

KENYA / JUDGMENT

## Okelo v Republic [1987] KECA 89 (KLR)

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COURT

Court of Appeal

BEFORE

JO Nyarangi, HG Platt, JM Gachuhi

CASE / FILE NUMBER

Criminal Appeal 1 of 1987

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Okelo v Republic (Criminal Appeal 1 of 1987) [1987] KECA 89 (KLR) (19 June 1987) (Judgment)

Albert Olwelo Okelo v Republic [1987] eKLR

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[1987] KECA 89 (KLR)

Republic of Kenya

In the Court of Appeal at Kisumu

Criminal Appeal 1 of 1987

JO Nyarangi, HG Platt & JM Gachuhi, JJA

June 19, 1987

Between

Albert Olwelo Okelo

Appellant

and

Republic

Respondent

## Judgment

1.The appellant was convicted of the theft of a motor vehicle contrary to section 78A of the Penal Code and sentenced to two years' imprisonment together with three strokes of corporal punishment. The appellant had been charged on a first count of stealing a motor vehicle as the fifth accused in that on January 9, 1984 at Kaloleni Village, in Kisumu township, jointly with others not before the court stole a Peugeot 504 motor vehicle, registration KLS 176, valued at Kshs 175,000, the property of Joshua Anyango Ogutu.

2.In a second alternative count, the appellant and one Benson Joseph Nyamwaya were charged with handling stolen goods contrary to section 322(2) of the Penal Code, in that on January 21, 1985 at Kochogo Village, in Kisumu District, the appellant and Benson jointly handled stolen property otherwise than in the course of stealing in that they received four wheels, four doors, three seats and three carpets all being spare parts of motor vehicle registration KLS 176, knowing or having reason to believe them to be stolen or unlawfully obtained.

3.It will be seen that on the first count, Zablon Pedo Ogola, Charles Ouma Odongo, James Odhiambo Ouma, were the other three accused charged with Benson Joseph Nyamwaya and this appellant concerning the theft of the vehicle on January 9, 1985. Zablon, Charles and James were related and it was found that Zablon had undertaken to repair the vehicle on January 9. In the course of repairs he converted the vehicle to his use by taking the vehicle to the home of Charles, on January 10, 1985. It was kept outside the home under a Mango tree until January 18, 1985. During these eight days Zablon and the son of Charles, namely James Odhiambo Ouma, drove the vehicle each evening. Zablon is the brother-in-law of Charles and thus related to Charles and James. On January 20, 1985 Zablon employed Francis Obura Misito (PW 3) to come with him to a certain place, in fact the house of Charles, where he was paid Ksh 80 to cut up the body. By this time there were no seats, wheels or doors. There was only the shell of the body. That was because on January 18, a neighbour of Charles Ouma Odongo saw this appellant as one of the mechanics who dismantled the car. They put the seats in a place of hiding in branches of the mango tree. Then later on the wheels and the seats were placed in a greenish vehicle and driven away at midnight by persons including this appellant.

4.This appellant gave sworn testimony, in the course of which he explained that he was a mechanic at Ahero, and that Benson Nyamwaya was his customer. It was his case that Benson had brought him four doors, four wheels, three seats and a carpet, and requested him to take these spare parts to Benson's home, which the appellant had done. He was aware of an agreement Exhibit 14 between Zablon and Benson dated January 19, 1985. This appellant agreed that he had signed that document, but only at the request of Benson, as an acknowledgment of the spare parts which Benson had asked the appellant to deliver to Benson's house. The appellant protested that he did not then know, that he was signing an agreement between Zablon and himself, for himself to buy the spare parts for Kshs 2,500 from Zablon. The agreement was in the handwriting of Benson. The appellant had never doubted Benson but he found now that Benson had cheated him.

5. In the course of these proceedings, it came to light during investigations between January 19 and 23, 1985 that the death had occurred of Benson Nyamwaya in a traffic accident, with the result that the charges against him abated, and the appellant remained alone on the second alternative count.

6. The learned trial magistrate made the following findings of fact:- 1) I find it as a fact that the 1st accused stole the complainant's vehicle from the possession of PW 2 on January 9, 1984 as he had taken it away without the knowledge and permission of PW 2. 2) the same stolen vehicle being brought to the house of the 2nd accused by the 1st accused when accused No 1, 2, 3 and 5 systematically dismantled it, and who all hid some of its parts in the branches of a mango tree. 3) I find this dismantling as having been done with a guilty knowledge on behalf of accused 2, 3 and 5 who I hold as accessories after the fact who aided and abetted the 1st accused in disposing of the vehicle on the mango tree and elsewhere such as burying the engine in a hole as seen in photograph 10m and the number plates being thrown into latrine in the same plot. 4) I find all the above as facts and I find accused No 1, 2, 3 and 5 guilty of stealing complainant's vehicle Peugeot Saloon KLS 176 as stated in count 1 and I convict them."

