



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Appeal 133 of 2010**

**KENNETH KURIA MBARIA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an Appeal against the conviction and sentence of TWC WAMAE (MRS), Senior Principal Magistrate, in the SRM'S Court at Naivasha in the Criminal Case NO. 2134 of 2009 on 22<sup>nd</sup> April, 2010)*

**JUDGMENT**

The appellant was charged and convicted of the offence of stealing a motor vehicle contrary to Section 278A of the Penal Code (Cap 63 Laws of Kenya) and was sentenced to a fine of Kshs.70,000/- in or in default to 24 months imprisonment.

The appellant has appealed to this court by Petition of Appeal dated 30<sup>th</sup> April, 2010, on the grounds-

- (1) *the Learned Trial Magistrate erred both in law and fact in failing to consider the evidence offered by the defence.*
- (2) *the learned trial magistrate erred both in law and fact in failing to find that the ingredients of the charges facing the appellant were not proved as by law required.*
- (3) *The learned trial magistrate having found that the subject motor cycle was in the hands of a known third party as at the time of the alleged theft erred in convicting the appellant.*
- (4) *the learned trial magistrate erred both in law and fact when she convicted the appellant without any evidence at all connecting him with the alleged theft.*
- (5) *that the learned trial magistrate erred both in law and fact in basing her findings on assumptions and not the evidence on record, without ensuring that there was a thorough investigation of the alleged offence, contrary to law.*
- (6) *the sentence against the appellant was indeed harsh excessive and unfair in the circumstances.*
- (7) *the learned trial magistrate misapprehended the law and facts and arrived at an erroneous conclusion.*

And for those reasons prays that -

(a) *the Honourable do revise and evaluate the record, the conviction and sentence be set aside and appellant set at liberty,*

(b) *in the alternative, the conviction and the sentence be substituted with one that meets the interests of justice and fairness.*

Mr. Njogu learned State Counsel readily conceded to the appeal. Section 278A of the Penal Code defines "stealing" in the following terms:-

**265(1)** A person who fraudulently and without any claim of right takes anything capable of being stolen, 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.

**(2)** A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say;

(a) *an intent permanently to deprive the general or special owner of the thing of it;*

The punishment for stealing, if the thing stolen is a motor vehicle, is imprisoned for seven years.

The facts in this case do not bear proof for the offence of stealing. The appellant had been given a motorbike by his uncle the complainant to use it to carry passengers and by the end of the day, he was to give his uncle Kshs.360/- from the business.

On the material day, the appellant being sick gave the motor bike to one Richard Maina Gitau, the 2<sup>nd</sup> co-accused, who in turn gave the motor vehicle to one Nicholas Kimani who reported to the Police that motorbike had been stolen.

What clearly comes out from the chain of events is that there was some consensus on the part of the appellant in trusting the 2<sup>nd</sup> accused and giving the motorbike to him and earn money for him while he was sick and also pay his uncle the agreed sum of Kshs.360/- per day. There is no evidence that he intended, within the definition of stealing under Section 269(a) (supra) to permanently deprive his uncle the ownership of the motorbike.

Mr. Mwangi who appeared for the appellant agreed with the above submissions and added further facts that it was the appellant who assisted the police in tracing the accused, Richard Maina Gitau, and the said Nicholas Kimani with whom the motor bike was found, and submitted that the ingredients for the offence of stealing were not established. Counsel cited on the case of **AGGREY -vs- REPUBLIC [1983] KLR 649**, where the Court of Appeal allowed an appeal and held that the evidence did not support and it could not be said the ingredients of theft were established.

In that case the appellant had been charged and convicted of the offence of theft contrary to Section 275 of the

Penal Code. The High Court had summarily rejected the appeal under Section 352(2) of the Criminal Procedure Code (Cap 75, Laws of Kenya). The facts however showed that the items alleged to have been stolen did not belong to the complainant, International House.

Counsel also relied on the decision of my brother Isaac Lenaola in **FREDRICK KIRAITHE KAITHE -VS- REPUBLIC**, (Meru H.C.CR. Appeal No. 279 & of 2002), that for a charge of stealing to be proved - it must be shown that there was fraudulent intuition on the part of the accused, and a "taking" must be established in such cases.

And **theft** is defined in the **Oxford Law Dictionary 5<sup>th</sup> Edition 2000** as:

***"the dishonest appropriation of property belonging to someone else with the intention of keeping it permanently" and "Appropriation" is defined as "the assumption of the rights of owner of the property and includes any act showing that one is treating the property as his own."***

As already indicated above, the appellant was taken ill on 7<sup>th</sup> August 2007 and because the complainant wanted his daily income of Kshs.360/- he gave the motorbike to the 2<sup>nd</sup> accused. However, when he got well on 9<sup>th</sup> August 2009, he could not trace the 2<sup>nd</sup> accused and he reported the matter to the Police, and the 2<sup>nd</sup> accused only surfaced some 6 days later on 15<sup>th</sup> August 2009 when, the appellant called on Wanyama the investigating officer, and had Nicholas Kimani arrested and is said to be facing charges.

In those circumstances, it cannot be said that the appellant intended to steal the motorbike. It was the carelessness of the 2<sup>nd</sup> accused in giving out the motorbike to someone else unknown to the appellant that caused the arrest and prosecution of the appellant. The ingredients for theft were not proved and I commend Mr. Njogu Learned State Counsel for readily conceding the appeal.

For those reasons the appeal is allowed, the conviction quashed, and sentence is set aside and the appellant be set free forthwith unless otherwise lawfully held.

There shall be orders accordingly.

**Dated signed and delivered at Nakuru this 23<sup>rd</sup> day July of 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**