



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 73 OF 2017

(Being an appeal arising from Kitale Chief Magistrate's Court

Criminal Case No. 2981 of 2013 delivered by P.W. Wasike

Resident Magistrate on 12/9/2017)

JOSPHAT NYAKUNDI MUHERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Stealing contrary to Section 275 of the Penal Code**. The particulars of the offence was that on the **26th day of October 2013 at Kitale Municipality within Trans County stole motorcycle Bajaj Boxer 150 CC Red registration number KMDB 499 U valued at Kenya shillings 94,000/= the property of Patricia Aluoch Luma.**

2. The appellant denied the charge and after full trial he was convicted and sentenced to 4 years imprisonment hence this appeal.

3. Before looking at the grounds of appeal, it is worthy to summarise the evidence as presented during trial.

PW1 Patricia Aluoch Luma stated that she purchased the said motor cycle for the sum of kshs 94,000/= with the intention of using it for boda boda business. She then entered into an agreement with the appellant where he was to use the same and pay her kshs 500/- per day. They entered into a written agreement which was marked but not produced.

4. The appellant did use it for one month but later did not remit the money as agreed. On 26/10/2013 she was found drunk at Grassland bar by the complainant's daughter. He was arrested and put in the cells. He said that the motorcycle was lost.

5. **PW2 Dorine Otieno** testified that she was the daughter to PW1 and that she knew the appellant very well. That on 26/10/2013 she was informed by the appellant's wife that he was drinking at grassland bar and he did not have the motorcycle. He was arrested and taken to the police station.

6. **PW3 Walter Luma Abwao** is the husband to PW1. He confirmed that they purchased the motorcycle from Suam for purposes of business. He identified the agreement between PW1 and the appellant.

7. **PW4 Jackson Ngeywa Soet** a pastor testified that he prayed for the motorcycle on 6/8/2013. The same had been brought to his house by the appellant and PW1.

8. When put on his defence the appellant denied the charge in his sworn evidence. He explained how he was unwell on 15/11/2018 when thereafter he was arrested by police officers after coming back from hospital.

9. On cross-examination he said that he had his own motorcycle and that PW1 did not employ her.

Analysis and Determination

10. I have gone through the proceedings carefully as well as the written submissions by the State counsel as well as the appellant. The

grounds raised by the appellant in his appeal point to the fact that the prosecution did not prove its case beyond reasonable doubt and that the trial court relied on circumstantial evidence in arriving at its decision.

11. The State has conceded to his appeal on the grounds that the offence of Stealing was not proved. In particular the State averred that there was no *mens rea* proved on the part of the appellant.

12. Looking at the evidence as presented by the prosecution I do not think this conceding holds water. There is no doubt that there was a relationship between the appellant and PW1. These are people who knew each other. I am persuaded that though the exhibits were not produced, the appellant was indeed given the motorbike to undertake boda boda business for the complainant.

13. If then he was in possession of the motorcycle, where did it go. In fact it was the appellant's wife who informed PW2 that he was drinking at grassland bar and he did not have the motorcycle.

14. I do not see any other reason why he did not return the property to the owner. Neither is there any malice by the complainant against the appellant. These are people who knew each other and the pastor whom I can call an independent witness saw both the appellant and the complainant when they brought the motorcycle to be prayed for.

15. Consequently I do not find the appeal meritorious. The defence tendered by the appellant on trial did not oust the evidence of the prosecution.

16. This appeal is dismissed. In view of the mitigation offered by the appellant in his closing submission I shall order that he be released forthwith unless lawfully held and to serve the remainder of the term under probation within the relevant jurisdiction as shall be determined by the Trans Nzoia County Probation Officer.

Orders accordingly.

Delivered, signed and dated at Kitale this 27th day of September, 2018.

H.K. CHEMITEI

JUDGE

27/09/18

In the presence of:

Mr Kakoi for the Respondent

Appellant – present

Court Assistant – Kirong

Judgment read in open court