



**Some & another v Republic (Criminal Appeal E12 of 2022)
[2022] KEHC 14111 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 14111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E12 OF 2022
JK SERGON, J
SEPTEMBER 30, 2022
(CONSOLIDATED WITH CRIMINAL APPEAL NO. E13 OF 2022)**

BETWEEN

KIPNGETICH SOME 1ST APPELLANT

SIMON MUCHENDE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment and Orders of the Honourable Hon. D.
ORIMBA in Criminal Case No. E294 OF 2021 delivered on 28th January, 2022)*

JUDGMENT

1. The appellants, Kipngetich Some and Simon Muchende, together with others not before this court, were charged with various offences and convicted on the following counts, as below:
 - i. Count I, both appellants were charged with stealing motor vehicle contrary to section 278A of the *Penal Code*. The particulars of the charge were that on the March 28, 2021 at Lodwar police station in Turkana Central sub-county within Turkana county jointly stole a motor cycle make Honda red in colour chassis No BF Oxxxxx1 valued at Kshs 115,000/= which was detained at Lodwar police station as an exhibit.
 - ii. Alternative charge for count I, the 2nd appellant was charged with neglect to prevent a felony contrary to section 392 as read with section 36 of the *Penal Code*. The particulars were that on the March 28, 2021 at Lodwar police station in Turkana Central sub-county within Turkana county knowingly that Kipngetich Some, and Amos Cheruiyot designed to steal motor cycle make Honda read in color chassis No xxxx failed to use all reasonable cause to prevent such theft.



- iii. Count II, both appellants were jointly charged with stealing motor cycle contrary to section 278A of the [Penal Code](#). The particulars are that on the March 29, 2021 at Lodwar police station in Turkana Central sub-county within Turkana county jointly stole a motor cycle make Honda Reg No KMFG 940T valued at Kshs 115,000/= which was detained at Lodwar police station as an exhibit.
 - iv. Alternative to count II for the 2nd appellant, he was charged with neglect to prevent a felony contrary to section 392 as read with section 36 of the [Penal Code](#). The particulars of the charge are that on the March 29, 2021 at Lodwar police station in Turkana Central sub-county within Turkana county knowing that Kipngetich Some and Benard Lokoyo designed to steal a motor cycle make Honda Reg No KMFG 940T failed to use all reasonable cause to prevent such theft.
 - v. Count III, both appellants were jointly charged with stealing motor cycle contrary to section 278A of the [Penal Code](#). The particulars are that on the March 30, 2021 at Lodwar police station in Turkana Central sub-county within Turkana county jointly stole a motor cycle make TVS star Reg No KMEW 641T valued at Kshs 90,000/= which was detained at Lodwar police station as an exhibit.
 - vi. Alternative to count III, the 2nd appellant was charged with neglect to prevent a felony contrary to section 392 as read with section 36 of the [Penal Code](#). The particulars of the charge are that on the March 30, 2021 at Lodwar police station in Turkana Central sub-county within Turkana county knowing that Kipngetich Some and Benard Lokoyo designed to steal a motor cycle make TVS star Reg No KMEW 641T failed to use all reasonable cause to prevent such theft.
 - vii. Alternative to count III for the 1st appellant, he was charged with handling stolen goods contrary to section 322 (1)(2) of the [Penal Code](#). The particulars were that on the 30th day of March, 2021 at Lodwar police station in Turkana Central sub-county within Turkana county, otherwise than in the course of stealing dishonestly undertook the removal of motor vehicle make TVS star Reg No KMEW 641T knowing it to be stolen goods.
2. The appellants pleaded not guilty and the trial was conducted where the trial court found that the prosecution had proved its case against them beyond reasonable doubt. The appellants were convicted as charged and sentenced as to count I the 1st appellant was sentenced to a fine of Kshs 20,000/= and in default sentenced to serve 6 months' imprisonment. Alternative to count I the 2nd appellant was sentenced to a fine of Kshs 10,000/= in default 4 months' imprisonment. Count II 1st appellant was sentenced to a fine of Kshs 20,000/- in default 6 months' imprisonment. Alternative to count II the 2nd appellant were sentenced to a fine of Kshs 10,000/= and in default to serve 4 months' imprisonment. Count III 1st appellant was sentenced to a fine of Kshs 20,000/= in default 6 months' imprisonment. Alternative to count Iii the 2nd appellant was sentenced to a fine of Kshs 10,000/= each in default to serve 4 months' imprisonment.
 3. Aggrieved by the conviction and sentence, the appellants lodged their appeal on both the conviction and sentence. The 1st appellant based his appeal on the following grounds:
 - i. The learned trial magistrate erred in fact and law by failing to acknowledge and appreciate the clear contradictions on the prosecution's case which definitely created reasonable doubt in the prosecution case.
 - ii. That the learned trial magistrate erred in fact and law by not considering the appellant's defence as the same was reliable.



- iii. That the learned trial magistrate erred in law and fact in convicting, sentencing the appellant to 6 months without giving regard to the evidence adduced before court.
 - iv. That the learned trial magistrate erred in law and contradicting and/or misdirecting himself while analyzing the whole evidence tendered by the prosecution witness and the testimony of the defence.
 - v. That the learned trial magistrate erred in law and in fact by failing to independently analyze and/or evaluate the evidence of the prosecution and that of the defence before drawing conclusions.
 - vi. That the learned trial magistrate erred in law and fact to ignore glaring inconsistencies in the prosecution's case.
4. The 2nd appellant based his appeal on the following grounds, that:
- a. The learned trial magistrate erred in law and in facts when convicting the accused person without observing that, the mention dates that incident occur I was off duty at that time date 28, 29 and 30 on the month of March. I was absent home to confirm this I need duty roster to be availed in court.
 - b. The learned trial magistrate erred in law and in facts when convicting the accused person without observing that the mode of arrest of accused person was unjust because was not booked as per the national police service rules for any action to be taken by officer in charge of the police station not the court.
 - c. The learned trial magistrate erred in law and in facts when convicting the accused person without considering that no procedure was followed as per the summary of the occurrence book as required by the law.
 - d. The learned trial magistrate erred in law and in facts when convicting the accused person without observing that, the duty officers who were at the station on the mentions dates all of them were transferred to other stations so that they may not be my witnesses in this instance case.
5. The appellants in seeking their appeal to be allowed and the subordinate courts judgment to be quashed and the sentences be dismissed jointly submitted that the prosecution failed to prove beyond reasonable doubt that the 1st appellant had forethought and actual intention to steal the said motor cycle, since at the time of arrest the 1st appellant was not in possession of the said motor cycle. That this was corroborated by PW1, PW2, and PW4 evidences. Reliance was placed on the case of *Stephen Nguli Mulili v Republic* (2014) eKLR.
6. Also, that the trial courts magistrate gave credence to the prosecution's evidence without according the defence's evidence similar weight as required in law. The cases of *Peter Muriungi Kirii v Republic* (2021) eKLR; and *Kiilu & another v Republic* (2005)1 KLR were relied upon.
7. That PW5 during cross-examination confirms that he did not see the 1st and 2nd appellant steal the motorcycle but heard that they had stolen, since he was informed that they stole it. That his evidence amounted to hearsay and it is therefore inadmissible. The relied on the case of *Kinyatti v Republic*, appeal No 60 of (1983) CA.
8. It was their submission that at the end of trial the burden of proof beyond reasonable doubt was not discharged by the prosecution. That the contradictions are so material, and learned magistrate decision



was wholly based on speculation, and in total disregard of the facts that the judgement was contrary to the weight of the evidence. That this position is supported by an excerpt from the magistrates judgment, “... The court is further informed that upon being searched Kshs 18,500/-was recovered from his pocket. There is all possibility that the money was the proceeds of the illegal sale of the motor cycle kept as exhibits...” That PW3 upon being cross-examined admitted that the Kshs 18,500/- found in possession of the 1st appellant was possible to be his salary as it was the end of the month.

9. Further, that PW5 retracted his statement when he was cross-examined and stated that he did not see the 1st appellant stealing the bike but heard it from someone. That such evidence adduced by a witness who is not reliable and trustworthy should be inadmissible as it raises doubt on the case. That therefore, nothing PW5 said in court should be accepted as evidence against the 1st and 2nd appellants. Reliance was placed on the case of *Ndungu Kimanyi v Republic* KLR (1979).
10. The prosecution did not file response to this instant appeal.
11. Nevertheless, this being a first appeal, it is the duty of this court to re-evaluate the evidence adduced before the lower court and come to its own conclusions and findings in respect thereof. The Court of Appeal in the case of *David Njuguna Wairimu v Republic* [2010] eKLR, cited with approval the decision in *Okeno v R* [1972] EA. 32 in which the Court of Appeal for East Africa laid down what the duty of the first appellate court is and set out the principles that should guide the first appellate court as follows:

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
12. Accordingly, this court has perused and considered the record of the lower court and re-evaluated the evidence that was presented therein. The prosecution called a total of 6 witnesses.
13. PW1, Cpl Johnson Echwa, based at Lodwar testified that on March 30, 2021 at about 8pm, when he got back to the station, he saw OCS and Sgt Kiiyiapa taking people to the office. The OCS ordered Sgt Kiiyiapa to take action. Sgt Kiiyiapa booked in the two suspects in the occurrence book. A quick search was done on them. PW1 did search of 1st appellant from whom he got Kshs 18,500/=. The money was alleged to be proceeds of the sale of motor cycle which was stolen from Lodwar police station.
14. PW1 further stated that on March 31, 2021 together with Cpl Kurgat, C.I Mutegi, PC Losuin and PC Agutu went to Equity Bank in company of 1st appellant. That while there, accused 4 to whom 1st appellant had sold motor cycle was found and arrested. The motor cycle was recovered having been brought by accused 5 who was equally arrested and charged for handling stolen goods. The team then proceeded to Kanam Kamer and on arriving found a group of people being chased by the OCS, they joined the chase and a numberless motor cycle was recovered and a separate number plate, at a house where accuses 6 took them in Nakwamekwi. It was also his evidence that the motor cycle recovered at Equity Bank was also numberless. Also, that the two suspects, 1st appellant and 2nd appellant were well known to them, being police officers themselves.



- On cross-examination PW1 stated that he did not see 1st appellant stealing the motor cycle, and also did not see 2nd appellant at the scene of recovery. The motor cycle was brought to the scene by accused 6 when called by accused 5.
15. PW2, Jeremiah Yaola Masika a chef at the Lodwar police station canteen. He stated that on March 30, 2021 at about 8pm he went to the office of the OCS, where he saw OCS on phone, while his people outside were pushing a motor cycle. PW2 was instructed by the OCS to call them. The OCS enquired from PC Kiiyiapa whether he had released the motor cycle to which PC Kiiyiapa answered in the negative. PW2 was later called to record a statement. On being cross examined, stated that he saw the 1st appellant pushing the motor cycle; and that it was him (PW2) who pushed the motor cycle back to the station, from the 1st appellant and his group.
 16. PW3, PC Sila Kemboi No xxxx of Lodwar police station, stated that on on March 30, 2021 he was on duty at station registry at about 7.58pm when the OCS called him together with his colleague PC Oure enquired whether some exhibits had been received. Shortly, 1st appellant and 2nd appellant were brought alongside motor cycle Reg KMBW 441W. The 1st appellant was the one found with the motor cycle. On cross examination, PW3 stated that the 1st appellant had the motor cycle and accused 3 was the one to buy the same.
 17. PW4, PC Beatrice Aule No xxxx based at Lodwar police station, gave her testimony that on March 30, 2021, she reported for duty at 8pm, when she saw 1st appellant and another person going towards police canteen. Shortly, thereafter PW2 Jeremiah Yaola Masika came saying that PW4 was required by the OCS. She proceeded to the OCS office where she was asked whether she had released some exhibits which she denied. She was ordered by OCS to arrest the 1st appellant and 2nd accused, which she did. The two were searched and Kshs 18,500 was recovered from 1st appellant. They were placed in the cells. Later accused 3 was arrested at night and brought to police station.
 18. PW5, PC Erastus Lobwin No xxxx based at Lodwar police station, testified that on March 30, 2021 at about 8.30pm where he met 1st appellant pushing a motor cycle. Along with 1st appellant were people not previously known to PW5 pushing a numberless motor cycle, yellow and blue in colour respectively. It was his evidence that he did not question them since 1st appellant was a police officer. On the following morning he learnt that the motor cycles were being stolen, at the time he witnessed.
 19. PW6, PC Maxwel Kinuthia Mwangi No xxxxx of Lodwar police station, was the investigating officer. He testified that on the March 30, 2021 he was at Lodwar police station at 1950hrs with other colleagues having arrived from Eliye springs. They met the OCS and Cpl Kiapya having arrested police officers. The OCS ordered that CPL Some (1st appellant) to be booked in custody. Before being booked a quick search was done on him and Kshs 18,500/- was recovered in his pocket.
 20. The following morning on March 31, 2021 upon interrogation of the suspects and enquiring from PW5; PC Lobwin 1st appellant led the police to Rudolf hotel where accused 4 was arrested then led the police to near Equity Bank. Accused 4 called someone who brought motor cycle numberless make Honda produced as Exh3. The 1st appellant later revealed that he sold another motor bike to accused 6 who was also arrested.
 21. Upon arrest of all the 6 suspects, statements were recorded and a decision was made to charge them with the current offence. The 3 motor cycles were detained by traffic officers for traffic offences. He produced stations duty rooster from March 21, 2021 to April 3, 2021. 1st appellant, being a colleague, was well known to him. According to the records 1st appellant was on duty at the time, he was at the



- county ground. That 2nd appellant is also a police officer and was on duty at the station guard. Duty rooster exhibit 5. 2nd appellant was arrested for failing to be on duty as required by the rooster.
22. On cross-examination by Mr Odhiambo, the counsel for 1st appellant, he stated that when one is on duty he records an entry in the OB. According to the duty rooster two officers were to man the station during the morning hours. The motor cycles were stolen on Sunday evening about 9pm, 2 bike was stolen on 1. He admitted recovering Kshs 18,500/= from 1st appellant but did not bother to find out the source of the money.
 23. On cross-examination by 2nd appellant, he stated that accused was arrested on March 31, 2021 and arraigned in court on the April 1, 2021. That exhibit 3 and 4 were recovered on the March 31, 2021. That 2nd accused failed to report on duty on the nights of 28th, 29th and March 30, 2021. He absented duty. That in view of such absence necessary action is taken.
 24. At this juncture the prosecution closed its case. The court made a finding and ruled that a *prima facie* case had been established against the appellants. They were placed on their defence and denied to having committed the offence.
 25. The 1st appellant gave sworn evidence and called one witnesses, while the 2nd appellant also tendered sworn evidence but without calling any witnesses.
 26. The 1st appellant, D1W1 testified in his sworn statement stated that on March 28, 2021 he was in his house, then went to Kanam Kemer alongside the wife whom they disagreed. On the earlier date on May 25, 2021 he had found the wife with another man and had a quarrel. On the May 25, 2021 he was indoor as he was not on duty. That he has just been framed in this case. That on March 29, 2021, he was briefly in Lodwar town and went back to his house. That he was not involved in theft of motor bikes as alleged. That on the date of arrest he was in his house when Sgt Philip Kiyapa called saying that the OCS wanted to see him. He went to the station and while near the police canteen 6 officers apprehended him.
 27. D1W2, Mr Raphael Etoo Egelan stated in his sworn evidence that he lives in Eldoret and he works as a driver, and the 1st appellant was his schoolmate. That on March 30, 2021 at about 9am he came from Kakuma. Then about 8pm he went home and had a discussion with a wife over some dispute. At 8pm he went to look for a doctor near Huduma Centre in Lodwar.
 28. The 2nd appellant, D2W1 testified in his sworn statement stated that he lives in Soweto area of Lodwar town and that he is a police officer stationed at Lodwar police station. That on March 30, 2021 at about 7pm, he went out and saw Mr Kurgat with a motor cycle. Mr Kurgat moved and called him. He was asked to go and see the OCS. Having not gone to work for some days, he was scared when asked to go and see the OCS. He told court that he had stress since the wife had eloped with another man. That on reaching the OCS, officer, he was informed that a motor cycle had been stolen. That he was then arrested and placed in the cells and later charged with the offence.
 29. The issue for determination is whether the prosecution proved its case beyond reasonable doubt, against the appellants. From the record, it was PW2, PW4 and PW5 evidence that it was the 1st appellant, a police officer, together with others members of public, that were seen pushing the motor cycle from the police station, without authority to do the same. Moreover, it was the 1st appellant who led the police officer to the recovery of other motor cycles, that he had sold to the members of the public. There is no doubt who committed the offence. The trial magistrate convicted the 1st appellant of count I, II, and II.



30. As for the 2nd appellant, the evidence on record and to his own admission and by the duty roster, he was supposed to be on duty on the material dates, but failed to report. The trial court convicted him on the offences: Alternatives to count I, II, and III.

31. This court finds guidance in the case of *Ketan Somaia & another v Republic* [2005] eKLR, the High Court observed that,

“By saying that the 2nd appellant threw all caution to the wind, I understand the learned trial magistrate to be saying that the 2nd appellant was either completely negligent or otherwise reckless, in the performance of his duties.

In the case of *Rex v Cyril J. Watkins* (1945)12 EACA 81, the Court of Appeal for Eastern Africa held that it was not right for it to uphold a conviction which was founded more by criminal neglect than by criminal intent. This is the way they expressed themselves; We need only say that the existence of criminal negligence, however reprehensible it may be, does not constitute theft.”

The reason for that holding is simple. It is to be found in the definition of the term “stealing” as set out in section 268 of the Penal Code. For a person to be convicted for the offence of stealing, he must take or convert the thing, fraudulently. In other words, the prosecution must prove not only the act of taking or conversion, but also that the person had a fraudulent intent. It is therefore not sufficient for the prosecution to prove that the accused person was negligent or reckless.

32. The High Court further stated that;

In the case of *The Republic v Jones* (1976) Klr 1, the High Court, appellate side held 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 afterwards to repay the money to the owner.”

33. From the foregoing, and having reviewed and analysed the defence offered by the appellants and the prosecution evidence; A close examination of the defence offered clearly shows that it does not create doubts on the strength of the prosecution case. It is trite law that legal burden of proof in criminal cases lies with the prosecution.

34. This court is satisfied that the prosecution proved its case both counts against both appellants.

35. I find that no merit in the appeal. The same is dismissed and conviction and sentence upheld.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 30TH DAY OF SEPTEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the 1st Appellant

.....for the 2nd Appellant

.....for the Respondent

