- REPUBLIC [1958] EA 715. Applying thattest, he submitted, it is clear that other explanations areavailable equally consistent with the innocence of the Appellantand the trial Magistrate should not have convicted. Thoseexplanations included other persons who had access to the keys inthe absence of the Appellant and also the mysterious arrest andrelease of the driver, whom the trial Magistrate found as a factwas an outright thief.

Mr. Kimani further submitted that the evidence was notavailable as to when in point of time the items disappeared fromthe car. In the first place the complainant did not see any jackat the Port and cannot testify that it was there and was missing.The only other evidence about the tyre and the jack being in thecar was hearsay evidence from the Port-gate. No one from the Gatewas called to testify in that respect. The possibility was noteliminated therefore that the items could have disappeared when thevehicle was still within the Port area.

All these doubts coupled with the conduct of the Appellant should have created enough doubts in the trial courts mind towarrant an acquittal. The Appellant he submitted had gone forlunch and returned to the office in the afternoon to show the carto his boss. When they discovered the tyre was missing, theAppellant assisted in tracing the driver who was arrested. He wasinnocently assisting his boss and did not run away from the officewhen the tyre was found missing.

The trial Magistrate he concluded did not fully appreciate thelaw and the evidence and drew irreconcilable conclusions from theevidence which defied logic. Just because the 2nd and 3rd accusedwere guilty did not make the Appellant guilty also.

As for sentence he submitted that 24 months was excessive inthe circumstances.

Mr. Ng'eno for the State did not think so and supported thetrial Magistrate's conviction and sentence. In his view the factthat it was the Appellant who had the full responsibility ofclearing the vehicle, hiring the driver who was found to be athief, knew the contents in the vehicle, and took the keys to theoffice, pointed only to one conclusion that he was responsible forthe loss of the items listed in the charge. It matters not that hereturned to the office in the afternoon since he was supposed to beworking there in any event. Such conduct does not attractfavorable assessment of the Appellants involved. He conceded thatthe evidence was circumstantial but submitted that there was- anunbroken link from the Port to the discovery of the loss which pointed only to the Appellant as the person who stole. He wasrightly convicted. The sentence was also lenient.

I have considered the entire matter which I must as an appellate court re-evaluate. It seems to me plainly clear thatthis was a case that was poorly investigated, poorlyprosecuted, and with utmost respect to the learned trialMagistrate, inadequately evaluated.

The case as rightly submitted by the defence and conceded bythe State fell to be decided on circumstantial evidence. There wasno direct evidence to show, as the trial Magistrate erroneouslyfound, that it was the Appellant and the driver who took the tyreto the 3rd accused for sale. Neither the two prosecution witnessesnor the 3rd accused purport to give such direct evidence.

The learned trial Magistrate did not make a finding in law that the case depended on circumstantial evidence and if so what standard's should apply for consideration. As was stated in the SIMONI MUSOKE case

"In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation Upon any other reasonable hypothesis than that of guilt."

"... ...The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. "...... It is also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."In my evaluation of the evidence of the two prosecutionwitnesses I am not satisfied that the facts satisfy these legalrequirements. There were certainly opportunities for other personsto commit the offence charged without the involvement of theAppellant. There is no evidence as to when in point of time thetheft took place. The evidence that the two items were in the caras it passed Port gate was hearsay and so inadmissible. There wasevidence and the trial Magistrate found as a fact that the car keyswere handed over to the office people. There was no evidence toeliminate the possibility of any other person perpetrating thetheft before the Appellant returned to the office in the afternoon.The circumstances of this case do not show that his return to theoffice was actuated by any other motive than the resumption of hisnormal duties in the office.

The damning finding was that made by the learned trialMagistrate that the driver was an outright thief. Other thanlamenting about his release and recommending arrest, the learnedMagistrate did not draw the inviting presumption of law thatevidence which could be produced and is not produced, would, ifproduced, be prejudicial to the party who withholds it. Applied tothis case, serious doubts would be

raised about the culpability ofthe Appellant who was alleged to have accompanied the driver duringthe commission of the offence.

On all accounts it was not safe to convict the appellant in this case and I allow the Appeal, quash the conviction and set aside the sentence. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Mombasa this 7th day of November 1997.

P.N WAKI

JUDGE

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