



REPUBLIC OF KENYA

High Court at Kericho

Criminal Appeal 58 of 2011

HARON KIPKURUI CHERUIYOT.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

*(Being an appeal against both conviction and sentence in Chief Magistrate's court Cr. Case No. 341 of 2011 in Judgment delivered on 4<sup>th</sup> day of November 2011 by Hon. M. O. Okuche, Resident Magistrate at Kericho Law Courts)*

### JUDGMENT

The Appellant, **HARON KIPKURUI CHERUIYOT** was charged with the offence of stealing a motor-cycle contrary to **Section 278A** of the **Penal Code**. It was stated in the particulars of the offence that on diverse dates between 29<sup>th</sup> November 2010 and 1<sup>st</sup> December 2010 at unknown time in Kericho District within the Rift Valley Province, stole a motorcycle **Bajaj Boxer Registration number KMCL 933R** valued at Kshs. 80,000. The property of Hillary Kipkurui Mutai. The matter was heard by the subordinate court, Kericho where the Appellant was convicted and sentenced to two (2) years imprisonment. He now appeals against the conviction and sentence.

The Appellant on being aggrieved by the conviction and sentence aforesaid preferred the appeal on the following grounds:-

***(1)The trial Magistrate erred in law and fact by entering a conviction whereas the evidence adduced by the prosecution witnesses indicate that the appellant came into possession of the motor bike by way of an agreement and not theft and therefore the term of the agreement governed possession and use.***

***(2)That without prejudice to the foregoing the prosecution failed to prove the charge of theft beyond reasonable doubt.***

***(3)That further, without prejudice the sentence passed by the trial Magistrate was influenced by the erroneous consideration and or remarks by the prosecution.***

To prove the case the prosecution called a total of three (3) witnesses. **PW1 HILLARY KIPKURUI MUTAI**, the Complainant, stated that he purchased two motorcycles from Tamisha Auto Spares, Kericho, Registration Numbers KMCL 933R and KMCM 530L respectively. He gave the Appellant motorcycle registration number KMCL 933R to operate a boda boda business on his behalf. They entered into a verbal agreement whereby the motor-cycle was to be operated within Kericho town and he was to

remit Kshs. 400 to him on daily basis. While away on holiday he received information from PW2 that his motor-cycle was lost an issue he disregarded. He returned to Kericho at the end of January 2011 to find it missing. The Appellant explained that the motorcycle had gone missing and he had reported the matter to the police. It was however discovered that no such report was made. The Appellant was arrested and charged.

**PW2 LEONARD KIPROTICH RONO**, confirmed that PW1 gave the Appellant the motorcycle registration number KMCL 933R to operate as boda boda within Kericho town on 8/11/2010. On 29/11/2010 the Appellant informed him that the motor cycle had been stolen. It was found that the Appellant had not reported to the police. The motorcycle was never recovered.

**PW3 NAMUEL NYAKUNDI, NO. 82071**, who investigated the case found that no report of missing motor cycle had been made to the police station. On being arrested the Appellant explained that he had given the motorcycle to another person who never returned it.

In his defence the Appellant denied having committed the offence.

When the appeal came up for hearing on the 15<sup>th</sup> October, 2012 the Appellant denied having stolen. The learned State Counsel Mr. Rogoncho conceded the appeal on grounds that the ingredients of the charge were never proved. He stated that it was not in contention that the motorcycle was lawfully passed to the appellant.

According to him the offence that could have been committed was obtaining by false pretence. He viewed the conviction as a miscarriage of justice as the motorcycle was not recovered in possession of the appellant.

I have considered the evidence on record, the judgment of the learned Resident Magistrate, grounds of appeal and the oral submissions of the appellant and the learned State Counsel respectively.

This being the first appeal I am guided by the case of **AJODE –VS- REPUBLIC CRIMINAL APPEAL NO. 81 OF 2004.**

Where the Court of Appeal sitting at Kisumu held as follows:-

***“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowances for that”.***

With the above holding in mind I am enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it and come up with my own conclusion.

With regard to the submission of the learned State Counsel that the offence in the least could have been one of obtaining by false pretence. It is the law that any person who obtains by false pretence with an intent to defraud from any other person anything capable of being stolen commits the offence of false pretence. False pretence has been defined by the **Penal Code Section 312** to be:-

***“Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true”.***

In this case PW1 entrusted the motorcycle with the Appellant under some agreement. He was to operate a boda boda business whereby he would remit some 400/= to him on daily basis. It can therefore not be envisaged that the Appellant made some representation to PW1 prior to being given the motor cycle hence there was no false pretence whatsoever.

The charge the Appellant faced was of stealing a motorcycle. According to **Section 278A** of the **Penal**

**Code**, the item stolen ought to have been a motor vehicle within the meaning of the Traffic Act. A motor cycle is defined by **Section 2** of the **Traffic Act** to mean a motor vehicle with less than four (4) wheels the weight of which un laden does not exceed eight hundred weight. This was indeed a motor vehicle. Therefore whatever was said to have been stolen was a motor-vehicle as envisaged by **Section 278A** of the **Penal Code**.

The issue to be determined is hence, whether the Appellant stole the motor-vehicle. The evidence adduced by PW1 and PW2 clearly show that the Appellant did not take the motor cycle without the owner's consent. It was PW1 who entrusted the motorcycle with him to carry out business. **Section 268** of the **Penal Code** defines stealing as follows:-

***“... or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”***

Subsection (2) of the aforesaid section stipulate circumstances under which a person will be deemed to have converted any property fraudulently. There must be an intent to permanently deprive the owner of the thing amongst other intents.

In his findings the learned Magistrate analyzed evidence and found the Appellant having unlawfully denied PW1 title to the motor cycle permanently an act that was done without consent. It is true PW1 was permanently deprived of the motorcycle. But, the question to be posed is whether the Appellant had an intent to do so. In reaching his conclusion the learned Magistrate argued that it was only the appellant who knew the whereabouts of the motor-cycle information that he withheld from PW1. He also faulted him for failure to report the matter to the police.

According to the evidence adduced by the prosecution, the appellant notified PW2 that the motor-cycle had gone missing, he however did not report to the police. PW3 said he had given the motor-cycle to another person who never returned it. He however did not report to the police. As an investigation officer he did not state what investigation he carried out to establish if indeed the appellant had given the motor-cycle to another person and with what intention. The prosecution had a duty of proving whether the appellant assumed a right to the motorcycle and kept it with an intention of dealing with it as it were his own. Being construed to have a guilty mind by virtue of having not made a report to the police would depend on whether he understood that requirement. He notified his colleague (PW2) who in turn informed PW1. Failure on the part of the police to investigate the explanation given by the appellant makes it difficult for one to infer a guilty mind on the part of the appellant. For no evidence was adduced by the prosecution to prove that the appellant knowingly converted the motor-cycle to his own use or that of another in violation of the verbal agreement he had with PW1. A civil wrong may have been committed by the appellant to PW1 which does not amount to theft in the circumstances.

In the premises I find that the evidence adduced was not sufficient to prove the charge against the appellant. The conviction was unsafe. Consequently I allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith.

**DATED at KERICHO this 31<sup>st</sup> day of October 2012**

**LILIAN N. MUTENDE**

**JUDGE**

**COUNSEL APPEARING**

Mr. Rogoncho, State Counsel, for the Respondent

Mr. R. Koech, Court clerk