



**Ndonga v Republic (Criminal Appeal 15 of 2020)
[2024] KEHC 12843 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL 15 OF 2020
CJ KENDAGOR, J
OCTOBER 4, 2024**

BETWEEN

JOSHUA NDONGA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 1549 of 2020 delivered by Hon. W. K. Micheni on 29th April, 2020)

JUDGMENT

1. The Appellant was charged with the offence of stealing motor cycle contrary to Section 278 (A) of the Penal Code. Particulars of the offence were that on the 17th day of May ,2019, at Kiganjo Forest Quarry within Nyeri County, the Appellant stole a motorcycle registration number KMEF 386W property of Joseph Ndirangu.
2. The Appellant denied the charges, and the case proceeded to full trial. The Appellant, dissatisfied with the trial Court’s verdict, filed this instant appeal against the conviction and sentence.
3. In his petition of appeal, he raised the following grounds;
 - i. That the learned Magistrate erred in law and fact in failing to find that there was no sufficient reason or evidence showing the Appellant to have committed the offence charged.
 - ii. That the learned trial magistrate erred in law by not complying with Section 169 (1) of the Criminal Procedure code when she failed to indicate point or points of determination, the decision thereof and reasons for the decision in the content of her judgment making the entire judgment legally invalid.



- iii. That the learned trial Magistrate erred in law and fact in her analysis by descending into the arena and appeared to be acting for complainant/prosecution when she held that the full purchase price was paid contrary to the evidence on record.
 - iv. That the learned trial Magistrate erred in law and fact by ignoring the tenets of the evidence law in holding that PW1 had Photographs of the motorcycle in court but failed to produce them due to technicalities, hence allowing into evidence photos that were imaginary which makes the entire judgment an epitome of extraneous considerations.
 - v. That the learned Magistrate erred in law and fact by importing and subsequently misapplying the wrong provisions of *the Constitution* on technicalities to support her otherwise erroneous judgment and sentence by merely stating that the ingredients of theft were proven without specifically stating which ingredients and by what evidence were they proven.
 - vi. That the learned Magistrate erred in law and fact in ignoring or giving no consideration to the defence case and submissions made thereto therefore making a biased and erroneous decision.
 - vii. That the learned Magistrate erred in law and fact by failing to find that the prosecution case was full of inconsistencies as the complainant's evidence was uncorroborated and the testimonies of the other witnesses were purely hearsay.
 - viii. That the learned Magistrate erred in law and fact in failing to properly analyse the relevance or otherwise of the whole evidence that was tendered before her, thus arriving at a wrong finding.
 - ix. That the learned magistrate erred in law and fact in basing her sentence on facts and allegation not proved or supported by any evidence.
 - x. That the sentence imposed is manifestly harsh and excessive in the circumstances.
4. The appeal was canvassed through written submissions. The Appellant argued that the prosecution failed to meet the standard of proof beyond reasonable doubt and claimed that the trial Court relied on documents that had not been presented in court. The Respondent conceded to the entire appeal and acknowledged that key elements of the offence had not been proven beyond reasonable doubt.
 5. As the first appellate Court, this Court is mandated to look afresh at the evidence presented before the Court so as determine whether the Appellant was properly convicted. I am guided by the decisions in *Njoroge v Republic (1987) KLR, 19*, *Okeno v Republic (1972) E.A, 32* and *Kiilu & Another v Republic (2005) 1 KLR 174* that have been cited by the parties herein.
 6. The complainant testified that he bought the motorcycle from the Appellant for Kshs.65,000/=, which he paid in instalments, and subsequently took possession of it. He stated that the Appellant then borrowed the motorcycle to facilitate the collection of its log book but never returned it and was not available on the phone.
 7. PW2 testified that he was outside the retail shop when the Appellant asked the complainant's wife for money at their shop, as well as during the initial discussions between the Appellant and the complainant regarding the purchase of the motorcycle. He stated that he had not witnessed any payments and did not know the details of the agreement.
 8. PW3 was the complainant's wife. She testified that the Appellant requested a loan of Kshs.10,000/= while in her shop, and later expressed interest in selling his motorcycle, which she then relayed to the complainant. She told the Court that she was present during the negotiations that evening. According to PW3, the complainant gave her Kshs.20,000/= as part of the instalment, which she sent to the



