



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 176 OF 2019

MARKNON MASIKA WAFULA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 895 of 2018 at the

Principal Magistrate's Court Kimilili by Hon. I. G. Ruhu– RM on 25th October, 2019)

JUDGEMENT

1. **Marknon Masika Wafula**, the Appellant, was charged with the offence of stealing a motorcycle contrary to **Section 278A** of the Penal Code. The particulars of the offence were that on the 23rd September 2018, at Kamukuywa Market in Kimilili Sub- County Bungoma County, stole one motorcycle registration KMEJ 710 M make TVs HLX black in colour valued at Ksh. 96,000/- the property of one **Emmanuel Onsongo Chesoli**.
2. Having been taken through full trial, he was found guilty, convicted and sentenced to serve five (5) years imprisonment.
3. Aggrieved, he filed this appeal at the outset in person raising several grounds of appeal. That: evidence adduced was insufficient, contradictory and the court shifted the burden of proof to the appellant; the appellant was in lawful possession of the subject motorcycle before theft, therefore the conviction occasioned was a miscarriage of justice; circumstantial evidence that the court based on to convict the appellant lacked sufficient corroboration; the trial Magistrate relied on irrelevant and immaterial facts to reach the decision; and the sentence imposed was harsh and unconstitutional.
4. Subsequently the appellant appointed learned Counsel, Mr. Otsiula to represent him who filed written submissions on his behalf. During hearing of the appeal it was urged that the appellant does not contest the fact of having been an employee of the complainant and the actual taking and possession of the subject motorcycle prior to the loss. That the appellant rode the motorcycle for a period of six (6) months with the knowledge and consent of the complainant.
5. That there was no fraudulent conversion of the motor-cycle as the appellant was assaulted and the motorcycle stolen. That no investigations were conducted and it was not explained how the charges were preferred against the appellant.
6. Arguing that no fraudulent intent was established, he cited the case of **H.K. Bwire vs Uganda (1965)** where it was stated that the gist of the offence of theft is the fraudulent intention to appropriate permanently; and in **R v Kantil Chhaganlal Raval and another (1960) EA 606** where it was held that an employee who took goods without instructions or permission and without signing a delivery book, sold them and did not account for the proceeds took the goods *animus furandi* when he took goods. And that the time when he sold the goods, intended to permanently deprive the owner thereof (see **Criminal Law, William Musyoka (2016) pp. 367**)
7. That circumstantial evidence, the basis upon which the court convicted was not corroborated hence unsafe; No call data was availed to prove that the appellant and suspect were in communication therefore even if the cell phone was produced, the appellant was charged on the basis of suspicion. In this regard he cited the case of **Sawe -vs- Republic (2003) KLR 364** where it was said that:

“1. In order to justify on circumstantial evidence, the inference of the guilt, the exculpatory facts must be incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence cans be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable

hypothesis of innocence is on the Prosecution. This burden always remains with the Prosecution and never shifts to the Accused.”

8. The State/Respondent opposed the appeal. It urged that: the chain of events brought out by the prosecution was explicit and elaborate that the defence account was fabricated; the motorcycle got lost under suspect circumstances; the appellant claimed that he was robbed but failed to demonstrate that he was injured as no witness came forth to testify that he was taken to hospital for treatment.

9. That stealing was proved as the orchestrated robbery of the motorcycle that was stage managed was not recovered to the detriment of the owner. That through phone signals, there was communication between the appellant’s phone and the person in possession of the motorcycle who however eluded being seized.

10. Further, that ownership of the motorcycle was proved and circumstantial evidence adduced was cogent to the effect that the appellant feigned injury to depict that he was robbed of the subject motorcycle. And after being taken to hospital briefly he was seen riding a different motorcycle as if he had no injuries.

11. Briefly evidence adduced was that through an oral agreement, Emmanuel Onsongo Chesoli, the Complainant, entrusted his motorcycle registration number **KMEJ 710M** with the appellant whom he engaged as a rider. On the 23rd September, 2018 he received several calls from people who gave him information that his rider had been assaulted and the motorcycle stolen. He went to Delight Clinic where the appellant had been taken and instructed another rider to take him to Kimilili District Hospital. The following day he saw the appellant riding another motorcycle and informed **PW2 John Khisa**, the Chairman of Bodaboda Association. The matter was reported to the police and the appellant was summoned. He shared details of the person who allegedly stole the motorcycle. When PW2 visited him at Kimilili Hospital he disclosed that the suspect had moved around with him for three (3) days in the capacity of a client therefore he shared the number with the office of DCI.