7. This surprising, though ingenious result, seems to have caught counsel unawares. On 1st appeal Mr Olago Aluoch seems to have understood that on those conclusions no offence had been disclosed in accordance with the charge-sheet. But he curtailed his appeal to the general ground that there was no evidence on the record to support the conviction and to the ground that the sentence was excessive. State counsel, however, took the point that the evidence on the record shows clearly, that the dismantling and the disposing of the components of the Peugeot had been done with guilty knowledge, so that Charles, James and this appellant, had been correctly held to be accessories after the fact. As such they were liable on the principle offence together with Zablon who was held to have stolen the vehicle.

8. The learned judge on first appeal contented himself with the issues of fact, and came to the conclusion that the appellant had been properly identified as taking part in the dismantling of the Peugeot. In his view the appellant had been unable to give an honest explanation of his part in this dismantling of the vehicle. It was the judge's view that the penalties imposed were not excessive for this "highly organized crime."

9. The appellant in his appeal challenges the facts as found by the lower courts. Having considered the record, we cannot find any ground upon which to say as a matter of law that those findings were wrongly arrived at. What strikes us as being the fundamental issue in this case, is whether it was open to the trial court to hold that the appellant was an accessory after the fact, and thus as liable for the theft of the vehicle as his co-accused Zablon. By inference the appellant complains that he was wrongly convicted.

10. It is necessary to consider the nature of the offence of being an accessory after the fact. Section 396(1) of the Penal Code provides that a person who receives or assists another who is to his knowledge guilty of an offence, in order to enable him to escape punishment, is said to be an accessory after the fact of the offence. Thereafter, section 397 of the Penal Code, provides that any person who becomes an accessory after the fact to a felony, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for three years.

11. In contrast an accessory before the fact is one of those persons dealt with in section 20(1) of the Penal Code. This section explains that when an offence is committed by persons who are deemed to have taken part in committing an offence they may be charged together with those who actually committed it. Such persons, apart from those who do or omit to do any act for the purpose of enabling or aiding another person to commit the offence; and those persons who counsel or procure any other person to commit an offence. Applying those provisions to the present case, as the trial magistrate found that the first accused Zablon stole the vehicle in question by himself and then later took it to the house of his brother-in-law, Charles, and that later on still Zablon, Charles, James and the appellant systematically dismantled the vehicle, he must have found that the appellant did not assist Zablon in stealing the vehicle. The appellant must have come in at the stage of dismantling the vehicle and disposing of its parts. It follows that it was not a pure error of language that the appellant was found to be an accessory after the fact, a mistake for a finding that he was an accessory before the fact, because he did not assist Zablon to commit the crime as envisaged by section 20 of the Penal Code.

12. If then the learned magistrate wished to consider the appellant an accessory after the fact, could he do so on the charges as they stood in the charge-sheet? Unfortunately, he could not. As section 396 of the Penal Code shows, being an accessory after the fact is a separate offence, neither theft nor handling, with its own type of punishment. It requires its own charge and particulars of the manner in which the offender is alleged to have received or assisted the other guilty person in order to enable the latter to escape punishment. Authority to that effect will be found in *R v Saidi Nsugbuga s/o Juma and Another*, (1941) 8 EACA 81 at page 82 where their Lordships observed:—"The first observation that we have to make is that the information is imperfect in that it fails to give any particulars of the manner in which the appellants made themselves accessories after the fact to the murder of Sabini."

13. Their Lordships went on to consider whether the lack of particulars had invalidated the trial, and in that case they held that the irregularity was curable. In this case unfortunately, there is no charge at all, and if the appellant was rightly found guilty of the offence of being an accessory after the fact, the charge of theft did not cover that offence, and nor did the charge of handling. The result would be that the appellant was found guilty of an offence with which he had not been charged, and there is no provision in the Criminal Procedure Code from section 179 to 191, whereby the appellant may be convicted of the offence of being an accessory after the fact, though charged with theft or handling. Though being an accessory after the fact may be minor, it is not cognate to either of the other offences (*Cf Velezi Kashizha v Reg* [1954] 21 EACA 329). Moreover the appellant had not had the chance of defending himself on this charge. In fact,

unless we are much mistaken no one at the trial knew that the concept of an accessory after the fact would be resorted to, and we are surprised that it was not made the main thrust of the first appeal. However that may be, the possible scope of an accessory after the fact in defence or an appeal is well illustrated by the remarks in Russell on Crime, 12th Edition page 167 as follows:—"Since the crime of the principal offender and that of the accessory after the fact are quite distinct, the fact that that principal may have pleaded guilty or have been convicted, does not preclude the alleged accessory from asserting that no such felony was in fact committed and thus re-opening the question."