- appellant the following day via MPESA. She also stated that she witnessed some of the subsequent payments, all made in cash. Her evidence was that the complainant, upon taking possession of the motorcycle, used it for a month before the Appellant requested for the same and never returned it. During cross-examination, she acknowledged that she did not indicate the loan in her statement.
9. PW4 told the Court that he repairs motorcycles and that he had examined the subject motorcycle, which the complainant purchased from the Appellant, and confirmed that it was in good condition. The rest of his evidence on the payments was hearsay.
 10. The investigation officer informed the Court that the complainant reported the motorcycle missing, and the case was assigned to him. He testified about the Appellant's arrest and mentioned that he had not received any documents from the complainant to verify the accusation. He stated that, upon conducting a search, he discovered the motor vehicle was registered to a different owner, not the Appellant.
 11. In his defence, the Appellant denied selling a motorcycle to the complainant. He stated that whereas they knew each other, he never owned a motorcycle and had never borrowed money from the complainant or his wife. He told the Court that their relationship deteriorated when the complainant requested that he steal cement from his workplace. According to the Appellant, when he declined to comply with this unlawful request, the complainant threatened him. The Appellant stated that he relocated because his previous employer's machine had broken down, prompting him to secure employment elsewhere.
 12. The issues for determination are;
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt.
 - b. Whether or not in the circumstances of this case, the sentence that was meted out upon the Appellant by the Trial Court was manifestly excessive
 13. The Appellant was charged with an offence under Section 278A of the Penal Code. The provisions thereof states that: "If the thing stolen is a motor vehicle within the meaning of the *Traffic Act*(Cap. 403), the offender is liable to imprisonment for seven years."
 14. The offence of stealing is defined under Section 268 of the Penal Code as follows:
 - "(1) A person who fraudulently and without 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".
 15. In the dealing with the ingredients of the offence of stealing, the Court of Appeal case of, John Muiruri Kagunyi v Republic [1982] eKLR stated that: "Stealing consists of taking anything "fraudulently and without claim of right (section 268(1) of the Penal Code)."
 16. The prosecution's case was based on the existence of a motorcycle and its sale to the complainant, which granted him ownership rights. The complainant's testimony on the registration details contradicted the particulars in the charge sheet. The particulars indicated the motorcycle registration as KMEF 386W, yet the complainant, in his testimony, indicated the registration as KMCL 386W. There was no evidence of the sale transaction to corroborate the complainant's testimony.
 17. The lack of documented evidence for the sale transaction raises significant concerns, primarily because the independent witnesses only provided hearsay evidence regarding the events. No Mpesa statement



was produced in Court as evidence of the partial payment to the Appellant, as the complainant alleged. There were inconsistencies between PW1 and PW2 testimony regarding who was present during the transactions. The investigation officer should have obtained proof of the number to which the money was sent and confirmed that it belonged to the Appellant.

18. The Investigating Officer stated that he conducted a search, but a copy of the Search Records from NTSA was never produced in Court. The search would have helped show that the motorcycle under reference belonged to or was affiliated with the Appellant. The records from NTSA would have also assisted the Court confirm that the motorcycle existed and that the particulars of registration were as alleged by the complainant.
19. The prosecution did not respond or invite the Court to determine the defence's objection to the identification of the photographs mentioned during the complainant's examination in chief. They were not marked for identification and were not produced by the prosecution, so they did not form part of the court record. The trial Court's analysis regarding the existence of photographs was flawed because they held no evidential value.
20. The learned trial magistrate began her analysis of the evidence by pointing out the gaps in the prosecution's case. On page J4 of the Judgment, she states as follows;

“Analysis

The motorcycle reg. no KMEF386W was not recovered. The ownership documents were also not produced as evidence. Technically, one can argue further that even if the motorcycle was available, the ownership of the had not changed hands since no transfer had been made. The defence argued that there was no transaction. The Court however heard the evidence of the two independent witnesses who said that they were aware that the accused used to own a red motor cycle. Actually PW1 had photographs of the said motorcycle in Court but they were not produced due to technicalities.”

21. In *Pius Arap Maina v Republic* [2013] KEHC 1762 (KLR) Kimondo, J. held as follows;

“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be interpreted in favour of the accused.”

22. Did this motorcycle exist? Did the Appellant sell the motorcycle to the Complainant, thereby granting him ownership rights? Was it stolen? Was it stolen by the Appellant? Crucial ingredients were not proven beyond reasonable doubt. The standard of proof in criminal cases requires that all elements be proven beyond a reasonable doubt. Courts cannot draw inferences on issues that lack supporting evidence. Mere suspicion cannot constitute guilt without concrete proof. There were numerous doubts regarding the prosecution's case, and they failed to prove their case against the Appellant beyond reasonable doubt. Therefore, the conviction, as conceded by the Respondent, was unsafe.
23. I allow the appeal and quash the conviction. Accordingly, I set aside the sentence and the compensation order.

It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 04TH DAY OF OCTOBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Hellen

ODPP: Mr. Mwakio

