



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPEAL NO 88 OF 2015**

**MUMBO MWAVUO CHITI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being and appeal against the judgment, conviction and sentence against the appellant by Hon J. Kamau (RM), on 28<sup>th</sup> April 2015 in Mombasa Criminal Case no. 2865 of 2013)*

**J U D G M E N T**

The appellant MUMO MWAVUO CHITI, was charged with stealing a motor vehicle contrary to section 278 (A) of the penal code.

The particulars are that;

“On 29<sup>th</sup> August, 2012 at Likoni location in Mombasa County the appellant jointly with others not before court, stole a motor cycle registration No KMCR 426 Q make Haujin value at Ksh 80,000 the property of NELSON YAWA KARENGE”

The appellant pleaded NOT GUILTY to the charge. He was tried, convicted and sentenced to serve 1 year imprisonment. He has appealed against the conviction and sentence.

The prosecution adduced evidence of two witnesses, being Nelson Yawa Kareng, (Pw1) and also the complainant in this case and Pw2 No 717111 Constable Stephen Sachita.

Pw1 testified that on 4.7.2011, he bought a motorcycle registration No KMCR 426Q at Ksh 80,000 and was issued receipt No 082202 (Exhibit P1). That after paying all the mone,y he received a log book serial No.5236141U in his name, Nelson Yawa Kerenge ( Exhibit P2 ) Pw1 went on to state that he wanted the motor cycle to do “boda boda” work an so he employed Mumbo Mwavuo, (the appellant herein) as a rider verbally. That the motor cycle was to operate at Likoni area and he instructed the appellant not to let anyone else ride the motor cycle. Pw1 also said that the appellant would give him the money every day and go with the motor cycle to where he lived in Likoni Majengo Mapya. He then recalled at 29.8.2012, he was on night duty when the appellant called him at about 12.45 am and asked for the motor cycle’s number plate. This shocked Pw1 because the appellant knew the motor cycle’s number plate. That the appellant then told him that the motorcycle had got lost and promised to tell him the details the following day.

And on 30.8.2012, Pw1 went to the appellant’s house at about 9.00am. He did not find him and so he called him on his mobile phone. That the appellant came and told him that he had given the motorcycle to

one Fondo Nyamawi to go to Ukunda and it was lost. Pw1 did not know who Fondo was and so he asked to see him. The appellant told him that he had reported the matter to the police station and he passed by there and found that Fondo Nyamawi had reported in the occurrence book. That they agreed and he gave the said Fondo and the appellant a week to search for the motorcycle. He did not find Fondo after the one week and the appellant told him that Fondo had travelled.

It was further evidence by Pw1 that on 30.9.2012, he was at his home when the appellant brought Fondo Nyamawi and one Omar Sheikh Juma who told him that they had not found the motor cycle. They went to the police station, Pw1 said that the appellant with Fondo and the other men arrived the station earlier than him and he did not know what the police said but the appellant was left at the police station. He was told not to enter the police station by the OCPD. He returned to the police station the following day and found Fondo and others had been brought by another person. He was told that they had returned because the accused had beaten. That the appellant left the police station while the two men remained inside. According to Pw1 he saw the appellant after about 2 weeks but has never seen the other two men. He recorded his statement on 22.1.2013 because the appellant was in custody; having been arrested on 21.1.2013. The appellant was then charged.

When cross examined by the appellant, Pw1 said that the first time he went to the police station, he found a report had been made by Fondo Nyamawi who he did not know. He denied saying that the motor cycle was stolen from Fondo.

Pw2, No. 71711 constable Stephen Sachita told court that on 29<sup>th</sup> 8.2012, he was at Likoni Police station when a report was brought in by one Fondo Nyamawi who alleged that his motor cycle registration No KMCA426Q Hanji. He was assigned the case and he found that the motorcycle had been given by the appellant who was a fellow rider and with Fondo they would ferry passengers from Likoni. He established that the appellant had been given the motor cycle for one trip and that it belonged to Nelson and not Fondo. Pw2 said he established that the owner of motorcycle is Nelson, the complainant, who came and gave him the log book.

Pw2 said that Fondo is still large. He recorded his statement with the police. Pw2 produced a receipt and log book as exhibits P1 and 2 respectively.

The prosecution closed its case and the appellant was placed on defence as per the provisions of section 211 of the Criminal Procedure Code and he did not call a witness. The appellant opted to give sworn evidence

In his sworn defence, the appellant told the court that he was given a motor cycle to work with and he used it for 1 year 3 months to do business. He said that the complainant bought a second motor bike which was given to another driver. He said that the driver of the second motor cycle lost it and as a friend of the appellant, accompanied him to the police station report the matter. That he, the appellant was arrested later and detained at Likoni police station while the other one was released.

