



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 282 OF 2012
TONY SLUMASAAPPELLANT
V E R S U S
REPUBLICRESPONDENT

(Appeal against the sentence and conviction of [S.N. MWANGI, RM) delivered on 2.11.2011 in the Principal Magistrate's Court Vihiga in Criminal Case No.1029 of 2010)

J U D G M E N T

The appellant was charged with the offence of stealing a motorcycle contrary to **section 278 A** of the **Penal Code**. The particulars of the offence are that *on the 8.11.2010 along Gisambai-Hamisi road jointly with another not before court stole one motorcycle Registration number KMCG 436 E make BAJAJ valued at KShs.85,000/= the property of MANASE LIVAGWA UNDUSU.*

The appellant was convicted of the offence and sentence to serve three (3) years imprisonment. The grounds of appeal are that the case proceeded without any exhibit, the prosecution witnesses were not credible, the evidence of PW3 did not corroborate the evidence of the other witnesses, the type of light used was not described, the trial court was biased and the sentence is harsh. The appellant filed written submissions which mainly expound on the above grounds. He contends that there was no document produced to prove ownership of the motorcycle. Almost all the witnesses did not witness the incident and were merely informed. The incident occurred at night and the complainant was alone when the incident occurred, the source of light was not described. The investigations conducted by PW6 were shoddy and the witnesses were not credible.

Mr. Oroni, State Counsel, opposed the appeal and relied on the evidence on record. Counsel submitted that the appellant was positively identified.

Before the trial court **BEATRICE MBONI** testified as **PW1**. Her evidence is that she had bought the stolen motorcycle on 21.10.2009 and entrusted it to her husband PW2. The motorcycle was being driven by KARANI (PW3). On the 9.11.2010 she was informed that the motorcycle had had an accident and it had been stolen. She did not know who stole the motorcycle. **PW2 MANASE LUNDUSU** is the husband to PW1. He was informed by Karani (PW3) that he had an accident and sustained injuries. He informed him that two people took the motorcycle to Gisambai police base to report the accident and he knew them physically and by name. PW2 informed PW3 to go to hospital. They later went to the police station but did not find the motorbike. Other motorcycle riders informed him that they knew the people who had taken the motorbike and the accused's name was one of them. Police officers went to the accused's house and arrested him but there was no motorbike. The motorbike was never recovered.

PW3 FRANCIS KARANI MUSA was the one using the motorbike for boda boda business. On the 8.11.2010 at about 7.30 p.m. he was on his way home when he fell near Sosa cottages. He was alone when the accident occurred. He was slightly injured and the accused together with his fellow co-accused who jumped bail went to the scene and took the motorcycle and PW3's phone saying they were taking the motorcycle to the police. PW3 was still in pain. When he later went to Gisambai police station to check the motorbike it was not there. He went to the accused to ask him about the motorbike but he denied. The motorbike was never recovered. It is his evidence that other people also saw the accused taking the motorbike.

PW4 ALFRED ODOBE was heading home on the 8.11.2010 at about 7.30 p.m. when he saw that PW3 had had an accident with a black motorcycle. He saw the accused trying to start the motorcycle but was unable to do it. He later learnt that the motorcycle could not be traced. He knew the accused. **PW5 ABDALLA EGONGA** runs butchery at Gisambai. On the 8.11.2010 at about 7.30 p.m. he was heading home when he found there was a motorcycle accident near Sosa cottages. The rider had fell on his own and he knew him. There were two young men who wanted to assist the accident victim by taking the motorcycle to the police. There was security light. One of the two men was the accused and he knew him as a boda boda operator. He later heard that the motorcycle had been stolen.

PW6 APC PAUL NG'ENO was attached at the Gisambai AP post. On the 8.11.2010 PW3 went to report the accident at about 7.30 p.m. He informed him that two people went to his rescue and took the motorcycle. He booked the report. On the 16.11.2010 motorcycle riders from Gisambai market went to the AP camp together and informed him that they had seen the accused taking the motorbike claiming that they were taking it to the AP camp. The accused was arrested and taken to Vihiga police station. Nothing was recovered.

The accused was put on his defence. In his unsworn testimony he testified that he was arrested on the 16.11.2010 by police officers who went together with boda boda riders who he used to work with. He was told that he had stolen a motorcycle on 8.11.2010 but he denied.

The prosecution evidence shows that PW3 had an accident while riding the stolen motorcycle on the 8.11.2010. Other people witnessed the accident. It is also established that two people took the motorcycle pretending that they were taking it to the Gisambai AP Camp. The main issue for determination is whether it is the appellant who was one of the two people who took the motorcycle. The evidence of PW3 is that he knew those who took the motorcycle by their names and physical appearance. PW4 saw the appellant trying to start the motorcycle. PW5 also saw the appellant and his co-accused with the motorcycle. According to PW5 there was light that was enough to identify the appellant. It is also clear from the prosecution evidence that the appellant used to operate motorcycle as a boda boda cyclist. In his evidence the appellant confirmed that he used to operate as a boda boda cyclist but denied committing the offence.

What was stolen was a motorcycle that was operating. Witnesses saw the appellant starting the motorcycle and assumed that they were assisting the victim of the accident. The motorcycle could have been easily driven to a distant destination and it was never found. The prosecution evidence is consistent to the effect that the appellant was one of those people who were having the motorcycle. The evidence of PW3 was corroborated by that of PW4 and PW5. Although the investigating officer testified that PW3 informed him that he did not know those who took the motorcycle, I am satisfied that the appellant was one of those people who took the motorcycle as he was seen by PW4 and PW5. It is clear that the motorcycle riders at Gisambai were aware that it was the appellant and his colleague who had taken the motorcycle and were surprised to see that the motorcycle could not be traced. I do find that the trial magistrate made the correct decision. The sentence of three years imprisonment is not excessive.

In the end, I do find that the appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 17th day of February 2014

SAID J. CHITEMBWE

J U D G E