



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 26 OF 2018**

**SMM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the judgement (conviction and sentence) of Hon. C. L. Adisa, RM, delivered on 28<sup>th</sup> May 2018 in Bungoma Chief Magistrate's Court in Criminal Case No. 107 of 2018, R v. SMM)***

**JUDGEMENT**

***[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]***

1. The appellant has appealed against his conviction and sentence of five years' imprisonment in respect of the offence of attempted stealing contrary to section 278A as read with section 389 of the Penal Code (Cap 63) Laws of Kenya.
2. Ms. Koech, counsel for the respondent has supported both the conviction and sentence.
3. In this court the appellant has raised seven grounds in his petition of appeal.
4. In ground 1 the appellant has faulted the trial court for convicting him, when the offence was not proved beyond reasonable. The evidence of the complainant, No. 2015117729 Simon Wangata (PW 1), was that on 18/1/2018 he was at house Mateka AP Post at 3.45 am, after returning from patrol. He heard the motor cycle registration No. KMEA 741F TVS STAR being pushed. The said motor cycle was at his door and had been involved in an accident. Pw 1 and Solomon Kilonzo were taking care of this motor cycle, which was an exhibit. He came out and saw two people. One of the two people who wore a pink shirt was on the fence; and one Simon was pushing it. He pushed it up to the gate., which was 40 -50 metres away. When he put on the lights Simon put down the motor cycle and ran away. He had seen S using a torch. Pw 1 did not lose sight of him as he chased him. He also was shouting: "thief thief." Close neighbours woke up and went towards where Pw 1 was. The neighbours were armed with rungas. They arrested and beat him up and he was then taken to the police post.
5. Pw 1 had kept the motor cycle at his door, since they had no designated place to keep the exhibit. It also was the evidence of Pw 1 that he had not known the appellant and he also denied framing the appellant.
6. The evidence of Pw 1 is supported by that of Pw 2. He heard shouts of people beating a person. He went and found the appellant being beaten. He also testified that they kept the said motor cycle as an exhibit, since it had caused an accident.
7. Pw 3 No. 110791 PC Derrick Mandere, was the investigating officer. He was stationed at Bumula police station. While there he received the appellant, who had been brought by police officers from Mateka AP post. The motor cycle was kept as an exhibit, as its owner (Moses) had disappeared. He produced the motor cycle as an exhibit Pexb 1.
8. Upon being put on his defence the appellant testified on oath. He testified that on that night he was in the company of other people from a funeral, when the met the police on the way. The people he was with ran away. They arrested him. One simpon Angala came and beat him in the leg. He was taken to Bungoma police station and then to court. It is in court that he learned about the charge.
9. The trial court saw and heard the prosecution witnesses and the appellant testify. It believed the prosecution version of the evidence, which was based on demeanour. Pw 1 did not know the appellant before and he chased the appellant that night without losing sight of him. He was using a torch as he chased the appellant. The appellant was arrested by members of the public who administered mob justice upon him. Pw 1 had no reason to frame him and he denied the same as did Pw 2. The trial court found the appellant to be an untruthful witness. The finding is supported by ample evidence on record.
10. Furthermore, Mr. Anwar for the appellant submitted that the prosecution did not prove that the motor cycle was the property of APC

Simon Wangata, which he held as an exhibit. The evidence in this regard is that the motor cycle was under the care of police officers at the camp and on that material day it is Pw 1 and Solomon Kilonzo, who were taking care of it. Furthermore, the said motor cycle was at his door and had been involved in an accident. In the particulars of the charge sheet, APC Simon Wangata is indicated as holding the said motor cycle as an exhibit on behalf of the Republic. It is therefore clear that Pw 1 held the motor cycle as an exhibit. In view of this evidence, I find that Pw 1 held the motor cycle as a special owner in terms of section 2 of the Criminal Procedure Code (Cap 75) Laws of Kenya. I therefore no merit in this submission which I hereby dismiss.

11. Furthermore, Ms. Koech, counsel for the respondent submitted that the offence committed was attempted stealing. I find that the offence committed was the full offence of stealing. The evidence in this regard is that the appellant had pushed the motor cycle from its original position to near the gate, which now was 40 to 50 metres away from the door, where it was kept. The offence of theft was completed the moment it was moved away from its original position. Even if it had been moved for one inch or one centimeter from its original position the offence of stealing was completed. See R. V. Cherry (1781) 1 Leach 236.

12. The prosecution did not appeal against the acquittal of the appellant on a charge of stealing pursuant to section 348A (1) of the Criminal Procedure Code. I therefore will not make any finding in that regard, since the matter is not before me there was no appeal by the respondent.

13. The submission of the appellant's counsel that the appellant was not recognized because it was at night is without merit in the light of the prosecution evidence. His defence is a bare denial and that he was framed was rightly rejected by the trial court. The evidence of Pw 1 did not need corroboration as the appellant was arrested by members of the public, when Pw 1 was chasing him without losing sight of him.

14. This a first appeal. As a first appeal court I have independently re-assessed the entire evidence. Having done so, I find that the appellant was convicted upon sound evidence.

15. The upshot of the foregoing is that the appellant's appeal against conviction fails and is hereby dismissed.

16. Mr. Anwar for the appellant also faulted the trial court for sentencing the appellant to five years' imprisonment, which was manifestly excessive. Although the prosecutor submitted that he may be treated as a first offender, the report of the probation officer reveals that he had two previous convictions, one of which was for theft and the other was for being in possession of narcotic drugs. Both convictions are seven years old.

17. I have re-assessed the sentence, I find that the appellant is a person of bad health. He claims to be HIV positive and to be suffering from tuberculosis. He also is taking care of his three children, whose mother is deceased. As a result, I find that the sentence imposed upon the appellant for attempted stealing is manifestly excessive in the light of the fact that the motor cycle was recovered.

18. In the premises, I agree with Mr. Anwar that the sentence is manifestly excessive with the result that I hereby reduce it to the period already served. The appellant is hereby ordered released unless he is held on other lawful warrants.

**Judgement signed and dated at Narok this 19<sup>th</sup> day of December, 2019**

**J. M. Bwonwong'a**

**Judge**

**And**

**Judgement signed, dated and delivered in open court at Bungoma this 12<sup>th</sup> day of February, 2020.**

**S. N. Riechi**

**Judge**

**12/2/2020**