



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mule v Republic (Criminal Appeal 113 of 2021)
[2023] KEHC 20467 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL 113 OF 2021
TM MATHEKA, J
JULY 19, 2023**

BETWEEN

PHILIP MULE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against conviction and sentence imposed by Honourable E.M Muiru
Principal Magistrate in Kilungu PMCR no. E593 of 2021 of 29th October 2021)*

JUDGMENT

1. Philip Mule was charged jointly with Joshua Muoki in Kilungu MCCR No. E593/2021 with stealing motor cycle contrary to section 278A of the Penal Code. It was alleged that on the 13/8/2021 at Kilome market Kilome sub-location Mukaa Sub-county within Makueni County they jointly stole a motor cycle make Skygo reg. no. KMEX xxxC, valued at 94,000/=, the property of Kellen Kinama. In the alternative they were charged with handling stolen goods contrary to section 332(1) (2) (sic) of the same code – it was alleged that on the same date time and place – they, other than in the course of stealing, dishonestly retained the said motor cycle knowing or having reason to believe it to be stolen goods.
2. The charges were read to them on 17/08/2021 and each pleaded not guilty.
3. A full trial was conducted. The prosecutor called three witnesses.
4. At the close of the case for the prosecution the accused persons were found to have a case to answer. Each gave a sworn statement.
5. Vide a judgment delivered on 29/10/2021 the appellant was found guilty and convicted accordingly while his co-accused was acquitted under section 215 of the Penal Code.
6. The appellant was sentenced to serve three-and-a-half-year imprisonment.



7. In the initial petition the appellant indicates that he was appealing only against the sentence however when he filed his submissions dated 20/3/2023 he had framed two grounds that:-
 1. The offence was fabricated by the complainant.
 2. That the charge be dismissed and even the sentence be reduced/ he be released on a non-custodial sentence.
8. The appeal was opposed by the State through written submissions filed on 20/3/2023.
9. The case for the prosecution was that on 13/8/2021 the complainant came with his motor bike to Kilome and parked it outside a hardware shop at 6:30 am. The only person he saw around that place was the 1st accused. He parked the motor bike and took his employer's lorry to Kasikeu.
10. He returned about 3:00 pm but did not find the motor bike. He rang PW2 Joshua Kiratu and told him about his missing motor bike and that he suspected the 1st accused person. On his part Joshua testified that he told PW1 that he had seen the 2nd accused and the appellant herein on a motorbike. He later learnt that the two had been arrested at Tsavo for trespass in the park and were being held at Mito Andei. Police at Kilome were informed. PW3 went to Loitoktok Police Station where the appellant and his co accused had been transferred. He re-arrested them together when the motor bike and took them to Kilome Police Station.
11. In his defence the 1st accused conceded that indeed he was arrested by the Kenya Wildlife Service officers at Tsavo- but denied having been arrested with the motorbike.
12. The 2nd accused testified that it was the appellant who had hired him to carry him on the appellant's motor bike. That as they went to appellant home they went through the park and were arrested for trespass. He told the court that he was not aware that the motor bike was stolen. Given the opportunity, the appellant did not have any questions for his co-accused.
13. As the 1st appellate court, I am required to re-analyse the evidence and draw my own conclusions aware that I never saw or heard witnesses.
14. I have carefully considered the evidence on record, the rival submissions and there are two issues for determination –
 1. Whether the prosecution proved the case beyond a reasonable doubt.
 2. Whether the sentence is one that which this court ought to interfere with.
15. On the 1st issue the case for the prosecution was that when the complainant was parking his motor bike the appellant was in the vicinity – when the motor bike was recovered – he had been arrested with it and that was established by PW3, the police officer no. 51466 PC Moses Marete who re-arrested the appellant and his co-accused from Loitoktok Police Station. This was supported by the evidence of the 2nd accused who testified on oath – that he was with the appellant when they were arrested with the motor bike – but that the appellant had hired him as a rider to take him home. The appellant did not controvert this evidence.
16. Section 278A provides the offence for stealing of motor vehicles – where the thing stolen is a motor vehicle is within the meaning of the *Traffic Act* the offender is liable to imprisonment for 7 years. The *Traffic Act* Cap 403 defines motor vehicle as “any mechanically propelled vehicle ...”. vehicle is defined as to “include a motor vehicle, a trailer and any other and any other conveyance used on a road”.



A motor cycle is defined as “a motor vehicle with less than 4 wheels the weight of which motor cycle does not exceed 800 weights”.

Hence it is not in doubt that a motor cycle is a motor vehicle as per section 278A of the Penal Code.

17. There is no doubt that the same was the property of complainant who produced documentary evidence to support the same.
18. The evidence of PW1, PW2, PW3 together with the defence of A2 established without a doubt that appellant stole the motor cycle.
19. Hence the appeal against the conviction fails.
20. As against the sentence the appellant was liable to 7 years’ imprisonment. However, his mitigation was considered – he was not a 1st offender having been charged with a similar offence which involved house breaking and stealing in 2019. He was given an option of fine that time. Taking that into consideration it is my view the sentence of 3 ½ years was justified.
21. With respect to the appeal against sentence I find that the same is also unmerited.
22. In the end the appeal is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH JULY 2023

MUMBUA T. MATHEKA

JUDGE

Court Assistant Mwiwa

Appellant Present

For the state: Mr. Tanui

