



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 16 OF 2015
NELSON MURIUKI JOEL.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR 19 of 2015 at Runyenjes Principal Magistrate's Court by J.P. Nandi - SRM on 24th February, 2015)

JUDGEMENT

This is an appeal against both conviction and sentence of two years imprisonment in respect of a charge of theft contrary to section 275 of the Penal Code (Cap 63 Laws of Kenya) imposed upon the appellant by the Court of the Principal Magistrate at Runyenjes on 16th February, 2015.

In support of his appeal, the appellant has listed seven grounds in his petition of appeal. In the 1st ground, he has stated that he did not plead guilty to the charge. In ground 2, he has attacked the judgement of the trial court for failing to find that there was no evidence of an agreement to show that he had been given the motorcycle by the complainant. In ground 3, the appellant has stated that the trial court erred in law and fact by failing to find that the appellant was not arrested with the stolen motorcycle. In ground 4, he has stated that the trial court erred in law and fact by failing to find the date when the motorcycle was given to the appellant by the complainant. In ground 5, the appellant has attacked the judgement by stating that the trial court erred in law and fact in relying on the evidence of PW 1 and 2, which was riddled with inconsistencies. In ground 6, the appellant has stated that the trial court erred in law and fact in failing to find that there was a long standing grudge between the appellant and the complainant in respect of the appellant's girlfriend. And finally, in ground 7, the appellant has stated that the trial court erred in law and fact by rejecting his defence evidence which he says was in violation of sections 169 and 212 of the Criminal Procedure Code Cap 175 of Laws of Kenya.

The evidence of the complainant (PW 1) was that he bought the motorcycle for Kshs 78,000/-. He then gave it to the appellant to run the business of carrying passengers for pay, and the appellant was required to be giving him Kshs 250/- daily. He carried on this business up to 13th November, 2014, when he disappeared with the motorcycle. PW 1 looked for him and eventually, he found that he was in Mwea and had him arrested by police from Wanguru Police Station on 8th January, 2015. It is important to note that the motorcycle was not recovered. According to the complainant, he handed over the motorcycle to the appellant because he trusted him. He denied having any grudge against the appellant.

The evidence of the complainant was corroborated in all material particulars by Anthony Nyaga (PW 2). PW 2 witnessed the handing over of the motorcycle to the appellant which was done in October, 2014. On 13th November 2014, PW 1 told PW 2 that the appellant had disappeared with his motorcycle,

whereupon the matter was reported to the police. According to this witness, the appellant and the complainant agreed that the complainant was to be given Kshs 250/- daily by the appellant. And while under cross-examination, PW 2 stated that there was no written agreement between the complainant and the appellant.

When he was placed on his defence, the appellant decided to make an unsworn statement and called no witnesses. According to him, he was framed up. He does not say who framed him up. He went further to state that he was not given the motorcycle, as he does not even know how to ride a motorcycle. He also stated that the complainant had a grudge against him as *they were competing over a certain lady*. However, he admitted going into hiding to Mwea to avoid the complainant.

The trial court carefully set out the case for the prosecution and that of the defence and then proceeded to set out the issues for determination. After considering the evidence of both the prosecution and the defence, the court concluded that the prosecution had proved its case beyond reasonable doubt against the appellant. Thereafter, that court imposed a sentence of two years imprisonment.

In respect of ground 2 of his petition of appeal, I find that it was not necessary to show that there was a written agreement between the appellant and the complainant, that the latter gave to the former the motorcycle. This ground of appeal is without merit in the light of the evidence of PW 1 and 2 that the motorcycle was handed over to the appellant to carry on the business of carrying passengers for pay, which is popularly known as boda boda business. There was ample evidence of an oral agreement, which was rightly accepted by the trial court. This ground of appeal is without merit and is hereby dismissed.

In respect of ground 3, it is true that the motorcycle was not recovered from the appellant when he was arrested. This he says would have connected him with the offence. In the light of the evidence of PW 1 and 2 which was believed by the trial court, I find that this ground is without merit and is hereby dismissed.

In ground 4, there was evidence that the motorcycle was given to the appellant on an unspecified date in October 2014. This in itself does not vitiate the conviction in view of the abundant evidence that he was given the motorcycle in October 2014.

As regards ground 5, I find that there are no inconsistencies in the evidence of PW 1 and 2 as alleged by the appellant. The evidence of the two witnesses is cogent and they mutually corroborate each other. In respect of ground 6, the appellant has faulted the judgement because the trial court failed to find that there was a long standing grudge between the appellant and the complainant in respect of the appellant's girlfriend. It is to be noted that PW 1 categorically denied that he had a grudge against the appellant. His evidence was rightly believed on this score. In the circumstances, I find no merit in this ground which is hereby dismissed.

And finally, as regards ground 7, the appellant has stated that his defence was wrongly rejected and is in violation of section 169 of the Criminal Procedure Code. In this regard, it is clear from the judgement of the trial court that his evidence was considered by the trial court and properly rejected. In particular, the trial court considered the allegation of the grudge between PW 1 and the appellant and found that the grudge did not hold any water. The court also considered that the appellant went into hiding at Mwea without the girlfriend. The court found that PW 1 had no reason to follow him to Mwea when the girlfriend was not there. In the circumstances, the judgement complied with the provisions of section 169 of the Criminal Procedure Code, in that it gave reasons for rejecting the appellant's defence evidence. This is a 1st appeal court. I am according to *Okeno v. R. (1972) E A 32*, required to exhaustively examine the evidence and make my own independent findings and conclusions. After re-assessing the evidence I have come to the conclusion that the appellant was properly convicted.

In sentencing the appellant, the court imposed a sentence of imprisonment of two (2) years. The appellant was a first offender and he had urged the court to be lenient to him. In the circumstances of this case, I find that the sentence of two years imprisonment was well merited.

The upshot of this is that the appeal is dismissed in respect of both the conviction and sentence.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **17th** day of **NOVEMBER, .2015**

In the presence of the Appellant and presence of counsel for Respondent .

Court clerk Nyaga

J. M. BWONWONGA

JUDGE

17.11.15.