



**Cheruiyot & another v Republic (Criminal Appeal E013 of 2023)
[2024] KEHC 13426 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13426 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E013 OF 2023
RL KORIR, J
OCTOBER 31, 2024**

BETWEEN

JULIUS KIPLANGAT CHERUIYOT 1ST APPELLANT

GIDEON KIPLANGAT RONO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Criminal Case Number E733 of 2022
by Hon. Kiniale L. in the Senior Principal Magistrate's Court at Bomet)*

JUDGMENT

1. The Appellants were charged with the offence of stealing a motor vehicle contrary to section 278A of the Penal Code. The particulars of the charge were that on 19th July 2022 at Aitong Market in Narok West Sub-County within Narok County, stole a motor cycle registration number KMG 438E valued at Kshs 155,950/=, the property of Watu Credit Company.
2. The Appellants faced an alternative charge of handling stolen property contrary to section 322 (1) (2) of the Penal Code. The particulars of the charge were that on 19th July 2022 at Aitong Market in Narok West Sub-County within Narok County, otherwise than in the course of stealing, dishonestly undertook the disposal of a motor cycle registration number KMG 438E having reason to believe to be stolen.
3. The 2nd Appellant was charged with the second count of giving false information to a person employed in the Public Service contrary to section 129A of the Penal Code. The particulars of the charge were that on 13th July 2022 at Chebunyo Location in Chepalungu Sub-County within Bomet County, informed a police officer, a person employed in the Public Service that his Bajaj motor cycle registration number KMG 438E 100cc that he took on credit from Watu Credit Company was stolen, information he knew to be false.



4. The Appellants pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case.
5. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellants and put them on their defence.
6. At the conclusion of the trial, the Appellants were convicted on the charge of stealing a motorcycle and were each sentenced to serve four (4) years imprisonment. The 2nd Appellant was further convicted of the offence of giving false information to a person employed in the Public Service and was sentenced to serve 6 months imprisonment. The sentences were to run concurrently.
7. Being dissatisfied with the Judgment dated 16th March 2023, the Appellants through their home-made Petitions appealed against the Judgement and relied on the grounds reproduced verbatim as follows:-
 - i. That, the learned trial Magistrate erred in law and fact in convicting me on evidence which did not meet the required standard of proof in accordance with the law.
 - ii. That the learned trial Magistrate erred in law and fact by relying on extrinsic evidence that were not adduced in court during the trial.
 - iii. That the learned trial Magistrate erred in law and fact by depending on evidence which was based on theory of conspiracy between me, the complainant (PW1) and PW2 that was not proved beyond reasonable doubt by the Prosecuting witnesses.
 - iv. That the learned trial Magistrate erred in law and fact by convicting me on charges that were not tallying and favourable.
 - v. That the trial Magistrate did not consider my mitigation and the circumstances of the case and arrived at the sentence which did not meet Article 50(2) of *the Constitution* of Kenya.
 - vi. That I wish to be present during the hearing of my appeal and I also request court proceedings.
8. This being the first appellate court, it has a duty to re-evaluate and scrutinize the evidence on record and draw its own independent conclusions. See *Mark Ouiruri Mose vs. R* (2013) eKLR.
9. I now proceed to analyse the Prosecution and Defence cases in the succeeding paragraphs.

The Prosecution's Case.

10. It was the Prosecution's case that the complainant (Watu Credit Company) sold motor cycle registration number KMG4 438E to the 2nd Appellant on credit. That on or about 12th July 2022, the 2nd Appellant reported to Chebunyo Police Station that his motor cycle had been stolen.
11. Cheruiyot Sang (PW2) from Watu Credit Company stated that he had received reports that stolen motor cycles were being sold in Narok County. That he found a motorcycle registration number KMFK 774E which appeared to have a fake license plate. PW2 stated that after running the frame number through their system, he discovered the motor cycle belonged to them under a different number plate (KMFT 168Y).
12. It was the Prosecution's case that Julius Ngoitik bought the said motorcycle from the 1st Appellant for Kshs 63,000/= in cash. Dickson Omoshi (PW3) stated that he was the 1st Appellant's broker and together with the 1st Appellant, they were engaged in the business of selling motorcycles. That he was the one who sourced for the buyer (PW4).



