REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 61 OF 2015

HILLARY KIPLAGAT KIPYEGO.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1048 of 2011 at the Principal Magistrate's Court, Kapsabet (Hon. G.A Adhiambo, SRM) dated 27th April 2015)

JUDGMENT

[1] This is an appeal against the conviction and sentence of two years' imprisonment imposed upon the Appellant herein, **Hillary Kiplagat Kipyego,** by the Senior Resident Magistrate, Kapsabet, **Hon. G.A. Adhiambo,** on the **27 April 2015** for the offence of Stealing contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. The brief background of the matter is that, the Appellant had been charged and arraigned before the lower court jointly with one **John Kipchumba Rop** (hereinafter the 1st Accused) with the aforestated offence, whose particulars were that, on the **12th day of March 2011** at Kapkurei Location in Nandi County, they jointly stole one motorcycle **Registration No. KMCK 4891**, make TVS Star, valued at **Kshs. 80,000/=,** the property of **Noah Kiptum Bitok.**

[2] The Appellant denied that charge and, after trial, in which the Prosecution called 5 witnesses, he was found guilty of the offence charged and was convicted by the Senior Resident Magistrate in a Judgment delivered on **13 April 2015**. The Appellant was thereafter, on **27 April 2015**, sentenced to serve 2 years' imprisonment. Being aggrieved by that decision, the Appellant lodged this appeal on **7 May 2015** on the following main grounds:

> **[a]** That the trial court erred in both law and fact by convicting him while relying on the uncorroborated evidence of his co-accused and **PW4;**
>
> **[b]** That the trial court erred in both law and fact by convicting him on the basis of a poorly investigated Prosecution Case and on the basis of unauthenticated documents;
>
> **[c]** That the trial court erred in both law and fact by convicting him on the basis of the hearsay evidence of a co-accused; while rejecting his sworn evidence without giving any convincing reason for the rejection of his alibi defence.

[3] The Appellant thereafter applied for leave to Amend his Grounds of Appeal, which leave was granted by the Court **(Hon. Ogembo, J.)** on **6 April 2017**. Thus in his Amended Grounds of Appeal filed herein on **5 April 2017** pursuant to **Section 350(2)(v)** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya,** the Appellant raised the issue that he was in prison on **13 March 2011** when the offence in question is alleged to have occurred. He contended therefore that the trial court erred both in law and fact by convicting him without considering that he was in incarcerated until **8 July 2011,** the date he was alleged to have escaped from lawful custody; in respect of which he was charged and prosecuted in **Criminal Case No. 2525** of **2011:**

[4] The Appellant also contended that the trial court fell into error by convicting him without considering the period of 3 years and 7 months that he spent in remand pending his trial as required by **Section 333(2)** of the **Criminal Procedure Code**; and without considering the state of his health, which was deteriorating by the day due to chronic epigastric ulcers and hemorrhoids. The court record further shows that the Appellant filed Supplementary Ground of Appeal on **24 April 2018** in which he raised the issue that the trial court erred in law and fact by violating **Article 50(2)** and **Article 27(1)(2)** of the **Constitution**, in convicting him without considering that he raised the issue concerning his forged identity card. Thus, it was the Appellant's prayer that his appeal be allowed, conviction quashed and sentence set aside.

[5] The appeal was urged by the Appellant way of written submissions which he filed herein on **12 April 2018**; which submissions were amplified on **5 July 2018**. He reiterated his contention that he lost his identity card, and that the one that was produced before the lower court had no date of birth. He also urged the Court to give consideration to the fact that he was in remand for 3 years and 7 months in failing

health; which factors were, in his view, never taken into consideration by the trial court in passing the sentence of two years imprisonment against him. In addition, the Appellant urged the Court to peruse and consider the Judgment dated **10 March 2016,** delivered by **Hon. Kimondo, J**. in **Eldoret High Court Criminal Appeal No. 33 of 2013: Hillary Kiplagat Kipyego vs. Republic**, in support of his contention that he was in prison on **12 March 2011** when the offence in question is alleged to have been committed. He reiterated his contention that he was not accorded a fair trial and urged the Court to reconsider the case against him with a view of quashing his conviction and setting aside the sentence imposed on him by the trial court.

