



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO.15 OF 2016

BETWEEN

OGAL CHARLES NYAMULOAPPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in the CM's Court Homa Bay's Criminal case No.672 of 2015 – HON. N. KARIUKI, RM dated 23rd March, 2016)

JUDGMENT

1. **CHARLES OGAL NYAMULO** (Appellant) had been jointly charged with **CALVINS OUMA AWINO** with the offence of stealing a motor cycle contrary to **Section 278A** of the **Penal Code**, that on 7th September 2015 at Rodi market, they stole a motor cycle model **Bajaj** Boxer, red in colour, registration No. KMPD 620V, Chassis No.FWA 50420, engine No.WFA 08707 valued at Kshs.90,000/= the property of **BERNARD OPIYO NYAPARA** – both denied the charge.
2. The evidence at trial was that **JOHN AGITI** (PW2), a motor cycle rider had parked the aforementioned motor cycle on 7th September, 2015 at about 8.00 p.m. and went into a hotel at Rodi market for a meal. When he came out of the hotel, he did not find the motor cycle - so he made a report at the AP post in Rodi and also informed the owner **BERNARD KOPIYO NYAPARA** (PW1).
3. The next day he learnt from an acquaintance that the missing motor cycle had been found at Sori market. Meanwhile on 8th September 2015 Chief Inspector **JULIUS KIMAIYO** (PW3) of Sori AP Post received a tip of from an informer that a motor cycle was being dismantled at a petrol station garage within Sori market. He proceeded to the garage accompanied by Sgt **JOSEPH KERARIO** (PW4) and found a mechanic changing a motor cycle's ignition box. The head lamp and the tank's covering box and seal had been removed, but the registration number was intact. The mechanic pointed to the 2nd accused (**CALVINS**) as the person who had brought the motor cycle and requested for the changes and that he'd been told to also change the ignition key, head lamp covers and the ignition key. At this point 2nd accused claimed he was the owner saying that the motor cycle was undergoing repairs because it had been involved in an accident.
4. Eventually the owner of the motor cycle (PW1) was called and he positively identified the motor cycle as he had its log book and receipt for purchase.
5. When the owner of the motor cycle came and identified it, the 2nd accused (**CALVINS**) changed his story to PW3 claiming that it was the appellant who had given him the motor cycle. However to PW4,

CALVINS said “another man gave him the motor bike but he was with Charles. The appellant (s) CHARLES then said he just helped the 2nd accused with a place to sleep in his vehicle and he knew nothing about the motor bike. When police searched the appellant’s vehicle, they found a helmet so he was arrested. It was the evidence of PW3 and PW4 that PW1 identified the helmet as his. This persuaded the officers that the appellant was linked to the theft of the motor cycle.

6. The appellant’s defence was that he was a stranger to the theft as he did not even know who had brought the motor cycle to his co-accused nor did he know how the helmet got to be inside his car. He said he’d been framed up by police.

7. In her judgment the trial magistrate held that the motor cycle was positively identified by PW1 and PW2. Further, that although none of the witnesses saw the actual theft, there was circumstantial evidence to prove that the appellants colluded to steal the motor cycle.

8. She rejected the appellant’s defence saying he never denied claims by his co-accused that he and another were the ones who had given out the motor cycle. She further made a finding that the appellant was in possession of the helmet, one day after it had been stolen and the appellant was thus involved in stealing the motor cycle.

9. The appellant submitted that the only link to the theft was the recovered helmet yet he was not charged with theft of a helmet nor did PW1 or PW2 state in court that a helmet was among the stolen item neither did they identify that helmet in court.

10. In conceding the appeal, Mr. Oluoch submits on behalf of the State that the conviction based on the recovered helmet was wanting because:-

a. The charge sheet does not indicate that a helmet was among the items stolen. There can be no debate on that, indeed the charge sheet does not refer to a helmet as one of the stolen items nor did PW1 or PW2 make any such reference or claims.

11. As Mr. Oluoch correctly pointed out, the first time the issue about the helmet arose was in the evidence of PW3 who said he recovered the helmet from the appellant’s car. Indeed if both the motor cycle and the helmet belonged to PW1 then there is no reason why the motor cycle was photographed and released to the owner, yet the same was not done with regard to the helmet. The only reasonable explanation is that this was not done because no helmet was recovered from the appellant’s motor vehicle – which is why neither PW1 nor PW2 made any reference to it.

12. The trial magistrate noted that the evidence was circumstantial, but with the greatest of respect to her, she misapplied the concept – the evidence did not point inculpatory to the guilty of the appellant, to the exclusion of anyone else. Even using a reasonable hypothesis, and working on the assumption that the helmet was found in his motor vehicle – there was a possible explanation that the helmet could have belonged to anyone else other than the complainant since he did not identify it as his. On this I am guided by the decision in **Kipkering arap Koske and Another (1949) 16 EACA 13** which held that:-

“... in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

13. Finally the claims made by the 2nd accused who kept changing his story regarding the motor cycle and how it got into his possession, ought to have been treated with caution – not just due to his shifty conduct, but also because this was accomplice evidence and therefore an exculpatory statement which required corroboration - there was none.

14. In light of the a foregoing, I make a finding that the conviction was based on unsound evidence and was not safe. The appeal is properly conceded, and the conviction is quashed and sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 21st day of **July, 2016** at Homa Bay.

H.A. OMONDI

JUDGE