IN THE COURT OF APPEAL

AT NAKURU

CRIMINAL APPEAL NO. 3 of 2012

(CORAM: KIHARA KARIUKI, SICHALE, OTIENO-ODEK JJA)

SIMON NDIRANGU KIRAGURI ……..……...1ST APPELLANT

CEPHA NJUGUNA KIGONDU ..... 2ND APPELLANT

AND

REPUBLIC …….....…..RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Nakuru (A. Emukule J.) delivered on 3rd February 2012)

in

H.C.CR. Appeal Nos. 102 and 103 of 2011)

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JUDGMENT OF THE COURT

1.***SIMON NDIRANGU KIRAGURI*** and ***CEPHA NJUGUNA KIGONDU***, hereinafter referred to as the appellants, were convicted by the High Court for the offence of stealing a motor vehicle contrary to ***Section 278 A*** of the Penal Code (Cap 63 of the Laws of Kenya). They were sentenced to two years imprisonment by the trial magistrate. Aggrieved by the decision of the magistrate court, they appealed to the High Court against conviction and sentence. The High Court (Emukule J) in a judgment delivered on 3rd February 2012, enhanced the sentence to a term of 4 years imprisonment. Being aggrieved and dissatisfied with the decision of the High Court, the appellants have now come before this Court in a second appeal.

2.The grounds of appeal as stated in the memorandum of appeal filed on 14th November 2012 is that the Honourable Judge (Emukule J.) gravely misdirected himself during trial by giving audience to the complainant in the absence of the appellant thereby leading to unfair treatment of the appellants and no fair trial of the case. That the judge erred in law and fact in failing to consider adequately or at all that the

charge sheet was manifestly defective. That the judge erred in law and fact in failing to consider that the appellants had paid valuable consideration for the motor vehicle and at the time the appellants bought the vehicle it was not registered in the name of the complainant. That the judge came up with his own theories to support his decision particularly the holding that the appellants were part of a grand gang. Counsel for the appellant urged this court to note that the High Court judge heard the appeal as a single judge and not as a two judge matter as required under section 359 of the Criminal Procedure Act. It was submitted that Section 278 A of the Penal Code with which the appellants were charged created no offence.

3.During the hearing of the appeal, the appellants were represented by learned counsel *Mr. Wandugi* while the State was represented by the Senior Principal Prosecutions Counsel *Mr. J. K. Chirchir*. Counsel for the respondent stated that the State was conceding to the appeal. This court permitted both counsel to argue the appeal for the court to evaluate the merit and basis of conceding the appeal based on submissions made.

4.Counsel for appellant submitted that the learned Judge was impartial to the extent that he gave audience to the complainant in the absence of the appellant and thereafter enhanced the sentence of imprisonment of the appellants to 4 years. Counsel submitted that there is no provision known to law that allows a judge to give audience to a complainant even in the presence of the prosecution. It was submitted that there was no record as to what transpired during this audience and the process of a fair trial was defeated. It was also argued that under the provisions of Section 359 of the Criminal Procedure Act, appeals to the High Court should be heard by two judges and not a single judge as happened in this matter. This court was urged to find that the charge sheet was incurably defective to the extent that the appellants as accused persons were charged "with other persons not before the court". This Court was urged to find that the phrase "*other persons not before the court*" rendered the charge sheet incurably defective since the appellants did not know who were these other persons with whom they were alleged to have committed the offence of theft of a motor vehicle. As such, it was submitted that the appellants could not adequately prepare for their defence as they did not know who these other persons were. The appellants further submitted that the honourable judge erred in making a finding that the offence of theft had been committed. It was argued that the evidence adduced showed that the appellants were *bona-fide* purchasers for value of the motor vehicle in question. It was further submitted that the evidence showed that the complainant voluntarily parted with the motor vehicle and gave it to one Jimmy *Rotich* and not the appellants.

5.Counsel for the respondent conceded to the appeal. However, he submitted that even if the charge sheet was defective, it was not incurably defective and this could be cured under ***Section 382*** of the Criminal Procedure Act. On the issue of Section 359 of the Criminal Procedure Act, counsel urged this court to find that it is the practice (except for cases involving robbery with violence) for a single judge to sit and hear appeals. Counsel also submitted and agreed with the appellants that there was no evidence on record sufficient to convict the appellants for theft under ***Section 268*** of the Penal Code since the appellants gave adequate explanation as to how they came in possession of the motor vehicle. It was submitted that from the record, one *Jimmy Rotich*, is the one who defrauded the complainant. Counsel for the State submitted that it was wrong for the learned Judge to enhance the sentence after meeting the complainant.

