REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 502 & 503 OF 1974

CHAAMA HASSAN HASA

MOHAMED HERSHI …..…....…….APPELLANT

VERSUS

THE REPUBLIC……..…...……RESPONDENT

JUDGMENT

Trevelyan J The two appellants, Mohamed Hershi (the first appellant), and Chaama Hassan Hasa (the second appellant), were charged with a man named Mutiga, with the theft, at Nairobi, on the 11th/12th March 1974 of a motor vehicle described as a Toyota Land Cruiser. They were also charged, in the alternative, with handling by way of receiving it, at Thika, on 13th March, ie a day or so later. Each of the three men denied the charges. The prosecution did not attempt to prove that the vehicle was stolen within the period mentioned in the charge; little or no attention was, throughout the trial, paid by anyone to the matter of time; but it was established that the vehicle was stolen at some time on 11th March, after its owner had parked it outside his house, or some time on the morning of 12th March before he found that it was missing.

Upon the prosecution evidence accepted by the trial magistrate, the vehicle was next seen at about 1.00 pm, or a little later, on the morning of 13th March, at a petrol station called the Juja Service Station some miles out of Nairobi on the Thika Road near the turn-off to Gatundu. The three men were in it, Mutiga being its driver. The second appellant asked the attendant, Sebastian Maina, to put some petrol into the vehicle's tank, and this was done. Just then, a police patrol of two corporals appeared on the scene, and the appellants disappeared. Mutiga was questioned, and said that two Somalis had hired him for Shs 200 to drive the vehicle for them, but he was, nonetheless, arrested. On 14th March, he took the police to a house in Eastleigh where he pointed the two appellants out as the Somalis to whom he had referred, and they were arrested.

Mutiga gave an enquiry statement, and the two appellants, charged with theft, but not with receiving, made cautioned statements to the police. Mutiga, denying that he stole the vehicle, said that he could not have stolen it because he was at home when the theft was carried out. He went on to say that at about 11.30 pm on 13th March (he must have meant 12th March) the two appellants whom he knew only "through face" hired him, for Shs 200, to drive them to Gatundu. He went on: I entered the vehicle and asked for the ignition key, they told me that their brother went with the ignition key to Mogadishu. I

asked them how am I going to drive? One of them connected wires and the car started and I started the journey. On arrival at Gatundu gate, the police inspected the car and refused the entry

As a result of which they changed direction, and, following a stop of about fifteen minutes, went to the service station as they were short of petrol. The first appellant said that he did not steal the vehicle and could not have done so because he was not in Nairobi on "the date mentioned", and the second appellant said much the same thing, adding, "I was in Lodwar".

Mutiga, going upon his defence, made an unsworn statement pretty well in line with what he told the police, and the appellants each gave evidence on oath. The first appellant told the Court that he was a livestock dealer living in Uganda, adding:

On 11th March 1974 I was in Kitale. I was there for two nights. Night of 11th March I spent in Bismilali Hotel, Kitale. This is cash sale for money paid by me … I came to Nairobi on 13th March at about 10 am. … On 13th March I stayed in a lodge in Nairobi owned by Ismail Kasino and his brothers. That was where I was arrested.

He denied hiring Mutiga whom he said he had not seen before. He was subjected to very little cross-examination, and we can only detect one question specifically put to him about dates, which produced the answer,

"I was in Nairobi on 13th March".

The hotel keeper, a man called Osman Weiss confirmed having issued the cash sale slips. He told the Court:

On 12th March [the first appellant] left my hotel I think between 6.00 and 6.30 pm. I did not see [the first appellant] leave my hotel with his bag. Between 6.00 and 6.30 pm I issued [a cash sale slip] to [the first appellant] on 12th March 1974. I left [the first appellant] there in the hotel. I saw him.

He said that he knew the first appellant because he often came to his hotel being his "customer for a long time". He, too, was cross-examined very little. Again we can detect only one question about dates, which produced the answer, "On 11th March this year I checked all the bedrooms. I did so [at] 10.30 pm".

Another man, Mohamed Ahamed, also gave evidence for the first appellant. He told the Court:

I came with him from Kitale on 12th March. I gave him a lift in my truck. I left Kitale at 3 am. Dropped [the first appellant] at Eastleigh at about 11 am on 13th March. and, in cross-examination, "Met the first appellant in Kitale at 10 pm on 12th March. We met in a hotel. I know him." The evidence of neither of these witnesses was, on the face of it, for rejection, and it supports what the first appellant told the Court.

The second appellant told the Court that he did not hire Mutiga to drive for him, nor was there any reason for him to have done so. He knew how to drive and had a valid licence allowing him to do so. It is true that, in evidence-in-chief, he said, "I arrived in Nairobi on 11th March," but we have some doubt as to whether this was not, albeit innocently, wrongly recorded for in cross-examination he said, "I arrived in Nairobi on the night of 12th March", he had earlier told the police that on the night of 11th March he was in Lodwar, and, with so few questions being asked in cross-examination, why would the prosecutor have wished to question evidence which could be said to fit in with his case? We think it right to mention that the date, as recorded, has been over-written though the original entry may well have read 11th March as well.

