



REPUBLIC OF KENYA



KENYA LAW
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**Kitsada v Republic (Criminal Appeal E079 of 2022)
[2023] KEHC 3987 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E079 OF 2022**

GMA DULU, J

MAY 4, 2023

BETWEEN

ALEX KITSAU KITSADA APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case No. E843 of
2021 at Makindu on 29th October, 2021 by Hon. J. D. Karani - PM)*

JUDGMENT

1. The appellant was charged with stealing a motor cycle contrary to section 278 A of the *Penal Code*. The particulars of offence were that on September 14, 2021 at Kibwezi township in Makueni County stole a motor cycle registration number KMFk 268U make Skygo blue in colour valued at Kshs. 115,000/= the property of Kyalo Makonge.
2. In the alternative he was charged with handling stolen property Contrary to section 322 (1) (2) of the *Penal Code*. The particulars of offence were that on September 14, 2021 along Emali – Loitokitok road in Kajiado County jointly otherwise than in the course of stealing dishonestly retained the motor cycle registration number KMFk 268U make Skygo having reason to believe it to be stolen property.
3. He was charged with a second count of failing to register as a Kenyan citizen Contrary to section 14(1) (2) of the *Registration of Persons Act* (cap 107), the particulars of which being that on September 15, 2021 at Kibwezi Police Station in Makueni County was found not having registered as a Kenyan citizen after attaining the age of 18 years.
4. He was recorded as having pleaded guilty to Count I and II. He was sentenced to 5 years imprisonment for Count I for stealing motor cycle, and 1 year imprisonment for Count Ii failing to register as a Kenyan citizen.



5. He has now come to this court on appeal. I note that the appeal was on both conviction and sentence as he stated in the grounds of appeal that he had hired the motor cycle from the owner for use during the day.
6. However, in submissions, the appellant has only limited his grounds to the severity of the sentence. The appeal having been canvassed through written submissions, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecution.
7. In my view, the appellant being a layman, I am duty bound to consider both the conviction and the sentence.
8. I have perused the record of the trial court. On September 16, 2021 when the charges were read in Kiswahili, the appellant replied to Count I in Kiswahili 'ni kweli' which means it is true. Count II was also read to him and he said 'ni kweli' – it is true. Plea of guilty to both counts was then entered by the court.
9. I observe also that on September 17, 2021 the two charges were again read to him and he said 'ni kweli' and a plea of guilty was entered, and facts were then summarised by the prosecutor.
10. From the facts given by the prosecutor, I note that the appellant initially obtained the subject motor cycle from the owner in the morning on self-drive hire, and paid Kshs. 100/= for the hire. He however, delayed to return the motor cycle and was in the evening arrested on the Emali – Loitokitok road.
11. In my view therefore, the appellant had converted the motor cycle after obtaining it lawfully and the offence of theft of the motor cycle was thus disclosed. The offence of failing to register as a Kenya citizen on attaining 18 years was also established. The entry of a plea of guilty to both charges were thus well grounded.
12. From the record, I find that the trial court complied with the requirements stated in the case of *Adan v Republic* [1973] EA 445 in taking the plea of guilty. Thus the plea of guilty of the appellant herein was unequivocal and the conviction proper for both charges, and conviction was proper. I will uphold the conviction.
13. With regard to the sentence imposed, sentencing is an exercise of discretionary power by a trial court, taking into account the nature of the offence, the statutory sentence set by the law, as well as all aggravating and mitigating factors brought to the attention of the trial court.
14. I note that before meting out sentence, the trial court received and considered a pre-sentence report dated October 29, 2021 in which it was recorded that the appellant was not remorseful. In court however, on September 17, 2021 the appellant stated as follows –
'I ask for forgiveness. I was introduced to the area by one Mwanzia.'
15. The court was certainly entitled to consider the subsequent pre-sentence report, but was not bound by it.
16. Having myself perused the relevant law, I find that the offence of stealing under 278 A of the [Penal Code](#) carries a maximum sentence of 7 years imprisonment. In my view, for a first offender who pleaded guilty to the charge and did not waste court's time and who asked for forgiveness, in this case where the subject motor cycle was recovered, the sentence of 5 years imprisonment imposed was harsh and excessive. It cannot be said that the appellant was not remorseful merely because the Probation Officer said so in his report. I will thus set aside the sentence of 5 years imprisonment for stealing and substitute it with a sentence of 3 years imprisonment. I will however uphold the 1 year imprisonment for failing to register as a Kenya citizen.



17. Consequently, and for the above reasons, I set aside the sentence of 5 years imprisonment for Count I for stealing a motor cycle and order that instead the appellant will serve three (3) years imprisonment from the date he was sentenced by the trial court. I uphold the sentence of 1 year imprisonment for count II. Sentences will run concurrently as ordered by the trial court, which means that the appellant will serve three (3) years imprisonment from the date he was sentenced by the trial court.

Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 4TH DAY OF MAY, 2023 VIRTUALLY FROM VOI.

GEORGE DULU

JUDGE

In the virtual presence of:-

Appellant

Mr. Kazungu for state

Mr. Mwendwa Court Assistant

