



REPUBLIC OF KENYA



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**Wekesa v Republic (Criminal Appeal E078 of 2022)  
[2023] KEHC 21352 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21352 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E078 OF 2022**

**REA OUGO, J**

**JULY 28, 2023**

**BETWEEN**

**NEWTON WEKESA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from conviction and sentence from the judgment of Hon.  
M. Munyekenye SPM Webuye in Criminal Case no. 608 of 2019)*

**JUDGMENT**

1. Newton Wekesa alias Antony Wekesa Omukaya, the appellant, was charged with the offence of Robbery with Violence contrary to section 295 a read with section 296 (1) of the *Penal Code*. The particulars of the charge were that; on the night of 17<sup>th</sup> September 2019 at Matulo sub-location, in Webuye sub-county within Bungoma county the appellant jointly with another not before court while armed with offensive weapons namely pangas robbed off Kennedy Simiyu his motor cycle registration no. KMEQ xxxC tvs HLX valued at Kshs. 115,000/= and immediately before the time of such robbery used threats to the said Kennedy Simiyu. He also faced an alternative charged of Handling stolen property contrary to section 322(1) of the *Penal Code*. The particulars of the charge are that; on the night of 17<sup>th</sup> September 2019 at Kiminini sub-county within Trans-Nzoia county, otherwise than in the course of stealing dishonestly undertook the retention of motor cycle reg.no. KMFQ xxxC Tvs HLX knowing of having reason to believe it was stolen property.
2. In a judgment dated 30/8/2022 the trial court acquitted the appellant of the offence of robbery with violence. He was convicted of the charge of handling stolen property contrary to section 322 (1) of the *Penal Code* and sentenced to 14 years imprisonment.
3. In his petition of appeal, the appellant has listed the following ground of appeal;



- i. That the trial Magistrate grossly erred in law and facts to convict the appellant on contradictory, inconsistent and uncorroborated evidence.
  - ii. That the arresting officer arrested the wrong person
  - iii. That the complainant was not given time to articulate himself.
4. This being a first appeal, this court is required to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32.
5. The prosecution called 5 witnesses to prove their case; Robert Situma Akoko (Pw1) testified that his wife bought a motor bike KMEQ xxxC on the 30/8/2019. He used to ride it. On the 17/9/2019 at midnight Kennedy Simiyu asked him to help him take a sick child to hospital at Webuye District Hospital. Kennedy too had his motor bike and they went riding their motor bikes. They collected the sick child and his parents at Matulo area. He carried the mother and the child, Kennedy carried the child's father. They left them in hospital and on reaching Matulo RC school whilst crossing the railway line his motor cycle got spoilt. He took Kennedy's motor bike to go get a spanner and tools to repair his bike. On returning to the place, he had left Kennedy he did not find him there. The motor bike too was not there. There were bushes around the place. He called Kennedy's name. Kennedy came out of a bush. Kennedy told him that he had been attacked by a group of 5 men armed with machete, that he heard them say "maliza yeye" so he took off. He left the motor bike at the place. He called Watu Credit and reported the theft of the motor bike. It had a track. He was advised to report the theft to the police. He reported the theft at Webuye police station. The police accompanied them to the scene but the police dog could not trace anything. Watu Credit informed them that the motor cycle was being rode to Kitale and that they had alerted the police at Kitale. At 4.45am he got call from Watu Credit that the motor cycle had been recovered and was at Kiminini police station. He went to the said police station with his wife and Kennedy Simiyu and they identified the said motor cycle. He was shown the appellant who had been arrested.
6. Jorum Omunametsa ( Pw2) an employee of Watu Credit testified that on the 17/9/2019 he received a report that motor cycle KMEQ xxxC had been stolen. Watu Credit had loaned the said motor cycle to Faustine Kausi Wangalia. As a recovery officer he had put a tracking device on the said motor cycle. He checked their system and saw through the tracker that the motor cycle was headed to Kminini. He called the DCIO Bungoma and gave him the said information. He was given the number of the DCIO Kiminini, later he got information from the said DCIO that a person had been arrested with the said motor bike. He did not see the person who was arrested.
7. Faustine Khausi testified that she bought motor cycle KMEQ xxxC from Watu Credit from Kshs. 111500/-. It was on loan and she was still paying for it. The said motor cycle was stolen on the night on 19/9/2019. Pw1 her husband had taken someone to hospital. He was with Kennedy. She called Watu Credit and informed them of the theft. The motor cycle had a track. She was later informed that the motor cycle was recovered at Kiminini. She saw the accused at the police station at Webuye station. She identified her motor cycle at the said police station.
8. No.237381 CI Joseph Odongo (Pw4) testified that on the 17/9/2019 at 4.00am he got call from one Jorum who informed that he had received a call from his customer that a motor cycle KMEQ xxxC had been stolen and that it was heading towards Kiminini. He was told that the motor cycle was black in color and that it had a tracking gadget. He called the officer at Kingani police station and asked him to put a road block and to stop any motor bike heading his direction. Before he reached the place Jorum called him and told him that the motor bike was heading towards Kitale. As he headed towards



Kiminini they saw the motor bike approach them. They blocked the motor bike from passing and the rider tried to get away but he was unable. They alighted from the vehicle and gave chase to the rider. They chased him for about 100meters and managed to arrest him in a maize farm. The motor cycle bore registration no. KMEQ xxxC. the motor cycle had one person the rider on it when they stopped him. he took the suspect to Kiminini police station. The suspect told him that his name was Antony Wekesa Omukaya. Officers from Webuye police station picked him up and he was later informed that the accused gave another name Newton.

