REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 53 OF 2015

(From original conviction and sentence in Criminal Case No. 444 of 2013 of the Principal Magistrate's Court at MwingiG. W. Kirugumi - RM).

JUSTUS MUITHI KAVOWA..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was tried in the subordinate court at Mwingi with two others. Under count one he was jointly charged with the two others with stealing a motor cycle. In an alternative charge the two other persons were charged with handling stolen goods.

Under count one the appellant was together with Jeremiah Ndetu Kitemi and Benson Mbula Mutheke were jointly charged with stealing a motor cycle contrary to Section 278A of the Penal Code. The particulars of the offence were that on 5th July 2013 at Musuani Location in Migwani District Kitui County jointly stole one motor cycle registration No. KMCY 986T, frame No. LF3PCJ302DB000231 valued at Kshs 68,000/- the property of Musembi Mutemi.

The other two accused persons were in the alternative charged with handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars of the offence were that on 2nd August 2013 at Katulani vilage in Katulani District of Kitui County other than in the cause of stealing, dishonestly retained one motor cycle registration No. KMCY 986T knowing or having reasons to believe it to be stolen property.

All the three denied the charges. After a full trial the other two accused persons were acquitted of both counts. The appellant was however convicted of the offence of stealing a motor cycle and sentenced to serve 2 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal through counsel C.K Nzili and Company Advocates on the following grounds:-

1. That the learned trial magistrate erred in law and in fact in finding the appellant guilty against the weight of the evidence tendered.
2. The learned trial magistrate erred in law and in fact in failing to consider the inordinate delay in charging the appellant, the defence testimony and the submissions made thereof.
3. The learned trial magistrate erred in law and in fact in failing to consider the appellants mitigation and the social inquiry report.
4. The learned trial magistrate erred in law and in fact in failing to consider the doubts, inconsistences

and contradictions in the prosecution case in favour of the appellant.

5. The learned trial magistrate erred in law and in fact in failing to give the appellant an opportunity to tender and call witnesses in support of his defence.
6. The learned trial magistrate erred in law and in fact in giving an excessive sentence in the circumstances of the case.

During the hearing of the appeal Mr. Nzili for the appellant submitted firstly that the appellant was not given adequate opportunity to conduct his defence contrary to the Constitutional requirements for fair hearing. Counsel stated that though the appellant had asked for time to call his witnesses the court forced him to close his case. Secondly the appellant asked for a chance to make submissions but was not given enough time to do so.

Counsel also submitted that the sentence was excessive and contrary to the Judiciary guidelines on sentencing. According to counsel, that though the appellant stated in his mitigation that he wanted leniency, and a social enquiry report was provided to the court the appellant was still handed down a custodial sentence.

With regard to ground 3, counsel argued that the appellant raised a fundamental issue for being placed in police custody for 10 days before charge, but the magistrate did not address her mind to this issue though the prosecution did not explain the cause of the delay.

On ground 1 and 4, counsel argued that the charge was defective and relied on a case of ***Wilson Opiyo -vs- Republic (2014) eKLR.*** Counsel submitted generally that the evidence in our present case was not water tight and that the appellant should have been acquitted just as Wilson Opiyo was acquitted by the above High Court on appeal.

Learned prosecuting counsel Mr. Okemwa opposed the appeal. Counsel submitted that the record did not indicate that the appellant was not given an opportunity to be heard. With regard to calling additional witnesses, counsel argued, the appellant had indicated that he would not call any witness. However on the defence leaving date he sprung a surprise to the court and said he had a witness in Kitui. The magistrate, according to counsel properly made a ruling disallowing further adjournments as the appellant did not give sufficient reasons for requesting an adjournment.

On delay in charging the appellant for one and a half weeks after arrest, counsel submitted that the appellant must have been arrested elsewhere but later brought to Migwani police station. Counsel stated therefore that there was no such delay which contravened the appellants right. In any case counsel argued that such violation of rights, if proved, could be adequately compensated through a claim for damages in a civil case. It could not nullify a criminal conviction.

With regard to the charge, counsel argued that it was properly framed for the stealing a motor cycle. He stated that the appellant took the motor cycle without permission and dishonestly sold it through a written agreement. That amounted to theft.

In response to the prosecuting counsel's submissions, Mr. Nzili for the appellant said that the evidence by PWI was shaky on the alleged theft of the motor cycle and also contradictory. On delay in charging the appellant, counsel contended that such caused injustice and unfairness to appellant, and when a complaint was made in the defence, no explanation was given by the prosecution and as such the entire proceedings were null and void.

The facts of the case in brief are as follows. The prosecution at the trial called three witnesses PWI Kandazi Malonzo, PW2 Musembi Mutemi and PW3 Police Constable Jackson Kalumba.

The prosecution evidence was that on the 5th of July 2013 Musembi Mutemi PW2, was driving a motor cycle belonging to PWI Kandazi Malonza as a boda boda operator. At 8.00 am he was called on the phone by the appellant who wanted to be given a ride. He gave him a ride to Musuani where the appellant told him to allow him withdraw money from an Mpesa shop.

