



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
HCRA NO. 164 OF 2012

HILLARY KIPLAGAT KIPYEGO ::::::::::::::::::::::::::::::::::::::: APPELLANT

=VERSUS=

REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT

The Appellant, **HILLARY KIPLAGAT KIPYEGO** was convicted for the offence of Stealing a motor -cycle, contrary to Section 278 (A) of the Penal Code.

He was said to have stolen the motor cycle belonging to **CYRUS WANYOIKE WAINAINA** (P.W.1).

The Appellant was sentenced to three (3) years imprisonment. In his appeal, the Appellant faults the trial court for relying on evidence which was contradictory and inconsistent. The inconsistency is said to arise between the evidence tendered by P.W.1 and P.W.2.

Whereas those two witnesses were together at the time the offence was committed, it is not clear why the details of what allegedly transpired , were at variance.

Secondly, the evidence tendered by P.W.2 was said to have been inconsistent with what he had recorded in his statement.

The Appellant also insisted that he was never in possession of the stolen motor-cycle, at the time of his arrest. He asserted that he was arrested after he had withdrawn money from an M-pesa shop. The reason for his arrest was that he had been riding a motor-cycle which was not insured. For that offence, the Appellant says that he was charged before another Court.

If the police officer who arrested him had testified, the Appellant believes that the said officer would have exonerated him from the offence in issue herein.

Another issue that was raised by the Appellant was that the alleged oral agreement was insufficient to prove the existence of the alleged contract for the Hire of the Complainant's motor-cycle.

On the issue of his ID, the Appellant reiterated that he never gave it to the Complainant. He said that it is the Investigating Officer, in the other case, who had his ID.

In the opinion of the Appellant, if he had given his ID to the Complainant, that fact would have

featured in the Complainant's statement. But a perusal of the statement revealed that the ID was not mentioned.

The Appellant also submitted that the trial court was wrong to have rejected his defence, without giving any reasons for doing so. His view was that the defence was convincing, and that it should not have been rejected.

In answer to the appeal, **Mr. Omwenga**, learned state counsel, submitted that the case against the Appellant had been proved beyond any reasonable doubt.

The Respondent summarized the evidence and concluded that the prosecution had disproved the Appellant's alibi.

As regards the sentence, the Respondent submitted that the same was very reasonable in the prevailing circumstances.

In Reply to the Respondent's submissions, the Appellant submitted that because the motor-bike was never produced before the trial court, the offence had not been proved.

I have re-evaluated all the evidence on record.

P.W.1, **CYRUS WANYOIKE WAINAINA**, is the Complainant. On 11th February, 2011, P.W.1 purchased a motor-bike from P.W.3. The said motor-bike was a "Focin" whose registration number was **KMCN 924 P**.

The log book was produced before the trial court.

P.W.1 was introduced to the Appellant by P.W.2, who was a taxi driver. The taxi driver had ferried the Appellant from Kapseret, to Eldoret town.

It is whilst P.W.2 was ferrying the Appellant in his taxi, that the Appellant asked P.W.2 to introduce him to a person from whom he could hire a motor-bike.

P.W.2 introduced the Appellant to P.W.1, and thereafter, P.W.1 hired out his motor-bike to the Appellant.

Although the Appellant was supposed to return the motor-bike on the evening of the same day, he never returned it.

Three months after the Appellant had hired P.W.1's motor-bike in Eldoret town, he was arrested, at Iten.

P.W.1 testified that when P.W.2 introduced the Appellant to him, P.W.2 told P.W.1 that he had known the Appellant well.

Nonetheless, P.W.1 interviewed the Appellant, to get to know him better, before hiring out the motor-bike.

The Appellant told P.W.1 that he was an army officer. He then gave to P.W.1 a copy of his National Identity Card. The Appellant also gave to P.W.1, his mobile phone number.

According to P.W.1, the Appellant paid to him, the agreed hire charges, amounting to Kshs 1,700/=.

At the time when P.W.1 was talking to the Appellant, P.W.2 was said to have been present. Therefore, as P.W.1 also had a copy of the Appellant's Identity Card, and his mobile phone number,

P.W.1 did not find it necessary to draw up a written agreement with the Appellant.

When the Appellant did not return the motor-bike, P.W.1 reported to the police. The police locked-up P.W.2, but they later set him free.

During cross-examination, P.W.1 said that P.W.2 had told him that he (P.W.2) knew the Appellant very well. As P.W.2 was a business colleague of P.W.1, the Complainant believed him when he said that he knew the Appellant well.

P.W.2, ROBERT MBURU KARANJA, testified that he was a taxi driver. On 1st March, 2011, P.W.2 ferried the Appellant from Kapseret to Eldoret town.

P.W.2 called out to the Complainant, who he then introduced to the Appellant. He did so because the accused had told him (P.W.2) that he wanted to hire a motor-bike.

When P.W.2 first testified, (on 29th August, 2011), he said that after he introduced P.W.1 to the Appellant, he left the two men negotiating. He explained that he returned later, and found that the Complainant had handed over the motor-bike to the Appellant.

It is noteworthy that at that stage, the prosecutor asked the court to stand down P.W.2. His reason for that application was that the statement of P.W.2 appeared to have a discrepancy from his testimony.

The accused had no objection to the application. It was therefore granted, and P.W.2 was stood down. When P.W.2 next testified, he said that he was present when the Appellant handed over to the Complainant, a copy of his Identity Card.

P.W.2 went on to say that the Complainant later informed him that he had handed over the motor-bike to the Appellant.

