



**REPUBLIC OF KENYA**  
**INT HE HIGH COURT OF KENYA AT BUNGOMA**

(CORAM: F. GIKONYO J)

**CRIMINAL APPEAL NO 160 OF 2012**

**GODFREY WEKESA MURUNGA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**APPEAL ARISING FROM THE ORIGINAL CONVICTION AND SENTENCE BY P.V.OOKO, SRM  
IN SIRISIA PMCCRC NO 6 OF 2012 ON 24.9.2012**

**JUDGMENT**

**INTRODUCTION**

[1] The Appellant, **GODFREY WEKESA MURUNGA**, herein was charged with the offence of stealing a motor cycle contrary to section 278(a) of the Penal code. Particulars of the offence were that: on diverse dates between 21<sup>st</sup> and 22<sup>nd</sup> May, 2011 at Malakisi township, Malakisi Location in Bungoma West District within Bungoma County, he stole a motor cycle registration Number KMCN 298 B Make TVs star black and blue in colour, Engine Number OF5KA1630497, Frame Number MD625GF57A1K92739 valued at Kshs.76,000 the property of **ALEX JUMA**.

[2] The appellant pleaded not guilty, and was convicted for the offence. He was then convicted and sentenced to serve three (3) years imprisonment.

**The appeal**

[3] The appellant was aggrieved by the conviction and sentence and so he filed this appeal. The appeal carries the following four (4) grounds:

1) *That the learned trial Magistrate erred in law and facts by allowing evidence to be adduced by one same family member.*

2) *That the appellant is diabetic on insulin treatment and epileptic since birth and therefore custodial sentence will be difficult for him due to the congestion and in-hygienic in prison. On those grounds he pleads for reduction of sentence and be awarded an option of fine.*

3) *That the learned trial Magistrate disregarded his mitigation that he is an orphan, sole bread winner in his family and his last two sisters are in school.*

**4) *That the sentence meted out was harsh and excessive***

[4] During the hearing of the appeal, the Appellant did not make any substantive submissions in support of his appeal. Instead he said that he had faith in the court and left it to the court. I understand that submission to be recognition of the duty of the court to re-evaluate the evidence as required by law in the light of the proposed ground of appeal and come to own convictions. Surely, the court shall determine the appeal.

**The state opposed appeal**

[5] Mr Kibelion, the learned state counsel appeared for the state. He submitted that the trial court properly evaluated the evidence and arrived at a safe conviction. It also meted out a legal defence provided in law.

[6] To support his surmises above mentioned, Mr Kibelion submitted that the Appellant was given the subject motor vehicle by PW1 and PW2. They agreed with the Appellant that he will carry out bodaboda business and be returning the Motor cycle every evening together with daily remittance of Kshs.400. The Motor cycle should be returned to PW1 and PW2 between 6-7 PM every day. On the material day, the Appellant did not return the Motor cycle. Three days later, the Appellant called PW1 and informed him that the Motor cycle has been stolen. PW1 reported the matter to the police and so also did the Appellant. The Appellant was then released by the police on bond with a condition that he should appear before them after 7 days. The Appellant did not honour the request to appear before the police; instead he disappeared for 7 months when he was arrested. He did not offer any explanation about the incident or a satisfactory account as to how the motor vehicle was stolen. He remained mum for two days after the alleged theft. On the basis of the evidence tendered, he asked the court to dismiss the Appeal.

**COURT'S RENDITION**

**Duty of court**

[7] This court is the first appellate court in this case. It therefore, has a legal duty to evaluate the evidence a fresh and come to its own conclusions, except it must provide allowance for the fact that it neither heard nor saw the witnesses. See **OKENO v REPUBLIC**. That duty shall be discharged.

