



**Rono v Republic (Criminal Appeal E049 of 2022)  
[2023] KEHC 22864 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22864 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E049 OF 2022  
RL KORIR, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**ZADOCK RONO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the Conviction and Sentence in Criminal Case Number 379 of  
2020 by Hon. Kiniale L. in the Principal Magistrate's Court at Bomet)*

**JUDGMENT**

1. The Appellant was charged tried of the offence of stealing a motorcycle contrary to Section 278A of the Penal Code. The particulars of the charge were that on the 3rd day of March 2020 at Kapsoya Village in Bomet Central Sub County, within Bomet County, jointly with others not before court stole a motorcycle registration number KMEE xxxR make Bajaj, black in colour and valued at Kshs 112,000/= being the property of Beverlyne Chebet.
2. The Appellant pleaded not guilty to the charge before the trial court, and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case.
3. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.
4. At the conclusion of the trial, he was convicted on the charge of stealing a motorcycle and sentenced to serve three (3) years in prison.
5. Being dissatisfied with the Judgment dated 4th May 2022, Zadock Rono appealed to this court and relied on the following grounds: -



- i. That, the learned Magistrate erred in law and fact by convicting the Appellant without sufficient evidence and/or proof that he was the one in actual possession of the alleged motorcycle on the date indicated in the Charge Sheet to have been stolen.
  - ii. That the learned Magistrate erred in law and fact by convicting the Appellant without considering that the allegations of hiring there was no written agreement describing the terms of hire which would also have contained direction as to where the motorcycle was being kept at the close of business.
  - iii. That the learned Magistrate erred in law and fact by sentencing the Appellant to serve three (3) years imprisonment without calling for a probation report.
6. This being the first appellate court, it has a duty to re-evaluate and scrutinize evidence on record and draw its own independent conclusions. The Court of Appeal in the case of Mark Ouiruri Mose vs. R (2013) eKLR, held that: -

“This court has a duty to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter”.

#### **The Prosecution’s Case.**

7. It was the Prosecution’s case that the Appellant was hired by Beverlyne Chebet (PW1) to ride and provide boda boda services using her motorcycle registration number KMEE xxxR. That the Appellant was to remit Kshs 350/= per day to PW1.
8. The Prosecution stated that the Appellant stole the said motorcycle and that he could not account for the missing motorcycle which was in his custody.

#### **The Accused/Appellant’s Case.**

9. The Appellant, Zaddock Rono denied stealing the motorcycle. It was his case that PW1 would hire him occasionally to ride the motorcycle and that he would give her money at the end of the day.
10. It was the Appellant’s testimony that on the material day, PW1 called him to go and pick the motorcycle but he did not pick it. The Appellant also stated that Amos would also ride the motorcycle occasionally on behalf of PW1.
11. The Appellant stated that for the period he worked for PW1, he used to return the motorcycle together with the money in the evening.
12. This appeal proceeded by way of written submissions.

#### **The Prosecution’s/Respondent’s Submissions.**

13. The Respondent submitted that the receipt and logbook produced as P.Exh 1 and 2 confirmed that PW1 was the special owner of the motorcycle since it was purchased by her husband, Richard Kimutai Bett (PW2).
14. It was the Respondent’s submission that the Appellant was in possession of the motorcycle. That from the evidence of PW1 and PW2, the Appellant was given the motorcycle to operate with the understanding that he was to remit Kshs 300/= per day to PW1. It was the Respondent’s further submission that this fact was corroborated by the Appellant who confirmed the same.



15. The Respondent submitted that it had not been controverted that the Appellant was in possession of the motorcycle when it went missing. That the Appellant actually informed PW2 that the motorcycle was missing. The Respondent further submitted that under the doctrine of recent possession, the Appellant was responsible for the missing motorcycle as he could not give a satisfactory and reasonable account on the whereabouts of the motorcycle.
16. It was the Respondent's submission that even though the Appellant gave a sworn statement, he gave a mere denial of the offence. It was their further submission that the Appellant alleged that the motorcycle was not in his possession at the time it disappeared and stated that he was at home at that material time. That he did not call any witnesses to corroborate that fact and that it did not dislodge the Prosecution's evidence.
17. The Respondent submitted that the trial Magistrate gave the Appellant a chance to mitigate and she sentenced him to 3 years imprisonment for an offence which carried a maximum sentence of 7 years. They further submitted that the learned Magistrate properly exercised her discretion and properly meted the appropriate sentence.

