



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**CRIMINAL APPEAL NO. 01 OF 2020**

**HAMMY KOMORA KANANA**

**BARISA LISANIA KIGOGO..... APPELLANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the Original Conviction and Sentence in Criminal Case No. 109 of 2018 in the Principal Magistrate's Court at Garsen before Hon. J. M. Macharia (PM) dated 30<sup>th</sup> October 2019 )*

**CORAM: Hon. Justice Reuben Nyakundi**

**Mr. Mwangi for the State**

**Appellants in person**

**J U D G M E N T**

The appellants were jointly charged with the offence of stealing motor cycle, contrary to Section 278 (A) of the Penal Code and in the alternative the 2<sup>nd</sup> appellant was charged singularly with the offence of handling stolen property contrary to Section 322 (1) (2) of the Penal Code.

It was alleged that on diverse dates between 1<sup>st</sup> May 2017 and 31<sup>st</sup> May 2017 at Sera Mnazi, junction in Tana River Delta, Sub-County, the appellants stole a motor cycle Registration No. KMDM 247X Bajaj Blue valued at Kshs.97,000/= the property of **Gedi Ali Adhan**. It was upon a full trial that the appellants were convicted on 30.10.2019 and subsequently sentenced to four (4) years imprisonment.

Being aggrieved with both conviction and sentence, appellants preferred an appeal based on the following grounds:

- (a). That the Learned trial Magistrate erred in Law and fact by failing to consider that the case was not properly investigated.*
- (b). That the Learned trial Magistrate erred in Law and fact by not considering that the motor cycle was not found in their possession and that it was recovered and returned to the owner.*
- (c). That the Learned trial Magistrate erred in Law and fact by not considering that the said defence which was plausible and in answer to the prosecution case.*

**Background - the case for the prosecution**

The prosecution case was based on the evidence of three witnesses which the Court captured as follows: **(PW1) APC Mureithi Nyaga** was telephoned about a stolen motor cycle found in possession of the 1<sup>st</sup> appellant. In response to the complaint he took a step to recover the motor cycle and went further to request for the log-book from the registered owner. **(PW2)** – during the perusal of the Log-book, the details matched those of the recovered motor cycle despite the changes in its colour from blue to red to disguise its features as completely. It also emerged from the explanation he received from **(PW2)** the fuel tank had also been removed and in place of it a red tank fixed as supported by the physical observation. As regards the evidence of **(PW2) Gedi Adhan**, the registered owner of the subject motor cycle he stated to have left in the forest due to the heavy rains at the time. The following morning when he went back to retrieve it he found the same missing in location. Thereafter, **(PW2)** told the Court that he found the 1<sup>st</sup> appellant with a motor cycle though its colour had been changed from blue to red. On inquiry from the 1<sup>st</sup> appellant, **(PW2)** testified that he was adamant that he is the owner of the motor cycle inspite of the clear identification mark of a big bolt to fix to the stand which was still in place. He produced the log-book in support of ownership as

exhibit 2.

Last was (PW3) whose evidence was of **Sergeant Christopher Nabube (PW3)** attached to Garsen Police Station. In his testimony on 28.6.2018 he received a report on the theft of a motor cycle. From that report, he recorded witness statements which included that of the complainant (PW2) and (PW1) to establish culpability. On this aspect it emerged that the appellants were in one way or another involved in the theft of the alleged motor cycle. With that reasonable belief the two appellants were arrested and charged with the offence.

At the close of the prosecution case, each of the appellant was placed on his defence. The 1<sup>st</sup> appellant denied the offence. He however acknowledged that a motor cycle in question was taken to him for repairs by the 2<sup>nd</sup> appellant. In the course of fixing the repairs, members of the public approached him with threats of actual violence but the police took away the motor cycle to the police station. He was charged with an offence he did not commit.

The second appellant also denied the charge and that his arrest was a mistaken identity. Its against this backdrop the Learned trial Magistrate convicted and sentenced the appellants on grounds that they both formed the necessary intention to commit the unlawful act of stealing.

### **The submissions by the appellants all grounds argued together in consideration**

In their identical submissions, the appellant argued that Article 50 (2) (P) of the Constitution was violated. That if the Learned trial Magistrate proceeded to factor in the provisions of the constitution they could have benefited from a less severe sentence other than the four years passed by the Court. That the sentence imposed was excessive and punitive given the fact that they are family men with a responsibility to make financial provision for their upkeep and support. It was their contention that appeal's Court do consider their grievances to allow the appeal.

