



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**HCCRA NO. 214 OF 2017**

**CLACKSON KIPSANG KIPCHUMBA.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court**

**at Kabarnet Cr. Case no. 348 of 2017 delivered on the 14<sup>th</sup> day of November, 2017**

**by Hon. N.M. Idagwa, RM**

**JUDGMENT**

1. The appellant was convicted and sentenced to imprisonment for 6 years on 14/11/2017 for the offence of stealing motor-cycle contrary to section 278 of the Penal Code, the particulars whereof were that he had “between the night of 22<sup>nd</sup> and 23<sup>rd</sup> day of May 2017 at unknown time at Katipsogon village Ng’etmoi Location in Baringo County stole a motor cycle make Bajaj Boxer registration number KMEC 621Q Black in colour valued at Ksh.108,000/=, (one hundred and eight thousand) the property of Hallan Bwalei.”

2. The appellant faced an alternative charge of handling stolen goods contrary to section 322 (1) (2) of the Penal Code with particulars that he had “on the 24<sup>th</sup> day of May 2017 at Ng’etmoi Location in Baringo Central Sub-County within Baringo County otherwise then in the course of stealing dishonestly undertook the retention of motor cycle registration number KMEC 621Q make Bajaj Boxer, knowing or having reason to believe it to be stolen or unlawfully obtained.”

3. The Court has considered the submissions by the appellant and the DPP in this matter, and the issue for determination is whether the appellant stole the motorbike belonging to the complainant.

**Analysis of Evidence**

4. Pw1, owner of motor cycle KMEC 621Q (produced ownership documents exhibits 1 and 2 and the motor cycle itself as exhibit 3) discovered the loss of his motor cycle on the 23/5/2017 at 6:00 am when he woke up and wanted to go to work, he reported the matter to the police and was later that night informed that his motor cycle had been spotted at Eldama Ravine at a house where the appellant was, and the motor cycle was recovered. On cross-examination, Pw1 denied any agreement with the appellant for the letter to use the motor cycle or to take a customer to Eldama Ravine.

5. Pw2, the Police Officer who received the report that a motor cycle had been stolen also testified as to its recovery at Kibasis, Eldama Ravine at a house which members of the public had directed the police and the complainant:

*“We went to the homestead where we had been directed, it had a gate. The gate was open we entered the compound which was big. There was a house near the gate. The other houses were a bit far from the gate. It was at night. We knocked on the first house door. The person opened. We entered the house which was partitioned into two. We immediately saw the motorbike. It is the accused who was in that house alone, he is the person who opened the door. We asked him if that motorbike was his, he kept quiet. The motorbike had the same registration plates with what we were looking for. The owner of the motorbike examined the motorbike and recognized it is his.”*

On cross-examination, Pw2 confirmed that the appellant was arrested at 2:00 am on the same night, and that the appellant had been alone in the house.

6. Pw3, the Investigating Officer produced the motorcycle and its 2 keys which had been left with the complainant at his house as well as its registration documents. The motorcycle was on the Court's order returned to the complainant after photographs had been taken of it for use in Court.

### **Unsworn Statement of the Defence**

7. When put on his defence, the appellant gave an unsworn statement admitting the possession of the motorcycle alleging that the complainant had sent him to take a lady who had been to his home, said that his only mistake was that:

*“I started drinking alcohol. I was caught up with time and could not ride the motorbike. I went to seek shelter at my Aunt's place. At 2:00 am police came and found me with a lady they told me I was having sex with my employer girl.....If I never got drunk that day I would not be in this problem.”*

### **Determination**

8. Being unsworn statement, the appellant's defence is of little value as it was not tested by cross-examination (See **May v. R** (1981) KLR 129), and it is technically not evidence. When considered in relation to the whole evidence presented before the Court, there is no evidence which supports the unsworn statement so as to give it any value. The appellant did not, for example, call as a witness the Aunt at whose place he alleges to have put up or the lady that he had allegedly been sent to drop at Eldama Ravine. The fact that both keys to the motorbike were with the complainant called for cogent evidence as to how he rode the bike. The unsworn statement of the appellant can simply not trump the evidence of the Prosecution witnesses.

9. The appellant having been found with the stolen motorbike the same day, later in the night on 23/5/2017, there is a reasonable prescription under the doctrine of recent possession that he was the thief or guilty receiver. From the evidence, the prescription of theft is more appropriate, there not being any evidence of any intervening transaction by any other person other than the accused. (See **Gachuru v. R** (2005) 1 KLR 688 on recent possession.

### **Appeal from conviction**

10. I would find the appellant guilty of theft contrary to section 278 A of the Penal Code as charged. I, therefore, do not find any merit in the appeal for conviction and the same will be dismissed.

### **Arrest of judgment**

11. On the application by the appellant, in a request similar to a motion for arrest of judgment (see section 324 of the Criminal Procedure Code) and with no objection by the DPP, the court on 26/6/2019 when the matter was coming up for judgment, arrested its judgment to facilitate reconciliation between the complainant and the appellant who was before the court and confirmed his willingness to forgive the appellant.

12. On 8/7/2019, the complainant, Hallan Bwalei, testified on oath before the court that:

*“I am the complainant. I have come to forgive the appellant for the offence of theft of motor cycle. I recovered my motor cycle Reg. No. KMEC621Q. I do not have any other claim against the appellant.”*

13. Article 159 (2) (c) of the Constitution enjoins the court to promote alternative mechanisms of dispute resolution subject to the repugnancy clause and provisions of any written law. I do not find anything repugnant or against any written law in allowing reconciliation of a complainant and an appellant, or withdrawal of a charge, at the appeal stage on an offence of theft of a motor cycle contrary to section 278A of the Penal Code.

### **Sentence**

14. I have noted that the appellant has been in custody since arraignment on 24/5/2017 and since sentence on 14/11/2017. If the pre-trial detention is considered as required by section 333(2) Proviso of the Criminal Procedure Code, the appellant will have served over 2 years of the six-year sentence which with remissions is only four years of prison custody, which the court considers excessive for the offence charged and the value of the allegedly stolen property.

15. As regard the sentence, I find that the sentence of imprisonment for 6 years for the offence of theft of motorcycle in the circumstances of the case where the bike was recovered and the convict a first offender is excessive. Considering the mitigation by the appellant, I would find the appropriate sentence to be one of imprisonment for 4 years.

16. However, in view of the circumstances of the case where the stolen motor cycle was recovered by the complainant who now professes to have forgiven the appellant without further or other claim against the appellant, I consider that the appellant has been adequately punished for the offence of theft. The objects of deterrence by retribution, punishment and rehabilitation have been met by the period of incarceration for over 2 years.

### **Orders**

17. Accordingly, for the reasons set out above, pursuant to section 354 (3) (b) of the Criminal Procedure Code and in furtherance of the

constitutional directive to the court and tribunals to promote Alternative Dispute Resolution Mechanisms in all matters before them, I without altering the conviction, reduce the sentence against the appellant to period already served so that he is released from custody, unless he is other lawfully held.

*Order accordingly.*

**DATED AND DELIVERED THIS 18<sup>TH</sup> DAY OF JULY 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.