



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NOS. 54 & 55 OF 2014

1 CHARLES MUCHIRA MURIITHI

2 PETER MURIITHI KAMUNDE.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR 454 at Embu Chief Magistrate's Court by A.G. Munene – SRM on 12th September, 2015)

JUDGEMENT

1. In these two consolidated appeals, the two appellants were convicted and sentenced in **count one**, to five years imprisonment in respect of the offence of stealing from a person, on 12th September 2014 by the court of the Senior Resident Magistrate at Embu. In **count two**, Peter Muriithi Kamunde (2nd Appellant) was acquitted of stealing the helmet of the Samuel Mugendi Gichovi (PW 2), the complainant in count 2 and was also acquitted of handling stolen property namely the helmet of PW 2. In count two, Charles Muchira Muriithi (1st Appellant) was acquitted of the alternative charge of dishonestly retaining the stolen mobile phone of the complainant.
2. The respondent/state has supported both their convictions and sentence.
3. This is a first appeal. As a first appeal court, according to *Peters v. R Sunday Post Ltd (1958) EA 424* I am required to re-assess the evidence upon which they were convicted and thereafter arrive at my own independent conclusions. At the same time, I am required to generally defer to findings of fact as found by the trial court. The reason being that the trial court had the advantage of seeing and hearing the witnesses, an opportunity that this court does not have.
4. Both appellants were convicted on the direct evidence of Abraham Mugo Mwaniki, the complainant (PW 1). According to the complainant, he hired the appellant's a boda boda (motor cycle) to take him from Manyatta to Kathangariri, in respect of which he paid Kshs 100/- as fare, before being taken there. Another passenger came and the appellant told him that this other passenger was his customer. He therefore allowed this other passenger to board the boda boda (motorcycle). While they were along Rupingazi river, this other passenger got hold of the complainant's neck and as a result the appellant stopped the motorcycle. They then jointly started beating him.
5. The first appellant took the complainant's J-tel phone which was produced as exhibit 1. PW 1 produced a purchase receipt for his phone which was put in evidence as exhibit No. 2. The second appellant then searched his pocket from where he took his identity card and Kshs 7,00/- from his pocket. Thereafter

they boarded the boda boda and went away, leaving the complainant behind. No one responded to the complainant's screams for assistance. The matter was reported to Manyatta police station. The complainant went and also reported this matter to the boda boda operators at Manyatta. It is these operators who arrested both appellants and took them to the police station.

6. After being detained by police, the first appellant was found with the phone of the complainant. There was nothing recovered from the second appellant. The complainant further states that he knew the first appellant before this incident. He confirmed under cross-examination that he had paid the appellant before boarding his motor cycle. He denied giving second appellant his phone as security for non payment of the motor cycle fare.

7. Samuel Mugendi Gichovi (PW 2) is the complainant in count II. According to this PW 2, he had lost the helmet for his motorcycle KMDA 821V Chirnery make. The helmet was recovered in the house of second appellant. This particular helmet was put in evidence as exhibit 3. The other evidence produced by the prosecution was that of No. 676776 PC David Wangombe (PW 3) who re-arrested both appellants after they were brought by members of the public to the police station.

8. The first appellant (Charles Muchira Muriithi) gave sworn evidence. He described himself as a matatu conductor and went further to testify that the complainant (PW 1) was his friend. He also testified that on the material date they were drinking beer with him. After taking the beer, they went to the stage from where the complainant was carried by the boda boda of the second appellant. According to him, the complainant was drunk and he requested him (the appellant) to keep the phone for him. Subsequently, he was told by the second appellant that the complainant did not pay his motor cycle fare. Finally he testified that he had paid the second appellant Kshs 100 and had also given him his phone. Notwithstanding this the complainant insisted that he wanted his Kshs 20,000/- failing which he was to ensure that this first appellant was to be imprisoned. He then caused the other boda boda riders to arrest him telling them that the first appellant was a thief.