13. It was the Prosecution's case that with the help of PW3, police officers laid a trap for the 1st Appellant by suggesting that there was a potential buyer for another motor cycle. That the 1st Appellant and the 2nd Appellant came aboard motor cycle registration number KMFx 037X which appeared to have a fake license plate number. That when the frame number was run, it was discovered that the original license plate number was KMGA 438E, the subject motor cycle that the 2nd Appellant had reported stolen. It was their further case that the Appellants were promptly arrested.

The Appellants'/Defence case.

14. The 1st Appellant (DW1) denied committing the offence and that he had been framed. That on the material day, someone called him to buy him drinks and he boarded a motorcycle and when he met him, the other person showed him a motorcycle which he wanted to sell. DW1 further stated that the seller asked for cash and he had to go to an M-pesa shop to withdraw it. That he was then arrested by three police officers who claimed that he was selling a stolen motorcycle.
15. It was DW1's case that the police officers showed him a motorcycle that they had earlier on detained and its number plate which had been removed. That the police officers demanded money and threatened to charge him with the theft of the motorcycle if he didn't pay.
16. The 2nd Appellant (DW2) stated that his motorcycle had been stolen and he reported the same to Chebunyo Police Station and to Watu Credit Company. That he was later on called to Watu Credit Company where he was shown a motorcycle with a different number plate. DW2 further stated that he was asked to record a statement and when he finished, he was arrested.
17. Philip Kiptende (DW3) stated that on the material day, he called the 1st Appellant and told him that he had sheep for sale. That the 1st Appellant came and they agreed on the price. DW3 further stated that he wanted cash only and the 1st Appellant went to withdraw money. That the 1st Appellant later called him and told him that he had been arrested.
18. This Appeal proceeded by way of written submissions.

The Appellants' submissions.

19. Through his home made submissions filed in this court on 9th November 2023, the 1st Appellant submitted that he did not wish to contest the conviction but wished to submit on his sentence. The 1st Appellant submitted that he deserved a lesser sentence because the Prosecution lied about his conduct.
20. It was the 1st Appellant's submission that the Prosecution failed to show that he was a serial offender. That he was a first offender and the sentence passed by the trial court was harsh. It was his further submission that the trial court had no obligation to impose a custodial sentence as it could have imposed a fine.
21. The 1st Appellant submitted that the trial court did not consider his mitigation. That he had school going children and was the sole breadwinner. He further submitted that he was a business man who dealt with buying and selling of livestock.
22. The 1st Appellant pleaded with this court to reduce his sentence and give him a second chance in life.
23. The 2nd Appellant through his home made submissions filed on 30th October 2023 submitted that the Prosecution failed to provide material evidence in support of their case. That there were no photos taken at the scene to determine the type of motorcycle and those who were in its possession. The 2nd Appellant submitted that the Prosecution failed to give an explanation why the complainant (Watu Credit Company) conducted the investigations and not the police.



24. It was the 2nd Appellant's submission that the motorcycle was in the sole possession of the 1st Appellant. That the Prosecution did not prove its case beyond reasonable doubt. It was the 2nd Appellant's submission that the trial court did not consider his defence.
25. The 2nd Appellant submitted that the court erred when it sentenced him for four years yet the evidence showed that the motorcycle was sold to Julius Lotigo by the 1st Appellant.
26. Despite being granted time extension to file their submissions, the Respondent failed to do so.
27. I have gone through and given due consideration to the trial court's proceedings, the grounds of Appeal filed on 17th and 24th March 2023, the Appellant's written submission filed on 9th November 2023 and 30th October 2023. The following issues arise for my determination:-
 - i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Defence cast doubt on the Prosecution case.
 - iii. Whether the sentence preferred against the Appellants were excessive.

i. Whether the Prosecution proved its case beyond reasonable doubt

28. The elements of stealing are contained in Section 268 of the Penal Code which provides:-
 - (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.