In cross examination by the prosecutor, Dw1 said that he was not aware that he was supposed to give the motor cycle to anyone else. He also said that he was willing to pay the complainant for the lost motor cycle.

At the close of the entire hearing the trial magistrate wrote a judgment and said.

“Be that as it may, I am convinced beyond reasonable doubt of the evidence of both the prosecution witnesses that the accused was as responsible for pw1’s motor cycle. Although the name Fondo Nyamawi could have been a crucial witness, I find that the two prosecution were credible and corroborated their testimonies against the accused person.

I therefore find that the accused’s defence is not convincing and does not assist this court in deciding this matter. I will dismiss the accused’s defence as an afterthought. It is weak and has failed to rebut the evidence of the prosecution.”

The appellant filed five (5) grounds of appeal, briefly, that the Hon. Trial magistrate erred in law and fact.

1. in convicting him while the prosecution had fail to prove its case;
2. in convicting him while the real culprit (FUNDO NYAMAWI) was left scot free thus making him suffer from a mistake which was not his;
3. by failing to consider his defence during trial;
4. in shifting the burden of proof in criminal law to the appellant;
5. by passing a sentence which was manifestly excessive in the circumstances;

At the hearing, Mr Mushelle, counsel for the appellant submitted orally and stated that although they had filed five ( 5) grounds of appeal, they would argue grounds 1 and 2 together. According to Mr Mushelle, the conviction in this case was against the weight of the evidence. He submitted that before an accused is convicted, the prosecution must prove their case beyond reasonable doubt. And in this case, the prosecution was meant to prove that it is the appellant who stole the motor cycle. The prosecution relied on the evidence of Pw1, the complainant and Pw2, the investigating officer. Mr. Mushelle submitted that it was clear that the complainant (Pw1) had employed the appellant and one Fondo as riders of the alleged motor cycle whereby by the appellant would ride during the day and Fondo in the night. He also submitted that it clearly came out that the said motor cycle went missing while in the possession of Fondo Nyamawi and he was even arrested for it by the police. That Fondo was released by the police and he disappeared. The complainant reported to the seniors and to be seen to be working, the police arrested the appellant. Mr Mushelle submitted that the conduct of the appellant was not that of a person who had stolen and that the trial magistrate shifted the burden of proof to the appellant by dismissing the defence.

On the other hand, M/s Mutua learned counsel for the state submitted by opposing the appeal. She stated that Fondo was cleared of any wrong doing since the appellant could not give a satisfactory account as to why he gave Fondo the motor cycle without the authority of the complainant. She submitted that the claim by the appellant that he operated the motor cycle during the day and Fondo in the night was dismissed by the trial court and even counsel. She stated that Fondo was unknown to the complainant and that had he recorded a statement, the truth that he was never given a motor cycle by the appellant would have come out. She also submitted that the appellant's defence was a mere denial which did not shake the prosecution's evidence. And on the issue of sentence, M/s Mutua, learned counsel for the state submitted that the sentence meted against the appellant was lenient considering the nature of the offence he was charged with. She concluded that the prosecution proved their case against the appellant beyond reasonable doubt and urged the court to uphold the conviction and sentence.

In determining this appeal, I will deal with the issues raised in the grounds of the petition of appeal.

I have considered the said grounds, the oral submissions by the learned counsel for the appellant and the learned counsel for the state. However, I have cautioned myself, that it is my duty as the first appellate court, to carefully re-examine, re-evaluate and analyze the evidence on record to arrive at my own conclusion. I have also cautioned myself that I did not have the benefit of seeing the witnesses and observing the witnesses demeanor.

The duty of a first appellate court is set in the celebrated case of OKENO VRS REPUBLIC ( 1972) E 32 , where the court of appeal stated as follows;

***“An appellant on a first appeal is entitled to expect the evidence a whole to be submitted to a fresh and exhaustive examination ( pandya vrs Republic ( 1957) E A 336) and the appellants own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M.Ruwala Vrs Republic ( 1957) E A 570) it is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions.***

***Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see Peters Vrs Sunday post (1958) EA 424)."***

In dealing with grounds 1 and 2, the issue for determination is whether the prosecution's evidence was sufficient enough to warrant the appellant's conviction and sentence.

An analysis of the evidence adduced before the trial court reveals that, the complainant (Pw1) was the owner of the motor cycle registration number KMCR 426Q having produced receipt No 082202 and log book serial No S236141U ( Exhibit P 1 and 2)

It is not disputed that the complainant had employed the appellant, Mumbo Mavuno as a rider for his second motorcycle which was to operate within Likoni.

