



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

Criminal Appeal 112 of 2005

SILAS NJOKA NDANGORA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant in this appeal was charged with housebreaking and stealing under section 304 (1) and 279 (b) of Penal Code. He was convicted and sentenced to 4 years in prison. He has filed 5 grounds of appeal complaining that at the time the bicycle was captured they could not recognize who had the bicycle and that the first report in police O.B does not mention the appellant and that his defence was clear from the facts surrounding the trial. And that he was a first offender and the Trial Magistrate found the bicycle was used to ferry stolen goods. The prosecution evidence was that the complainant left his home on 10/5/2005 and took his goats and sheep to graze. He returned in the house at about 4 p.m. and **“I opened the house and found 50 kg of sorghum missing”** he said. A search was mounted by neighbours and a bicycle was found by the roadside with other items and the bag of sorghum. They found a Mr. Kinyua who said that the person who had the bicycle had run away into the forest. The matter was reported to the chief and eventually to police at Ngiri Police station.

One of the neighbours Kinyua (PW2) said that when the neighbours were searching for the missing bag of sorghum they followed marks of bicycle tyre which led them to a thicket. At about 8 p.m. they saw a person pushing a bicycle. Then the person with bicycle saw the neighbours and ran away leaving the bicycle behind. The light available was moonlight. This evidence is different from that of PW1 the complainant. The matter was reported to the chief on 11/5/2005 on that date the chief staff (sub-area) called on PW3 with a bicycle, a panga, sorghum stiffer and pump. The panga was known to be of PW3 who explained that the accused had borrowed it from him (PW3) in the July year 2004 to use.

Then on 14/5/2005 at about 10.00a.m PC Jervasio Kinyua received a report that the appellant was complaining that his bicycle was stolen. PW4 arrested the appellant and charged him with house breaking and stealing. The items were retained by the police. The appellant in his defence stated that he had gone to his farm and had kept the bicycle there. He later at about 12.30 p.m. found his bicycle missing. He inquired and made a search around but did not find it. On 11/5/2005 he reported the matter to police at Kiambere Police Station. His report was received by P.C Omunyi. Then on 13/5/2005 Appellant met Joseph Ngungi and the sub –area who informed him that his bicycle was at police station. When he went there he identified the bicycle as his but he was surprised when he was arrested and locked up. There was no evidence that appellant was found breaking or stealing in the house of complainant. It was suspicion that it was him because eventually a bag of sorghum was found by his bicycle which he admitted to be his. He said in his unsworn statement that he was with his bicycle until 12.30 noon. On 10/5/2005 he searched for it and made inquiries but did not recover it until he reported the matter to the police. And when the police officers showed him the bicycle he immediately admitted that it was his but

denied the ownership of the bag of sorghum which he was shown at the police station. His conduct which is supported by prosecution evidence creates a doubt whether he is the one who broke into the house of complainant to steal the sorghum. No one really saw him with the bicycle and sorghum but PW2 said that he saw a person at 8.00 p.m. by the light of moonlight who run away when he saw the witness leaving behind the bicycle. This evidence is contrary to what the complainant said “**that after a long search**” the bicycle was found by the roadside. And it is also contrary to the behaviour of appellant as recorded in his statement.

I therefore find that the Trial Magistrate erred in failing to consider that the unsworn statement of the appellant raised a doubt as to who really stole the complainant’s sorghum. It shows that during this time the appellants bicycle was not with him and there is strong possibility a third party had taken the appellants bicycle to ferry the complainant’s sorghum.

In my view that is a conclusion that can be reached in the circumstances. The appellant had no onus to prove but he did give an explanation which creates a doubt in the prosecution case. The benefit of the doubt in criminal trial always falls in favour of the appellant. The Trial Magistrate stated that the unsworn statement was strictly speaking not evidence the Magistrate was in error. An accused unsworn statement must be considered in every case. I find that the prosecution case was challenged by the appellant and the evidence is not sufficient to support the conviction. I therefore quash conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated 19th July, 2007.

J. N. KHAMINWA

JUDGE

19/7/2007

Khaminwa – Judge

Njue –Clerk

Appellant present

Mr. Kimathi for State Counsel present

Read in open court.

J. N. KHAMINWA

JUDGE