



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 34 OF 2017**

**ERIC FUNDI NJAGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. The appellant was charged and convicted by Embu Resident Magistrate in CM Criminal Case No 456 of 2016 with the giving false information to a person employed in the public service contrary to Section 129(b) of the Penal Code and sentenced to a fine of Kshs. 30,000/= in default five (5) months imprisonment. He was further ordered to keep peace for a period of one (1) year and provide a surety of Kshs. 50,000/=.

2. Being dissatisfied with the conviction and sentence, the appellant lodged this appeal. He relies on the following grounds: -

- a. That the appellant was convicted against the weight of evidence.
- b. *That the magistrate erred in basing conviction on a CCTV footage which was not corroborated.*
- c. That the ingredients of the offence of giving false information were not proved.
- d. That the appellant's defence was not considered.
- e. That the sentence imposed was harsh, illegal and excessive in the circumstances.

3. The appeal was argued by way of written submissions. Messrs Mugendi Karigi & Co. advocates represented the appellant while Ms. Matere state counsel was for the respondent.

4. The facts of the case are that PW2 the complainant bought a motorcycle registration number KMDL 700M from the appellant on 20/04/2016 at a consideration of Kshs. 50,000/= which he paid in cash. On 20/04/2016 the appellant made a report at Manyatta police station that his motor bike had been stolen. Investigations commenced and the outcome was that the appellant's report to PW5 PC Timothy Ndiwa of Manyatta police station the theft of the motorcycle was false.

5. The investigating officer found evidence to the effect that the appellant had sold his motorcycle to PW1 and had been fully paid. He was charged with the offence of giving false information to the officer who received the alleged theft report.

6. The duty of the first appellate court was explained in the case of ***NJOROGE VS REPUBLIC [1987] KLR 19:-***

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see *Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570.*)

7. The evidence of the prosecution was made up of five (5) witnesses. PW1 testified that on 20/04/2016 he was approached by one Anthony a motorcycle mechanic who told him he had a motorcycle on sale. PW1 knew that his friend Gitonga (PW2) wanted to buy a motorcycle. He called him to see, test and inspect the said motorcycle. PW2 liked the motor cycle after inspection and asked Anthony to call the owner

who the appellant.

8. The price was agreed at Kshs.50,000/= PW2 did not have all the money needed to seal the transaction. PW1 lent him Kshs.25,000/= he had withdrawn from the ATM. PW1 handed over the Kshs.25,000/= to PW2 in the County Sacco Bank. The appellant was left outside the bank watching over the motorcycle. The money Kshs.50,000/= was handed over to Anthony. The appellant handed over the motorcycle, the helmet and the keys to Gitonga PW2.

9. Police officers took the motorcycle as an exhibit at Gikuuri market on the allegations that it was stolen property.

10. PW2 testified in support of PW1's evidence on how he bought the motorcycle KMDL 700M. He said PW1 knew he (PW2) was interested in purchasing a motorcycle. He called him to inspect the one on sale in possession of Anthony. The appellant was called by Anthony after PW2 inspected and tested the motor cycle and was satisfied.

11. The money, part of it borrowed from PW1 was handed over to Anthony inside the bank as the appellant kept watch over the motorcycle. The agreement was not prepared for signing on that day because the appellant was in a hurry. He said that he had a patient in hospital. He was to come the following day for the signing of the agreement. This did not happen. On 3<sup>rd</sup> day, PW2 handed over the motor bike to his driver to go to work at Mukuuri market. Police came and seized the motorcycle claiming that a report of theft had been made at Manyatta police station.

12. The evidence of PW3 is that on 16/04/2016 she sent the appellant to buy for her and deliver some food supplies to her house. She gave him Kshs.4,300/= but he did not return or deliver the said items. Four days later the appellant told her that his motorbike had been stolen on 18/04/2018.

