



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 242 of 2011

VINCENT ODHIAMBO ODUL APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the SPM's court at Migori in

criminal case No.204 of 2011 – Kibet Sambu, SRM dated 18th October, 2011)

JUDGMENT

1.The appellant herein VINCENT ODHIAMBO ODUL was charged with stealing a motorcycle contrary to **section 278 A** of the **Penal Code**. The particulars of the offence were that on the 17th March 2011 at Awendo Township in Migori County, in the Republic of Kenya, he stole a motor cycle make RVS star, Red in colour, Registration Number KMCJ 704 V valued at Kshs. 81,000, the property of George Okeyo Anyona.

2. The prosecution called 2 witnesses. PW1 was George Okeyo Anyona, (Anyona) a security guard with Sony Sugar Company Limited. He told the court that on 17th March 2011 his rider one David Otieno Omondi was approached by one Ken who requested for a ride to some an undisclosed destination. As the rider Omondi was not quite sure of where Ken intended to go, he (Omondi) requested one Mohamed Odhiambo (Odhiambo) who testified as PW2 to accompany Ken to Ken's intended destination. Unaware of the fact that Ken intended to cross into Tanzania, Odhiambo found himself in Tanzania. The motorcycle was kept in some home while Ken and Odhiambo proceeded to another home on foot. At the second home, Ken asked Odhiambo for the keys of the motorcycle. After receiving the keys from Odhiambo, Ken vanished for about one (month) with the motorcycle, leaving Odhiambo stranded in Tanzania.

5.During cross examination by the appellant, Anyona stated that Omondi described to him the physical features of Ken who commandeered the motorcycle to Tanzania. He also stated that it was the appellant who had been arrested in possession of the motor cycle. Anyona also told the court that immediately after his motorcycle disappeared his rider Omondi and Mohammed Odhiambo went underground but confirmed that it was the appellant who led them to a home in Tanzania and said that was the place where he had kept the motorcycle. Anyona also said that the appellant was arrested on 14th April 2011.

6. In re-examination, Anyona told the court that he had no prior knowledge of Odhiambo and further that he did not give any authority to his rider David Otieno Omondi to give out his motorcycle to any other

rider.

7. PW2 was Number 65494 Corporal Josphat Ongoki of Migori Police Station, Crime branch section. His evidence was that on the 14th April 2011, while he was at the police station, members of the public went to the station seeking to know the fate of a suspect they had been looking for. Among the members of the public were Anyona and his rider Omondi. Omondi identified the appellant as the person who had taken Anyona's motorcycle. PW2 allowed members of the public to view the appellant. PW2 learnt during his investigations that the appellant had stolen the motorcycle and travelled with it to Tanzania but then he duped the rider to give the keys and eventually disappeared with it for about (1) one month. The appellant was subsequently arrested in possession of the motor cycle in Tanzania. The appellant was initially held at Sirare police station in Tanzania and later collected by PW2 and taken to Migori police station.

8. PW2 also interrogated the appellant who confessed to him that he had left the motor cycle in the hands of a Tanzanian national by the name Emmanuel from Panyako area in Tanzania. On instructions from the OCS, Migori police station, PW2 was back to Tanzania accompanied by the appellant and the motorcycle rider. With the help of the OCs of Panyako police station, PW2 looked for and found Emmanuel who admitted to having known the appellant and further admitted that the appellant had given him the subject motor cycle. PW2 also stated that Emmanuel told him that the appellant went back to Tanzania some 10 days after he had left the motor cycle there. PW2 further stated that the appellant was arrested while trafficking in bhang from Tanzania towards the Kenyan border. The appellant was apparently released after a bribe of Kshs.10,000/= was paid to the police by his friend Emmanuel. When the appellant repaid the money to Emmanuel, the motor cycle was released to the appellant.

9. PW2 produced the motor cycle log book, the purchase receipt and the transfer form as **P. Exhibits 1, 2 and 3** respectively while a letter given to him by the OCS Migori police station was produced as **P. Exhibit 4**.

