



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL APPEAL NO. 54 OF 2014**  
**(FORMELY KISII HCCRA NO. 271 OF 2012)**

**BETWEEN**

**JAMES RIOBA MAKARA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 290 of 2012 at Principal Magistrate's Court at Kehancha, Hon.A. P. Ndege, SRM dated on 6<sup>th</sup> December 2012)*

**JUDGMENT**

1. The appellant, **JAMES RIOBA MAKARA**, was charged with the offence of stealing a motorcycle contrary to **section 278(a)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 23<sup>rd</sup> June 2012 at Kehancha Township in Kuria West District within Migori District with others not before the court, he stole motor cycle registration No. KMCL 427G valued at Kshs. 77,000/- the property of Gladys Gesere Ogesa. The appellant was convicted and sentenced to two and a half years imprisonment.
2. Mr Kisia, learned counsel for the appellant attacked the judgment and conviction mainly on the ground that the prosecution failed to prove its case beyond reasonable doubt. He pointed out that there was no evidence to prove that the appellant committed the offence. He further stated that the prosecution did not prove the intent to steal the motorcycle as it was stolen by his brother. Counsel cited the case of *Wilson Odida Opiyo v Republic Homa Bay Criminal Appeal No. 20 of 2013 [2014]eKLR* to support his arguments.
3. Ms Owenga, learned counsel for the State, opposed the appeal on the ground that the prosecution proved that the appellant stole the motor cycle and that the sentence was warranted.
4. As this is a first appeal, I am required to review the evidence and come to an independent conclusion as to whether or not to uphold the conviction bearing in mind that I neither saw nor heard the witnesses testify.
5. The thrust of the prosecution case was that the complainant, PW 1, testified that she employed the appellant in October 2011 to operate a the subject motor cycle which he used to sell her sell her doughnuts. On 23<sup>rd</sup> June 2012, the appellant told her that his brother had taken the motor cycle and had not returned it. She recalled initially they made an effort to look for it but this was not

successful hence she reported the matter to the police.

6. PW 2 confirmed that he witnessed the agreement between PW 1 and the appellant when she handed him the motor cycle. He recalled that the appellant called him and they met on 25<sup>th</sup> June 2012. At the meeting the appellant informed him that he had given the motor cycle to his brother who had not returned it. He was present when he also talked to PW 1 and he confirmed that the appellant went to look for his brother. He advised PW 1 to report the matter to the police.
7. PW 2, a police officer, recalled that on 26<sup>th</sup> June 2012, PW 1 and the appellant came and made a report at Kehancha Police Station that the appellant's brother had run away with PW 1's motor cycle. He investigated the matter and concluded that the appellant was not authorized to give the motorcycle to his brother and that he had conspired with his brother to steal the motor cycle. When put on his defence, the appellant elected to give an unsworn statement in which he denied that charge facing him.
8. The learned magistrate found guilty of theft by conversion. He concluded, "*The accused client herein, in the absence of any other explanation, must have fraudulently converted the motorcycle herein to the use of someone else. By virtue of section 268(1) of the Penal Code, he stole the motor cycle. The motor cycle is yet to be returned to the complainant, owner and the whereabouts are not known. The intention is therefore to permanently deprive the complainant of the motor cycle. I do not see or find any other explanation or fact which might point towards the accused client's innocence ....*"
9. I have re-evaluated the evidence and it is clear that PW 1 employed the appellant to use her motor cycle to sell her products. The primary issue is whether the prosecution proved that the appellant stole the motor cycle. In ***Wilson Odida Opiyo v Republic (Supra)*** in a similar case, I stated as follows;

*[14] The prosecution case was that the appellant was an employee who was given the motorcycle by his employer. In order to prove the offence of stealing the prosecution had to prove that there was intent to deprive the complainant permanently of the motorcycle. The prosecution evidence was merely that the appellant gave the motorcycle to someone else to use. This fact, without more, does not prove the mens rea of the offence of stealing nor does the fact that the appellant did not have the complainant's permission to give out the motorcycle prove the appellant's state of mind. The fact that the appellant was an employee entitled him to be in possession of the motorcycle. The prosecution failed to prove the felonious intent which was necessary to found a conviction.*

10. In coming to the conclusion that the appellant was guilty, the learned magistrate relied on **section 111** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which provides that an person accused of an offence has the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to the operation of the law creating the offence with which the person is charged and the burden of proving any fact especially within the knowledge of such person is upon him. The burden is discharged if the court is satisfied by evidence tendered by the prosecution or in cross examination. Where the facts peculiarly within the accused's knowledge under **section 111(1)** of the ***Evidence Act*** a rebuttable presumption arises that he knows the circumstances under which the theft took place.
11. The definition of theft is contained in **section 268 (1)** of the ***Penal Code*** which states, "*a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property is said to steal that thing or property.*" Under **section 268(2)(a)** of the ***Penal Code***, a person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with an intent to permanently deprive the general or special owner of the thing of it.

12. In this case, the appellant's explanation was that he had given the motor cycle to his brother and his brother had not returned it. He informed both PW 1 and PW 2 and he made efforts to look for his brother. This was a reasonable explanation that emerged from the testimony of the prosecution witnesses and it was the duty of the prosecution to disprove this fact and prove that either that the appellant stole the motor cycle or had conspired with his brother to steal it. PW 3 made no effort to locate the appellant's brother or explain why he was not interrogated. In other words, the prosecution failed to prove that the appellant intended to permanently deprive PW 1 of the motor cycle.

13. I therefore find that the prosecution failed to prove its case. The conviction and sentence are set aside and the appellant is set free unless otherwise lawfully held.

**DATED** and **DELIVERED** at **MIGORI** this 13<sup>th</sup> day of February 2015.

**D.S. MAJANJA**

**JUDGE**

Mr Kisia instructed by Kisia and Company Advocates for the appellant.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.