



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL CASE NO. 151 OF 2017

SAMSON SAITA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was convicted of the alternative charge of handling stolen goods contrary to Section 322(1) (2) of the Penal Code and sentenced to serve 5 years imprisonment. He was aggrieved by the convictions and the sentence and filed this appeal.

The grounds of appeal are that:

1. The learned trial magistrate grossly erred in law and facts in presiding over a prejudicial trial that failed to meet the standards for a fair hearing as outlined under article 50(2)(g),(h) and (j) of the constitution.
2. The learned trial magistrate erred in law and fact in failing to find that the prosecution had not called a material witness to whom the complainant had entrusted the motor cycle.
3. The learned trial magistrate erred in law and fact in convicting the appellant in the absence of corroborative evidence.
4. The learned trial magistrate erred in law and in fact in convicting the appellant against the weight of the evidence.
5. The learned trial magistrate misdirected himself in law and in fact by handling the appellant a harsh sentence.
6. The learned trial magistrate gravely erred in law and fact in rejecting the appellant's defence.

2. The appellant was facing a main charge of stealing contrary to Section 278A of the Penal Code and an alternative charge of handling stolen goods contrary to section 322(1) of the penal code. The particulars of the alternative charge were that on the 5th May 2017 at Paul's bakery area, township location in Uasin Gishu County otherwise than in the cause of stealing dishonestly retained one motor cycle knowing or having reason to believe it to be stolen property. The particulars of the main charge were that on the 13th May 2017 at Lwandeti Friends area, Manda sub location in Kakamega North sub county within Kakamega county jointly with others not before court stole one motor cycle registration No. KMDZ 964M valued at Kshs.104,000.00 Star Hix 125 the property of Addah Betty Simon(herein referred to as the complainant)

Case for prosecution

3. The prosecution called three witnesses in the case. The complainant P.W.1, the complainant's son P.W.2 and the investigating officer Sgt. Lugonzo P.W.3. It was the evidence of the complainant that she lives at Lwandeti. That she was running a motor cycle(boda boda) business. That she had entrusted her motor cycle registration No. KMD2 964M to one Raphael. That on 13/4/2017 she was phoned by one Jael Wanamo who told her that her motor cycle had been stolen. That later on the appellant was arrested in Eldoret town with the said motor cycle with tampered number plate. The appellant was then brought to Malava Police station and charged with the offence.

4. The son to the complainant, P.W.2, testified that he is a prison officer at GK prison Eldoret. That on 5th May 2017 he received a phone call from his mother that her motor cycle had been stolen and that it had been spotted in Eldoret town. That he met an informer in Eldoret town who told him that the motor cycle was at Paul's bakery. They went to the place where they spotted the motor cycle with the appellant. P.W.2 passed as a customer. He requested the appellant to ferry him to G.K. Prison Eldoret. The appellant did so. On reaching there he

informed the appellant that the motor cycle was stolen. He detained him. That P.W.2 called his mother P.W.1 who went to the place with the purchase receipts to the motor cycle. They checked the serial number on the motor cycle that corresponded with the number on the receipts. They took the appellant to Eldoret police station. Later they took him to Kabras police station. He was charged.

5. The investigating officer P.W.3 OF Kabras police station testified that on the 15th April 2017 the complainant P.W.1 went to the police station and reported that on the previous day her motor cycle had been stolen while in the hands of her rider. That on the 5th May 2017 the appellant and another were arrested in Eldoret while in possession of motor cycle. The registration No. KMD2 977Z . They were taken to Kabras Police Station. That the number plate to the motor cycle had been altered from KMD2 964M to read KMD2 977Z.

Defence case

6. When placed to his defence the appellant stated in a sworn statement that he was arrested at his home at Valuya and taken to Malava police station. He was taken to court and charged with an offence he knew nothing about. He denied that he was arrested at Eldoret town.

Submissions

7. The appellant made written submissions. He submitted that the complainant's motor cycle rider called Raphael did not testify in the case. That the person called Wanamo who is said to have informed the complainant of the theft was not called to testify in the case. That the area chief who was also mentioned in the case did not testify. The appellant further submitted that the trial court failed to consider his defence.

8. The state through the prosecution counsel Mr. Ngetich opposed the appeal through oral submissions. He submitted that the appellant was found in possession of the motor cycle. That he was found in possession of recently stolen property. That the conviction and the sentence were legal. That the appeal should therefore be dismissed.

Analysis and Determination

9. The appellant was convicted of handling stolen goods contrary to Section 322 (2) of the Penal Code. Before the appellant could be convicted of the said offence the prosecution had to prove that the motor cycle was stolen. The person to whom the complainant had entrusted the motor cycle, one Raphael did not testify in the case. Only Raphael could say that the motor cycle was stolen. There was no explanation given as to why he did not testify. Without his evidence, the prosecution had not proved that the motor cycle was stolen. The trial court relied on hearsay evidence to find that the motor cycle was stolen. This was a misdirection on the part of the trial court. There was thereby no evidence that the motor cycle was stolen. The complainant in her evidence stated that she went to Eldoret on the day the appellant was arrested and found him having been arrested. The appellant did not question any of these witnesses during cross examination whether he was arrested at his home as alleged in his defence. There was thereby no truth in his defence that he was arrested at his home. He was arrested in Eldoret town while in possession of a motor cycle.

10. The complainant and her son P.W.2 stated that they compared the serial number on the complainant's purchase receipt and that on the motor cycle and found that they corresponded. However when the matter was being heard in court, there is no record that the trial court confirmed either the serial number on the receipt correspond with the chassis number on the motor cycle. Since the number plate had been altered, the court can only have satisfied itself that the motor cycle is the one that belonged to the complainant by comparing the serial number on the receipt and the chassis number.

11. As the trial court failed to do this there was no evidence that this particular motor cycle belonged to the complainant. No other evidence was led on the identification of the motor cycle. The appellant was thus convicted of the offence when the prosecution had not proved that the motor cycle was stolen not that it belonged to the complainant. Consequently, there was no evidence that the appellant handled stolen property.

12. On my analysis of the evidence found that the appellant was wrongly convicted of the offence of handling stolen goods. The appeal is thereby upheld. The conviction is accordingly quashed and the sentence set aside.

The appellant is set at liberty forthwith unless lawfully held.

Dated, signed and delivered in open court at Kakamega this 28th day of March, 2019.

J. NJAGI

JUDGE

In presence of:

Appellantpresent in person

Miss. Kibetfor respondent

GeorgeCourt Assistant

14 days Right of Appeal