[6] Ms. Kegehi, Learned Counsel for the State, opposed the appeal contending that the Prosecution called 6 witnesses before the trial court who linked the accused to the crime he was charged with. She provided a summary of the Prosecution Case as set out in the Record of the lower court, thereby narrating how the Appellant approached the 1st Accused and borrowed the subject motorcycle from him; that the Appellant produced his identity card and Armed Forces identity card as a form of assurance that he would return the motorcycle at 1.00 p.m. that very day; that the Appellant did not return the motorcycle as promised, thereby permanently depriving the owner thereof, namely **Noah Kiptum Bitok** (**PW1** before the lower court) of the lawful possession of his property. It was further the submission of **Ms. Kegehi** that the trial court considered all the relevant factors, including the Appellant's alibi and the aspect about his lost identity card, and came to the conclusion that the Appellant committed the offence charged. She therefore supported the conviction and sentence and urged for the dismissal of the appeal.

[7] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, the Court is under obligation to reconsider and re-evaluate the evidence adduced before the lower court with a view of coming to its own conclusions thereon; as was aptly expressed in **Okeno vs. Republic [1972] EA 32,** namely that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings 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..."**

[8] The Appellant was charged before the lower court, jointly with **John Kipchumba** (the 1st Accused), with the offence of Stealing contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. The particulars of that charge were that on the **12th day of March, 2011**, at Kapkoris location within Nandi County, they jointly stole one motor cycle **Registration No. KMCK 489B,** Make TVS Star, valued at **Kshs. 80,000/=,** the property of **Noah Kiptum Bitok**. In proof of that charge, the Prosecution called 6 witnesses before the trial court, whose evidence was that, at all material times, the motorcycle in question belonged to **Noah Kiptum Bitok (PW1).** He had employed the 1st Accused, **John Kipchumba** as its operator, for the purpose, not only of ferrying his wife, **Hellen Chelimo Korir (PW2)**, (a teacher by profession) to and from school; but also for hire and reward.

[9] The Prosecution adduced evidence before the lower court to show that, at about 10.00 a.m. on the **12 March 2011**, the 1st Accused called **PW1** and informed him that he had given the motorcycle to a certain man, who he thereafter identified to be the Appellant, who had gone with it to **Kemetoi** on the assurance that he would return it but that the man had not returned the motorcycle; and that he had retained photocopies of the man's identity card and could easily identify him. Upon the matter being reported to **Koitabut Police Post**, **Serem Police Station** as well as **Eldoret Police Station**, a search was mounted for the Appellant, he could not be immediately traced. Ultimately, the 1st Accused was arrested and charged on **22 May 2011**. The Appellant was later traced and found at the **Eldoret G.K. Prison**, and was similarly charged with the theft of the motorcycle which was yet to be recovered .

[10] The 1st Accused, in his sworn statement of defence, confirmed the Prosecution version of the events; namely, that he was employed by **PW1** to operate the subject motorcycle; and that he worked as such until **11 March 2011** when the Appellant borrowed the motorcycle from him to pick his girlfriend from **Kemetoi**, never to return. He confirmed that he asked for copies of the Appellant's national identity card as well as his Armed Forces identity card as a form of security for the safe return of the motor cycle. He further confirmed that when the Appellant failed to return at 1.00 p.m. on **11 March 2011** as agreed, he alerted **PW1** of the matter. The 1st Accused denied that he concluded with the Appellant to steal the motorcycle.

[11] On his part, the Appellant told the lower court that he was arrested on **11 February 2011** while at Lovona, Eldoret and was taken to Eldoret Police Station where he was charged with the offence of Stealing a motorcycle vide **Criminal Case No. 588 of 2011**. He added that he denied the charges and was taken to prison; and that while in prison, a Production Order was issued by Kapsabet Court and was thus jointly charged with the 1st Accused in the lower court case, being **Kapsabet Criminal Case No. 1048 of 2011** with the offence of Stealing a motorcycle. It was thus his contention that he was in prison on **11 March 2011** and therefore could not have committed the offence in question.

