



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CRIMINAL APPEAL NO. 130 OF 2019**

**PHILIP MWANGARE MATERE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Arising from the original conviction and sentence by Hon. M. Munyekenye (P.M)*

*in Webuye PMC Criminal Case No. 35/2016 delivered on 6/8/2019)*

**JUDGMENT**

1. The Appellant was charged with the offence of burglary contrary to **section 304(2)** and stealing contrary to **section 279(b)** of the **Penal Code**. The particulars were that on the night of 3<sup>rd</sup> September, 2015 at Sikata Village within Bungoma East Sub County of Bungoma County, he broke and entered the dwelling house of Timothy Wapang'ana with intent to steal from there in and did steal from there one Motor Cycle Registration Number KMDF 936F make Tvs Star frame number MD625GF56E1A30624 all valued at Kshs 100,000/= the property of the said Timothy Wapng'ana.
2. He faced an alternative charge of handling stolen property contrary to **section 322(1)** of the **Penal Code**. The particulars being that on 12<sup>th</sup> January, 2016 at Wananchi Estate within Bungoma East Sub County of Bungoma County, otherwise than in the course of stealing, he dishonestly retained Motor Cycle Registration Number KMDF 598S TVs Star, frame number MD625GF56E1A30624 knowing or having reasons to believe it to be stolen property.
3. In Count II, he faced a charge of assault in resisting arrest contrary to **section 253** of the **Penal Code**. It was alleged that on the 12<sup>th</sup> January, 2016 at Wananchi Estate within Bungoma East Sub County of Bungoma County, he assaulted number 55111 PC driver Francis Onyiego with intent to prevent lawful apprehension of himself for the offence of burglary and stealing Motor Cycle Registration Number KMDF 936X Tvs Star Chassis number MD625GF59E1A30066.
4. In Count III he faced a charge of malicious damage to property contrary to **section 339(1)** of the **Penal Code**. The particulars were that on 12<sup>th</sup> January, 2016, at Wananchi Estate within Bungoma East Sub County of Bungoma county he willfully and unlawfully damaged one jacket valued at Kshs 1,500/= the property of number 38615 PC Aggrey Mungasia.
5. The Appellant pleaded not guilty whereupon the prosecution called a total of six (6) witnesses. A summary of the prosecution's case was that the Appellant broke into the house of Timothy Kihara Wapangana while the said Timothy Wapangana was away condoling with a neighbor. The Appellant cut the window grill to gain access and stole one motorcycle. Acting on a tip off from an informer, the police went to a house at Wananchi Estate where they found and arrested the Appellant and recovered the motorcycle. During the arrest, the Appellant resisted arrest and in the process bit PC Francis Onyiego on the arm and tore the jacket of PC Aggrey Mungasia.
6. At the close of the prosecution's case, the Appellant was placed on his defence. He gave a sworn statement to the effect that he had been arrested at the instance of PW4, PC Francis Onyiego who had inappropriately touched his wife in a bar on 26<sup>th</sup> December, 2015 and had promised to deal with him. He denied any connection with the charges.
7. At the end of the trial, the Appellant was convicted on the alternative charge of handling stolen property and that of assault and was sentenced to seven (7) and three (3) years' imprisonment respectively.
8. Dissatisfied with the outcome, the Appellant appealed to this court against both the conviction and sentence. The appeal is based on the grounds that some of the prosecution witnesses did not testify; the conviction was based on contradictory and speculative evidence; the seven (7) years' imprisonment was harsh and excessive and the court failed to consider the 23 months spent in remand.

9. The appeal was canvassed by way of written submissions, and the respective submissions have been carefully considered.

10. This is the first appellate court in this case. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (See - **Pandya vs. Republic [1957] EA. (336)**; **Shantilal M. Ruwala vs. R. [1957] EA. 570** and **Peters vs. Sunday Post [1958] E.A 424**).

11. Upon perusal of the evidence on record, the grounds of appeal and the respective submissions, two issues arise for determination. The first is whether the prosecution proved its case to the required standard and the second is whether the sentence imposed upon the Appellant was excessive.

