REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 15 OF 2017

ELIJAH SOWENE NGESIANI alias TATU......................APPELLANT

VERSUS

REPUBLIC.. RESPONDENT

(**From original conviction and sentence in Criminal Case Number 472 of 2015**

in the Senior Resident Magistrate's Court (sic) **at Voi delivered by Hon J. Omburah (PM) on 23rd February 2017)**

JUDGMENT

INTRODUCTION

1. The Appellant herein, Elijah Sowene Ngesiani alias Tatu was charged with the offence of stealing contrary to Section 278A of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on 6th April 2015 at Burandogo Village within Taita Taveta County, he stole a Motor Cycle Registration No KMCR 958 D Make San Agree valued at Kshs 67,000/= the property of Mohamed Awadh Saadi (hereinafter referred to as "PW 1").

2. The Learned Trial Magistrate Hon J. Omburah, Principal Magistrate, convicted him and sentenced him to two(2) years imprisonment. Being dissatisfied with the said judgment, he lodged his Petition of Appeal on 3rd March 2017. He relied on seven (7) Grounds of Appeal.

LEGAL ANALYSIS

3. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

4. It appeared to this court that the only issue that was before it for determination was really whether or not the Prosecution had proven its case beyond reasonable doubt. It was the Appellant's argument that the Prosecution failed to call crucial witnesses to prove its case and that its casewas full of contradictions and inconsistencies.

5. He questioned why PW 1 reported the theft of his Motor Cycle on 10th April 2015 instead of 6th April 2015 when the said Motor Cycle was said to have been stolen. He also took issue with PW 1 for not having adduced in evidence, a logbook, to prove that the Motor Cycle belonged to him. It was also his contention that the colour of the said Motor Vehicle was not indicated in the Charge Sheet.

6. He also questioned why PW 1, Elpina Ndunda (hereinafter referred to as "PW 2") and Ibrahim Mohamed (hereinafter referred to as "PW 3") referred to him as "Tatu" whereas Number 87991 PC Wilson Changawa (hereinafter referred to as "PW 4") referred to him as Elijah Sowene which he stated,raised doubt as to whether PW 1, PW 2 and PW 3 were really his neighbours. He took issue with the Learned Trial Magistrate for not having taken his defence into consideration.

7. He also argued that the sentence of two (2) years without the option of a fine was harsh, erroneous and a nullity and therefore asked this court to allow his Appeal herein.

8. On the other hand, the State urged this court to dismiss the Appeal herein because the Prosecution had proved its case. It submitted that it was not necessary for the colour of the said Motor Cycle to have been indicated in the Charge Sheet because the said Charge Sheet contained sufficient information to describe the said Motor Cycle.

9. In this regard, it relied on Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya) and the case of **Njuguna vs Republic [2002] LLR NO. 3755 (CAK)** where the court therein held as follows:-

> **"…stating a lesser amount than the amount that was actually stolen was no more than an irregularity in the Charge and it did not render the Charge defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him."**

10. It added that it was not necessary for the Prosecution to have adduced in evidence the logbook of the said Motor Cycle and that in any event, the Appellant did not raise the issue during the trial.

11. It was its further submission that the Appellant was identified through recognition by PW 1, P2 and PW 3 who were his neighbours and that referring to him as "Tatu" did not mean that they were referring to a person other than him. It argued that he did not give an alibi of 6th April 2015 when he stole the said Motor Cycle or demonstrate any ill-motive for PW 1, PW 2 and PW 3 to have framed him with the offence herein.

12. It was emphatic that it was not necessary for the Prosecution to have called call police officers who assisted in his arrest as witnesses in the case herein because PW 5's evidence was sufficient herein to sustain a conviction against him.

13. A perusal of the proceedings shows that the Appellant was known to PW 1, PW 2 and PW 3 as they were neighbours. He used to borrow the Motor Cycle to run his errands. On 6th April 2015, he borrowed the said Motor Cycle but did not return the same. PW 1 looked for it but did not get it. The Appellant was then arrested in Voi on 30thOctober 2015. He denied ever having known PW 1, PW 2 and PW 3.