- (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.
29. I am persuaded by Nyakundi J. in *Robert Onchwari Orina & another vs Republic* (2021) eKLR, where he held that:-

“.....For an accused person to be convicted of the offence under Section 268 of the Penal Code, it’s incumbent upon the prosecution to prove (sic!) that he or she dealt with the property of the complainant fraudulently without any claim of right or converts it into his or her own use, other than the general or special owner thereof. That intention is executed in a manner to deprive the rightful owner of the property permanently.

In *R v Jones* (1976) KLR 1 the Court observed that:

“On a charge of theft, it was necessary to prove a fraudulent taking or conversion without claim of right, and a person was deemed to have taken or converted money fraudulently if he did so without a claim of right and with intent to use it at his will, even if he intended to repay the money to the owner.”

Analysis

30. Isaiah Kiptoo Maritim (PW1) who worked for the complainant (Watu Credit Company) stated that they sold the subject motor cycle registration number KMGA 438E to the 2nd Appellant on credit. That they sold the subject motorcycle for Kshs 209,000/= and the company held on to the logbook until the loan was cleared. No. 240380 PC Chepkoech Langat (PW6) who was the investigating officer produced the logbook as P.Exh 3 and a copy of the loan agreement as P.Exh 2.
31. I have looked at the loan agreement (P.Exh 2) and confirmed that the 2nd Appellant had been issued a loan of Kshs 121,890/= for the purchase of the subject motor vehicle. A look at the log book (P.Exh 3) also confirmed that the subject motor cycle was registered in the name of Watu Nominees Company Limited, which was the complainant.
32. Additionally, the 2nd Appellant stated in his defence that when the subject motor cycle was stolen, he reported the theft to the police and to the complainant company.
33. From the above, there is no doubt in my mind that the subject motorcycle was sold on credit to the 2nd Appellant. As at the time of the offence, it is my finding that Watu Credit Company was the registered owner while the 2nd Appellant was its beneficial owner.
34. The Prosecution also had to prove that the Appellants fraudulently converted the use of the subject motorcycle and deprive it off its rightful owner, in this case, Watu Credit Company.
35. Dickson Omoshai (PW3) stated that he was the 1st Appellant’s broker and that they dealt with the sale of motorcycles. PW3 in conjunction with police officers Cheruiyot Sang (PW2) and Julius Lotigo (PW4) lured the 1st Appellant with a deal to sell a motorcycle. PW3 and PW4 testified that the 1st Appellant came with a motorcycle and was arrested. When PW3 and PW4 were cross examined, they stated that the 1st Appellant came and the 2nd Appellant came together and were jointly arrested. Cheruiyot Sang (PW2) also testified that the 2nd Appellant was with the 1st Appellant when they brought the motorcycle.
36. No. 71821 Cpl Joseph Maraka (PW5) testified that he was the arresting officer. That on the material day, he arrested both the Appellants and further that the 1st Appellant had a number plate inside his jacket. That he also recovered a motor cycle registration number KMFx 037X. When he was cross



- examined, PW5 maintained that he arrested both Appellants on the material day in possession of the bike and with the intent to sell it.
37. Isaiah Kiptoo Maritim (PW1) stated that when he saw the subject motorcycle (then with registration number KMFY 037X) at the police station, he did a search using the frame number and it revealed that the real registration of the subject motor cycle was KMGA 438E which they had sold to the 2nd Appellant and had been reported stolen.
38. From the evidence above, it is clear that the Appellants were arrested on the material day by PW5 while in possession of the subject motorcycle. The 1st Appellant acting on information from his broker (PW3) came to the scene together with the 2nd Appellant with the intent of selling the motorcycle knowing very well that the subject motorcycle did not belong to them.
39. Flowing from the above and based on the totality of the evidence before me, it is my finding that the Prosecution established and proved the elements for the offence of stealing beyond reasonable doubt.
40. The 2nd Appellant faced a second charge of giving false information to a person employed in the Public Service. Section 129 of the Penal Code provides:-
- Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, the person employed in the public service—
- (a) to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him; or
- (b) to use the lawful power of the person employed in the public service to the injury or annoyance of any person, is guilty of a misdemeanour and is liable to imprisonment for three years.
41. No. 240380 PC Chepkoech Langat (PW6) who was the investigating officer testified that the 2nd Appellant reported that his motorcycle had been stolen. That when she asked him to bring the logbook, the 2nd Appellant stated that he would revert and never did. PW6 was cross-examined and her testimony remained uncontroverted.
42. As earlier stated, the 2nd Appellant was arrested together with the 1st Appellant while in possession of the subject motorcycle. If indeed the 2nd Appellant was genuine, he would have reported that he had recovered his motorcycle to the police. But it appears that the 2nd Appellant was in concert with the 1st Appellant intending to defraud the complainant company.
43. It is logical to conclude from the evidence above that the 2nd Appellant intended to avoid his loan obligations with the complainant company and still benefit from the fraudulent sale of the subject motorcycle. He only reported the purported theft of the subject motor vehicle to cover his tracks in the event of an investigation.
44. From the evidence of the 2nd Appellant, it can be deduced that he intentionally gave the investigating officer (PW6) false information. It is my finding that the Prosecution proved the charge of giving false information to a person employed in the Public Service beyond reasonable doubt.

