



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

**Criminal Appeal 32 of 2010**

**REUBEN CHERUTICH ..... APPELLANT  
VERSUS  
REPUBLIC ..... ACCUSED**

**JUDGMENT**

**REUBEN CHERUTICH** brings this appeal on the following grounds:-

1. The learned trial Magistrate erred in law and in fact in failing to hold that the prosecution witness evidence was contradictory,
2. The learned trial Magistrate erred in law and in fact in failing to find that the owner of the suspected stolen goods was not called to identify the exhibits,
3. The learned trial Magistrate erred in law and in fact in failing to find that none of the purported exhibits were recovered from the accused,
4. The learned trial Magistrate erred in law and in fact for failing to hold that there was doubt as to what parts of the motor vehicle were stolen,
5. The learned trial Magistrate erred in law and in fact in failing to find that no proper investigation was carried out before preferring the charges against the appellant herein,
6. The learned trial Magistrate erred in law and in fact in making a judgment based on erroneous facts,
7. The learned trial Magistrate erred in law and in fact in failing to find that the prosecution had not proved its case beyond reasonable doubt,

8. The learned trial Magistrate erred in law and in fact in sentencing the appellant to 2½ years imprisonment which sentence was manifestly excessive in the circumstance and without the option of fine.

The appellant was charged with the offence of stealing motor vehicle parts contrary to Section 279 (e) of the Penal Code. At the end of the prosecution and defence evidence the trial court found that the appellant was guilty of, not stealing motor vehicle parts but attempted theft contrary to the provisions of Section 388 of the Penal Code and accordingly convicted and sentenced him as above stated giving rise to this appeal.

I have carefully considered the record of proceedings at the court below. The evidence led was categorical that the accused was arrested as he fled from a motor vehicle from near or underneath which were found some of the exhibits produced at court. The time of arrest was about 11.00 p.m. in the Marigat's D.O's residence and the appellant did not show that he lived on the premises to explain his presence there at that time of the night. His advocate's questions in cross-examination did not dislodge the prosecution case that the appellant was arrested as he fled from the motor vehicle. I find therefore that the trial court was right in observing the appellant's presence at the scene of crime.

The contradictions referred to by the appellant in this appeal regard whether or not the appellant was inside, or beneath the motor vehicle when the police ambushed him leading him to attempt to flee and whether or not the spanners were beside or beneath the motor vehicle. True those contradictions do exist in the evidence. But, are they material contradictions tending to prove the innocence of the appellant? I think not. The fact is that the appellant was in the vicinity of the motor vehicle that had part of its parts dislodged from it, the seats for example and he attempted to flee when the police ambushed him. That is not the conduct of an innocent passerby, and incidentally evidence was that there was no through road inside the D.O's residence.

The grounds of appeal nos. 3 and 4 miss the point completely as the conviction here was not one for theft but one for attempted theft. The appellant's counsel must have had the judgment before preparing the grounds of appeal.

My assessing and analyzing of the evidence at trial brings me to the conclusion that the trial court arrived at the right conclusion and the conviction was based on very sound evidence and basis considering the provisions of Section 180 of the Criminal Procedure Code which are:-

**“When a person is charged with an offence he may be convicted of having attempted to commit that offence although he was not charged with the attempt.”**

There were found spanners in or near the motor vehicle from which the appellant fled when ambushed by the police. The seats of that motor vehicle were already loosened and this necessarily proves the attempt to steal. Section 388 of the Penal Code defines attempt thus:-

**“when a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.”**

That is what the appellant herein did. As regards whether or not the sentence was harsh one needs to have regard to that sentence as meted out against the maximum sentence allowable and the circumstances of the commission of offence and whether the offender is a first or subsequent one. The maximum sentence allowed by Section 389 of the Penal Code is one-half of the offence attempted. In this case the full term under S.297 (e) is fourteen (14) years and so the appellant herein was liable to a term of seven (7) years. He got 2½ years. I do not find that to be harsh.

In the result I find this appeal to be devoid of merit and dismiss it as such.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 7<sup>TH</sup> DAY OF OCTOBER 2010.**

**P. M. MWILU**

**JUDGE**

**In the presence of:-**

Appellant

Kipnyekwei advocate for appellant

Kabaka Counsel for the State

Andrew Omwenga – Court Clerk

**P. M. MWILU**

**JUDGE**