



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 140 OF 2004

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE
NO.10 OF 2003 OF THE CHIEF MAGISTRATE'S COURT AT NAIROB**

ZEVARIO NJERU NKUGUTIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

ZAVERIO NJERU NKUGUTI was convicted for **STEALING BY A PERSON EMPLOYED IN THE PUBLIC SERVICE**, contrary to section 280 of the Penal code. After taking into account the appellants mitigation, the learned trial Magistrate sentenced him to a fine of Kshs 10,000/= in default of which he was to be jailed for 12 months. Feeling aggrieved with his conviction and sentence, the appellant brought this appeal.

When the appeal came up for hearing the learned State Counsel Mr. Makura notified the court that the respondent would not oppose the appeal. He said that it was not clear from the record if a plea was ever taken. He also said that there were numerous inconsistencies in the prosecution case. For instance, that when the charge sheet cited the motor cycle which was stolen as being a SUZUKI, PW7 said that they had recovered a YAMAHA.

The learned State Counsel also submitted that the prosecution had failed to prove that the appellant had misappropriated the cash in issue, dishonestly.

A perusal of the record of the proceedings reveals that on 14th March 2003, at 10.30 a.m., the charge was read out to the accused person in the English language, and that he responded thereto by saying it was not true. Therefore, the first reason advanced by the State for not opposing the appeal is without foundation.

Meanwhile, on the same issue, I think that even if the trial court had failed to place on record a plea of **“not guilty”** that by itself would not necessarily have been fatal. I believe that the most important step is for the trial court to proceed with a full hearing, if the accused person had not pleaded guilty. In this case, the case proceeded in full, with eight prosecution witnesses testifying. At the end of the prosecution case, the trial court ruled that the appellant had case to answer, and the appellant then gave a sworn testimony, in his defence.

In the circumstances, I hold the considered view that the failure to indicate that the accused had pleaded **“not guilty”** would not have occasioned any prejudice to the appellant.

The next issue touched on the charge sheet which stated that the item which was stolen was a **SUZUKI MOTOR CYCLE**, engine number **POX/KTNA/00/243**. PW1, Stephen Kamuyu Karaba, testified that he was a Deputy Director of Education, in charge of Primary Education. He said that the appellant was at the material time, an education officer, employed to deal with non-formal education. The said sector of Education was supported by UNICEF, through provision of equipment for projects. One of the items which UNICEF did donate for the project was the motor cycle in issue. The motor cycle was received, together with another one on 17th October 2002, at the basement of Jogoo House, Nairobi.

On 4th February 2003, PW1 received a report that the motor cycle was missing. When he checked with the appellant, the latter confirmed that he had the motor cycle. PW1 testified as follows:

“He is the one who was supposed to use the motor cycle – so I decided he should do the registration. He was supposed to use it in execution of official duties. When duties are not being preformed, then it should be in the office. In January – February, accused was still based in Nairobi. There was an assignment he was doing in Gigiri with UNICEF by that time. It was normal for him to use the bike to Gigiri. He was entitled to be taken there. When I called him after I was told it was missing, I confirmed I was therefore not worried about it. It was not me who reported to the police. After he told me he knew where it was, I was not aware of any theft. If he had taken it during normal hours in the course of his duty, I could not say that he had stolen it.”

PW2 Anne Ekumbo, also confirmed that she knew that the appellant was to use one of the Motor cycles donated by UNICEF. She said that if the appellant had used it to Gigiri, it would have been proper for him to do so. She went on to say that if the appellant had used the motor cycle without signing a work ticket, that would be a departmental disciplinary matter, not theft.

From all that evidence, I am surprised that the learned trial magistrate still convicted the appellant. I therefore find that the learned State Counsel, Mr. Makura, was correct to have conceded the appeal.

Another issue was in relation to the motor vehicle which was recovered by PW7 **PC** Patrick Farah. He talked of a **YAMAHA** motor cycle whereas the motor cycle in issue was a **SUZUKI**. Although there is that discrepancy, I do not think that it would have been fatal, as the motor cycle in issue was actually adduced in evidence. Its identifying numbers were verified by both PW1 and the learned trial magistrate. Therefore, whereas PW7 could be criticized for casually stating that the motor cycle was a Yamaha instead of a Suzuki, I do not think that error could have occasioned any injustice to the appellant. He knew exactly which motor cycle was being talked about, as he had it in his custody. Therefore, had that been the only issue before me, I would have held it to be a non-issue.

However, as I have already shown above, the prosecution witnesses themselves were very much convinced that the appellant had not stolen the motor cycle in issue. Stealing is defined in section 268 of the Penal Code. S. 268(2) reads as follows:

“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:

In this case, the learned trial Magistrate held as follows

: “He may not have had the intent to deprive the owner of the same permanently, but he did convert it to his own use (even using it to learn how to ride a bike is conversion) and he knew it would not have been possible to return it in its original condition.”

To my mind, once the learned trial Magistrate came to the conclusion that the appellant may not have

intended to deprive the Ministry of Education of the motor cycle permanently, she should have acquitted him, in line with the provisions of S. 268(2) (a) of the Penal Code (set out above).

In conclusion, I find that it would be unsafe to uphold conviction on the basis of the evidence which was adduced in court. I therefore quash conviction, set aside the sentence and order that the appellant be set at liberty if he is in custody

But if he did pay the fine of Kshs. 10,000/=, the same should be reimbursed to him

Dated at Nairobi this 16th day of February 2005

FRED A. OCHIENG

JUDGE

Mr. Odero court clerk