12. On the first issue, **section 322(1)** of the **Penal Code** under which the Appellant was convicted provides that:

*A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.*

13. In the instant case, the prosecution adduced evidence that a motorcycle Registration Number KMDF 936X was stolen from the home of PW1 while he was away condoling with a neighbor on the night of 3<sup>rd</sup> September, 2015. The said Motorcycle was later found in the Appellant's house. The Appellant could not explain how he came to be in possession of the motorcycle for which he had no ownership documents.

14. On his part, PW1 identified the motorcycle at Webuye Police Station by way of its registration plate/number, engine number, front tyre, mud lap and the front shocks. The motorcycle had however been modified slightly by insertion of a rear grill and change of the fuel tank.

15. John Wamukota Mwhili who testified as PW3 stated that he bought the subject motorcycle from Car and General Bungoma but had not yet transferred ownership of the motorcycle to PW1 and one John Muraya to whom he had sold it. The ingredients of the offence of handling stolen goods were restated in the case of **Mungai vs. Republic [2006] 2 KLR 262**, thus:

*Under section 322(1) of the Penal Code (cap 63), a person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.*

16. A defence in a case of handling of stolen goods may be that the possessor of the goods did not know that the goods he was found in possession of were stolen. However, from a reading of **section 322(4)** of the **Penal Code**, the Prosecution was not required to prove that the Appellant knew of the particular circumstances in which the motor cycle was stolen. The said section provides as follows:

*It shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods.*

17. The Appellant in his defence did not dispute having been found in possession of the motorcycle nor did he try to explain how he came by the motorcycle. He merely blamed PW4 for his misfortunes.

18. On the offence of assault, the prosecution's case was that when the police officers tried to arrest the Appellant, he charged at PC Francis Onyiego and bit his right hand in a bid to evade arrest. The offence was committed in the presence of other police officers and the Appellant's landlord, one Joseph Litiema Kisiginyi who testified as PW2. A P3 form filled at Webuye County Hospital on 12<sup>th</sup> January, 2016 was produced in proof, and confirmed that PC Francis Onyiego had sustained a human bite on his right hand dorsal aspect. The injury was classified as harm.

19. From the foregoing evidence, I am satisfied that the offence of handling stolen property contrary to **section 322(1)** of the **Penal Code** and that of assault in resisting arrest contrary to **section 253** of the **Penal Code** were proved to the required standards. I find that the witnesses' testimonies were consistent and unshaken on cross-examination. Consequently, the grounds of appeal in paragraphs 1, 3, 4 and 5 have no merit.

20. On the propriety of sentence, the sentence to be imposed upon conviction for the offence of handling stolen property as provided under **section 322(2)** of the **Penal Code** is a prison term not exceeding 14 years with hard labour. The trial magistrate imposed a 7 years' prison term.

21. I note that in sentencing, the trial magistrate considered a number of factors including the Appellant's mitigation that he is a breadwinner for his four (4) children. The court also considered that the Appellant had spent 24 months in remand. The court however observed that his long stint in remand was caused by the Appellant's own folly of jumping bail. The court also took into account the fact that the offence was a serious one calling for a deterrent sentence.

22. Under **section 333(2)** of the **Criminal Procedure Code**, the court ought to consider the period of time spent in remand when sentencing. There is no qualification for those that are remanded upon cancellation of their bond terms. As such, the Appellant's detention in remand ought to be discounted.

23. It is trite law that sentencing is at the discretion of the trial court. The appellate court is entitled to interfere with the discretion if satisfied that the subordinate court did not exercise the discretion properly. This was stated in **Francis Nkunja Tharamba vs. Republic [2012] eKLR** where the Court of Appeal stated the following in regard to interfering with sentencing by the subordinate court:

*...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing.*

*The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere.*

24. I am in agreement with the trial court that the offence requires a deterrent sentence as well as to give a chance to the Appellant to reform.

25. Consequently, this appeal partially succeeds only to the extent that the period spent in remand ought to be counted in favour of the Appellant. The two sentences of 7 years and 2 years respectively shall therefore run from 27<sup>th</sup> September, 2017.

It is so ordered.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2021.**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Appellant in Person.**

**In the presence of.....State Counsel.**