### **The respondent's submissions**

In response to the appeals, Learned prosecution counsel opposed the appeal on grounds upon which the appellants anchored their arguments. Further, Learned counsel submitted that all the essential ingredients of the offence were proved beyond reasonable doubt. That the appellants did not present any evidence to controvert the watertight case by the prosecution from (PW1 – PW3) testimonies. In his address to the Court, Learned counsel argued that the appeal should be dismissed for the reasons that it lacks merit. He set to rely on the case of **Eric Otieno v R {2006} eKLR** and Section III of the Evidence Act as the well settled principles that determined the prosecution case.

### **Determination**

This is a first appeal and the Court is bound to reappraise the evidence on record afresh and after doing so come to my own conclusion, but bearing in mind that the Learned trial Magistrate had the advantage of hearing and seeing the witness physically in Court, and able to evaluate their demeanor and veracity. The art of comparing and evaluating the demeanor of witnesses is no doubt one which time and thought therefore may be accorded to the Magistrate versed in such comparisons and conclusions on witnesses. (See **Okeno v R {1972} EA 32**). **R v Ruwala {1957} EA 570**).

In the instant appeal, it will be convenient to deal with evidence on conviction, notwithstanding that the appellants rested their case on manifest punitive of the sentence. From the indictment and brief facts, the appellants were jointly charged with the offence of theft of a motor cycle with an alternative charge of handling stolen property by **Barisa Kigogo**. For the appellants to be convicted of the offence under Section 278 of the Penal Code, the prosecution was under an obligation to prove each of the following elements beyond reasonable doubt:

- (a). That each formed an intention to unlawfully and without color of right deprive the complainant permanently of his right to ownership.*
- (b). That at the time of the theft, the motor cycle was in possession of the complainant.*
- (c). That the appellants participated in the commission of the crime and squarely placed at the scene.*
- (d). That the motor cycle was positively identified as belonging to the complainant.*

As a result of these provisions and the points raised in this appeal, I may start with analyzing each ingredient and the corresponding evidence.

#### **(a). On whether the motor cycle was intentionally and unlawfully taken from the complainant with an intention to deprive him of it permanently.**

It was therefore for the prosecution to prove the features of what amounts taking away from one's control, conversion, carry it, moving it or, hiding it from access of the complainant, with full knowledge and intention to permanently deprive him or her of the property without his or her consent. **Black's Law Dictionary 8<sup>th</sup> Edition {2004} at 1453** sets the realistic perspective on this issue as follows:

**“Conversion is defined in terms of tort and criminal law as “the wrongful possession or disposition of another’s property as if it were one’s own; an act or series of act of willful interference, without lawful justification, with an item or property in a manner inconsistent with another’s right whereby that other person is deprived of the use and possession of the property. Therefore, the act of taking as an actus-reus of the offence includes taking possession, refusing to give up possession upon demand, disposition of the goods to a third person, or destroying them, provided that it is also established that there is an intention on the part of the accused in so doing to deny the owners right or to assert a right vested in the owner.”** (See also **Okello Charles v R CR Appeal**

**No. 0003 of 2018 (at Gulu in Uganda).**

The existence of the offence under Section 278 (A) of the Penal Code in my view brings into perspective the provisions of Section 4 of the Penal Code which states as follows:

***“To be in possession of or have in possession includes not only having in ones own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place, whether belonging to or occupied by oneself or not for the use and benefit of oneself or of any other person. If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything. In his or their custody or possession, or shall be deemed and taken to be in the custody and possession of each and all of them.”***

The breadth of the elements of theft means that the prosecution must establish appropriation and an intention to permanently deprive the complainant of the right to claim the legal or beneficial interest. The provisions to mind imports the element of dishonest appropriation of another person’s property. The interaction between the two principles of facilitating the taking away or conversion with an intention to deprive the owner permanently and subsequent actual or constructive possession manifest criminality to constitutes the offence punishable under the Penal Code.

I have evaluated the prosecution evidence on the record of the trial Court, the perspective by each witness on existence of facts to proof the element of the offence, and the subsequent answer put forth by the appellants. It is significant to state that the ingredients of the offence for the charge of stealing contrary to Section 278 of the Penal Code stand proven beyond reasonable doubt.

Likewise, I am persuaded in the same breath as the trial Court that there are no errors, or wrong principles taken into account to warrant this Court to impeach the impugned Judgment. There is no way I would fault the trial Magistrate on any of the grounds in the memorandum of appeal without sufficient evidential material.

In closing, this appeal be and is hereby dismissed on both conviction and sentence. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF DECEMBER 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Mwangi for the state
2. The appellants