6.Having listened to the submissions by both counsels, this Court reminds itself that this is a second appeal. The duties of the court on a second appeal are well stated. The appeal lies on matters of law only.

7.The charge sheet states that on the 20th day of March 2010 at Nakuru Town within Nakuru district of

Rift Valley Province, the appellants jointly with others not before the court, stole motor vehicle registration number KBK 704 A make Toyota Pro Box valued at Ksh. 600,000/= the property of ***Priscilla Wanjiku Mwangi***. In the alternative, the appellants were charged that on the 6th day of April 2010 at Nairobi city centre within Nairobi area, jointly and otherwise than in the course of stealing dishonestly retained a motor vehicle registration KBK 704 A make Toyota Pro Box knowing or having reason to believe it to have been stolen or unlawfully obtained contrary to ***Section 322 (2)*** of the Penal Code.

8.The trial magistrate convicted the appellants on the main count for the offence of stealing a motor vehicle and sentenced them to a term of 2 years imprisonment. The learned Judge upheld the trial magistrate's conviction but enhanced the sentence to a term of 4 years terming the 2 years as too lenient.

9.We have listened to the submissions by the appellants and there are two issues for consideration. Is the alleged misconduct by the judge proved and if yes, does this render the appeal conducted at the High Court a nullity. If the allegation of misconduct is proved or not proven, should this court determine the merits of the appeal and take into account the submissions by both learned counsels on merit" It is our view that if the alleged misconduct on the part of learned Judge is proved, this goes to the root of the entire proceedings in the High Court. What evidence is there on record to support the allegation of misconduct."

10.The alleged misconduct is that the learned Judge gave audience to the complainant in the absence of the appellant. We have perused the record of proceedings before the High Court. The proceedings before the court on 3rd February 2012 is relevant at page 194 of the record. The record shows that on this date, Mr. Waithaka counsel for the appellant asked the learned Judge to indicate whether the court met the complainant in chambers. The response from the learned Judge as recorded at page 195 of the record is that he confirms having met the complainant in chambers in the presence of a state counsel by the name *Mr. Omwenga*. The record does not indicate when the learned Judge met the complainant in chambers. There is no record as to what transpired and why the meeting did take place. What say we about this record" When a judge takes the seat of justice, he must be like Caesar's wife – beyond suspicion.

11.Having perused the record on pages 194 to 195 we are satisfied that the procedure adopted by the learned Judge in meeting the complainant is improper. This lapse of procedure goes to the root of the appeal that was conducted by the superior court and *ex debito justicia* vitiates the entire proceedings. (**See *R - V- RICHMOND CONFIRMING AUTHORITY* [1921] 1 KB 248).** Article 50 (1) of the Constitution entitles an accused person to a fair and public hearing. Article 50 (2) (f) entitles an accused person to be present when being tried. The procedure adopted by the learned Judge in meeting the complainant in the absence of the appellants fell below this constitutional threshold. Justice must not only be done but must be seen to be done. We appreciate the candour and transparency of the learned Judge in putting on record this matter. We draw no inferences in relation to the audience given to the complainant. The proceedings before the High Court judge is hereby declared a nullity.

12.Having declared the proceedings before the High Court a nullity, we are constrained to determine whether we should order that the appeal be heard afresh or whether we should determine this appeal on merits and re-evaluate the evidence that was tendered before the trial magistrate. Making an order for re-hearing of the appeal *de novo* would waste judicial time and unnecessarily prolong the criminal trial of the appellants. **Article 50 (1) (e) of the Constitution** provides that every accused person has the right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay. Bearing in mind the foregoing Constitutional provision, we are inclined not to order a re-hearing of the appeal but to re-evaluate the evidence before the trial magistrate.

13.The accused persons were charged with stealing a motor vehicle KBK 704 A, Toyota Pro Box.