13. PW4 an officer attached to Forensic Division of the Directorate of Criminal Investigations (DCI) testified that between 10<sup>th</sup> to 24<sup>th</sup> June 2016 he received an exhibit memo from PC Timothy Ndhwa (PW5) and an M1010 SD card print still images of the appellant. He generated a working DVD which he produced in evidence.

14. The investigating officer PW5 said a report had been made at Manyatta police station by the appellant that on 15/04/2016, his motorcycle registration number KMDL 700M blue in colour had been stolen. He was instructed to conduct investigations in the matter. He recorded statements of witnesses. There were several versions of the incidents that led to the motorcycle changing hands from the appellant and the key witnesses. He managed to retrieve some CCTV images from County Sacco Bank which he sent to PW4 for processing. The CCTV footage was played in court and produced as part of the evidence. PW4 concluded that the appellant had given a false report that his motorcycle had been stolen.

15. The appellant in his defence said on 16/04/2016 he was in the process of selling the motorcycle to one Anthony Kimathi. He had the logbook in the storage bag of the bike. The agreed price was Kshs.60,000/=. He was interrupted by a call from a customer and proceeded to PW4's shop and was given money to buy and deliver supplies. One Anthony took the motorcycle to PW4's shop. The logbook was found to be missing.

16. He further stated that Anthony did not bring back the motorcycle and his phone went off for several days. When he later took hold of him, Anthony promised to deliver the motorcycle on 17/04/2016 but it had been damaged. He left him somewhere and entered the County Sacco bank with two people whom he described as mechanics.

17. When Anthony came out, he gave Kshs.2,000/= to the appellant for repairs. Anthony later left with the motorbike and was not seen again. This prompted the appellant to report the loss of his motorcycle to the police. He denies having sold the motorcycle to PW2.

18. The law applicable is Section 129 of the Penal Code which provides:-

Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, the person employed in the public service— (a) to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him; or (b) to use the lawful power of the person employed in the public service to the injury or annoyance of any person, is guilty of a misdemeanour and is liable to imprisonment for three years.

19. The prosecution in this case are required to establish beyond any reasonable doubt the following ingredients of the offence:-

a. That the information was given to a person employed in the public service.

b. That the person giving the information must know that it is false.

c. That the information was intended to cause the officer to do or to omit anything he ought not to have done or to omit if he knew that the information was false; or to use his lawful power to injure or annoy any person.

20. From the evidence of PW1 and PW2 to buy. PW1 was aware that his friend PW2 was looking for a motorcycle to purchase. It is the friend of the appellant one Anthony who offered the motorcycle for sale. It is not in dispute that Anthony had taken the motor bike from the appellant with the consent of the appellant. The appellant confirmed this fact in his defence.

21. The question is why Anthony took the motorbike for about four (4) days before returning it. The appellant admits in his defence that his

motorbike was on sale. On the 16/04/2016 the appellant said that he had a potential buyer one Anthony Kimathi and had even carried the logbook with him. He says the logbook was stolen from the compartment bag of the bike on the same day.

22. The appellant gave the motor bike voluntarily to Anthony. PW5 said the report of the loss of the motorbike was made at Manyatta police station the same day before the motorbike was given to Anthony. This was on 15/04/2016. The appellant gave a different version on how he followed up Anthony to return the motorbike. On 18/04/2016, the appellant said that he threatened Anthony that he would report the matter to the police. It is imperative to note that the appellant did not tell the truth because he had reported the matter three (3) days before making the threat if at all he made it as he claims.

23. The appellant went on to say that he reported the matter on 20/04/2016 after meeting with Anthony and after Anthony disappeared with the motorbike and with the phone of the appellant. The evidence of PW5 was to the effect that only the loss of the motorbike was reported on 15/04/2016 but there was no mention of the phone. This renders the defence of the appellant incredible.

24. The appellant knew who had taken his motorbike and failed to return it to him as the two had agreed. The evidence show that it was none other but his friend Anthony. PW5's evidence is clear that the appellant did not give the name of the suspect to PW5 although he knew very well who he was. That is, assuming that the report was true and also recognizing that giving the name of the suspect would have made the work of the investigators easier. The appellant never explained in his defence why he kept the name of the suspect to himself.

