



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 48 OF 2016**

**MAXWELL RUWA CHILUMO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From Original Conviction and Sentence in Criminal Case No. 718 of 2014 of Chief Magistrate's Court at Malindi – S.R. Wewa, PM)

**JUDGEMENT**

1. The Appellant, Maxwell Ruwa Chilumo, was charged, tried, convicted and sentenced to serve five years imprisonment for stealing a motor vehicle contrary to Section 278A of the Penal Code. The particulars of the offence disclosed that on 4<sup>th</sup> November, 2014 at Majengo Mapya, Malindi Sub-County in Kilifi County, the Appellant stole motorcycle registration number KMDC 492L make Boxer valued at Kshs. 100,000 the property of Joseph Kalama Masha.
2. The appeal is both on sentence and conviction. The parties relied entirely on their written submissions to dispose the appeal.
3. In brief the Appellant's case is that the prosecution did not discharge its burden of proof. According to him, PW2 Harrison Kaingu claimed that he hired out the motorcycle to him but there was no formal agreement produced nor was there evidence from the mobile service provider that there was communication between him and PW2. The Appellant submitted that facts must be proved by evidence and the court cannot act on assumptions. In support of this statement he relied on the case of **Muiruri Njoroge v Republic, Criminal Appeal No. 115 of 1982** where it was held that a court of law does not act on mere assertions unless the same is proved by evidence before the court.
4. The Appellant asserted that by failing in its duty to analyse and evaluate the assertions in accordance with the law, the trial court had compromised his right of achieving justice and the decision was therefore prejudicial to him. He cited the decision of **Okeno v Republic [1972] EACA 32** in support of his assertion.
5. The Appellant also submitted that the record does not show that his defence was considered. Relying on the decision in **Chemagong v Republic [1984] KLR 611**, the Appellant urged this court to allow his appeal on the ground that the trial court acted on the wrong principles of law.
6. The Appellant further submitted that the trial court was duty-bound to consider without partiality the evidence of both sides. His view is that a case ought to be determined upon proven facts which the prosecution did not do. To buttress this point he relied on the case of **Stephen Mungai Macharia v Republic, CA Criminal Appeal No. 1 of 1994** where it was held that an accused person is not under an obligation to prove his innocence. He concluded by asserting that the allegation against him was not proved moreso through formal documentary evidence therefore making his conviction unsafe.
7. Opposing the appeal, the State represented by counsel from the Office of the Director of Public Prosecutions urged the confirmation of the conviction and sentence stating that the case had been sufficiently proved and that PW2 knew the Appellant hence identification was not in question. It was the Respondent's case that in mitigation the Appellant never denied the charges nor denied being given the motorcycle. Further, that the trial magistrate observed the demeanour of the witnesses and also considered the evidence of the Appellant and reached the conclusion that the defence case was not credible. Finally, it was submitted for the Respondent that the trial court had found that there was no formal written agreement and the deal between the Appellant and PW2 was based on trust.
8. This being a first appeal, this court is obligated to look at the evidence afresh, reconsider the same and re-evaluate it before reaching its conclusion keeping in mind the fact that the trial court had an opportunity to observe the demeanour of witnesses. In determining this appeal, the court, as was stated in **Chemagong** (supra), should also be guided by the principle that a finding of fact made by the trial court should not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles.