The trial magistrate began his judgment by saying:

The three accused Alex Nyamu, Mohamed Hershi and Chaama Hassan are jointly charged with stealing a motor vehicle, contrary to section 278A of the Penal

Code making no reference to the handling charge, and then, after setting out and dealing with so much of the evidence as he thought was needed, he made these findings which we now reproduce:

The first accused impressed me as a truthful young man. I accept his evidence that he was hired by [the first and second appellants] to drive the stolen motor vehicle.

He told all this to the police immediately after his arrest and what is more it is he who pointed out both [the first and second appellants] and got them arrested. Whether [the first appellant] was in Kitale and [the second appellant] was in Lodwar when the complainant's vehicle was stolen, the fact remains that both of them were in the stolen car with the first accused on the night of 13th March 1974. On this issue, the evidence of the first accused, though he was an accomplice, was corroborated by Sebastian Maina the petrol attendant at Juja Service Station. Accordingly, I find that both [the first and second appellants] were in recent possession of the stolen motor vehicle.

In the absence of any explanation by either of them to account for their possession of a recently stolen motor vehicle, I must find that it was they who stole it. Accordingly, I convict both of them of stealing the motor vehicle contrary to section 278A of the Penal Code. The first accused is acquitted to both the main and the alternative count.

There is much in the judgment with which we cannot agree. As we read what the magistrate said, he acquitted Mutiga because, while he considered him an accomplice, Mutiga nevertheless impressed him as a truthful young man who (a) gave his story to the police as soon as he was arrested, and (b) pointed the other two men out. We find it difficult to follow the magistrate's reasoning and while we are not, in these appeals, primarily concerned with Mutiga, we will say something about him because the magistrate used what he said about the appellants to support their convictions. Mutiga's demeanour should have been tested before it was adopted; but no test was made. We ask, and we believe that we are guilty of no unfairness in asking, whether, had the magistrate made a proper test, he would necessarily have come to the same conclusion about him. There is the evidence of the two defence witnesses, there is Mutiga's statement that he only knew the two appellants by face, yet he was able to direct the police to where they were staying in Nairobi. There is the acceptance of a commission late at night, to drive a vehicle which had no ignition key or no great distance for Shs 200, and more besides. That he gave his story to the police soon after his arrest and pointed the two appellants out was immaterial.

But the magistrate should not, in any event, have used what Mutiga told the police and himself in considering the case against the appellants. As what Mutiga told the police was not in the nature of a confession, it was not for use as such: See *R v Ndaria s/o Karuki,* (1945) 12 EACA 84, *Miligwa s/o Mwinje v R* (1953) 20 EACA 255, *Kamweli s/o Nguku v R* [1960] EA 164, *et alia*, whilst what he told the magistrate was also not for use as such as it was given without benefit of oath. In its earlier decisions, as appears from such cases as *R v Ndaria s/o Kuruki, supra*, and *R v Ramji Hirji* (1946) 13 EACA 127, the Court of Appeal held that an unsworn statement at a trial could, if it were a confession, but could not if it were not a confession, be taken into consideration against a co-accused. But in its more recent decision, such as those given in *Patrisi Ozia v R*, [1957] EA 36, *Ezera Kyabanamaizi v R* [1962] EA 309 and *Usi v Republic of Uganda* [1973] EACA 467, it was held that an unsworn statement by an accused is simply not evidence against his co-accused at all, nor does it amount to accomplice evidence capable of being accepted after corroboration. We think that we have to follow the latter of the two lines of cases, but whether we apply the one or the other is of no importance, because what Mutiga told the magistrate exculpated, and was intended to exculpate, himself.

In the result all that the magistrate had to go on against the two appellants was the evidence of the petrol attendant. Believing as he did, though wrongly as we shall show, that the appellants were found in possession of the vehicle at the service station, the magistrate purported to apply what is generally referred to as the doctrine of recent possession, often expressed in this way: that where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining).

But this doctrine does not apply to all the cases. What has been laid down is that, where it is proved that property has been stolen and very soon after the stealing the accused has been found in possession of it, it is open to the tribunal of fact to find him guilty of stealing, or of handling it by way of receiving: see *R v Seymour* (1954) 38 Cr App Rep 68; the possession may, indeed, point irresistibly to his having committed other offences as well, but this does not now concern us (and does not need our consideration). Whether the accused should or should not be convicted, depends, not simply on his possession, but on all the facts since such possession is but one aspect of circumstantial evidence, the sum total of which must be unexplainable upon any reasonable hypotheses other than that of the guilt of the person charged, before a conviction can be recorded. We think the trial magistrate may have fallen into his very serious error by a misunderstanding of what was said in *R v Aves* (1950) 34 Cr App Rep 159. Aves was charged with receiving, and, in delivering the judgment of the appeal court which reviewed his conviction, Lord Goddard CJ said:

Where the only evidence is that an accused person is in possession of property recently stolen a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt as to whether he knew the property was stolen, they should be told that the case has not been proved, and therefore the verdict should be not guilty.