25. PW1 and PW2 in their testimonies gave a narrative of how they met the appellant on 20/04/2016 and confirmed with him that he was selling his motorbike. It was Anthony who called the appellant to come on request of PW2 who desired to negotiate with the owner on the sale. The appellant came and after agreeing on the price, accompanied PW1, PW2 and Anthony to County Sacco Bank to withdraw the cash for paymen. The appellant remained outside guarding the bike as Anthony entered the banking hall with PW1 and PW2 where he received the cash on behalf of the appellant.

26. The appellant handed over the motorbike, the keys and the helmet to PW2. The appellant said he was in a hurry and did not have time to sign the agreement on the material day. He promised to sign the agreement the following day but he failed to turn up. It was on the third day that PW2 released the motorbike to his driver for work.

27. In his defence, the appellant admits meeting Anthony on 20/04/2016. He said Anthony was accompanied by two people whom he introduced as mechanics. PW2 told the court that he was a motorcycle mechanic while PW1 said he was a motorcycle operator. Although the appellant denies selling the motorcycle, he places himself at the scene where the transaction was sealed through the payment of the purchase price.

28. PW2 said that the appellant authorized Anthony to receive the money from PW2 on his behalf. The conduct of the appellant and Anthony between 15<sup>th</sup> to 20<sup>th</sup> April 2016 leaves no doubt that there was a plot to defraud of their money any interested buyer in the stage-managed sale. This is confirmed by the fact that the motorbike was recovered two days after it was sold to PW2. It was found in possession of PW2's driver at Mukuuri market.

29. The defence argued that the CCTV footage was not clear as to whose images were captured that the County Sacco Bank. PW4 the forensic expert admitted in cross-examination that the images were not clear. PW5 attempted to describe whose images the footage showed. He said it showed three men entering the bank and said he could identify the clothes of the people shown.

30. It is my considered view that the CCTV footage did not have clear images as to help identify who were the three men in the bank. For this reason, I find that the evidence of the footage was neither reliable nor conclusive.

31. The evidence of the key witnesses PW1 and PW2 was quite detailed and coordinated on what transpired between them and the appellant who was introduced to them by Anthony. The evidence was found credible by the trial magistrate who had the opportunity to observe the demeanor of the witnesses.

32. In my considered opinion based on the analysis herein that the appellant offered his motorbike for sale through Anthony with a view of receiving the sale proceeds and taking the motorbike later pretending that it had been stolen. This is supported by the report made to the police and the general conduct of the appellant and Anthony during the material period.

33. The failure to give the name of the suspect to the police by the appellant was part of the well-organized plot to defraud any interested buyer. The appellant is the one who handed over the logbook to PW2 upon the "sale" of the bike. Yet he lied that the document had been stolen on 16/04/2016. At no time did the appellant report the loss or theft of the logbook.

34. I reach the conclusion that the prosecution proved that the report made to PW5 on the theft of the motorbike registration number KMDL 700M was false and that the appellant knew it was false. It was intended to move the police to arrest any person who was to "buy" the motorbike with a view of the appellant recovering it despite having received the sale proceeds from the complainant. This is a move that was meant to injure the victim of this plot both financially and psychologically by the appellant and his friend Anthony.

35. I find that the prosecution proved all the ingredients of the offence against the accused beyond any reasonable doubt.

36. I find that the conviction was based on cogent evidence and that the sentence of the fine of Kshs.30,000/= as well as the defaulters sentence was within the law.

37. However, the orders for keeping peace for a period of one (1) year is not supported by the law. Even if it would have been provided for, imposing a further punishment on the appellant who was a first offender would result in an excessive sentence.

38. The said orders are hereby set aside.

39. The conviction and the sentence are hereby upheld save for the peace keeping orders of one (1) year.

40. This appeal stands dismissed for lack of merit.

41. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF OCTOBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for Mugendi for Appellant**

**Ms. Mate for Respondent**