10. The appellant took PW2 through a lengthy cross examination. PW2 confirmed that Anyona had reported the loss of his motor cycle to Migori police station. He also stated that the appellant was arrested in connection with a different offence but was also positively identified in connection with the theft of Anyona's motor cycle. PW2 also confirmed that the appellant led police and Anyona to Emmanuel's home where the said Emmanuel confirmed that it was the appellant who had taken Anyona's motorcycle to the home. PW2 stated that the rider of the motor vehicle, Mohamed Odhiambo Ochieng who was charged with another case was still at large.

11. PW2 was recalled to produce the statement of the witness who was still at large called Mohamed Ochieng of Awendo Town. That Mohamed Ochieng informed PW2 that he had been given a motor cycle by David Omondi Otieno on the 16th March 2011, that he rode the said motorcycle Registration Number KM CJ 704 V for the entire night and on the following morning, returned the same to the said Omondi. On that same night of 16th March 2011, Omondi had asked Ochieng to take him to one Ken – the appellant herein – to be taken somewhere at a cost of Kshs.700/=, of which Kshs.500/= was paid on the spot and the balance thereof of Kshs.200/= was to be paid later.

12. PW2 stated further that according to Mohamed, Mohamed rode the motor cycle to Igoma on the Kenya-Tanzania border and from there, the appellant rode the motor cycle as he said he was well versed with the terrain. Later, Mohamed was abandoned at the home of one Okinyi as the appellant took the keys and vanished. Mohamed was chased out of Okinyi's home but eventually found shelter at the local Chief's offices. The chief who was interrogated by PW2 confirmed that Ken had temporarily left behind a motor cycle at the said chief's home and was escorted to Kogaja police station together with Okinyi. The statement by Mohamed which gave details of how he and the appellant had moved from Kenya to Tanzania and how he had been abandoned was produced as **P. Exhibit 5**.

13. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case requiring the appellant to be put on his defence. After compliance with **section 211** of the **Criminal Procedure Code**, the appellant chose to give an unsworn statement. He called no

witnesses.

14. Briefly, the appellant stated that his full name was Vincent Odhiambo Odul of Migori Town and that he was a taxi driver. He said he knew nothing about the charges facing him. He only recalled waking up on 15th March 2011 and doing his normal chores until late evening when he proceeded to Resort Club for drinks up to 1.00 p.m.(??). He drank so much beer that he lost consciousness and could therefore not tell his surroundings. When he eventually came to, he found himself at Migori police station and after a while, he was arraigned in court over charges he knew nothing about.

15. After carefully analyzing the evidence that was placed before him the learned trial magistrate was satisfied that the prosecution had proved its case beyond any reasonable doubt and accordingly found the appellant guilty as charged and convicted him. Upon conviction and after hearing both the prosecution and the appellant on the appellant's previous criminal antecedents and mitigation, the appellant was sentenced to serve four (4) years imprisonment.

16. The appellant, being aggrieved by both conviction and sentence, filed the present appeal. The home-made petition of appeal filed in court on 27th October 2011 comprises 11 grounds but the actual grounds of appeal can be summarized as follows:-

- 1) *That the learned trial magistrate erred in both law and fact by relying on the complainant's fabricated evidence;*
- 2) *That the learned trial magistrate erred in both law and fact for failure to see that critical witnesses were not called by the prosecution;*
- 3) *That the learned trial magistrate erred in both law and fact by delivering judgment in the absence of the complainant.*
- 4) *That the learned trial magistrate erred in both law and fact by failing to give the appellant a fair and expeditious hearing of his case through numerous adjournments.*

17. When the appeal came before me for hearing on 8th October 2012, the appellant handed in his written submissions which I have carefully read and considered. He also stated that he was arrested on 15th March 2011 and taken to court on 18th March 2011. He stated further that his request to have the OB produced was not granted. The appellant also took issue with the prosecution's failure to produce David Otieno Omondi and Mohamed Odhiambo Ochieng as witnesses since these are the persons who alleged they had given him the motorcycle. The appellant maintained that he did not know the reason for his arrest.

