

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO 71 OF 2017

[From the original conviction and sentence in Criminal Case No. 99 of 2011 in the Senior Principal Magistrate's Court at Narok, R. v. Titus Wafula Masinde]

TITUS WAFULA MASINDEAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 10 years imprisonment in respect of the offence of handling stolen property contrary to section 322 (2) of the Penal Code (Cap 63) Laws of Kenya.
2. The state has supported both the conviction and sentence.
3. The appellant was convicted on the evidence of Benson Angwenyi Musomi (PW7) and Javan Kungu Ariika (PW8), who found the appellant in possession of the stolen motor cycle of Bonface Ndungu Ngatia (PW1).
4. The defence of the appellant is that he was framed by Benson Angwenyi Musomi which he testified arose from a grudge which PW 7 harboured against him. According to him he had thrown out PW 7 from the hotel where he was working as an attendant because PW7 had vomited in that hotel.
5. The appellant has raised 7 grounds of appeal in his petition to this court. In ground 1, he has stated the unchallengeable fact that he did not plead guilty. In ground 5, the appellant has faulted the trial court for failing to find that there were contradictions and inconsistencies in the evidence of the prosecution witnesses. In this regard, I have considered the evidence of the key witnesses PW7 and PW 8 and I find their evidence in respect of the arrest of the appellant was cogent and consistent. PW7 testified that the appellant wanted to sell him the stolen motor cycle. He was unable to produce documents of ownership. As a result, PW 7 reported the incident to Javan Kungu Ariika who was the chairman of Kericho Riverside Motor cycle Association. The 2 witnesses became suspicious that the motor cycle might have been stolen since the appellant did not have any document of ownership of that motor cycle. He also did not have the national identity card or driving licence. They therefore arranged for his arrest by the police namely No. 79097 PC Leonard Cherwa. The identity of the stolen motor cycle KMCN 142 E was the property of Bonface Ndungu Ngatia (PW1). PW1 had been robbed of this motor cycle, a mobile phone, motor cycle helmet and cash Sh.1400/= at Polonga area in Narok North district on 23/01/2011. It is to be noted that the appellant was acquitted of the robbery charge by the trial court. In the circumstances, I find no contradictions or inconsistencies in the evidence of the prosecution witnesses. I find no merit in this ground of appeal and I hereby dismiss it.
6. In ground 6, the appellant has faulted the trial court in failing to find that he was prejudiced by the non-calling of the arresting police officer for cross examination. I find that the appellant was arrested by PW7 and PW 8 and taken to the chief's camp from where he was re-arrested and taken to court. In the circumstances, I find that the non-calling of the arresting police officer did not prejudice him. This ground of appeal is lacking in merit and is hereby dismissed.
7. Furthermore, in grounds 2, 3, 4 and 7, the appellant has faulted the trial court for imposing a manifestly

excessive sentence in view of the fact that he was a first offender, a married person with school going children, all of whom dependent on him and that he was not given an option of a fine. In this regard, I find that the offence with which he was convicted carries a sentence of imprisonment for a term not exceeding 14 years with hard labour.

8. In sentencing the appellant, the court found that this was a serious offence and was on the increase and therefore came to the conclusion that a deterrent sentence was called for. I have considered the circumstances of the offence including the fact that the appellant was a first offender and that the motor cycle was recovered. Additionally, I find that the trial court did not commit any error of law or fact in sentencing the appellant to 10 years imprisonment. In the circumstances, I find that the sentence is merited.

9. This is a first appeal. As a first appeal court, according to *Okeno v. R. (1972) EA 32*, I am required to scrutinize the evidence upon which the convictions were based. I have done so and I find that the appellant was convicted on sound evidence. I therefore confirm both his conviction and the sentence.

10. The upshot of the foregoing is that the appellant's appeal is hereby dismissed in its entirety.

Judgement delivered in open court this 26th day of July, 2017 in the presence of the Appellant and Ms Nyaroita for Respondent.

J. M. Bwonwonga

Judge

26/7/2017