14.***Priscilla Wanjiku Mwangi, (PW 1)*** stated that on 14th March 2010, she met a one Jimmy Rotich at Jamhuri Park car bazaar in Nairobi. She had gone to the bazaar to look for a buyer for her husband's car motor vehicle registration number KBK 704 A, Toyota Pro Box. The said Jimmy Rotich showed interest in the car and they exchanged telephone contacts. That the said Jimmy Rotich telephoned her. That on 15th March 2010, she drove the vehicle to Nakuru and Jimmy Rotich still showed interest in the vehicle. That on 19th March 2010, Jimmy Rotich telephoned and said he was busy in Nairobi and would like to purchase the car and pay for it by cheque. It was agreed that Jimmy Rotich would bring a bankers cheque for Ksh. 600,000/= which was the agreed purchase price. That on 20th March 2010, at 6.30 pm, Jimmy Rotich came with a banker's cheque no. 90345 for Ksh. 600,000/= and the payee was Priscilla Wanjiku Mwangi (PW 1). Upon receipt of the bankers cheque, PW 1 and her husband parted with the car and gave it to Jimmy Rotich with the original log book and open transfer form duly signed (see page 18 of record). A sale agreement was also drawn. The said Jimmy Rotich gave PW 1 and PW 2 a copy of his identity card which was attached to the sale agreement. PW 1 testified that Jimmy Rotich was not in court. PW 1 stated that she banked the bankers cheque on 22 March 2010. The Bank manager called her and informed her the cheque was dishonoured. That she reported the matter to Nakuru Police and on 19th April 2010, she saw the vehicle at Nairobi Central Police Station. She was informed that two people had claimed the vehicle and this were the 1st and 2nd appellants. During cross examination, PW 1 stated that Jimmy Rotich gave her the bankers cheque and not the accused persons. She also testified that the bankers cheque looked genuine and she took the vehicle and gave it to Jimmy Rotich.

15.***James Mwangi Kamau, (PW 2),*** testified that the motor vehicle was registered in his name and he is the husband to PW 1. That on 20th March 2010, he came to Nakuru and in the company of PW 1 met Jimmy Rotich who presented them with a fake bankers cheque of Ksh. 600,000/=. Believing the cheque to be genuine, he gave Jimmy Rotich his PIN number, copy of ID, an open motor vehicle transfer form duly signed, the original log book for the vehicle and parted with the car.

16.PW 3 police constable Kennedy Opiti stated that on 26th March 2010, PW 1 made a complaint that a motor vehicle KBK 704 A, Toyota Pro Box, had been stolen. That the vehicle had been recovered by officers from C.I.D central Nairobi and taken to Central Police Station in Nakuru. That two people, 1st and 2nd accused, came to claim the vehicle and he arrested them and charged them in court. That the 1st appellant (1st accused) stated he bought the vehicle from the 2nd appellant (2nd accused). The 2nd appellant said he bought it from a one Joseph Odhiambo.

17.The 1st appellant in his defence stated that on 26th March 2010, Mr. Njuguna (2nd appellant) called him telling him he had a client with a vehicle to sell. The vehicle was registration no. KBK 704 A Toyota Pro Box. They agreed at a price of Ksh. 429,000/=. That on 26th March 2010, he paid for the vehicle having conducted a search at Kenya Revenue Authority and the said Njuguna gave him the original motor vehicle log book and a sale agreement between Prisiclla Mwangi and Joseph Otieno Odhiambo. That the said Njuguna had come with Anne Manyasia who was paid a cash transfer at Equity Bank of Ksh. 330,000/=. The said Anne Manyasia had authority of Joseph Otieno to collect the money. The photocopy of Anne's ID Card was produced in court being ID No. 22197200. The 1st appellant testified that on 30th March 2010, he went to KRA offices and transferred the motor vehicle into his names and paid Ksh. 2,525/= and he was given a new log book. The 1st accused completed his testimony that he did not steal the vehicle but was a purchaser for value. In cross-examination, the 1st accused stated he paid Ksh. 330,000/= to the owner through Ms Anne Manyasia and Ksh. 99,000/= to Mr Njuguna (2nd appellant, see pages 44 - 45 of the record).

18.The 2nd appellant testified that he runs a business of buying and selling electronic goods and

vehicles. That he places advertisements in newspapers promising to pay cash for electronic goods and vehicles purchased. That on 23rd March 2010, arising from the advertisements, he was called by a one Joseph Otieno who stated he had a Toyota Pro Box vehicle for sale. That he negotiated with Joseph Otieno a price of Ksh. 330,000/= and looked for a buyer in order to get a commission. He got a buyer who is the 1st accused and agreed at a price of Ksh. 429,000/=. That the said Joseph Otieno stated the money should be paid to his wife Anne Manyasia. That they went to Equity Bank Tea Room branch and the 1st accused transferred the sum of Ksh. 330,000/= to Anne Manyasia and Ksh. 99,000/= to him as his commission. That the said Joseph Otieno had written a letter authorizing Anne Manyasia to be paid the sum of Ksh. 330,000/=. (See pages 41 to 43 of record).