P.W. 2 also said that he had only ferried the Complainant like any other customer. Apparently, P.W.2 had never met the Appellant prior to the date when he introduced him to the Complainant.

P.W.2 emphasized that he never convinced the complainant to believe the Appellant.

P.W.3, **STEPHEN MBURU NGUGI**, testified that he sold the motor-bike to P.W.1. He had bought it at Kshs 60,000/=, and then sold it to P.W.1 at Kshs 55,000/=. The purchase price is shown on the Agreement signed by both P.W.1 and P.W.3.

P.W.4, P.C. **CRISPUS MWIKAMBA**, is a police officer who was attached to the Eldoret Police Station at the material time. He was on duty when P.W.1 reported to him that a customer who had hired his motor-bike, had failed to return it. P.W.1 told P.W.4 that the customer had left his Identity Card with P.W.1.

During cross-examination, P.W.4 said that it is P.W.1 who handed over to him, the Identity Card belonging to the Appellant.

The Appellant suggested to P.W.4 that it is he (the Appellant) who had left his Identity Card with P.W.4 But the Investigating Officer (P.W.4) denied that suggestion.

P.W.4 said that P.W.2 had told him that he was present when P.W.1 was holding negotiations with the Appellant.

After P.W.4 testified, the prosecution closed its case. And when the Appellant was put to his defence, he informed the court that he would give sworn testimony. He also said that he would call two

other witnesses.

The Appellant asked for, and was granted one (1) month to prepare his defence. When he was due to put forward his defence, the Appellant told the court that he was still not yet ready. The learned trial magistrate granted an adjournment, to the date which the Appellant had asked for.

In his defence, the Appellant testified that on the date when he is alleged to have been with P.W.1 and P.W.2 in Eldoret town, he was actually working in Nairobi.

In a nutshell, his defence was an alibi. He was saying that he was very far away from the place where the Complainant was robbed.

He explained that he was arrested at Iten, where he had gone to visit a sick relative. The police officer who arrested him claimed that the Appellant was a thief. The officer also told him that the motor-bike which he had, did not have an insurance cover.

The Appellant said that he had never met the Complainant or P.W.2. After concluding his evidence, the Appellant asked for an adjournment for one more week. He needed that time to get his two witnesses.

After the case resumed, the Appellant closed his defence, without calling his two (2) witnesses. He told the trial court that his said witnesses were not likely to turn up.

Having given due consideration to the all the evidence on record, together with the submissions canvassed before me, I note that the prosecution sought an adjournment when it became apparent to the prosecutor that P.W.2 was giving evidence which was not consistent with his statement.

I consider that revelation to be very significant, as it is the prosecutor who was owning up to the fact that his witness was telling a story which did not appear to tally with the statement which the witness had recorded earlier.

Obviously, a witness whose testimony was at variance with the statement which he had recorded earlier is likely to be declared as unreliable.

P.W.2 had told the court that after he had introduced P.W.1 to the Appellant, he left the two gentlemen to discuss the Appellant's desire to hire the complainant's motor-bike.

Obviously, if P.W.2 was not present when P.W.1 and the Appellant were negotiating, he could not have witnessed the handing over of the Appellant's Identity Card, to the Complainant.

It is thus very noticeable that when P.W.2 resumed his testimony, he said that he saw P.W.1 being given the Appellant's Identity Card. That piece of evidence, which was given on the second occasion, appeared to corroborate the Complainant's evidence. However, it still raises fundamental questions concerning why P.W.2 changed his evidence.

On his part, P.W.1 had told the Court that he believed the Appellant because P.W.2 informed him that he (P.W.2) knew the Appellant very well. But, on his part, P.W.2 told the court that he had not known the Appellant prior to the material day.

This court is unable to establish which of those two witnesses was talking the truth. It does appear that the police did not believe P.W.2's version, initially. I think that that is what informed the decision by the police, to arrest him.

As regards the defence put forward by the Appellant, I note that it was hinged on his contention that his Identity Card had been given to the police as security. Obviously, the Appellant was trying to distance himself from the Complainant's evidence, concerning the handing over of the Identity Card, by

the Appellant to the Complainant.

In that respect, I find that the Appellant's story was not consistent. First, he suggested to P.W.1, that he (the complainant) may have got the Appellant's Identity Card from where cards which are lost are found. That would imply that the Appellant had lost his Identity Card.

If that be the case, it would mean that the Appellant could not have used the same lost Identity Card as security which he handed over to the Investigating Officer.

In the light of the two inconsistent stories which the Appellant advanced, to try and explain how his Identity Card got into the hands of the Complainant and also of the Investigating Officer, I find that his defence, in that respect, cannot be believed. Therefore, the learned trial magistrate was right to have rejected that line of defence.

And because those two inconsistent lines of defence rendered the appellant an unreliable witness, I find that there is reason to also doubt the alibi.

I find and hold that the Appellant actually gave to the Complainant a copy of his Identity Card, at the time he hired the Complainant's motor-bike.

P.W.2 may or may not have been present when P.W.1 handed over his motor-bike to the Appellant. But that does not have any bearing on the fact that P.W.1 handed over his motor-bike to the Appellant.

The Appellant was arrested because the Investigating Officer had notified the police stations that the Appellant was a **"wanted"** person.

In the result, I find that the case against the Appellant was proved beyond any reasonable doubt. I therefore uphold both the conviction and the sentence. The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT ELDORET,

THIS 18TH DAY OF NOVEMBER, 2013.

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FRED A. OCHIENG

JUDGE.