It is also not in dispute that on 29.8.2012 the said motor cycle went missing and it was reported to the police station as stolen.

What is in dispute is who stole the said motor cycle?

According to the particulars of the charge, the appellant is alleged to have stolen the motor cycle jointly with others not before court.

It was the complainant's (Pw1) evidence that he had employed the appellant as a rider for his said motor cycle and they verbally agreed that he would not allow anyone else to ride this motor cycle. He also said that in informing him of the loss of the said motor cycle, the appellant told him that he had given one Fondo Nyamawi the motor cycle to ride to Ukunda for one trip "squad". It was the complainant's further evidence that he did not know who Fondo Nyamawi was.

Pw2, the investigating officer in this case testified that on 29.8.2012, a report was brought to the police station by one Fondo Nyamawi that his motor cycle registration Number KMCR 426 Q was lost. That he later established that the motor cycle in question belonged to one Nelson (Pw1) and that he had employed the appellant who he had given the motor cycle to ride and not Fondo.

In his sworn defence, the appellant does not deny that the complainant had employed him to ride one of his motor cycles.

However, he stated that while he was employed by the complainant to ride the second motor cycle he bought, Fondo Nyamawi had been employed to ride the first one. That the complainant then corrected him to Fondo after he sold the motor cycle he had given him to ride.

In her judgment the trial magistrate stated.

***"I find that Pw1 and Pw2 were consistent and corroborated each other's testimony with regard to who was given the responsibility to ...the complainant's motor cycle....."***

An analysis of the evidence of Pw1 Pw2 and the appellant, I find that the question of who the complainant (Pw1) had given the responsibility of riding his motor cycle is his word against that of the appellant. Pw2's evidence was quite disjointed that it did not clearly come out as being consistent with the evidence of Pw1.

He told court that Fondo Nyamawi reported to the police station that the motor cycle was his then he goes on to say;

***"We found that the motor bike was given by he accused"***

In the same breath, he says;

***“I found out that the accused was given the motor bike for a trip...”***

The question then becomes if the complainant had given the appellant the motor bike, why was its loss reported by Fondo Nyamawi? And how then was the appellant given the motor bike for one trip?

He further stated that;

***“Fondo brought Nelson the true owner to me on 30.8.2012”***

How was this possible when it was Pw1’s evidence that Fondo Nyamawi was unknown to him. Reading through the evidence of Pw2, one gets the feeling that he was confused. And why? It could be because he was hiding the truth from this court.

From the evidence of the prosecution’s witness and the appellant, it clearly came out that on the night the alleged motor cycle went missing it was in the possession of the said Fondo Nyamawi and that is why he is the one who reported the matter to the police station.

It also came out from evidence of Pw1 that Fondo admitted this and he gave them a week to look for the said motor bike and the thief.

Further, it came out that Fondo disappeared but the appellant managed to find him. He brought him back to the police station but for undisclosed reasons, Fondo was again released, not to be found.

I agree with Mr Mushelle for the appellant, that the conduct of the appellant in the whole case was not that of a guilty person. It is un rebutted evidence that he took part in investigations of the case and tried to bring Fondo Nyamawi to book but in vain. There is no evidence that like Fondo Nyamawi he also disappeared and yet he was free.

I find the trial magistrate was indeed misdirected when she found that the evidence was consistent and corroborated when the same was glaring with discrepancies, gaps and unanswered questions.

In fact, I find that the appellant’s defence was quite detailed and he clearly explained what transpired in the matter, putting the whole scenario into perspective unlike the investigating officer, Pw2 whose evidence just created confusion in the case. It is clear from the judgment that the trial magistrate did not give the appellants’ defence much thought and merely dismissed it as an afterthought and weak. It was not.

For the above reasons, I find the prosecution’s evidence raised a lot of unanswered questions, which cast doubts in the same, the benefit of which should have been awarded to the appellant.

On the issue of sentence, being excessive, under section 278 A of the Penal Code, “an offender is liable to imprisonment for seven years” the appellant was sentenced to serve one (1) year imprisonment. The sentence that was meted against him was legal and not excessive, even if he would have been founded culpable.

The upshot of the above is that the appeal is accordingly allowed, conviction quashed and sentence imposed upon the appellant set aside. The appellant be set free unless lawfully held for any other reason.

**Judgment signed, dated and delivered this 18<sup>th</sup> day of October 2016**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/s Mutua for the state

Mr Mushelle for the appellant

C/clerk- Kiarie