



REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

HCCRA NO. 39 OF 2015

MARTIN MUTHOMI MWIKAMBA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(An Appeal from the conviction and sentence in Marimanti Senior Resident Magistrate Criminal case No.328 of 2015)

JUDGMENT

1. Martin Muthomi Mwikamba alias Martin Mutwiri King'ori (hereafter "the Appellant) was on 21st July, 2015 arraigned before the Senior Resident Magistrate's Court, Marimanti to answer charges of stealing a motorcycle contrary to section 278 A of the Penal Code. It was alleged that on the 1st day of November, 2012 at Marima Trading Centre in Maara Sub-county within Tharaka Nithi County, the Appellant stole a motor cycle registration NO. KMCX 193 U make Captain, Chassis No.LSRPCKL1XCA600072 Engine NO.161 FMJ12020-792 red in colour valued at Kshs.82,000/= the property of Patrick Kithinji M'Rache. He faced an alternative charge of handling stolen property contrary to section 322(1) & 2 of the Penal Code.

2. The Appellant also faced a second count of making a false document contrary to section 347(a) as read with section 349 of the penal code. It was alleged that on diverse dates between the months of November, 2012 to March, 2014 at an unknown place within the Republic of Kenya, jointly with others not before court with intent to deceive, the Appellant made a false document namely motor cycle log book serial number S225053Q purporting it to be a genuine document for motorcycle registration number KMCX 193 U. The Appellant denied the charges but after trial, he was convicted of both counts and sentenced to four (4) and one (1) year for the two (2) counts, respectively. The sentences were to run cumulatively by virtue of section 37 of the Penal Code.

3. Aggrieved by that decision, the appellant appealed to this court against both the conviction and sentence. By the Amended Petition of Appeal lodged by Ms. Lucy Kaaria Matumbi and Company Advocates on 1st September, 2016 on behalf of the Appellant with leave of court, the Appellant raised five (5) grounds which were argued separately except for grounds one (1) and three (3). These were:-

a) that the trial court erred in finding that the charge of stealing was proved against the Appellant yet it found that the testimonies of the prosecution witnesses was contradictory;

b) that the trial court erred in finding that the charge of making false document was proved as required by laws;

c) that the trial court failed to consider the defence of the Appellant; and

d) that the conviction was against the weight of evidence.

4. This being a first appellate court, it behoves it to review and re-evaluate the facts afresh with a view to arriving at its own independent conclusions and findings (**See Okono .vs. Republic [1972] EA 74**). In so doing however, the court must bear in mind that it did not see the witnesses give testimony to gauge their demeanour (**Ajode .v. Republic [2004] eKLR 81**).

5. The prosecution case before the trial court was that on 1st November, 2012, Patrick Githinji “the Complainant” was informed by Johnson Murithi Nthiga (PW2) who was the rider of his motorcycle, that his said motorcycle had been stolen by the Appellant. PW2 explained to him how the Appellant had tricked him to show him how to ride but when PW2 went for a short call, the Appellant rode off and disappeared with the motorcycle. He told the court that he had purchased the motorcycle on 18th October, 2012 for Kshs.82,000/=. He produced a receipt to prove that he was the owner of the subject motorcycle. He denied having authored documents that were recovered from Edward Gitonga Gitundu (PW3). PW2 told the court that PW1 was his uncle and had given him the subject motorcycle to be riding. That the Appellant used to be his regular customer. That on 1st November, 2012 the Appellant asked him to train him to ride the motorcycle. When PW2, went on a short call, the Appellant took off and never saw him again until he saw him in court. He had trusted the Appellant as he used to drop him at Mutabi Girls’ as he knew him as a technician working thereat. He and PW1 reported the matter to the CID at Chuka. He never heard of the Appellant until the CID Marimanti called him when the motorcycle was recovered. In cross examination, PW2 stated that the Appellant used to be his customer and had told him that he was a technician at the Mutabi Girls’ where he used to drop him at the gate.

6. Edward Gitonga Gitundu (PW3) recalled how the Appellant was brought to his home on 7th March, 2013 by a Mr. Mutugi and offered to sell him a motorcycle for Kshs.40,000/- (forty thousand only). He asked the Appellant to return a week later whereby, on 15th March, 2013 the Appellant returned and sold him the motorcycle. PW3 paid a deposit of Kshs.20,000/= (twenty thousand only) and later paid the balance by way of a goat and Kshs.10,000/= (ten thousand only) cash, respectively. The Appellant gave him ownership documents including a sale agreement, log book and Pin Certificate. Raban Kinoti (PW4) recalled that the Appellant visited their home on 7th April, 2013 with a motorcycle and gave him the agreement for his father (PW3). Sarah Kaindi (PW5) the wife of recalled how the Appellant came to their home and sold her husband the motorcycle for Kshs.40,000/= (forty thousand only). On his part, Joseph Mwangi gagari (PW6) told the court how he introduced the Appellant to PW3 for the sale of the motorcycle. The Appellant later gave him the Pin Certificate and Log book to take to PW3 which he did.

7. Chief Inspector Nicholas Murgor (PW7) recalled how Corporal Ratemo (PW8) called him on 14th July, 2015 and asked him to arrest the Appellant. On the same day, he and other officers arrested the Appellant at Mukothima trading centre. PW8 investigated the case. He arrested PW3 on information that he had a stolen motorcycle. PW3 produced ownership documents which PW8 verified with the relevant authorities and found to be forgeries. He traced the original sellers of the motorcycle who directed him to PW1. He contacted PW1 who produced his own original documents of ownership for the motor cycle. In his investigations, he established that PW3 had been given the documents of ownership of the motor cycle by the Appellant. It is then that he arranged for the arrest of the Appellant on 14th July, 2015.