[8] The prosecution called four witnesses. PW2 was the registered owner of Motor cycle registration Number KMCN 298 B blue and black in colour. She is the wife of PW1 On 19.5.2011 both PW1 and PW2 were at home when at about 3.00 p.m. the Appellant went to their home and asked them to employ him as a bodaboda driver. PW1 and PW2 agreed to offer the appellant the job and verbally agreed that the Appellant shall be returning the motor cycle at 6.00 p.m. and latest 7.00 p.m. every day to their homestead with daily remittance of Kshs.400.00. They gave the Appellant the motor cycle. He never came back nor returned the motor cycle. He only called PW1 after 3 days and informed him that the motor cycle had been stolen.

[9] PW1 then suspected that accused could be the thief and so he reported the matter to the police only to find that the Appellant had reported the alleged theft of the motor cycle. The Appellant alleged that the motor cycle was stolen from him at midnight of 19.5.2011 when he was drinking. The Appellant was then arrested but was released to go and look for the motor cycle. He then disappeared until 2.1.2012 when he was arrested again and charged.

[10] PW3 is Alex Juma, the owner of the motor cycle registration No KMCN 298B, black blue colour, Make 7VS star which he bought at Kshs.76, 000.00. He has the original Log book but had not been registered yet. He left the motor cycle with his father, PW1 to employ a person who would do boda-boda business with it for him. He left the motor cycle with his father-PW1 to employ a person who would do the boda-boda business with it and make profit for him. PW3 was

later informed by PW1 that PW1 had given the motor cycle to the Appellant, who was PW3's uncle to carry out boda-boda business. On 22.5.2011, PW1 called PW3 and informed him that the motor cycle had been stolen. PW3 advised PW1 to report the matter to the police. PW3 then recorded his statement with the police. The motor cycle has never been recovered.

[11] PW4 is the police officer who arrested the Appellant on 22.5.2011 and interrogated him about the theft of the subject motor cycle. The Appellant told him that he had parked the motor cycle outside Vila Bar at Malakisi and left the keys in the ignition compartment. PW4 sought to establish the truth of the Appellant's story and visited the Vila bar in company of his colleagues and the Appellant. By that time the said Vila bar had been closed long time and was not operational. He did not believe his story and so he asked the Appellant to go and search for the motor cycle. He released him on police bond. The Appellant disappeared until 2.1.2012 when he was arrested.

[12] The Appellant gave unsworn statement on how he was arrested on 2.1.2012, taken to police station in Malakisi and locked up in the cells. He was then taken to court on the charges of an offence he never committed.

### **Evidence by members of same family**

[13] The first ground of the appeal is that the learned trial Magistrate allowed evidence to be adduced by members of the same family and convicted the Appellant on that evidence. There is nothing in law that prevents members of the same family from giving evidence in a criminal proceeding, and indeed such are competent witnesses. That terse rendition is sufficient to dispose of that ground of appeal. But for better understanding, see their respective roles in the case. PW3 was the owner of the stolen motor cycle. He left it to PW1 to engage it in a boda-boda business. PW1 employed the Appellant and gave him the subject motor cycle. PW2 was present when the Appellant was being given the subject motor cycle by PW1 and witnessed the verbal agreement between the Appellant and PW1 on the motor cycle on when it should be returned and the daily remittances to be made by the Appellant. These people were, in a material sense, involved in the entire transaction which constitutes the bedrock evidence towards prove of the facts in issue before court. Their evidence was crucial, necessary and relevant in proving the existence of facts in issue in the case the Appellant faced. They were, therefore, competent witnesses and were not in any incapacitation in law; being members of the same family does not prevent them from testifying on matters which they saw, heard or perceived in relation to the facts in issue in the criminal case the Appellant faced. Ground 1 of the appeal, therefore, falls for lack of merit or any legal probity.