9. No 77480 CPL Francis Amollo ( Pw5) testified that he is attached to Webuye police station. On the 17/9/2019 at 3.00am Robert Situma went to their police station and report the theft of his motor cycle KMEQ xxxC. He was informed that the motor cycle had a tracking device and that it had been tracked by Watu Credit. The motor bike was heading towards Kiminini. The officer in charge had been called by then. The motor cycle was intercepted as it headed towards Kiungani and the accused was arrested. The accused was taken to their station by officers from Kiminini police station together with the said motor bike.
10. The appellant gave a sworn statement. His defence was as follows; his names are Newton Omukaya Sande, he lives at Webuye SA estate and he is a mechanic. He denies the charges. On the 14/9/2019 he was in Bar at Silk with one mercy. An officer came and harassed him saying that the girl was his and that he would know who he was. He told PC Maingi that he had found the girl at the bar and that he was only buying her drinks. He told him he would leave the girl for him and he again told him that he would know who he is. On the 16/9/2019 he was at Mana club in a home of Sentric drinking changaa. Police came at (.00pm and they were arrested, 4 of them the seller of the changaa and 3 others. They were taken to Webuye police station. at the station the people paid Kshs. 3,000/-, or Kshs. 2,500/- and they left for home. He did not have the money and he stayed in the police cells for 3 days. On the 18/9/2019 he was brought to court and he was shocked when a charge of robbery was read to him. PC Maingi knew my name Newton but he did not know his other names.

### **Submissions**

11. The appellant in his submissions states that he worked as a boda boda and he was sent to transport the motor bike from Webuye to Kitale not knowing that the bike had issues with its originality. That he was purely a transporter not with the knowledge of the way about the motor bike. That he was sent and is innocent. That the sentence he was given was a maximum sentence and he pleads for mercy. The rest of his submissions is mitigation.
12. The respondent maintained that the charge for which the appellant was convicted was proved beyond reasonable doubt. That in his defense the appellant stated that he was arrested at a drinking den yet in his submissions filed in court on the 14<sup>th</sup> February 2023 the appellant claims that he was innocently transporting the motorbike from Webuye to Kitale and that he had no knowledge that the bike was stolen. That this amounts to an admission that he was in possession of the motor bike just like been demonstrated by the possession. That the appellant ought to have revealed to the trial court who sent him and that all facts point to him knowing that the bike was stolen. That the alternative charged was proved beyond reasonable doubt. On the sentence it was submitted that the offence of handling stolen property attracts a sentence of 14 years and that the appellant was sentenced to 14 years as per the law. That an appellant could only interfere with the discretion of the trial court if the said court acted on a wrong principle or if the sentence is excessive. That the sentence was legal and commensurate to the



offence. Reliance was made in the case of *Omar Dube Madero vs. Republic* (2018) eKLR where the court stated as follows;

“..To exonerate himself from the offence of handling stolen property on account of not knowing the animals were stolen, he ought to have at least disclosed to the trial court who hired him to drive..”

### **Analysis And Determination**

13. The issue for determination in this appeal is whether the prosecution proved a case of handling stolen property against the appellant beyond reasonable doubt . In *Mungai v. Republic*, (2006) 2 KLR 262 the court considered the ingredient of the offence of handling stolen property as follows:

1. Under section 322(1) of the *Penal Code* (cap 63), a person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

14. There is evidence from Pw1, Pw2 and Pw3 that the motor bike KMEQ xxxC was stolen on the night of 17/9/2019. The theft report was made to Pw2 who helped in tracing the whereabouts of the said motor bike. Pw4 on the same night at 4.00am saw the motor bike , the appellant was the rider. The appellant was arrested the same night. Pw4 gave clear evidence that they saw the accused approach them after they had been told that the motor bike was heading for Kiminini and on stopping the appellant he threw the bike and ran away Pw4 chased the appellant for about 100 meters and arrested him. Pw4 did not arrest the wrong person. In his defense the accused states he was arrested on the 16/9/2019 from a changaa den. In his submissions he admits having the motor bike but claims he did not know it was stolen. I cannot fault the trial court for stating that his defence did not hold water. Pw4 clearly placed the appellant at the scene where the stolen motor bike was seen and recovered. The motor bike was tracked the same night it was stolen and was found with the appellant. In the case of *Kelvin Nyongesa & 2 Other vs. Republic* [2010] eKLR, the court held as follows;

“Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for possession. This burden is evidential only and does not relieve the prosecution from proving its case as required standard.”

15. Further the Court of Appeal held as follows in the case of *Paul Mwita Robi vs. Republic* KSM Criminal Appeal No. 200 of 2008;

“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 11 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.”

16. The appellant did not offer any explanation on how he came into possession of the motor bike. He was found with the stolen motor bike the same night. The doctrine of recent possession entitles this court to draw an inference of guilt where the appellant was found in possession of recently stolen property in unexplained circumstances. The motor bike was identified by Pw1 and Pw3 the owner. I find that the prosecution proved the charged of handling stolen property beyond reasonable doubt. I uphold the conviction against the appellant



17. The next issue for consideration is whether the sentence was excessive. The law provides as follows; A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years. The appellant was sentenced to 14 years. The appellant was a first offender with no previous record. In my view the sentence was excessive, I set aside the sentence of 14 years imprisonment . The appellant Newton Wekesa is sentenced to serve six (6) years, the period he spent in remand shall be taken into account in commuting his sentence.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28<sup>TH</sup> DAY JULY 2023.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

Appellant/ Newton Wekesa- Present

Ms. Omondi -For the Respondent

Wilkister/Okwaro -C/A