8. In his defence, the Appellant told the court that he was a businessman at Mkinduni market. That on 14th July, 2015, he was selling charcoal when he was arrested for an offence he did not know. That the police assaulted him and when he threatened that he would sue them, they demanded for a bribe which he declined. That it is then that they took him to Marimanti Police Station. That at the station, the wife of PW3 gave the investigations officer money who promised to have PW3 sorted out in court. That PW7 and PW8 had lied that they had tracked him using a mobile phone which they never produced in court

9. At the trial, Ms Kaaria learned counsel for the Appellant, submitted that the evidence of the prosecution witnesses was contradictory. That there was no consistence as to when the alleged theft took

place; that PW3, PW4 and PW5 contradicted each other on the dates of the alleged sale of the motorcycle by the Appellant. That there was no expert evidence to prove that the documents the Appellant was charged with were forgeries. Counsel criticized the trial court that it did not consider the defence put forth by the Appellant and that the conviction was against the weight of evidence. On her part, Ms. Ndombi learned prosecutor submitted that the prosecution evidence was consistent and corroborative. That the Appellants defence was duly considered and properly rejected. She urged the appeal to be dismissed.

10. The first ground was that the trial court erred in finding that the charge of stealing had been proved and yet the court had made a finding that the prosecution evidence was contradictory. The testimony of PW1 was criticized on the ground that he gave two dates of 1st January, 2012 and 1st November, 2012 as the dates the motorcycle was stolen. That PW2 alleged to have carried the Appellant on 31st November, 2012 yet the motorcycle was meant to have been stolen on 1st November, 2012. PW3, 4 and 5 were criticized on the dates of the sale of the motorcycle by the Appellant.

11. This court has carefully considered and compared the handwritten and the typed proceedings. It is clear that PW1 and PW2 were categorical that the motorcycle was stolen on 1st November, 2012 having been purchased on 18th October, 2012 as per PExh 5. Further, the Appellant could not have ridden on the subject motor cycle on 31st November, 2012 as there is no such date in any calendar year the date must have been 31.10.2012 but the court in the hurry in recording recorded 31.11.2012. As regards the testimonies of PW3, PW4 and PW5, they were firm that the first visit by the Appellant to their home was on 7th March, 2012 when he was requested to come back the following week. That the Appellant returned on 15th March, 2012 when he was paid a deposit of Kshs.20,000/= (twenty thousand only) and he left the motorcycle with PW3. The date of 7th April, 2012 was when the Appellant brought the agreement produced as PExh7 and found Raban Kinoti (PW4) alone at home. As regards the testimonies of PW7 and 8 as to the date of the arrest of the Appellant, it is clear that PW7 arrested the Appellant on 14th July, 2015 and booked him at Mkindoni Police Station under OB NO.3414/7/15 wherefrom PW8 collected him the following day to Marimanti Police Station. In this regard, I do not find any contradiction in the testimonies of the witnesses as submitted on behalf of the Appellant and that ground is hereby rejected.

12. Ground two was that the charge of making a false document contrary to section 349 was not proved. The evidence on record is that PW6 is the one who introduced the Appellant to PW3. He accompanied him to PW3's home on the first visit of 7th March, 2012. That after PW3 had bought the motorcycle from the Appellant, PW3 kept asking him for the documents of ownership from him. PW4 recalled how the Appellant came to their home when he was alone and the Appellant left with him the agreement dated 7th April, 2013 (PExh.7) to give to his father (PW3). PW6 recalled how sometimes in that month the Appellant brought him an envelope containing the Pin certificate (PExh 8) which he passed on to PW3. While it may be that the agreement produced PExh 7 was not proved to have been written by the Appellant, for lack of a report of a handwriting expert, that cannot be said of the log book produced as PExh 8. The verification report dated 21st July, 2015 by the National Transport and Safety Authority produced as PExh 13 shows clearly that that log book was but a forgery. To this court's mind that charge had been proved to the required standard and the ground is rejected.

13. The third ground was that the defence of the Appellant was not considered. The record shows that the trial court considered the Appellants defence that he was arrested for selling charcoal and found it wanting. It found that it was a mere denial. This court notes that the Appellant first told the court that he was a businessman at Mkinduri market. He then changed and said that he was selling charcoal for some woman whose identity he neither disclosed nor did he call her to testify. He did not challenge the testimony of PW7 on how he was arrested by him. To my mind the defence was merely a mere concoction and had no truth in it and the trial court properly rejected it.

14. As regards the final ground that the conviction was against the weight of evidence, that ground was never argued. On my part I find that the prosecution proved that on the 1st November, 2012 at Marima, the Appellant tricked PW2 and disappeared with the motorcycle registration No.KMCX 193 U. He later sold it to PW3 for Kshs.40,000/= (forty thousand only) and gave him documents of title for the same that

were proved to be fake. That he was only traced two (2) years later in Meru where he was arrested and brought to Marimanti to face the charges for which he was convicted. The weight of evidence was in my view overwhelming. That ground also fails.

15. In the premises, the appeal is found to be without merit and the same is hereby dismissed.

Dated and delivered at Chuka this 13th day of December, 2016

A.MABEYA,

JUDGE.