19.The trial magistrate had all the above evidence before her. Is there an error of fact or law in evaluating the evidence" The accused were convicted of theft of a motor vehicle. Was there conclusive evidence that the ingredients of the offence was disclosed by the testimony adduced"

20.The testimony of the 1st accused is that he was a bona fide purchaser for value of the motor vehicle KBK 704 A Toyota Pro Box. The 1st accused (1st appellant) tendered in evidence proof that he paid the sum of Ksh. 429,000/= by way of bank transfer from his Equity Bank account to a one Anne Manyasia and Mr. Njuguna. We find that both the trial magistrate and the High Court judge erred in failing to take this evidence into account. The testimony of the 1st appellant in respect to this payment was not controverted. We find that it was an error to ignore this material evidence which is inconsistent with theft.

21.The trial magistrate and the learned Judge erred by ignoring material testimony of PW 1 (complainant) and PW 2 that they voluntarily parted with the motor vehicle KBK 704 A upon receipt of a bankers cheque from a one Jimmy Rotich and that they sold the said vehicle to the said Jimmy Rotich. The testimony by both PW 1 and PW 2 is that the 1st and 2nd appellants were not the ones who received the motor vehicle from them. PW 1 testified that none of the appellants was Jimmy Rotich to whom they gave the motor vehicle. This testimony is incompatible with the guilt of the appellants since they are not the persons who received the vehicle from the complainant with intent to steal. Neither were they the persons who gave the complainant the worthless cheque. We find that the trial magistrate and the learned Judge erred in ignoring this item of evidence.

22.Both the trial magistrate and the learned Judge erred by ignoring the issue of *mens rea*. Was there intent to steal the motor vehicle by the appellants. Both the 1st and 2nd appellants testified that when a Mr. Joseph Odhiambo indicated that he was selling motor vehicle KBK 704 A, the first cause of action they took was to conduct a search at KRA with the Registrar of Motor Vehicles. The search results were tendered in evidence before the trial magistrate and the judge (see page 41 of record). The search results indicated that the said Joseph Odhiambo was the registered owner of the vehicle. We find that the effort of the appellants to conduct a search as to the ownership of the vehicle is inconsistent with their having *mens rea* to steal the said vehicle. The vehicle was registered in the name of Joseph Odhiambo who they paid and with whom they signed a sale agreement. Coupled with the fact of payment of the sum of Ksh. 429,000/= for the vehicle, we find that no *mens rea* on the part of the appellants was proved in relation to the offence of theft of motor vehicle KBK 704 A Toyota Pro Box.

23.Was there evidence before the trial magistrate and the honourable judge to show that the appellants were part of a sales racket or a gang. The judge was correct in finding that Jimmy Rotich knew very well enough that the cheque issued to PW 1 was a worthless piece of paper and he had a motor vehicle for free. We find that this is sufficient *mens rea* on the part of Jimmy Rotich. Could this *mens rea* be transferred and be imputed on the appellants particularly the 1st appellant who parted with the sum of Ksh. 429,000/=" The learned Judge at page 5 of the judgment states that this was a part of a grand fraud

by the appellants and their associates Jimmy Rotich, Joseph Odhiambo (and Anne Manyasia – Odhiambo's alleged wife). We find that the learned Judge erred by drawing an inference that the appellants were part of a grand fraud. There is no conclusive evidence pointing to an irresistible conclusion that the said Jimmy Rotich acted in association with the appellants when he issued the worthless cheque to the complainant in exchange of the vehicle. There is no evidence on record as to how Joseph Odhiambo came into possession of the vehicle and its original log book. If the judge had correctly directed his mind to the evidence that the 1st appellant had paid a sum of Ksh. 429,000/= after conducting an official search at the registrar of motor vehicles, he should have concluded that the 1st appellant was a *bona fide* purchaser of the motor vehicle for value. We find that the appellants have been able to give a reasonable and convincing explanation as to how they came into possession of the motor vehicle. The explanation given is incompatible with *mens rea* required for stealing of motor vehicle KBK 704 A Toyota Pro Box. The explanation is incompatible with the guilt of the appellants. The learned Judge erred in drawing inferences in relation to the price paid to Joseph Odhiambo of Ksh. 330,000/=.

24.The upshot of the above is that we allow the appeal of each appellant, quash the conviction and set aside the sentence. The appellants shall be released from prison forthwith unless they or any of them is otherwise lawfully held.

Dated and delivered at NAKURU on this 12th day of April, 2013.

P. KIHARA KARIUKI

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JUDGE OF APPEAL

FATUMA SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR