



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 28 OF 2017**

**MIKA NJAGI NJIRU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. The appellant lodged this appeal against the judgment of Embu Senior Resident Magistrate delivered on 26/05/2017. The appellant was convicted for an offence of stealing a motor cycle contrary to Section 278A of the Penal Code and sentenced to serve three (3) years imprisonment.

2. The grounds of appeal precisely are as follows:-

*(a) That the case was not proved on the standards required.*

*(b) That the trial court did not give due consideration to the complainant's application to withdraw the complaint.*

*(c) That the trial court did not take into consideration the mitigation of the appellant.*

*(d) That the judgment did not contain the points of determination, the decision and the reasons thereof.*

3. The facts leading to the appeal are that on 7/10/2015 the complainant PW1 was at Kangethia market in Embu County. The appellant who PW1 knew before the incident came with one Peter Muturi and requested to be dropped home to deliver some luggage by his motor bike registration number KMDS 803F.

4. The appellant rode the motor cycle and carried PW1 on board. The luggage was dropped at Kiandome Tea Buying Centre. Then the appellant and PW1 moved on and stopped outside a bar. The appellant said he wanted to see someone there. He refused to give the complainant the ignition key on his request. The motor bike was parked outside the bar.

5. PW1 entered the bar briefly and when he came out, he did not find his motor cycle where it had been parked. On inquiring from the appellant, he said he did not know where it was and neither did he have the key. PW1 reported the matter to the police which resulted in the charge against the appellant.

6. The duty of the first appellate court was explained in the case of **OKENO VS REPUBLIC [1972] EA 32** as follows:-

*To subject the evidence on record to a fresh and exhaustive examination and arrive at its own decision on the evidence... It should make allowance of the fact that the trial court had the advantage of hearing and seeing witnesses.*

7. The appellant in his submissions relied on Section 169(1)(2) of the Criminal Procedure Code in attacking the form and contents of the judgment. He also relied on **Criminal Appeal No. 121 of 1983 James Nyanamba & Another Vs Republic** which dealt with the issue. It was held:-

*.....the judgment must specify the offence of which, and the section of the Penal Code or other law under which the accused person is convicted.*

8. It was argued that the failure to state the issues for determination and the reasons for the decision of the court violates Article 50 of the Constitution.

9. It was contended that the section under which the appellant was convicted was not stated in the judgment and the reasons for sentencing were not stated.

10. Further, it was contended that the sentence imposed did not take into consideration that the complainant wished to withdraw the case.

11. The appellant further argued that the complainant ought to have been heard by the court in his intended application for withdrawal. The fact that the appellant and complainant were friends ought to have been considered in meting out the sentence.

12. The respondent opposed the appeal. In the submissions dated 14/05/2018, it was stated that the prosecution proved its case beyond any reasonable doubt. Outlining the ingredients of the offence of stealing contrary to Section 278A of the Penal Code, the respondent submitted that the prosecution proved the offence rendering the defence of the appellant just a mere denial and an afterthought.

13. The sentence was within the law and reasonable in the circumstances as argued by the respondent. The maximum sentence provided by the law is seven (7) years and the court gave three (3) years after considering all the relevant factors in sentencing.

14. On the withdrawal of the case, the respondent submitted that there was no misdirection in the way it was handled. It was in order for the prosecution who was the complainant on behalf of the republic to present the issue to the court.

15. The respondent relied on the Tanzania case of **Nguma Vs the Republic of Tanzania** (unreported) which was cited by Cotran J. in **Republic Vs Mwaura Ikego**. It was held in that case:-

*It is logical within the rules of interpretation to hold that the word 'complainant' includes a public prosecutor. What this means in effect is that where a private person complains directly to a magistrate in a criminal matter he is the complainant. If however, the same person, instead of complaining to a magistrate were to complain to the police and the police brought a complaint to the court in the name of the Republic, the we think it follows that the Republic or the public prosecutor is the 'complainant' and the victim of the wrong complained becomes a witness for the purpose of substantiating the allegation.*

16. I proceed to address the issue of attempted withdrawal of the case. The court is guided by three distinct provisions of the law in reconciliation and withdrawal of criminal cases.

17. Section 87(a) of the Criminal Procedure Code (CPC) provides:-

*In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at anytime before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—*

*(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;*

18. Section 176 of the CPC, the court is enjoined to promote reconciliation to parties in a misdemeanor, even on its own motion. An example of the cases referred is the offence of assault where the courts have often promoted reconciliation and brought an end to cases of such nature. The victim may be paid compensation for injuries sustained as the parties may agree. Sometimes the parties may not involve the court in the terms of their reconciliation.

19. Section 204 of the CPC provides that if a complainant, at any time before a final order is passed in a case satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to do so and shall thereupon, acquit the accused.

20. In the case before me, the court was informed that the complainant wished to withdraw the case by his advocate. The prosecution opposed the application on grounds that the offence was a felony and that part of the evidence had been adduced.

21. The trial magistrate declined to allow withdrawal on grounds that the offence was a felony and reconciliation should not be allowed. He gave the following ruling:-

*....The court having received part of the evidence and this being a felony, I believe that this matter should proceed to conclusion, the court will consider all the evidence to totality at the close of the case.*

22. The trial magistrate did not give the complainant a hearing before making his ruling. For the court to determine whether the grounds for withdrawal of a case are sufficient, the complainant must be heard.

23. From the ruling, it appears that the magistrate was not clear in his mind that the application to withdraw the case was subject to the provisions of Section 204 of the Criminal Procedure Code as opposed to Section 176 of the Code. He said "Mr. Mugambi tells the court that the two (meaning the accused and the complainant) have reconciled and they have been friends for long".

24. However, the magistrate was right that reconciliation (under Section 176) could not be entered since the offence of stealing contrary to Section 278A was not a misdemeanor but a felony.

25. A misdemeanor is an offence lower than that of a felony and punishable by fine or imprisonment of less than three (3) years. It is described in the Penal Code as "*any offence which is not a felony*" in the same code as "*an offence declared by the law to be a felony or ... punishable with imprisonment for three (3) years or more*".

26. Section 204 of the Criminal Procedure Code is applicable to both misdemeanors and felonies.

27. Section 176 on the other hand is restricted to common assault, or any other offence of personal or private nature not amounting to felony.

28. The magistrate ought to have given the complainant a hearing in order to determine whether he had sufficient grounds to withdraw the complaint.

29. Upon hearing the complaint the court has a discretion to allow or refuse the application depending on the reasons given. The magistrate had a duty to interrogate the provisions of Section 204 and to give due consideration to the provisions.

30. The case proceeded for hearing and was concluded and judgment was delivered on 26/07/2017.

31. It was argued that the judgment of the trial magistrate did not contain points of determination,

decision and the reasons for the decision.

32. I have perused the judgment and noted that the points of determination were not specifically set out. However, the judgment read as a whole is clear that the magistrate was dealing with the offence of stealing contrary to Section 278A.

33. The magistrate set out to determine whether the ingredients of the offence were proved. The ingredients of the offence are synonymous with points of determination in a criminal case.

34. The magistrate proceeded to make his finding that the offence had been proved. This was after giving a well reasoned judgment.

35. I find that the judgment herein was in compliance with Section 169 of the Criminal Procedure Code.

36. The other issue is whether the case was proved beyond any reasonable doubt. PW1 testified that at the time the motor cycle was stolen, the appellant had in his possession the ignition key. He had been driving the motor cycle carrying PW1. He parked it outside the bar and kept the ignition key. PW1 entered the bar shortly before coming out to learn that the motor cycle was missing. The appellant did not explain in his defence how the motor cycle keys which were in his possession disappeared.

37. The appellant did not say that he ever returned the keys to PW1 or to anyone else. He did not give the keys to the police when he was arrested. The evidence of PW2 and PW3 corroborated the evidence of PW1 that it is the accused who drove the vehicle from Kangethia market to Kiadome Tea Buying Centre area where he dropped his luggage. He led PW1 to the bar where the motor cycle went missing. PW1 told the court that when he went outside the bar 20 minutes later he found the accused standing there but the motor cycle was missing.

38. The motor cycle must have been driven away using the ignition key in possession of the appellant. The theft took place within the 20 minutes that PW1 entered the bar. The appellant is the one who led PW1 to the bar saying that he wanted to see somebody there. But he remained outside while PW1 entered inside. The motor cycle was stolen within a very short while.

39. The circumstantial evidence does not point at any other person but the accused being responsible for the theft. The brief visit to the bar was designed to give the appellant as an opportunity to steal. This was noted by the trial magistrate in his judgment.

40. The defence of the appellant that he does not know who stole the motor cycle or where the keys went is a mere denial and does not shake the case of the prosecution. The allegation that PW1 was too drunk to ride the motor cycle was not supported by the evidence on record. The appellant and the complainant were friends of over 10 years and PW1 trusted the appellant.

41. It was therefore, in order to allow the appellant to ride the motor cycle for he trusted him. The issue of being too drunk and being incapable of riding the motor cycle was an afterthought on part of the appellant since it was never raised during cross-examination of the prosecution witness. In my considered view, the magistrate was right to find that the defence was not plausible.

42. It is my finding that the conviction was based on cogent evidence and was safe.

43. The sentence of three (3) years imprisonment was within the law for the maximum provided under Section 278A is seven years.

44. Nevertheless, I take into consideration that the complainant desired to withdraw the case against the appellant which exercise aborted for reasons given in this judgment. For this reason, I hereby order that the remaining sentence of imprisonment be converted to a non-custodial sentence subject to suitability of the appellant.

45. I hereby direct that a probation report in respect of the appellant be filed in court within seven (7) days.

46. The appeal is unsuccessful save for the review of sentence.

47. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF JUNE, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Ngige for Mugambi for Appellant**

**Ms. Mate for Respondent**