

CA NO : 46/02

**IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANAPROVINCIAL DIVISION)**

In the matter between:

NGAKANTSIMICHAEL KGOSIEMANG

APPELLANT

and

THE STATE

RESPONDENT

MMABATHO

NKABINDEJ & LEEUWJ

JUDGMENT

FOR THE APPELLANT: M M LITHEKO

FOR THE RESPONDENT : M D MOEKETSI

DATE OF HEARING: 7 FEBRUARY 2003

DATE OF JUDGMENT : 20 FEBRUARY 2003

JUDGMENT

LEE U

WJ:

1. The Appellant was arraigned, convicted and sentenced in the Magistrate Court Thaba Nchu of contravening section 66 (1) of National Road Traffic Act, No 93 of

1996 (Road Traffic Act). It is alleged that on the 15th November 2001, he wrongfully and unlawfully used motor vehicle BRW 647 FS (Motor vehicle) without the consent of Samuel Moroka, the Transport Control Officer of the Barolong Tribal Authority. The appeal is against conviction only.

2.The motor vehicle is owned by the Barolong Tribal Authority. Samuel Moroka gave the Appellant permission or authority to drive the motor vehicle on official business to Zone 2 in the Thaba Nchu area.

3.The Appellant failed to return by 16h00 of the same day as arranged. On the evening of the same day, Mr Moroka was called to a scene at Sanaspos where the motor vehicle was involved in an accident and was damaged. The Appellant was not present at the scene but reported to the office three (3) days after 15th November 2001. He did not report the accident to Samuel Moroka.

4.The Appellant, represented by Mr Litheko, did not testify under oath but called a witness, Robert Senoge. His version is to the effect that the car was stolen from him and that he was not present when it was involved in an accident. Mr Robert Senoge testified that he saw a certain Mr Zungu driving the vehicle when it was involved in an accident; that the said Zungu ran away from the scene after it had occurred. He further testified that he met the Appellant at an hotel, and informed him that the car was stolen from him in Bloemfontein. Samuel Moroka testified that he neither gave Appellant authority to drive to Bloemfontein nor Sanaspos, which places are outside Thaba Nchu.

5.It is not in dispute that the Appellant's authority was to use the motor vehicle to travel to Zone 2, in Thaba Nchu which is approximately 10 kilometres from the office. The version of the Appellant, through his witness, is that the vehicle was stolen from him in Bloemfontein, which trip was not authorized by Samuel Moroka. The

conduct of the Appellant, of not reporting the Theft immediately to the Tribal Authority and his failure to report the theft to Samuel Moroka, is indicative of dishonesty and lack of credibility on his part. The Appellant decided not to testify under oath despite the fact that the State had proved a prima facie case against him. This is a factor correctly taken against him by the Learned Magistrate. Compare Zulu & Another SACR 1998 (1) 7 (SCA) at 14 d.

6.I am satisfied that the State has discharged its onus and find that the Appellant, by using the motor vehicle beyond the authorized journey, did contravene the abovementioned statute, and was correctly convicted.

7.Mr Litheko, raised the point that the Appellant was wrongly charged with contravention of section 66 (1) of the Road Traffic Act. Mr Moeketsi, conceded, and rightly so, that the correct section applicable is section 66 (2) of the Road Traffic Act. The section provides that:

“No person shall ride in or drive a vehicle without the consent of the owner, operator or person in lawful charge thereof.”

8.The appropriate amendment ought to have been effected in terms of section 86 of the Criminal Procedure Act No 51 of 1977 (Criminal Procedure Act) by the Court a quo. But in terms of section 304 (2)(c) (iv) read with section 309 (3) of the Criminal Procedure Act, this Court has the power to effect such an amendment. The Appellant will not suffer any prejudice as a result of such amendment.

9.I accordingly dismiss the appeal. The conviction is confirmed, but amended to read as follows:

“Guilty of contravention of section 66 (2) of the National Road Traffic Act (Act 93 of 1996).

M M LEEUW

JUDGE OF THE HIGH COURT

I agree.

B E NKABINDE

JUDGE OF THE HIGH COURT