The appellant then told Musembi PW2 to take him back to Mwingi and said that he also wanted to be trained to ride a motor bike. Because the motor bike did not have enough fuel, the appellant bought 3 ½ litres of fuel at Musuani. The appellant then tricked Musembi PW2 and rode away. Though PW2 searched for the appellant, he was not able to trace him and reported the incident to Migwani Police station.

The evidence of PW3 PC Jackson Karumba and PWI Kandazi Malonza the owner of the motor cycle, was that the motor cycle was later found in the possession of the two co-accused of the appellant. It transpired that the said motor cycle was sold Uncle Electronics Motors, at a shop selling motor cycles at Kitui, and that it was sold for Kshs 44,000/- by the appellant. The appellant was traced by calling him through his mobile phone number which he had given to PW2 Musembi Mutemi and he was arrested and charged.

When put on his defence the appellant gave sworn testimony. He stated that he was a technical engineer with safaricom and was called on his mobile phone number from a strange number and asked to meet the caller at a hotel in Kitui town. When he arrived he met police officers who took him to Kitui Police Station and locked him for 1 ½ weeks. He was later taken to Migwani Police station and was then charged for a case he did not know.

After closing his testimony in cross examination, he said he wanted to call a witness who was not in court. The learned magistrate however disallowed the adjournment because the appellant had indicated earlier that he would not call any witness in his defence and also the case had been adjourned many times before.

At the close of the defence case, the appellant was allowed to file written submissions which he did not do.

This is a first appeal. As a first appellate court I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not see the witnesses testify to determine their demeanor see the case of ***Okeno -vs- Republic (1972) EA 32***.

The counsel for the appellant has submitted that there was inordinate delay in bringing the appellant to court thus violating his Constitutional rights. Indeed, the appellant was not brought to court within 24 hours as required by the Constitution. In addition, the prosecution did not give any explanation regarding the cause of that delay. However in my view the recourse open to the appellant is to pursue damages in a civil cause. It does not make the criminal proceedings herein a nullity.

The appellant's counsel has complained that the charge is defective. I have perused the charge in which the appellant was charged jointly with other two who were acquitted. The charge is for stealing a motor cycle. The particulars are for stealing a motor cycle. The evidence on record is that the appellant took away the motor cycle without permission of the special owner the boda boda rider PW2, and sold it to third parties at Kitui at a price of Kshs 44,000/-. It cannot thus be said that the charge is defective as the facts, if believed, show that the appellant took the motor cycle without colour of right and sold it, which established the intention to deprive the owner of the property, which amounted to theft. I dismiss that ground.

The learned counsel for the appellant has stated that the trial magistrate failed to give the appellant an opportunity to call witnesses in support of his defence. Indeed the record shows that the learned magistrate refused to adjourn further the case because in her view, the case had been delayed so much. It was a fact that at the close of the prosecution case the appellant stated that he did not have any witness to call but later said he wanted to call a witness.

In my view, the learned magistrate should have allowed the appellant to call the witness though the appellant neither gave the identity of the witness nor where he was, but merely stated that he was not present. However in the circumstances of this case, I find no prejudice caused to the appellant since in his evidence he did not say that he was with anybody at the alleged time of the theft and did not indicate that

there would be anybody who would assist him in his defence. I also dismiss that ground.

The appellant's counsel has also argued that the magistrate did not allow the appellant to tender his submissions. The record however is different. The appellant appeared in court on 7th April 2015 and the Magistrate ordered that he and the other accused would file written submissions and fixed a mention date a month later that is 7th of May 2015 for fixing a Judgment date. On the 7th of May 2015 the appellant and his two co-accused were present in court and there is no record that they said that they wanted to make oral or written submissions. Judgment date was then fixed for 17th June 2015 when Judgment was delivered. It cannot thus be said that the appellant was not given an opportunity to make submissions.

With regard to inconsistencies and contradictions and proof beyond reasonable doubt, in my view the appellant was positively identified by PW2 as well as the co-accused to who he had sold the motor cycle at Kitui. PW2 and the appellant met in broad daylight and they travelled together on the motor cycle for sometime. The motor cycle was also sold at Kitui in broad day light by the appellant. In my view the evidence of the prosecution was very clear and consistent that the appellant took away the motor cycle without consent of the owner and he also sold it to unsuspecting buyers at Kitui. In my view the offence was proved beyond reasonable doubt.

With regard to sentence, the maximum sentence for the offence of theft of a motor cycle under Section 278A is 7 years imprisonment. The learned magistrate handed down a prison sentence of two years.

Even though the appellant mitigated, the motor cycle was recovered, and a social enquiry report was tendered in court in my view the sentence of two years imprisonment was not excessive. It is not correct to say that the court did not consider the social enquiry report and the mitigation of the appellant. The trial court specifically stated on the record that it considered the social enquiry report, mitigation of the appellant and the nature of the case and the seriousness of the offence before sentencing. I thus dismiss that ground.

To conclude I find that this appeal has no merit. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and delivered at Garissa this 22nd July 2016

GEORGE DULU

JUDGE