[12] The Appellant further told the lower court that, on **1 April 2014**, when a search was conducted at the G.K. Prison, one **Joseph Chemaswet** who was living with him in the same ward, was found with some documents which included copies of his identity card and some agreements. That one of the agreements, dated **11 March 2011**, was between **Joseph Chemaswet** and the 1st Accused in respect of the sale of the subject motorcycle, **Registration No. KMCK 489B.** The Appellant called **Joseph Chemaswet** as his witness, and he testified that he had bought the said motor cycle at **Kshs. 50,000/=** from the 1st Accused on **11 March 2011**; and that he used the photocopy of the Appellant's identity card, which he had picked up in Eldoret Town. The documents that were found in the possession of **DW3** were produced before the lower court by **ACP Stephen Maiywa (DW4)** of Eldoret G.K. Prison.

[13] On the basis of the foregoing evidence, the lower court found the 1st Accused not guilty and acquitted him of the offence of theft, while convicting the Appellant thereof. The Learned Trial Magistrate was of the view that:

"...The Defence of the 2nd Accused did not shake the testimony of the 1st Accused in relation to the 1st Accused's narration of what happened on 11 March 2011 and 12 March 2011 and further what happened after that concerning the motor cycle that is the subject matter in this case...I further find that the 1st Accused came out as a credible person who explained in details how the subject motorcycle left his possession and how he came into possession of the copy of the national identity card of the 2nd Accused together with an Armed Forces identity Card. The court was convinced by the 1st Accused's reason of what actually transpired. I was convinced that the 1st Accused did not participate in the theft of the motor cycle and had no *mens rea* of permanently depriving the Complainant of his aforesaid motorcycle. On the other hand, I find that it has been proved beyond reasonable doubt that the 2nd Accused took possession of the subject motorcycle from the 1st Accused with the intention of permanently depriving the 1st Accused of the possession of the motorcycle and to permanently deprive the owner of the subject motorcycle the use of the said motorcycle...I find that the prosecution has proved its case against the 2nd Accused beyond reasonable doubt..."

[14] Thus, in respect of the Appellant, it is imperative to ascertain the following aspects of the case, and ascertain that there was sound basis for his conviction:

[a] The Charge and its Particulars

[b] On the Documents Exhibited before the Trial Court

[c] On Identification

[d] The Appellant's alibi

[e] A comment on Section 333(2) of the Criminal Procedure Code

[a] <u>The Charge and its Particulars</u>

[15] Regarding the charge and its particulars, the Appellant submitted that it was inappropriate to include **Section 268(1)** of the **Penal Code** in the Charge Sheet on the ground that it is merely defines stealing; and that **Section 275** was sufficient as it gives the general punishment. Certainly not much turns on this argument, as it is permissible to include the definitive provision along with the penalty provision. It may seem superfluous, but it certainly caused no prejudice to the Appellant. His contention that he ought to have been charged under **Section 278(A)** of the Penal Code is similarly untenable, for where an act strides several provisions, it is often a prosecutorial decision as to which provision to go under; and the Prosecution cannot be faulted for making an election to prefer the charge under Section 275 of the Penal Code. Indeed it was to the Appellant's advantage that the provision he was charged and prosecuted under is carries the lesser penalty of 3 years imprisonment as opposed to 7 years that is provided for in **Section 278(A)** of the **Penal Code**.

[16] As to whether there is a variance between the Charge and the evidence with regard to the date of the offence, the Appellant pointed out that, whereas the Charge Sheet gave the date of **12 March 2011** as the date of the offence, and whereas **PW1** talked of **12 March 2011**, the 1st Accused talked of **11 March 2011**. A perusal of the record of the lower court however shows that **PW1** was explicit that he received the report of the theft of his motorcycle on **12 March 2011**; that the 1st Accused informed him that he had given out the motorcycle to the Appellant on the **11 March 2011** and waited until **12 March 2011** to inform him of the incident. In cases of this nature, there can be no clear-cut date of commission; noting that as of **11 March 2011**, the Appellant had the motorcycle with the permission and consent of the 1st Accused.

[17] The record further shows that, after the Appellant failed to show up at the appointed time, which was 1.00 on **11 March 2011**, the 1st Accused maintained contact with the Appellant in the hopes of having the motorcycle returned. The 1st Accused's account of the events is reflected thus:

"He told me that he would return the motor cycle at around 1.00 p.m. He did not come back at 1.00 p.m. as agreed. I rang him and he told at Cheptol and that he was on the way coming ...After ten minutes I rang him and he told me that the motor cycle had a puncture and that he had just completed repairing it...I waited and when I tried to call him again, he had switched off his mobile phone....At around 9.00 p.m., I noticed that I was in problems and I rang my boss Noah Kiptum Bitok. I told Noah Kiptum Bitok what had happened. Noah asked me if I knew the 2nd Accused's home and when I answered in the affirmative, he told me to go to the 2nd Accused's home. The next day very early in the morning, I went to Paradise Pub at 5.00 a.m. because I knew that that is where the 2nd Accused used to sleep. The watchman told us the 2nd Accused never checked in that pub the previous evening even though he used to sleep there... I rang my boss and told him ...My boss told me to report the matter to the police..."

[18] Clearly therefore, having waited in vain for the return of the motorcycle, and the 1st Accused having done what he could in the circumstances to trace the Appellant, **PW1** and the 1st Accused were in order to deem **12 March 2011** as the date on which the theft occurred. I therefore find no merit in the Appellant's submission that the particulars of the Charge were at variance with the evidence.

[b] <u>On the Documents Exhibited before the Trial Court</u>:

[19] The Appellant took issue with the fact that, on **22 November 2012** when **PW1** adduced his evidence, the original copies of the documentary exhibits were in court and were duly marked as the exhibits; but that the documents thereafter disappeared before they could be

identified by the rest of the Prosecution witnesses. In effect, therefore, the trial court had to rely on photocopies of those documents, which in his view was a fatal to the Prosecution Case. A perusal of the record of the lower court confirms that **PW1** identified the original versions of an invoice and receipt for the purchase of the motorcycle, a Certificate of Change of Name and Transfer of Ownership as well as Log Book and an agreement in respect of the motorcycle. The documents, including the photocopies of the Appellant's identity cards, were accordingly marked for identification as **MFI 1-7.** The lower court record further confirms that at some point the documents went missing while in the custody of the Investigating Officer. This was before they could be produced in court as exhibits. The matter was raised before the lower court, not only by the Prosecution but also by the two accused persons and considerable time was spent by the court inquiring into the matter; and ultimately, the Prosecution Case was re-opened and **Inspector Shamalla** called to produce the certified copies of the documents. Hence, the lower court gave the matter due consideration, and having heard both the Prosecution and the Defence, made a decision, in the interest of justice, to admit the copies. The Appellant had the option of appealing that decision but did not.

[20] Upon a reconsideration of that decision, I find no basis for faulting the decision taken by the Learned Trial Magistrate. It is noteworthy that most of the documents were produced to prove that the motorcycle belonged to **PW1**, a fact that was not in dispute. The only other pertinent documents touching on the Appellant, were copies (and not original versions) of the Appellant's identity cards, which the 1st Accused received from the Appellant. In the premises, the lower court cannot be faulted for admitting the documents.

[b] <u>On Identification of the Appellant:</u>

[21] There is no dispute that the Appellant was traced five months later by **PW1** and the 1st Accused to Eldoret Prison where he was being held for other criminal cases, and a production order issued for his appearance before the lower court at Kapsabet. He therefore submitted that he was unfairly treated and that the evidence regarding his identification was prejudicial. It is noted however that **PW1** was not present when he obtained the motorcycle from the 1st Accused and did not purport to have seen or known him. He was identified by the 1st Accused who had known him well before; and had filed reports with Eldoret and Serem Police Stations, as well as Koitabut Police Post. The 1st Accused was categorical even in cross-examination by the Appellant, that he knew the Appellant very well.

[22] More importantly, the record of the lower court confirms that, upon his arraignment for plea before the trial court on the 25 May 2011, the 1st Accused responded as follows to the Charge:

> "**It is not true. A friend asked me to ride it for a while and he disappeared with it. He is called Hillary Kiplagat Kipyego."**

Clearly therefore, the Appellant's submissions questioning his identification are misplaced.

