



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO.144 OF 2018**

**(Appeal Originating from Eldoret CM's Court Cr.No.4138 of 20148 by: Hon. C. Obulutsa – C.M.)**

**JOSPHAT KOMEN KIPROP.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

This is an appeal from the judgment of **Hon. Obulutsa C.M.** in Criminal Case No.4138 of 2018 in which the appellant, **Josphat Komen Kiprop** was charged with the offence of stealing contrary to Section 275 of the Penal Code.

The particulars of the charge are that on 29/6/2018 at Karunga Farm, Stole a motor cycle, household goods, Metallic Windows, 2 mobile phones, gas cylinder, assorted farm implements, two sheep, 5 chicken, sprayer, television set, 3 plastic tanks, books and writing materials all worth Kshs.250,000/= the property of **Isaac Mwangi Dugunya**.

After a full trial, the appellant was convicted of the charge and sentenced to serve 30 months imprisonment.

He is dissatisfied with both the conviction and sentence and preferred this appeal. The grounds of appeal raised by the appellant are as follows:

- 1. That the court erred when it failed to find that he was never at the scene of crime;***
- 2. That the court erred in failing to find that he was never found in possession of the stolen goods;***
- 3. That the court erred in failing to find that he was not the owner of the lorry;***
- 4. That the court failed to consider his defence;***
- 5. That no first report was made;***
- 6. That the prosecution failed to prove its case beyond reasonable doubt.***

The appellant, therefore prays that the court do allow the appeal, quash the conviction and set aside the sentence.

In support of the grounds of appeal, the appellant filed submissions which in essence were a repetition of the grounds of appeal of appeal.

In opposing the appeal, **Mr. Onkoba**, learned counsel for the State submitted that the appellant was never at the scene of crime; that the appellant procured PW2 to carry household goods for the complainant; that when the complainant was inside his house, the appellant directed PW2 to leave with the goods on the lorry; that the appellant was not arrested immediately because he disappeared for three months; that the appellant was not found with anything because the arrest was made after three months; that the appellant was never the owner of the lorry but hired PW2; that PW3 was an independent witness whose testimony was never challenged. He urged the court to uphold the conviction and sentence.

This being a first appeal, it behoves this court to re-examine all the evidence tendered by all the witnesses, re-evaluate and analyze it and arrive at its own independent conclusions. The court will however bear in mind that it neither heard nor saw the witnesses testify, a benefit which the trial court had. I am guided by the decision in **Okeno v Republic (1972) EA 22**.

**Prosecution Case:**

The prosecution called a total of four witnesses. **PW1 Isaac Mwangi** told the court that on 29/6/2018, he was preparing to move house; that he packed his household goods and loaded them on a lorry which was driven by **PW2 Joseph Kuto**. He went back inside the house to get more things and on coming out, found the vehicle had gone. He reported to the police.

PW2, recalled that on 29/6/2018, the appellant called him to go and carry household goods at Moiben. The appellant told him that he was the owner of the goods; that the appellant who was with another person led him to a house where utensils, household goods and metallic windows were found; that the appellant overtook them and led them to a home, then a garage where they offloaded the things in a scapyard and he was paid Kshs.3,000/= and he left. PW2 said he assumed the goods belonged to the appellant, **PW3, Everlyne Mwangirwa**, a neighbor of PW1 recalled that on 29/6/2018, she was assisting PW1 load goods on a lorry as he was moving. They went to get more goods from the house and found the lorry going away and PW1 went to report and look for the culprit.

**PW4 PC Michi** of Kipsoya Police Station received a report of things having been stolen from PW1 and confirmed that the appellant was traced in September, 2018.

When called upon to defend himself, the appellant talked of having been called to station and was detained and then charged.

Whether the appellant was at the scene, that is, at PW1's house; from the evidence on record, it cannot be determined whether the appellant was at the scene. It is not clear how PW1 got PW2 to come and carry his goods. PW1 stated **"on 29/6/2018, I was at home. I was preparing to move from my house. I prepared my belongings and loaded them on a vehicle Canter. The driver was Kuto. Accused was the owner."**

Neither PW1, 2 or 3 told the court whether the appellant was present when the goods were being loaded on the vehicle. The evidence is so scanty that it is not possible to tell from the evidence whether or not the appellant was at the scene. I have read the judgment of the trial court and I find that the court's findings do not tally with the evidence on record. The court stated **"the complainant.... He approached the accused person's brother to get him a motor vehicle to move his items. Together with the driver, he and accused went to his house where the stated items were loaded onto the vehicle..."** The above detailed findings are not contained in PW1's evidence, that the appellant was a broker or that PW1, the appellant and PW2 drove together to PW1's house.

PW1 told the court that the vehicle that carried away his property belonged to the appellant. He did not tell the court how the appellant came to carry his household goods because he denied that they had an agreement.

PW1 then told the court that the lorry belonged to the appellant which evidence PW2 contradicted. PW2 said that the appellant misled him that the goods belonged to him and paid him Kshs.3,000/=. The question is, who was the owner of the lorry?

Who hired it, PW1 or the appellant? Again, the evidence is very scanty and vague.

The charge lists particular properties that were stolen. However, PW1 in his evidence generally stated that his household goods were carried away. PW2 said they loaded utensils, metal windows and household goods on the vehicle.

The trial court set out the issues for determination, one being whether, the accused person without any claim of right took the items on the vehicle. It was the duty of PW1 to prove what was stolen. There was no attempt to prove what was stolen. There was no attempt to prove that the property named in the charge sheet was stolen from PW1.

In his testimony, PW2 said that the accused overtook them and led him to a home, then to a garage where the goods were offloaded in a scapyard. There was no evidence led by the prosecution to prove whose home or scapyard the goods were taken to, was it the appellant's home, or somebody else's home?

The evidence on record did not establish how the appellant was arrested and how he was identified because the record did not disclose whether the appellant was known to PW1, 2 or 3 before.

It is the duty of the prosecution to prove its case beyond reasonable doubt. Generally, I find the evidence on record to be very scanty and cannot sustain a conviction. I do not agree with the trial court's finding that it is the appellant who stole PW1's goods. There is no evidence to support that contention. The conviction is unsafe. It is hereby quashed and the sentence is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

**Dated and Signed at NYAHURURU this 20th day of December, 2019.**

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**R.P.V. Wendoh**

**JUDGE**

**Delivered by Justice H. Omondi (Mrs) at Eldoret this 22nd day of January, 2020.**

**PRESENT:**

Busienei – prosecution counsel

Ngalomoi – court assistant

Appellant - present