I may add this as an addendum to the formula above stated: If there is evidence that [the] prisoner was in possession of property recently stolen and other evidence as well which tends to show guilty knowledge, then the chairman should direct the jury so far as they are dealing with recent possession in the terms which I have mentioned, and then go on to deal with the other evidence against the prisoner, if there is any, which may or may not be consistent with the explanation, if any, which he has given.

As reported, the judgment has just two paragraphs, and it caters for just two situations. The first paragraph spells out the formula to be applied where the only evidence against the accused person is his possession of property recently stolen, and the second paragraph provides for cases where, in addition to that possession, there is also other evidence which tends to show guilty knowledge, ie there is other evidence against the accused, as well. It does not cater for a situation where the other evidence is not against, but in favour of, the accused. In such a case, whether a presumption of guilty from possession does or does not arise will depend on all the facts. If it does arise, *R v Aves* is for application; if it does not, it has no application. Let us, then, apply the foregoing to the facts of the instant appeals.

Recalling that the basis of the case against the two appellants was that they were principal offenders by actually stealing or handling the vehicle themselves and that the burden was throughout on the prosecution to prove the appellants' guilt, let us take the charges separately. The theft was laid as having been committed at Nairobi on the night of 11th/12th March, but was only proved to have been committed at some time between an unknown moment on the former, and an equally unknown moment, on the latter day. As the magistrate did not reject that "[the first appellant] was in Kitale and [the second appellant] was in Lodwar when the complainant's vehicle was stolen", he did not rule out that they may have been in those places and so it was not proved that the appellants stole the vehicle either at the time charged or in the wider period spoken of by the complainant. Indeed on the evidence of the first appellant, supported as it was by his two witnesses, he could not have stolen it, unless as is most unlikely, he made a flying visit to Nairobi on 11th March and then returned to Kitale, which would have taken several hours to accomplish and there was, in any case, no point in his returning to Kitale if he was intending to get someone to drive the vehicle for him on the night of 12th March. And the second appellant could also not have stolen the vehicle if, as he says, he did not come to Nairobi until the night of 12th March, having been in Lodwar on the night of 11th March unless he, too, made an unlikely flying visit to Nairobi earlier on 11th March or some time on 12th March, but there was no point in his having done so either. The handling was laid as having been committed at Thika on 13th March, but on the evidence of Mutiga would have been committed probably at Nairobi, at some time between when the vehicle was parked on 11th March, and 11.30 pm on 12th March when Mutiga says he was engaged to drive it. This covers, if not all the period in which the theft must have been committed, almost all of it. Accordingly, on the magistrate's findings, if the two appellants might have been, the one at Kitale and the other at Lodwar, it was not proved that they handled the vehicle within those times either, and what we have said about the

appellants' whereabouts in relation to the theft charge also applies here. But, then, there is the period between 11.30 pm on 12th March and 1.30 am on 13th March to consider. So far as the first appellant is concerned, his witnesses say that he was in Kitale at 10.00 and 10.30 pm on 12th March and at 3.00 am on 13th March, so that it is highly unlikely that he could have been in Nairobi at 11.30 p.m. on 12th March or at Thika at 1.30 am on 13th March, and he could not have handled the vehicle. As for the second appellant, one wonders whether, if he did handle the vehicle, he would have told the magistrate that he came to Nairobi on the night of 12th March it being alleged that he handled the vehicle at 1.30 am on 13th March. But if he was in Nairobi on that night, he could have handled it. Even so, he cannot be convicted of having done so.

The petrol attendant may, indeed we believe must, have been wrong when he said that the first appellant was one of the three men in the vehicle at his petrol station, and, if that is so, he may also have been wrong when he said that the second appellant was one of them. But leaving that aside, his identification, and it is to be remembered that we only have his identification, is suspect for another reason. He told the Court that he recognized the three men when they were yet inside the vehicle. But, when Mutiga cross-examined him, he said, "I did not see who was driving the vehicle". He did say that the second appellant asked for the petrol, but if he did not see the driver, the man whom he was most likely to have approached, it is not safe to say that he saw, and could recognize, its other occupants.

We have one more thing to say. Bearing in mind that the police only charged the appellants with theft, and that the magistrate, for all that acquitted Mutiga on both charges, prepared his judgment, as its opening paragraph shows, only with the theft charge in mind, the handling charge may, dring the trial have been overlooked, so that, at all events from the time when they were put on their defence, the appellants may not have realized that they were facing more than the one charge, ie a charge of theft. We would, in the circumstances in any case, have been hesitant indeed in considering the entering of convictions on the handling charge.

Dated and Delivered at Nairobi this 2nd Day of December 1974

E. TREVELYAN

…....……

JUDGE

A.R.W HANCOX

…….....…

JUDGE