



**Republic v Chisutia (Criminal Appeal E089 of 2022)
[2024] KEHC 11688 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E089 OF 2022
SC CHIRCHIR, J
SEPTEMBER 26, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER CHISUTIA ACCUSED

*(Being an Appeal from the Judgment of Hon.C.N Njalale delivered on
23rd November 2022 in Butali SRM Criminal case No. 305 of 2020.)*

JUDGMENT

1. The Appellant was charged with stealing a Motorcycle Contrary to Section 278A of the [Penal Code](#).
2. The particulars of the charge were that on the 4th day of March 2020 at Ngarira Market, Shamoni Sub-Location in Kakamega Sub-County within Kakamega Sub-County jointly with others not before court stole Motorcycle registration number KMEY xxxU TVS Star red in colour 100 CC valued at Ksh. 94,000/= the property of Mukwano Sunguti Tito.
3. He was convicted and sentenced to 5 years imprisonment. He was aggrieved by the outcome and filed the present Appeal, while setting out the following grounds:-
 - i. That the Honourable Court erred in both Law and fact in holding that the Respondent had proved their case beyond reasonable doubts against the Appellant.
 - ii. That the Honourable Court erred both in Fact and Law in analyzing the evidence before itself and have arrived at the wrong finding.
 - iii. That the Honourable Court erred both in Law and Fact by awarding the Appellant an excessive sentence and/or failing to give an alternative sentence which was available to the Appellant.
4. The Appeal was canvassed by way of written submissions.



Appellant's Submissions

5. It is the Appellant's submissions that the prosecution did not prove theft, and that the Motorcycle was voluntarily handed over to the Appellant; and that the disappearance was reported to the police in any event. That, consequently, the disappearance of the motorbike was satisfactorily explained.
6. It is further submitted that though the charge sheet indicate that the Appellant stole the motor bike with others not before court, there was no evidence adduced to show that he stole the Motorbike with some accomplices.
7. On the alleged disappearance of the Appellant after the theft, the Appellant submits that the act was immaterial, as he was not a suspect then.

Respondent's Submissions

8. The Respondent submits that there was prove that the Motorcycle belonged to the complainant and there were witnesses who saw the Motorbike being handed over to the Appellant.
9. The Respondent further submits that there was no evidence of any robbery having taken place; that the Appellant did not report the theft until he was asked by PW1; that his disappearance for a period of 2 months following the disappearance of the Motorbike, suggest is culpability.

Analysis and Determination

10. This is a first Appeal and the mandate of this court is so review the evidence afresh, evaluate it and arrive at its own conclusions (Ref. *Eric Onyango v Republic* (2014) e KLR)
11. I have considered the evidence, the memorandum of Appeal and the Judgment of the Lower Court, and I have identified only one issue for determination, namely: whether the prosecution proved its case beyond reasonable doubt.
12. The Appellant herein was charged with theft contrary to Section 278A of the *Penal Code*. The elements of stealing is as set out in section 268 of the *Penal Code* as follows: -
 1. A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
 2. A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say -
 - a. an intent permanently to deprive the general or special owner of the thing of it;
 - b. an intent to use the thing as a pledge or security;
 - c. an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - d. an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - e. in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;



and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

3. When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
 4. When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
13. Section 278A then state that “ if thing stolen is a Motor vehicle within the meaning of *Traffic Act* the Offence is liable to imprisonment for 7 years”
 14. The Appellant’s argument that he was given the motor cycle as opposed to stealing it, I presume, flies in the face of the above elaborate definition of stealing, specifically under under section 268 (2) (a).
 15. The Complainant DW3 produced a Logbook and sales agreement both documents showing that he is the registered owner of the Motorcycle registration number KMEY xxx U.
 16. PW1 who was in control of the Motorcycle told the court he gave the motor cycle to the accused.
 17. The testimonies of above two witnesses remain intact at cross-examination. In any event I notice that the Appellant is not disputing the fact that he was given the motorcycle.
 18. Although the Appellant told the court that he was robbed of the Motorbike, the surrounding circumstances, on the contrary point to theft. The following fact as presented by the prosecution makes his defence implausible. These are the circumstances:
 - a. According to PW2 the Appellant borrowed the Motorcycle to ride it to go to Lukome. PW1, PW2 and PE4 were all then in Ngarira stage. The investigating officer told the court that the distance between the two centers is about 3.4 Kilometers. For such a short distance, from about 1 p.m , the previous day, the Appellant only made the return journey the following morning at 5 am. If he was covering a distance of 3kms away , what took him several hours to turn up. Indeed PW1 told the court that he waited for the Appellant’s return until 7.00Pm when he decided to go home.
 - b. It also emerged from the evidence of PW1, that they both went to make a report only after the Appellant arrived at PW1’s house. It follows that the Appellant had not made a report before. There was also no evidence that he had made a report of the alleged robbery.
 - c. PW1 told the court that the Appellant disappeared from home from March to May, 2020. The Motorcycle got lost in 4/3/2020 which places the Appellant’s disappearance on the same month, until May. This fact was not disputed by the Appellant by way of cross-examination save to state that his disappearance was immaterial. It he was innocent what was he running away from?
 19. I have considered the Appellant’s defence. He stated that he was robbed. I find his defence rather scanty and he never explained where he was for about 18 hours before making the report of the alleged robbery. What time was the alleged robbery for instance.? Despite having accepted that indeed he went with the complainant’s Motorbike, he failed to give an account of himself on what happened thereafter.



20. I am satisfied that both the direct and circumstantial evidence proved the charge of theft against the Appellant. His Appeal on conviction has no merit and it is hereby dismissed.

Sentence

21. Section 278 (A) of the penal code prescribes a maximum sentence of 7 years for a theft of a Motor vehicle.

22. Section 2 of the traffic Act (Cap 403, Laws of Kenya) defines a Motor vehicle to include any mechanically propelled vehicle with the exception of the vehicle running on a specially prepared way such as a railway or train way. Thus motorcycle is a motor vehicle for purposes of Section 278(A) of the Penal Code.

23. The Appellants complain is that the sentence was excessive and was not given an option of a fine.

24. By way of Mitigation ,the Appellant asked the court to forgive him. Which I take it to be a sign of remorse. The prosecution also stated that he was a first offender.

25. These are Mitigating factors and these Mitigating circumstances, I consider the sentence of 5 years against the maximum of 7 provided for, to be excessive. I hereby set it aside.

26. The section under which the accused is charged does not provide for an option of a fine, however section 26(3) of the penal code provides as follows: ‘ a person liable to imprisonment for an offence may be sentenced to a fine in addition in substitution for imprisonment’. The only exception is where the Law provides a Maximum sentence.

27. In the end the Appeal partially succeeds. I hereby sentence the accused to a fine of Ksh. 100,000/= or to 3 years imprisonment in the alternative.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF SEPTEMBER 2024.

S. CHIRCHIR

JUDGE

In the presence of:-

Godwin Luyundi – Court Assistant

Ms. Osoro for the DPP

Mr. Munyeno for the Appellant.

Appellant present