9. The second appellant (Peter Muriithi Kamunde) made an unsworn statement. His evidence is that he carried two pillion passengers one of whom was the complainant and the other one was the first appellant. Upon arrival at Rupingazi he stopped the boda boda at the request of the complainant. He went further to testify that the complainant requested him to stop the boda boda because the first appellant was demanding Kshs 200/-. As a result they started fighting. He did not interfere in the fight between the complainant and the first appellant. Finally he testified that he was arrested to shed light on the stealing of the complainant's phone and that nothing was recovered from him, except the helmet which he claimed was his property.

10. The two appellants filed their petitions of appeal in which they raised seven grounds of appeal that are similar. In ground 1 they state that they did not plead guilty to the charge, which is true. In ground 2 they state that they were not mentioned in the initial report to the police. In this regard I have considered the evidence of P. C. David Wangombe (PW 3). According to PW 3 the two appellants were taken to the police station by members of the public. Because of this the issue of the appellants being mentioned in the initial report to the police did not arise. And for this reason, this ground of appeal is without merit and is hereby dismissed.

11. In ground 3 they have state that the trial court erred in law and fact in failing to find that the evidence of recognition of the appellants by the complainant was not corroborated and was not cogent as required by section 137 of the Criminal Procedure Code. This section does not deal with evidence. It is in relation to the framing of charges . For this reason this ground of appeal is not applicable to this consolidated appeals. In relation to the attack on the evidence of recognition, I find that the complainant knew the appellants before. This offence was committed in broad daylight. In the circumstances, I find that their recognition by the complainant was positive because the circumstances favouring recognition were favourable. He was not in any way mistaken as to the identity of the two appellants. This ground of appeal is also without merit hereby dismissed. In ground 4 they have stated that the evidence given was contrary to **section 107 of the Evidence Act (Cap 80) Laws of Kenya**. In this regard I find that the prosecution discharged its burden of proof as required by law. I find no merit in this ground and it is also

dismissed.

12. In ground 5 they have stated that the trial court erred in law and fact because it failed to observe the provisions of section 150 of the Criminal Procedure Code, because the prosecution did not prove their case beyond reasonable doubt. That section imposes an obligation on the court to call witnesses on its own motion, if in its opinion their evidence is just to determination of the case before it. I find that the trial court did not fail to call any material witness in the instant case. I further find from the judgement that the trial court found from the evidence that the case against both appellants was proved beyond reasonable court. On the evidence produced before I find that there was ample evidence to support the charge. This ground of appeal is also fails and is hereby dismissed.

13. In ground 6 the appellants have stated that the trial court erred in law and fact for rejecting their alibi defence without good reason. This they allege is in violation of section 169 Criminal Procedure Code (Cap 75) Laws of Kenya. I find that the trial court gave reasons for rejecting their defence evidence. It stated in terms that it believed the evidence of the complainant (PW 1) and that of the police officer (PW 3). It further found that there was further corroboration in the evidence of both appellants. In short the trial court found the evidence of the appellants to be untruthful. It is clear therefore that the court gave reasons for rejecting their defence evidence. In the circumstances this ground of appeal is without merit and is hereby dismissed.

14. I have re-assessed the evidence upon which they were convicted and their written submissions and I find that their convictions were supported by ample evidence.

15. Attention is hereby drawn to the *Court of Appeal in Kantilal Jivraj v R (1961) EA 6* which stated that an order of acquittal should not be made where the trial court makes a finding in respect of the main count. In the circumstances orders of acquittal should not have been made in respect of the two alternative counts. They should have been left open. However, this did not occasion a failure of justice in terms of section 382 Criminal Procedure Code.

16. As regards sentence both appellants were sentenced to five years imprisonment. In sentencing the appellant the trial court took into account that both appellants were first offenders. The court also took into account the nature of the offence and the circumstances under which the offence was committed. Sentencing according to *Wanjema v. R (1971) EA 493* is a matter for the discretion of the trial court and should not be interfered with unless it is shown that it overlooked some material factor, took into account some immaterial factors, acted on a wrong principle, or the sentence is manifestly excessive. I find that the trial court did not commit any error of law and fact in sentencing both appellants to imprisonment for five years.

17. The upshot of the above is that the appeals of both appellants are hereby dismissed in their entirety.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **18th** day of **APRIL 2016**

In the presence of both appellants and Ms Mbae for the State

Court clerk Njue

J.M. BWONWONGA

JUDGE

18.04.16