



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 51 OF 2016**

**YONAH MANDU EKHOLO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against conviction and sentence in Criminal Case Number 1528 of 2016 in the Senior Principal Magistrate's Court at Maseno delivered by Hon. B.K.Kiptoo (RM) on 6th July, 2016)***

**JUDGMENT**

1. On 6th July, 2017 the appellant was convicted for stealing contrary to section 268(1) as read with section 275 of the Penal Code Cap 63 Laws of Kenya of the Penal Code and was sentenced to serve three years imprisonment for stealing a bicycle and a generator.

**The prosecution's case**

2. The prosecution called 5 witnesses in support of the charges. PW1 the complainant testified that he did not see accused his property. It was his evidence that the bicycle was recovered beside a road while the generator was recovered covered with leaves in a farm behind appellant's house.

3. PW2, a minor aged 7 years old told court that the complainant told her to tell court that appellant had stolen the bicycle and the generator. PW3, a minor aged 9 stated that he saw appellate steal the complainant's generator. PW4 told court that complainant's bicycle was recovered by the road side while the generator was recovered by a river. PW5 was neither at the scene of appellant's arrest nor scene or recovery of the stolen goods but he confirmed that the generator was recovered while appellant was in custody.

**The Defence Case**

5. When he was put on his defence, the appellant gave unsworn testimony in which he denied the offence. He said that the bicycle that was allegedly stolen was his which he had given complainant to use. He denied stealing complainant's generator.

**The appeal**

6. Being dissatisfied with the conviction and sentence of 4 years imprisonment in each limb, appellant lodged the instant appeal. In his amended grounds of appeal filed on 5th December, 2017, the appellant raised 7 grounds of appeal which I have summarized into 6 grounds to wit:

- 1. That Article 50(2) (j) of the Constitution was not complied with**
- 2. He was convicted on a defective charge**
- 3. No documentary evidence was produced to link him to the offence**
- 4. Crucial witnesses were not called to testify**
- 5. The exhibits were recovered while he was in custody and recovery was tainted**
- 6. The trial magistrate's decision was harsh and excessive**

7. When the appeal came up for hearing on 23rd January, 2018, the appellant stated that he as wholly relying on the grounds of appeal and

written submission filed on 23rd January, 2018. In her oral submissions, Ms. Wafula, for the stated that the evidence of the minors was corroborated and that there was evidence that the generator was recovered from appellant's compound.

### **Analysis and Determination**

8. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENOVS. REPUBLIC [1972] E.A. 32**, where it held that:-

***“It is the duty of a first appellate court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”***

9. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

10. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

#### **a. Fair hearing under Article 50(2)(j) of the Constitution**

On 13.5.15 and 8.6.15, the trial court directed the prosecution to supply the appellant with statements. On 14.7.15, the hearing was adjourned because appellant had not been supplied with statements. Appellant did not substantiate how the prosecution had failed to comply with Article 50(2) (j) of the Constitution and this ground must therefore fail.

#### **b. Defective charge sheet**

12. There is no evidence that the charge sheet was defective and this ground must similarly fail.

#### **c. Documentary evidence**

13. Accused did not deny that he sold the bicycle in issue to the complainant. Complainant produced a receipt to support his claim that the generator was his and this ground must correspondingly fail.

#### **d. Crucial witnesses**

14. Appellant did not identify any crucial witness that was not called as a witness and this ground must likewise fail.

#### **e. Recovery of the generator**

15. The learned trial magistrate placed heavy reliance on the evidence of PW2 and PW3 who are minors aged 7 and 9 years respectively.

16. I have considered the provisions of Section 19 of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya provides:

***(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.***

17. Under the above cited section, the trial court must be severally satisfied about two main ingredients before proceeding to take the evidence of a child of tender age namely;

**1) Whether the child understands the nature of an oath; or**

**2) If the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.**

18. If the child does not understand the nature of the oath, the trial court should determine if he/she possesses sufficient intelligence to justify the reception of the evidence, and he/she understands the duty of telling the truth. It is only after the said inquiry has been conducted that the testimony of a child of tender age is received in evidence either under oath or as unsworn statement. But in both instances, the child is liable to cross-examination. (See ***BGM HCCRA NO 141 OF 2011 [2013] eKLR***).

19. In the instant case, the statements recorded in the proceedings do not show that trial court did not conduct *voire dire* of the PW2 and PW3 to determine if they possessed of sufficient intelligence to understand the duty of speaking the truth.

20. A perusal of the proceedings before the trial learned magistrate shows that the court did not record that it was satisfied that the child was telling the truth. The trial magistrate did not comply with section 19 of Cap 15 of the laws of Kenya. Accordingly, the testimony of PW2 and

PW3 was not properly received in evidence.

21. The question for this court's consideration is whether the conviction could still stand on the other evidence on record.

22. Courts have emphasized that non-compliance with the requirements of section 19 of Cap 15 of the Laws of Kenya will result into quashing of a conviction unless there is other evidence before the court which is sufficient on its own to sustain a conviction. (See *Nyasan S/O Bichana V Republic [1958] EA 190*).

23. The only other evidence against the appellant is that of recovery of the stolen goods. The bicycle was not recovered from appellant but was found abandoned by the road side. While PW1 stated the generator was recovered covered with leaves in a farm behind appellant's house, PW4 stated that it was recovered by a river.

24. After considering the evidence by PW1 and W4, the court cannot help but wonder why both of them who claim to have been present during the recovery would give such inconsistent evidence. The inference that this court makes out of this contradictory evidence by PW1 and PW4 is that either one of them or both are untruthful.

### **Decision**

25. In view of the foregoing analysis, I reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. That there was neither direct nor circumstantial evidence against the appellant. The appeal is thus allowed. The conviction is hereby quashed and the sentence is set aside. It is ordered that the appellant be set at liberty unless otherwise lawfully held.

**DATED AND DELIVERED THIS 15th DAY OF March 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - **Felix &Carolyn**

Appellant - **Present in Person**

For the State - **Ms Wafula**