ii. Whether the Defence places doubt on the Prosecution case.

45. The testimonies of the Appellants (DW1 and DW2) and their witness Philip Kiptende's (DW3) have been elaborately captured earlier on in this Judgement. The 1st Appellant stated that he met someone who intended to sell him a motorcycle and the seller insisted on cash only. That he was arrested when



- he went to withdraw the money from an M-pesa shop. When the 1st Appellant was cross examined, he stated that he did not deal with motorcycles and that he had been framed.
46. The 1st Appellant's testimony was similar to DW3's testimony only that DW3 stated that he met the 1st Appellant with the intention of selling him sheep and not a motorcycle.
47. After analysing the testimonies of the 1st Appellant and DW3, I find the same to be contradictory. Further the 1st Appellant did not provide any evidence to back up his allegation that he was being framed. I have noted that the 1st Appellant stated that he knew the 2nd Appellant as a boda boda rider and he carried him to his destination on the material day.
48. The 2nd Appellant stated that he reported that his motorcycle had been stolen and was arrested when he went to check on the recovered subject motor cycle at the complainant company. I have considered this evidence against the Prosecution's evidence who through its witnesses, PW2, PW3, PW4, PW5 and PW6 placed the Appellants at the scene and in possession of the subject motorcycle. The Appellants offered no explanation as to how they came into possession of the subject motorcycle after it had been reported stolen and thereby failed to cast doubt on the prosecution evidence.
49. Under the doctrine of recent possession, the Court of Appeal in Paul Mwita Robi vs. Republic (2010) eKLR stated:-
- “Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden”.
50. Similarly, in the persuasive case of Kelvin Nyongesa & 2 Others vs. Republic (2016) eKLR, it was held:-
- “Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard”. (Emphasis mine)
51. Having considered the Appellants' defences as a whole, it is my finding that they did not cast doubt on the Prosecution's case, which I have already found proven.

ii. Whether the sentence preferred against the Appellants were excessive.

52. The penal section for the offence of stealing is contained in section 278A of the Penal Code which states:-
- If the thing stolen is a motor vehicle within the meaning of the *Traffic Act* (Cap. 403), the offender is liable to imprisonment for seven years.
53. Having considered the circumstances of the case, it is my finding that the trial court did not err when it handed each Appellant a four year prison term. The sentence was lawful, just, fair and proportionate. I also take judicial notice of the fact that cases of motor cycle theft are on the rise and this calls for deterrent sentences.
54. Regarding the second count, section 129 of the Penal Code as earlier stated, provided for a maximum sentence of three years. The trial court sentenced the 2nd Appellant to six months' imprisonment which I find to be reasonable in light of the circumstances of the case. The said sentence shall run concurrently with the sentence on count 1.



55. In the final analysis, it is my finding that the trial court was not in error when it convicted and sentenced the Appellants to serve 4 years' imprisonment. I affirm the conviction and sentences.
56. The Appellants' respective Appeals filed on 17th March 2023 and 24th March 2023 have no merit and are dismissed.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr. Waweru holding brief for Mr. Njeru for the Respondent, 1st and 2nd Appellants present acting in person and Siele (Court Assistant).