### **Did prosecution prove its case?**

[14] The evidence against the Appellant is purely circumstantial. It must meet the set standard on circumstantial evidence. The principles which guide the court when considering circumstantial evidence is now well settled. It is found in the decision of the predecessor of the Court of Appeal in the case of **R v KIPKERING ARAP KOSKEI AND ANOTHER (1949) 16 EACA 135** where the Court held:

*“That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecutions and never shifts to the accused.”*

[15] The principle was explained further in a later case of **SIMON MUSOKE v R. CRIMINAL APPEAL NO. 188 OF 1956** where the Court added that *at the same time there must not be any co-existing facts in or circumstances which may weaken or destroy that inference of the guilt of*

***the accused person.***

[16] From the evidence tendered, I find that motor cycle registration No KMCN 298B was the property of PW3. The Appellant is not laying any claim of right on the said motor cycle. I also find that there is no doubt the Appellant was given by PW1 the motor cycle on 19.5.2011 to carry out a ***boda-boda*** business. There is also no doubt PW1 and the Appellant agreed the Appellant will be returning the motor cycle every day at 6.00 p.m. and at the latest 7.00 p.m. together with daily remittances of Kshs.400.00. PW2 witnessed PW1 giving, and the Appellant receiving the subject motor cycle. Pw2 also witnessed the verbal agreement between the Appellant and PW1. Nothing which vitiates that evidence; it was strong and uncontroverted.

[15] The Appellant took away the motor cycle with the permission of PW1 and upon the verbal agreement entered into on 19.5.2011. But the Appellant did not return the motor cycle that evening or the next or at all thereafter. He called PW1 on the third day after he had been given the motor cycle to inform him that the motor cycle had been stolen. One wonders why he did not inform PW1 immediately or shortly after the motor cycle was stolen, if indeed, it was stolen. Why did the Appellant wait for 3 days to inform PW1 of the alleged theft of the motor cycle? The fact that the Appellant reported the alleged theft to the police the same day the motor cycle was alleged to have been stolen, that does not explain why he did not return the Motor cycle at 6.00 p.m. or latest 7.00 p.m. to PW1 on 19.5.2011, 20.5.2011 and 21.5.2011 as agreed on 19.5.2011. One other strange thing: the Appellant went to a bar to drink and parked the motor cycle outside with the keys on the ignition compartment. All the events stated by the prosecution witness, form an unbroken chain of circumstances which leads court to reach an irresistible inference on the guilt of the Appellant that he stole motor cycle registration Number KMCN 298B. And, there is no co-existing facts or evidence or factor in the circumstances of this case which weaken or destroy that inference of the guilt of the Appellant. A motor cycle is a property capable of being stolen, and the Appellant, fraudulently and without any claim of right took it with the sole intention of permanently depriving the owner of the said motor cycle.

[16] Accordingly I find that the Appellant stole motor cycle registration NO. KMCN 298B and is guilty of the offence of stealing a motor cycle contrary to section 278(a) of the Penal Code. He was properly convicted by the Trial Magistrate. I uphold the conviction. I now move to the other three grounds which are related and so I will deal with these as one as here below.

**Was the sentence harsh and excessive?**

[17] The Appellant has proposed a ground that the sentence of 3 years imprisonment is excessive. He has also proposed two other grounds that the trial court did not consider his mitigation and that he is diabetes and epileptic which renders non-custodial sentence untenable. Let me dispose of the last ground for obvious reasons, that, the condition of being diabetic and epileptic was not an issue that had been placed before the trial court for determination as a factor for mitigation. It was raised for the first time in the appeal. Moreover, there is no any medical evidence on record which the court can consider to establish that fact or even make any determination on that aspect. I, therefore, dismiss that ground.

[18] On mitigation, the trial court considered his mitigation and that he was the first offender when passing the sentence. The maximum sentence provided in section 278(a) of the Penal Code is seven (7) years and so three years was reasonable given the circumstances of the case and the mitigating factors. I dismiss that ground as well. Consequently, I uphold the conviction and sentence imposed by the trial magistrate. The entire appeal is dismissed.

**Dated and signed at Nairobi this 20<sup>th</sup> day of January, 2014**

**F. GIKONYO**

**JUDGE**

Dated, signed and delivered at Bungoma this 20<sup>th</sup> day of January 2014

**A MABEYA**

**JUDGE**