



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 124 OF 2013**

**MORRIS ONYANGO HAYA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Kisumu

(Hon. J. Sala RM) dated the 11th October 2013 in Kisumu CMCCR No. 452 of 2012)

**JUDGMENT**

On 13th August 2012 the appellant was arraigned before the Chief Magistrate's Court in Kisumu charged with theft of a motor cycle contrary to section 279A of the Penal Code. The particulars were that on 17th July 2012 along Nehru Road within Milimani in Kisumu East District in Nyanza Province, jointly with another not before Court stole one motor cycle Make TVS Star Registration Number KMCB 309X valued at Kshs.89,000/= the property of John Owuonda Kagose.

The appellant pleaded not guilty to the charge and a trial in which the prosecution called two witnesses ensued. The appellant opted to give sworn testimony.

Briefly the facts of the case were that upon purchasing a motor cycle the complainant (PW1) entrusted it to the appellant to operate a taxi business – "boda boda". Their agreement was that he would do so between 6AM and 8PM at a daily wage of 300/=. He did so from 20th May 2012 until 16th July 2012 when he indicated he no longer wished to continue. The complainant nevertheless allowed him to go home with the motor cycle. However the next day he went and informed the complainant that he had been robbed of the motor cycle during the night. He had already reported the matter to the police a fact which the complainant confirmed when he went there. However when P.C. Florence Koech the investigating officer went to the scene at Nehru Road she was unable to confirm that the robbery had taken place. According to her the appellant could not account for the motor cycle as he did not avail the security guards he alleged had witnessed the robbery. She therefore charged him with this offence. The motor cycle was never recovered.

On his part the appellant testified that the motor cycle was stolen from him by two people who had hired him to take them to town. He contended that the robbery was witnessed by guards from KK Security who tried to look for the motor cycle to no avail and who are the ones who also dropped him at the police station where he made a report.

After evaluating the evidence adduced by both sides the trial magistrate found the accused guilty of the offence, convicted him and sentenced him to four years imprisonment. An attempt at compensating the complainant did not succeed as the appellant and his father only paid a fraction of the money demanded

by the complainant.

In the petition of appeal the appellant raises the following grounds:-

1. **The trial magistrate erred in law and fact that the complainant stated that the appellant was his employer. Where he is overlooking the charge sheet of the case where says the appellant jointly with others stole a motor cycle Registration Number KMCQ 309X the property of JOHN AWUONDA where the appellant found that there was something hanging around the bush. (Read Mischieve).**
2. **The magistrate never considered that the channel of the proceeding diverted and encouraged the spirit of compensation of Kshs.45,000 Shillings to the complainant whereby the matter took another direction by convicting the appellant with an offence of stealing a motor cycle contrary to section (279 a) of the Penal Code.**
3. **The learned trial magistrate erred in the law and fact that the complainant deformed appellant's intext to tell the investigating officer that the appellant sold his motor cycle according to the proceedings.**
4. **The magistrate erred in law and facts that the complainant never produced any evidence or any witness to support his statement.**
5. **According to judgment page, appellant's defence was rejected by saying that it was merely "a blanket denial and a sham" which meant to divert Court attention from the prosecution. Appellant found that the decision was not fair, because at the time of the incident appellant was in a dilemma condition of which he could not identify even the K.K. who rsecued him from the scene of crime the evidence to support the matter, the robbers left him with injuries whereby the Court gave the weight that the K.K. Group to attend Court during cross-examination but appellant failed to produce them as defence witnesses.**

As the first appellate Court my duty, which I have discharged is to reconsider and evaluate the evidence in the lower Court so as to arrive at my own conclusion while bearing in my mind that I neither saw nor heard the witnesses. I must say the charge against the appellant was not proved beyond reasonable doubt. It is of course not disputed that a motor cycle was entrusted to him by the complainant to operate a business. It was his contention which he maintained throughout the same was stolen from him. It is instructive that the Court heard both the prosecution's case and the defence twice and on both occasions the appellant remained consistent. It is apparent from the evidence of the investigating officer that the burden of proof shifted to the appellant. He was to satisfy her beyond a shadow of doubt that the motor cycle was snatched from him. This ought not to be the case. It was her duty to carry out investigations to disprove the appellant's claim. It is clear from the evidence that apart from going to the scene she did nothing else. One would have expected her to thoroughly check the complainant's story. In her first testimony given on 7th September 2012 she stated that she had realized that the motor cycle was lost through the negligence of the appellant. That means that he had no criminal intention in the loss of the motor cycle. On his part the complainant testified that he was not sure

whether the motor cycle had been stolen. From the testimony it is apparent that there was room to give the benefit of doubt to the appellant as it was probable even to those two witnesses that he was telling the truth. To me this is a case of suspicion that the appellant himself orchestrated the theft. Suspicion however is just suspicion and is never sufficient to prove one guilty.

More importantly however is that the appellant was convicted for an offence that was not proved at all. I will not say that the charge was defective because from a cursory glance it was not. However the evidence adduced to support the charge was at variance with it. Section 279(a) under which the appellant was charged provides as follows:-

**"279. If the theft is committed under any of the circumstances following, that to say:-**

**a) if the thing is stolen from the person of another; ....."**

This motor cycle was not stolen from the person of the complainant. It was his own evidence that it was in the possession of the appellant at the material time. The appellant ought not to have been charged let alone convicted on that charge.

The appeal is allowed and unless he is otherwise lawfully held he ought to be released forthwith.

**Signed, dated and delivered at Kisumu this 30<sup>th</sup> day of July, 2015**

**E. N. MAINA**

**JUDGE**

In the presence of:-

N/A for the state

Appellant in person

CC: Moses Okumu