



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 47 OF 2017**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in Criminal Case No. 578 of 2017 delivered by P.C. BIWOTT Senior Principal Magistrate on 19/5/2017)**

**STEPHEN WAMALWA NYONGESA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. The appellant was charged with the offence of **Stealing from a person contrary to Section 279(a) of the Penal Code**. The particulars of the charge was that **on the 1<sup>st</sup> day of October 2015 at Kiminini Trading Centre within Trans Nzoia County Stole Motor Cycle Registration No. KMDF 122V make TVs Star blue in colour valued at Kshs 96,500/= the property of Jensen Kapchanga**.
2. The appellant as convicted and sentenced to 3 years imprisonment hence this appeal. The appellant has raised several grounds in his appeal but before looking at them its appropriate to summarise the proceedings during trial.
3. **PW1 the complainant** told the court that he was a boda boda rider and on 1/10/2015 they had a "chama" meeting at 7 Star hotel Kiminini with his 6 other members. The appellant came and borrowed the complainant's Motor bike and agreed to pay Kshs 600/=. He did not bring back the motorcycle and went out of network. The brother to the appellant informed the complainant that the appellant had lost the motorcycle. He reported the matter to the police. He was not traced for 5 days and he reported to the police. He was thereafter arrested when he resurfaced. The witness equally produced the purchase receipt and the logbook.
4. **PW2 Kitilo Imbula** also a boda boda rider testified that he was at stage on 1/10/2015 and around 10.00 am when the appellant came with stranger and asked for the complainant. After a while he came out of the hotel where PW1 was and he handed over the key and motorcycle to the appellant. He said that since then the motorbike has never been brought.
5. **PW3 John Wekesa Nyongesa** a boda boda rider equally was at stage on 1/10/2015 when the appellant inquired the whereabouts of the complainant. He was with a new friend. They came out with PW1 who handed over the motor cycle to him and he rode away.
6. **PW4 Simon Masibo** a boda boda rider was equally at the scene when the appellant came asking for PW1. He saw the complainant giving the motor bike to the appellant who was with his friend. He heard the following day that the motorcycle was not returned.
7. **PW5 Phanes Kemunto** a tailor testified that he was to be dropped by PW1 home on that day. He told him that the appellant had taken the motorbike. He said that he saw the appellant that day. He saw the appellant receiving the keys to the motorbike at the hotel.
8. **PW6 CPL Mishar Mohammed** from Kiminini Patrol Base took over the investigation for one Wekesa I.P. He carried out investigation and preferred charges against the appellant. He also produced the exhibits, namely the logbook and the purchase receipt.
9. When put on his defence the appellant gave unsworn evidence denying the charge. He said that on that day the complainant gave someone else his motorbike. Whoever he gave the same left him in the house and went with the motorbike. He reported the matter at Kiminini police post and he produced the O.B. dated 2/10/2015. The person disappeared and he did not resurface. He was arrested on 5/10/2015 but released.

**Analysis and Determination**

10. The appellant as well as the Respondent have filed written submissions extensively. The substance of the grounds of appeal by the appellant is that the evidence presented in totality by the prosecution could not sustain the charge; that the defence offered by the appellant was not taken into account and that the offence of Stealing was not proved.

11. What is not disputed here is that the complainant was the owner of the motorcycle. Secondly, that the appellant came with someone else and borrowed the same from the complainant. Infact the appellant has implicated someone else by the name Godfrey Wafula as per exhibit D 1(a).

12. All the prosecution witness agree that the appellant was with someone else when he came asking for the motorcycle. They rode together.

13. PW1 testified that he could not be reached thereafter and his phone had been put off. The question though is who was given the motorcycle? Was it the appellant or the alleged friend? The answer as per the prosecution is the appellant. Was he to return the same? I think he was to because there was no suggestion that he was given permanently.

14. In the premises, whatever the defence offered by the appellant holds no water as he deprived the complainant his property permanently. The question of whether Godfrey Wafula took or not is irrelevant as the person entrusted with the motorcycle was the appellant. Infact all the witness seemed not to know the said Wafula. They all spoke of

“his friend”.

15. Consequently, I do not find the appellant truthful. He did not infact subject himself to cross-examination. I find the whole incident choreographed to suggest that the motorcycle was stolen from him. The reporting to the police on 4/10/2015 was to say the least stage managed.

16. The appeal is otherwise dismissed.

**Delivered, signed and dated at Kitale this 27<sup>th</sup> day of September, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**27/09/18**

**In the presence of:**

**Mr Kakoi for the Respondent**

**Mukhooli for Appellant - absent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court**