### **Appellant's Submissions.**

18. On sentence, it was the Appellant's submission that from the evidence tendered by PW1 and PW2, it was unclear when the motorcycle was stolen. That PW1 stated that the last time she saw the motorcycle was on 3rd March 2020 while PW2 stated that he came to learn that the motorcycle got lost on 27th February 2020. It was his further submission that there were no business records that would have clarified the transactions done between him and PW1.
19. The Appellant submitted that in his testimony that he handed over the money together with the motorcycle on 3rd March 2020 and had not come into contact with the motorcycle again until a time when he was informed that it was lost. That it was the duty of the Prosecution to prove that he was in actual possession of the motorcycle and that he was the one who stole it.
20. It was the Appellant's submission that the investigating officer (PW4) did not avail witnesses to show that the Appellant was in possession of the motorcycle on the date of the offence. That it was his duty to investigate and ascertain the date of the loss and who stole the motorcycle.
21. The Appellant submitted that there was no written agreement between him and PW1 produced in court to show the terms of the hire. That agreement was a crucial document as it would have confirmed if the Appellant was the sole person engaged to ride the motorcycle. He further submitted that he told the trial court that he was not the only person engaged to ride the motorcycle as there was another person called Amos who would also ride the motorcycle.
22. It was the Appellant's submission that no probation report was called by the trial court before sentencing. That the Appellant was a first offender and that the 3 year sentence was excessive.
23. I have gone through and given due consideration to the trial court's proceedings, the Memorandum of Appeal dated 25th October 2022, the Appellant's Written Submissions filed on 23rd March 2023, the Respondent's Written Submissions dated 6th March 2023 and the following issues arise for my determination: -
  - i. Whether the Prosecution proved its case beyond reasonable doubt.
  - ii. Whether the Defence casts doubt on the Prosecution case.
  - iii. Whether the Sentence preferred against the Accused was excessive.



**i. Whether the Prosecution proved its case beyond reasonable doubt**

24. The Appellant was charged with stealing of a motorcycle. Stealing is defined in Section 268 of the Penal Code as:-

- (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.

25. 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, its incumbent upon the prosecution to prove 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.”

26. It was not in dispute that there existed a motorcycle registration number KMEE xxxR and that the Appellant rode and used it for a boda boda business and remitted money to Beverlyne Chebet (PW1). The issue of the failure by the Prosecution to produce a written agreement stipulating the terms of hire or casual employment between the Appellant and PW1 was not fatal as the Appellant confirmed in his defence that PW1 would occasionally hire the said motorcycle to him to do boda boda business on her behalf and he would give her money/ earnings at the end of the day.
27. In regards to the ownership of the motorcycle, Gladys Ngetich (PW3) who worked for Nakuru Equipment Supplies testified that Richard Kimutai Bett (PW2) bought the motorcycle from them. She produced a Log Book that was marked as P.Exh 1 and a Letter by Nakuru Equipment Supplies that was marked as P.Exh 2. The Log Book indicated that the motorcycle belonged to Auto Industries Ltd. PW3 clarified upon cross examination that Auto Industries supplied Nakuru Equipment Supplies with motor cycles so that they could sell them and that it was the buyer, in this case PW2, who needed to effect the transfer. Additionally, the letter from Nakuru Equipment Supplies confirmed that PW2 purchased the motorcycle from them. The production and authenticity of the Logbook and the Letter was not challenged by the Appellant.
28. Beverlyne Chebet (PW1) stated that her husband (PW2) bought the motorcycle for her so that she could use it to gain some income and this information was corroborated by Richard Kimutai Bett (PW2) her husband. Though not being the registered owner of the motorcycle, it is my finding that Beverlyne Chebet (PW1) was the special owner of motorcycle registration number KMEE xxxR.
29. As there is no direct evidence of the theft of the motorcycle by the Appellant, the whole case against him relied on circumstantial evidence. Circumstantial Evidence is evidence which is deduced or inferred from a set of facts. It is openly distinct from direct evidence in that, whereas direct evidence draws from credible testimonies which result in creating some sort of belief, circumstantial evidence on the other hand entails a process of inference and deduction. In the case of *Rex vs Kipkering Arap Koske & 2 others* (1949) EACA 135, the East African Court of Appeal stated that:-

“In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

30. More recently, the Court of Appeal in *Ahamad Abolfathi Mohammed and Another vs. Republic* (2018) eKLR, held: -

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, C.J. stated as follows on circumstantial evidence in *R. v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding



circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

31. Beverlyne Chebet (PW1) testified that the Appellant rode the motorcycle on a daily basis as a boda boda and would remit the earnings to her. That the Appellant would remit the money to her and leave with the motor cycle. It was her testimony that the Appellant continued remitting the money until he stopped on 12th March 2020. That the last time she saw the motorcycle was on 3rd March 2020 when the Appellant came to remit the earnings to her.
32. Upon cross examination, she stated that the motorcycle got lost in the Appellant’s hands and confirmed that she did not the motorcycle as the Appellant would ride it to her home when remitting the money and he would then leave with it. It was PW2’s testimony that it was her husband (PW2) who had informed her that the motorcycle had been stolen.
33. Richard Kimutai Bett (PW2) testified that sometime in February 2020, the Appellant called him to inform him that the motorcycle had an issue and that they met to have the motorcycle fixed. That later on, the Appellant informed him that the motorcycle had been stolen. The Appellant did not refute this statement upon cross examination.
34. No. 90923 PC Patrick Nyaoko (PW4) testified that he was the Investigating Officer in the matter and that on 12th March 2020, PW1 and PW2 came and reported the theft of motorcycle registration number KMEE xxxR. That PW1 told him that she had employed the Appellant to carry out boda boda business using the said motorcycle.
35. It was PW4’s testimony that he interviewed him on the circumstances under which the motorcycle got lost and that the Appellant could not account for it. That neither could the Appellant give the name of the person he gave the motorcycle to nor could he assist him in any efforts to recover the motorcycle.
36. PW4 testified that the Appellant disappeared and was arrested after two months. The same was confirmed during cross examination.
37. Based on the totality of the evidence, the Prosecution established that the Appellant rode the motorcycle registration number KMEE xxxR as a boda boda and it was in his possession as at 3rd March 2020. He was the last person in possession of the said motorcycle.
38. The circumstances under which the motorcycle got lost pointed towards the culpability of the Appellant to the exclusion of any other.
39. The burden of proof in criminal matters always lies with the Prosecution. However, the evidentiary burden may shift to the Appellant depending on the evidence adduced. In the present case, the Appellant claimed that Amos also rode the motorcycle and by this statement, the evidentiary burden shifted to him to explain and prove to the trial court the existence of that fact. The Court of Appeal in *Dorcas Jemutai Sang v Republic*(2018)eKLR held that:-

“ Thus by the operation and requirement of the provision of law above, the prosecution is enjoined to prove the guilt of an accused person to the satisfaction of the court beyond a reasonable doubt but where evidence tendered by the prosecution or in the defence, creates a reasonable doubt that the accused person committed the offence, he/she shall be acquitted. But if the accused person claims that existence of some circumstances or facts bring the case against him within any exception or exemption and he/she has such knowledge, he/she has the burden to prove the same.....”



40. Similarly, the Court of Appeal in *Boniface Okerosi Misera & another vs. Republic* (2021) eKLR, cited the case of *Douglas Thiong'o Kibocha vs. Republic* [2009] eKLR in which it was held thus:-

“When Parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters, especially within his knowledge. Otherwise, the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111 (1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge...”

41. In this case, the Appellant had the evidential burden to explain how the motor cycle established to have been in his custody as the rider got lost or was stolen. He failed to discharge that burden. Further he alleged that there was another rider called Amos who may have had possession of the motor cycle when it was stolen but failed to prove the existence of such a rider.

### **The Appellant failed to discharge his evidentiary burden of proof**

42. I am satisfied on the totality of the evidence that the Prosecution proved its case beyond reasonable doubt.

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

43. The Appellant testified that he did not steal the motorcycle. That he would occasionally ride the motorcycle registration number KMEE xxxR on behalf of PW1. He further testified that on 3rd March 2020, PW1 called her to go and pick up the motorcycle but he refused and that when PW1 called her on 5th March 2020 to go to the police station, he found Amos in custody. That he did not know Amos well but he would ride the said motorcycle occasionally.
44. It was the Appellant’s testimony that he was at home the entire March 2020 and that he did not run away. It was his further testimony that for the period he worked for PW1, he used to return the motorcycle in the evening.
45. I have considered the Appellant’s defence and I find that it did not cast doubt on the Prosecution’s case. As earlier discussed, the Appellant stated that Amos would also ride the said motorcycle as a boda boda but he did not raise this issue with the Prosecution’s witnesses during cross examination. He did not share this information with the Investigating Officer (PW4) during his investigations. In my view, the defence of Amos being an alternate rider is an afterthought.

### **iii. Whether the Sentence preferred against the Accused was excessive.**

46. The general principles upon which the first appellate court acts in regards to sentencing are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the Court should not lose sight of the fact that in sentencing, the trial court exercises discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion. See .....



47. The Appellant was charged under 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.

48. After being afforded the chance to mitigate, the Appellant mitigated through his counsel and the trial court noted that: -

“.....The Accused though remorseful and despite the plight raised by his counsel, this offence has a sentence of up to 7 years and a felony. The said motorcycle is yet to be recovered. I hereby sentence him to serve imprisonment for a period of 3 years.”

49. In appealing sentence, the Appellant faulted the trial court for not calling for a probation report before sentencing him. Probation reports though useful in assisting the courts in passing sentences, are not binding. What is of more significance was that the Appellant was given a chance to mitigate, to which he did. I agree with the sentiments of Odunga J. (as he then was) in *Republic vs Peter Mutuku Mulwa & another* (2020) eKLR, where he held that:-

“I must however state that the probation report being a report which is not subjected to cross-examination in order to determine its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the report and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in meting out its sentence. To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court’s duty of adjudication to probation officers.....”

50. I have found no fault with the sentence of 3 years imprisonment meted. It was fair and just particularly considering that there was no recovery of the motorcycle.

51. In the end, the conviction and sentence passed by the trial court are upheld and the Appeal dated 25th October 2022 is dismissed.

Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of the Appellant virtually present at Bomet Prison, Mr. Kenduiwo for the Appellant, Mr. Njeru for the Respondent and Siele (Court Assistant)