14. The Appellant herein relied on several technicalities to have the Appeal herein allowed. Whereas there was no indication in the proceedings why the judgment was not delivered on 16th February 2017, the trial was not rendered a nullity merely because the Learned Trial Magistrate delivered the judgment a week later on 23rd February 2017. This is because the Appellant was present on both occasions and therefore suffered no prejudice. In any event, there was no provision in the law that mandated that judgment must be delivered on the first day that it had been reserved for delivery.

15. His contentions regarding the use of different names by PW, PW 2, PW 3 on the one hand and PW 4 on the other hand, were neither here nor there for the reason that he had been charged as "Elijah Sowene

Ngesiani alias Tatu." The State laid out the correct position of the law that the Prosecution was under no obligation to call a particular number of witnesses to prove a fact as has been stipulated in Section 143 of the Evidence Act Cap 80 (Laws of Kenya).

16. His further assertions that PW 1 reported the incident on 10th April 2015 were also immaterial as PW 1 told the Trial Court that he made attempts to trace him first after he failed to return the aforesaid Motor Vehicle. Indeed a period of four (4) days from 6th April 2015 to 10th April 2015 could not be said to have been inordinate in the circumstances of the case.

17. This court agreed with the State's submissions that it was not necessary for PW 1 to have adduced in evidence, the logbook because he did presented a Certificate of Insurance that showed the Motor Cycle belonged to him. In any event, the Appellant did not deny that the said Motor Cycle belonged to PW 1 and/or adduce evidence to show that the said Motor Cycle did not belong to PW 1. The Learned Trial magistrate thus arrived at the correct conclusion when he found and held that the Prosecution proved its case against the Appellant to the required standard.

18. The Appellant's denial of having known PW 1, PW 2 and PW 3 was a mere denial to exonerate himself from the offence. He did not demonstrate that there existed any grudge between them and him to have warranted them to have framehim with the charges. The fact that he disappeared and never returned the said Motor Cycle to PW 1 but was arrested at Voi on 30th October 2015 led this court to make a negative inference on his part and conclude was a clear indication of his guilt.

19. Accordingly, having considered the Appellant's defence, this court also came to the same conclusion that the Learned Trial Magistrate arrived at that his defence was calculated to mislead the Trial Court. He offered no alibi for 6th April 2015 and also failed to call his aunt as a witness to support his assertion that he had gone to visit her on 29th October 2015 so as to demonstrate that he notabsconded Taveta until the said date when he was arrested as had been contended by the Prosecution witnesses.

20. Accordingly, having considered the Appellant's Petition of Appeal, his Written Submissions and those of the State, this court came to the firm conclusion that the Learned Trial Magistrate considered all the Prosecution and defence evidence that was adduced before him and arrived at the correct conclusion that the Prosecution proved its case to the required standard, which is, proof beyond reasonable doubt.

21. Notably, the Learned Trial Magistrate was under no obligation to impose the option of a fine despite Section not prescribing a mandatory sentence. Section 278A of the Penal Code prescribes the general penalty for the offence of theft. The same provides as follows:-

> **"If the thing stolen is a motor vehicle within the meaning of the Traffic Act (Cap. 403), the offender is liable to imprisonment for seven years.**

22. Bearing in mind that the value of the Motor Cycle was Kshs 67,000/=, it was the considered view that the sentence that was imposed on the Appellant was therefore not harsh, severe or manifestly excessive to have warranted this court to have interfered with the same.

DISPOSITION

19. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 3rd March 2017 was not merited and the same is hereby dismissed.

20. It is so ordered.

DATED and **DELIVERED** at **VOI** this **30th** day of **November** 2017

J. KAMAU

JUDGE

In the presence of:-

Elijah Sowene Ngesiani alias Tatu-for Appellant

Miss Anyumba for State

Susan Sarikoki– Court Clerk