18. In response, counsel appearing for the respondent submitted that the conviction of the appellant by the trial court was safe as the evidence tendered by the prosecution clearly linked the appellant with the commission of the offence of stealing as charged. As regards sentence, counsel submitted that the sentence of 4 years imprisonment as compared to the prescribed sentence of 7 years was extremely lenient, though he did not ask for enhancement. Counsel urged this court to dismiss the appeal on both conviction and sentence.

19. This is a first appeal and on a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to determining whether the conclusions reached by the trial court should be supported. In doing this, this court has to bear in mind the fact that it has no opportunity of seeing and hearing the witnesses who testified before the trial court. It is also important to remember that an appellate court, which had had no opportunity of seeing and hearing witnesses should not be in a hurry to overturn the findings of the trial court unless it is obvious that such findings are not supported by the evidence on record or that the trial court applied a wrong principle of law. See generally **Pandya –vs- R. [1957] EA 336** and **Okeno –vs- Republic [1972] EA 32.**

20. I have now carefully reconsidered and evaluated the evidence afresh. I have also considered and weighed the judgment by the learned trial magistrate and seen the reasons for reaching the conclusions he reached. From the evidence on record, the appellant's conviction was anchored on the evidence given by PW2, Corporal. Ongoki who was also the investigating officer of the case. His testimony was that the appellant faced similar charges in another case, but when the motorcycle in that case was recovered, the complainant chose to withdraw the case. There is also the evidence of the recorded statement in which Mohamed Ochieng who was still at large, gives a graphic description of how he and the appellant moved from Kenya to Tanzania riding Anyona's motor cycle and how once in Tanzania, the appellant became the rider because, according to the testimony of PW2, the appellant knew the Tanzanian terrain. There is also the evidence by Anyona and also by PW2, that once the appellant had been arrested, he was identified by Odhiambo as the person he had taken to Tanzania and who later vanished with Anyona's motor cycle for about one (1) month.

21. It is also to be noted that as Investigating Officer, PW2 interrogated certain persons in Tanzania among them Emmanuel and the chief of Panyako area both of whom confirmed the story as given by Odhiambo. In my humble view, I find the evidence of PW2 to be watertight and pointing to the fact that the appellant herein was the person who presented himself as Ken to both Omondi and Odhiambo and it is him who was taken to Tanzania by Odhiambo, but later disappeared with the motorcycle, leaving Odhiambo stranded in Tanzania. I am fully aware of the dangers of relying on the evidence of a single identifying witness, but in the instant case, PW2 heard with his own ears the testimonies of Emmanuel and the chief of Panyako to the effect that indeed the appellant was in Tanzania with Odhiambo on the day Odhiambo said they were in Tanzania. There is also evidence that the appellant was arrested while in possession of Anyona's motor cycle.

22. I have also given considerable thought to the appellant's defence before the trial court and to his submissions before me, but I am unable to agree that the appellant does not know why he was arrested.

23. As regards sentence, this court can only interfere with the sentence passed by a trial court if it is established that such sentence is either excessive or harsh in the circumstances or that the trial court applied the wrong principles in imposing the sentence. See generally **Diego -vs- Republic** and **Dismas - vs- Republic**.

24. In the instant case, a conviction for stealing contrary to **section 278A** of the **Penal Code** is to be punished by imprisonment for seven (7) years. The appellant herein was given four (4) years. I do not see any reason to interfere with the same.

25. Accordingly, this whole appeal is found to be without merit. The same is therefore dismissed in its entirety. R/A within 14 days from today.

26. It is so ordered.

Dated and delivered at Kisii this 31st day of January, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Present in person for Appellant

Mr. Shabola (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.

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