[c] <u>The Appellant's alibi:</u>

[23] The crux of this appeal is the Appellant's contention that he was in custody at Eldoret G.K. Prison on 11th and 12th March 2011 when the offence herein is alleged to have occurred. The record of the lower court does show that this aspect of the Appellant's defence was given consideration by the Learned Trial Magistrate as follows:

> **"The second charge sheet that relates to the offence allegedly committed on 08/02/2011 indicates that the date of arrest was on 11/02/2011 and date of reporting to court was on 14/02/2011. My view is that the mere fact that the 2nd Accused was arrested on 11/02/2011 is not prove that he was in custody on 11/3/2011 or even 12/3/2011. It is also my view that the mere fact that the 2nd Accused was allegedly charged for escaping from lawful custody on 8/07/2011 is not in itself prove that on 12/03/2011 or even 11/03/2011, the Accused was in custody. What if after allegedly taking plea in relation to the offence allegedly committed by him on 8/2/2011, he was released on bond and was arrested after the 12/3/2011 in relation to another offence or for absconding court."**

[24] The trial court can hardly be faulted in this regard, granted that although the Appellant was under no particular obligation to prove his alibi, it is trite that such a defence be raised at the earliest possible opportunity to afford the Prosecution an opportunity of testing its veracity. Hence, in **<u>R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145</u>**, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

> **"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".**

[25] This position was restated by the Court of Appeal in **<u>Victor Mwendwa Mulinge vs. Republic [2014] eKLR,</u>** thus:

> **"The appellant was arrested on 16th May, 2003 and taken to Shauri Moyo Police Station where his statement was recorded. That statement was not produced before the trial court. Had that been done, the court would have been able to consider whether what the appellant had stated at the earliest opportunity regarding his whereabouts on the material day was in line with his defence of alibi before the court. In <u>KARANJA v REPUBLIC</u> (Supra), this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."**

[26] In the instant matter, there was no indication that the Appellant raised his defence of alibi in any statement to the police. As far as the record of the lower court shows, his response to the Charge upon his arraignment on **26 September 2011** was as hereunder:

"They are all false. I don't even come from Serem. I am from Iten. I don't even know the 1st Accused."

[27] Here was an opportunity for the Appellant to put the Prosecution on notice in connection with his defence of alibi, but he did not. He did not give any indication of this line of defence in his cross-examination of the Prosecution witnesses, and opted to raise it for the first time in his submissions of no case to answer, after the close of the Prosecution case. In the premises, the Learned Trial Magistrate had no option but to weigh that evidence against the evidence adduced by the Prosecution witnesses and come to a conclusion; which was that the defence was untenable. The Appellant sought to rely on additional evidence before this Court with a view of demonstrating his alibi, including the Judgment of **Hon. Kimondo, J.** in **Eldoret High Court Criminal Appeal No. 33 of 2013**. The fact is, all these came too late in the day and do not help the dented credibility of the Appellant's defence in this regard. Hence, I would endorse the persuasive expressions employed in **Festo Androa Asenua v. Uganda, Cr. App. No. 1 of 1998** thus:

> **"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."**

[28] Like the Learned Trial Magistrate, I take the view that the Appellant's alibi defence was an afterthought and was for dismissal.

[e] A comment on Section 333(2) of the Criminal Procedure Code:

[29] It is manifest that the Appellant had spent time in custody before his conviction and sentence on **27 April 2015** and was therefore entitled to consideration pursuant to **Section 333(2)** of the Criminal Procedure Code. It is however not true that that period of incarceration was not taken into account by the lower court. At page 175 of the lower court record, it is manifest that, in passing the sentence of two years imprisonment, the lower court took into consideration the period the Appellant spent in custody awaiting trial. The record reads thus:

> **"I have considered the nature and gravity of the offence with which the Accused is convicted, his mitigation, the fact that he is not a first offender. I have taken note of the value of the motor cycle that the 2nd Accused stole, the fact that the motor cycle was not recovered. I have taken note of the period the Accused was in custody while this matter was pending before the court. The offence which the Accused has committed is prevalent and I find that he deserves a deterrent sentence..."**

[30] Thus, upon a re-evaluation of the lower court record, it is plain that trial court weighed the evidence adduced by the Prosecution as well as the Appellant's defence as it was required to do by dint of **Section 169** of the **Criminal Procedure Code**. It is manifest that, at page 157 of the Judgment, the trial court gave consideration to the Appellant's contention that he lost a copy of his identity card; and the angle introduced by **DW3** but was not persuaded by the explanation offered by the Appellant and his witnesses. In fact, the lower court dismissed **DW3** as a liar whose intention was to favour the Appellant with his false testimony.

[31] The Appellant's conviction was thus based on sound evidence. Likewise, the sentence imposed on him was lawful. Hence, I find no merit in the appeal and would accordingly dismiss it in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF SEPTEMBER, 2018

OLGA SEWE

JUDGE