14.Ex hypothesi the appellant in this case was not the thief. But the charge permitted the case to be considered on the basis of handling. What then is the connection between handling and being an accessory after the fact as found by the learned magistrate? Handling is a different offence to that of being an accessory after the fact. Handling concerns knowing, or having reason to believe, that goods have been stolen which the offender receives or disposes of. Being an accessory concerns aiding any person to escape punishment knowing that that person is guilty of an offence. But the receipt of stolen goods might well involve the knowing that a person has stolen them, and therefore it may well be that a set of facts may be wide enough to encompass both offences. So for instance it was explained in Russell on Crime (12th Ed Vol II p 1139), that the bare receiving of stolen goods knowing them to be stolen did not make an accessory at common law. But if a party received the goods from the thief to keep the goods for him knowing them to have been stolen; or if he received goods to facilitate the escape or the thief knowing the goods to be stolen, or to furnish the thief with supplies out of the goods stolen or for the purpose of assisting the thief by concealing them, he may have committed the offence of handling or that of being an accessory after the fact. It is well to recall that the scope of the offence of being an accessory after the fact is defined in section 396(1) of the Penal Code does incorporate the ideas of receiving, relieving, comforting or assisting another person who has committed a felony under the Law of England. (See Paskazia D/O Kabaiye v Reg [1954] 21 EACA 359 at p 360).

15.Looking at the facts of this case, the handling charge concerns Benson and the appellant and their connection with the dismantling of the vehicle. It would appear that the prosecution envisaged that Benson and the appellant were merely connected with the disposal of the stolen goods, and not with assisting Zablon to escape punishment by way of disposing of the goods. On the other hand the learned magistrate seems to have thought that the appellant and others were assisting Zablon. It appears that Zablon had been unable to sell the vehicle as a whole, and that parts of the vehicle were being sold off to get something out of the theft, while the remains of the vehicle were to be destroyed so as to be unidentifiable. There was also the presence of Zablon during the dismantling, and there was the agreement with Zablon signed by the appellant to purchase spares. There was evidence therefore which might have supported a charge of being an accessory after the fact, or it might be that the learned magistrate could have found him guilty of handling in the circumstances of this case.

16. In view of the fact the appellant has almost served the sentence imposed upon him it would seem unfair to convict him of the alternative charge of handling, with its minimum sentence of seven years' imprisonment. That would provide a punishment out of keeping with the punishment imposed on all the other accused including the thief, and it would lead to a conviction which appears to have been deliberately not chosen by the learned magistrate. On the other hand, as we have said, we cannot resort to the magistrate's choice of being an accessory after the fact without a charge to that effect. Consequently it appears to us that as the conviction stands, it is null and void it should be set aside.

17. Accordingly, we quash the conviction, set aside the sentence imposed and order the appellant to be set at liberty forthwith unless lawfully held.

18. But we wish to state that in future where it is clear, in this case, that the thief is as different person altogether than the person dealing with the stolen property, it would be wise to provide for an alternative charge of being an accessory after the fact to the charge of handling stolen property. (see section 136 (d) of the Criminal Procedure Code and R v Saidi Nsubuga (1941) 8 EACA at p 82). The problem is that being an accessory after the fact requires the proof of a wider set of circumstances than that required to prove handling, so that section 179 of the Criminal Procedure Code cannot be successfully operated. It is not therefore a case, where the particulars in handling have a combination of some particulars, which reduce the offence to the lesser offence of being an accessory after the fact; nor is it a case of proving facts which constitute a minor offence which is cognate to handling. Had the learned magistrate realised that he was aiming at the accused being an accessory after the fact before the end of the prosecution case, and had called for an amendment of the charge, so as to include a charge of being an accessory after the fact, he might well have convicted the appellant lawfully. We would only point out as a final comment the corporal punishment awarded would have been ultra vires under section 397 and 322 of the Penal Code. Thus in any event the order for corporal punishment would have had to be set aside.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JUNE 1987. J.O. NYARANGI JUDGE OF APPEAL..... H.G. PLATT JUDGE OF APPEAL..... J.M. GACHUHI JUDGE OF APPEAL

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