



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERICHO**  
**CRIMINAL APPEAL NO.23 OF 2013**

(An appeal against conviction and sentence of Bomet SPM Criminal Case No.11 of 2010 & 11 of 2008

– Hon. J. Kwenah – Senior Principal Magistrate delivered on 15<sup>th</sup> May 2013)

**DAVID CHERUIYOT LANGAT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

David Cheruiyot Langat, an Appellant herein and Brian Kipkemoi Samoei were tried on a charge of Supermarket breaking and stealing contrary to Section 306 (a) of the Penal Code. The duo also each faced an alternative count of handling suspected stolen goods contrary to Section 322(1) of the Penal Code. At the end of the trial the duo were convicted and each sentenced to serve four years imprisonment. Being dissatisfied, each convict filed an appeal. On 12<sup>th</sup> March 2013, Brian Kipkemoi Samoei, the Appellant's co-accused appeared before Hon. Mr. Justice Mutava and successfully applied to withdraw his appeal *i.e.* Kericho HCCRA. No.39 of 2010.

On appeal, the Appellant through the firm of Obondo Koko & Company Advocates put forward the following grounds:

1. THAT the learned trial Magistrate erred in law by convicting the Appellant to a term of a 4 years imprisonment whereas the Honourable Court failed to comply with Section 211 of the Criminal Procedure Code.
2. THAT the learned trial Magistrate erred in law by convicting the accused despite proceeding partly in the absence of the accused person.
3. THAT the learned trial Magistrate erred in law and in fact in failing to take into consideration the weight of the evidence adduced by the prosecution as against the accused person in getting a conviction.
4. THAT the learned trial Magistrate erred in law and in fact by misleading itself that the accused person had chosen not to give his defence.
5. THAT the learned trial Magistrate erred in law and in fact in proceeding to convict the accused person in his absence.

When the appeal came up for hearing Miss. Kivali, learned Prosecution Counsel vehemently opposed the same stating that the Appellant's trial was done within the law.

Before delving deeper into the merits or otherwise of the Appeal, let me set out in brief the case that was before the trial court. A total of three witnesses testified in support of the prosecution's case. Hitesh Patel (PW1) told the trial court that on 2<sup>nd</sup> September 2007 at about 8.15 p.m., he closed his shop situated at Bomet Township. When he opened the same the next day he found some items were missing. PW1 reported his complaint to PC. Masiza (PW2). Investigations were launched and one motorbike was recovered from the Appellant. The Appellant is said to have led the police to the house of Brian Kipkemoi Samoei where the police recovered a second motorbike. Those motorbikes were reproduced as exhibits in evidence. Elijah Kipkurui (PW3) told the trial court that officers from the CID department came and confiscated a motorbike he claimed had been given to him by Brian Kipkemoi Samoei. Trial began and midstream Brian Cheruiyot Langat escaped only to be brought under a warrant. When placed on his defence, the Appellant set up the defence of alibi, claiming to have been a conductor in a lorry at the aforesaid time. In the end the trial magistrate formed the opinion that the Appellant and his co-accused knew or ought to have known that the motorbikes were stolen goods. The learned Principal Magistrate further stated that the accused persons had failed to explain how they came into possession of those motorbikes. The Appellant and his co-accused were consequently convicted as earlier stated.

On appeal, Mr. Koko, learned advocate for the Appellant argued two main grounds. First, it is the Appellant's contention that his trial was irregular because the trial court did not comply with the provisions of Section 211 of the Criminal Procedure Code. Secondly, it was argued that part of the Appellant's trial proceeded in his absence contrary to Section 201(1) of the Criminal Procedure Code. Miss. Kivali, learned prosecution counsel was of the view that the trial was properly conducted and that the accused understood the requirements of Section 211 of the Criminal Procedure Code. It was also argued that the trial court had the discretion to proceed for hearing in the absence of the Appellant who had intentionally absconded himself from court. I have carefully perused the record and it is clear that on 10<sup>th</sup> July 2008, the learned Principal Magistrate came to the conclusion that both accused persons had a case to answer. The trial principal Magistrate also note that Section 211 of the criminal Procedure Code had been complied with. A critical examination of Section 211 of the Criminal Procedure Code will reveal that there are elaborate steps which must be followed and recorded. The trial court is required to again explain the substance of the charge and inform the accused of his rights to testify on oath or not. The court is also enjoined to explain to the accused person of his right to summon independent witnesses in support of his defence. In the appeal before this court, the trial court simply recorded that Section 211 was complied. With respect I agree with the submissions of Mr. Koko, that the provisions of the aforesaid Section were not fully complied with. The trial was therefore irregular hence the Appellant's defence was prejudiced. Such a trial cannot give rise to a conviction. I do not intend to belabor myself by considering the Appellant's 2<sup>nd</sup> ground of appeal. The appeal is allowed. The order on conviction is quashed and the sentence is set aside. The Appellant should be set free forthwith unless lawfully held.

Dated, signed and delivered in open court this 24<sup>th</sup> day of July 2014.

J. K. SERGON

JUDGE

In the presence of:

- Kivali for Director of Public Prosecutions
- Miss. Boyon holding brief for Koko for Appellant