12. **PW4 No. 39935 P.C. Michael Kwabayi**, the investigating officer upon receiving the report commenced investigations. He was given phone number 0798xxxxxx as the number that the suspect was using while seeking services from the appellant. Following loss of the motorcycle, the appellant had reported on the 23rd September, 2018. The number of the suspect, then, was tracked by the office of the DCI and it was indicated the individual was in Amagoro. Subsequently the person switched off the phone. It was concluded that the person had been tipped of the ongoing investigations. The DCIO established that the person was in communication with the appellant hence he was charged. The officer stated further that he was tasked to produce call data records but having handed over the phone to the DCI’s office no investigations were conducted.

13. Upon being placed on his defence the appellant stated that on the 19th September, 2018, in the course of his duties at Kamukuywa stage he got a passenger who was going to a place near the Police Station. On reaching the destination he asked him to pick him up the following day and they exchanged numbers. The following day he encountered him while headed to Kamukuywa and ferried him to where he had taken him the previous day. As soon as they reached the destination he asked him for change of 100/- then alighted and soon thereafter he was hit by a panga. He fell down and two (2) other people hit him with clubs. He lost consciousness and regained the same to find himself at Kimilili Sub-County Hospital. He was admitted at the hospital for four days and discharged on the 25th September, 2018. On 27th September, 2018 he was called by the complainant who instructed him to go and record a statement. He went to Kimilili Police Station and some Police Officers tried to track the phone number that he gave them but the suspect was not found. The phone was stated to have been switched off. His phone was taken to Kamukuywa Police Station and he was subsequently charged.

14. This being a first appellate court, it has a duty of submitting evidence adduced at trial to a fresh scrutiny bearing in mind the fact of having neither seen nor heard witnesses who testified in order to reach its independent conclusions. In the case of **Okeno -vs- Republic [1972] EA 32**, the Court of Appeal stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts’ findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424”.

15. Stealing is defined by the Black’s Law Dictionary, 8th Section as:

“To take (personal property) illegally with the intent to keep it unlawfully”

16. **Section 268** of the Penal Code defines stealing as:

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.

17. In the case of **Wycliffe Anyona Nyabuto -vs- Republic (2014) eKLR** the court stated that:

“Essential element in charge of theft is that the person accused fraudulently converts a property which is capable of being owned so as to deprive the owner of such property”

18. It is not in dispute that the appellant was lawfully in possession of the subject motorcycle as he was retained by the complainant as his rider. The argument of the prosecution was that the motorcycle got lost while in custody of the appellant under suspicious circumstances and following investigations carried out the appellant was suspected to have colluded with the person who took the motorcycle and permanently deprived the owner of it.

19. Being a criminal case, the burden of proving that fact was upon the prosecution and the standard proof was beyond reasonable doubt.

20. It was proved that the appellant was the last person with the motorcycle. It is not in dispute that following loss of the motorcycle the appellant was taken to hospital. The complainant admits having found him bandaged, but, argues that two (2) days later he was seen riding another motorcycle. The appellant on the other hand stated that he was hospitalized for four (4) days and this evidence was not disproved. He reported the incident to the Police. And after he gave the police the phone number of the suspect they commenced investigations which were not concluded. After the suspect switched off the phone, the police opted to charge the appellant.

21. While the prosecution has the burden of proving every element of crime, the accused (appellant herein) had no duty of proving his innocence so as not to be convicted. The appellant rendered an explanation that made the investigators act but for no apparent reasons failed to conclude investigations. The conviction by the trial court was entirely based on circumstantial evidence. In the case of **Rex -vs- Kipkering Arap Koske & 2 others (1949) EACA 135** the court 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.”

22. In the case of **Simoni Musoke -vs- Uganda (1958) EA 71** the court stated that before drawing the inference of guilt from circumstantial evidence the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference. (Also see Martin Kimeu vs. Republic (2002) eKLR.

23. To rely on circumstantial evidence, the court should satisfy itself that there are no co-existing circumstances to weaken such evidence. In the instant case it was established that the appellant reported an incident that occurred to the police. He gave an account of how he was attacked. Investigations to establish the whereabouts of the suspect were abandoned. The appellant was charged because he was suspected to have tipped the individual of the ongoing investigations. This would have been established had the Office of DCI Kimilili concluded their investigations by availing data. The police simply acted on suspicion.

24. In the case of **Sawe -vs- Republic (2003) KLR 364** the Court of Appeal held that:

“1. In order to justify on circumstantial evidence, the inference of the guilt, the exculpatory facts must be incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence cans be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the Prosecution. This burden always remains with the Prosecution and never shifts to the Accused. ”

25. The upshot of the above is that there were other circumstances that were pointed out which weakened evidence adduced by the prosecution. In the result, a conclusion could not be drawn that the appellant as opposed to any other person stole the motorcycle.

26. Therefore, the appeal succeeds. The conviction is quashed and sentence imposed set aside. The appellant shall be released forthwith unless otherwise lawfully held.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 17TH DAY OF DECEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant - Ms. Immaculate

Mr. Ayekha – ODPP

Appellant