9. The prosecution called three witnesses. PW1 Joseph Garama Masha, the owner of the motorcycle, testified that he bought the motorbike in question through a loan obtained from Faulu Kenya topped up by some savings he had made. He bought the motorcycle through a sale agreement entered between him and one Salim Kombe on 2<sup>nd</sup> October, 2014. The aim of purchasing the motorbike was to use it to do business within Malindi town and so he hired PW2 for that purpose. PW2 only used the motorbike for a week before he hired it out to two people who disappeared with it.
10. According to PW1, he lodged a complaint with the police after the motorcycle was not returned. The Appellant, whom he had never met was arrested and PW2 called him and showed him the Appellant.
11. PW2 testified that he was a boda boda rider and had once been hired by PW1 from March and was with him for six months before the motorcycle was stolen on 4<sup>th</sup> November, 2014. He stated that the Appellant called him through the mobile phone of one Kazungu Charo, a fellow boda boda rider, while they were at the boda boda stage. When PW2 went to a guest house where he had been summoned to by the Appellant, he found the Appellant with another person. The Appellant indicated that he wanted to be ferried to Gongoni and returned at 8.00 p.m. Since PW2 knew the Appellant, having worked together with him at Gongoni, he instead hired out the motorbike to him. The Appellant gave him Kshs. 300. As PW2's phone was spoilt, the Appellant left him with one of his phones. After leaving, the Appellant switched off his phone and PW2 could not get through to him. PW2 therefore reported the matter to PW1 and the police the following day. PW1 wanted his motorcycle back. Later when the Appellant was arrested he was informed by Safari Bull and Tahiso Makeba and he went and found the Appellant at Gongoni Police Station. The Appellant informed him that he had taken the motorbike to Kilifi. The Appellant was transferred to Malindi Police Station and charged. PW2 testified that he had no grudge against the Appellant.
12. During cross-examination PW2 explained that he knew the Appellant but not too well. He knew where the Appellant had rented premises at Gongoni. PW2 stated that he could not have entered a written agreement with the Appellant as the motorcycle did not belong to him. He stated that the Appellant gave him Kshs. 300 and a phone which was still with him. PW1 explained that he had a driving licence which had gotten lost.
13. Upon re-examination PW2 stated that he knew the Appellant as a friend in Gongoni who used to hire out his motorcycle to him and he was returning a hand when the Appellant asked him for a ride.
14. PW3 Police Constable Thomas Simiyu, the investigating officer, stated that after he was assigned the matter on 6<sup>th</sup> November, 2015 he got the logbook and purchase documents from the complainant. The statement was recorded on 7<sup>th</sup> November, 2015. PW3's evidence was that the Appellant was taken to the police station after he was found by police officers struggling with a rider. The Appellant told him that he had taken the motorbike to Kilifi. It had no fuel. He slept and when he woke up he found it missing. He however did not report the theft to the police or to the owner of the motorbike.
15. Cross-examined, PW3 stated that the year of the incident was 2014 and not 2015 as recorded in his statement. He stated that he was informed that the Appellant had borrowed the motorbike to go to Gongoni but had not returned it. He admitted that the agreement to hire the motorbike was not put down in writing. PW3's testimony was that the Appellant's phone had no communication relating to the case. PW3 reiterated that the Appellant told him he had taken the motorcycle to Kilifi and when he woke up in the morning he found the motorcycle missing.
16. In his defence the Appellant denied stealing the motorcycle. He stated that on 7<sup>th</sup> December, 2014 he alighted from a motor vehicle at Marereni where he was surrounded by boda boda riders who told him that he resembled a boy who had stolen a motorcycle. He was interrogated and escorted to Marereni Police Station from where he was taken to Malindi Police Station and charged.
17. It was the duty of the prosecution during the trial to establish that the complainant's motorcycle was stolen by the Appellant. The issue in this appeal is whether the prosecution discharged its onus to the standards required of it in a criminal trial.
18. The undisputed evidence that emerged established that PW1 bought a motorcycle registration number KMDC 492L and employed PW2 to ride the same. Documentary evidence was adduced showing that such a motorcycle was indeed bought by PW1 from Salim Kombe and its logbook deposited with a banking institution as security for a loan that had been obtained to purchase the motorbike. The evidence adduced therefore established beyond reasonable doubt that PW1 had a motorbike that was allegedly stolen.
19. The questions that remain to be answered are whether the motorcycle was indeed stolen and whether the thief was the Appellant. The evidence on the theft and the identity of the thief was that of PW2.
20. It is noted that the evidence adduced in support of the case was that of a single eyewitness. Although the court can convict on the evidence of a single witness, care must be taken to ensure that the evidence is solid least an accused person is prejudiced. Such evidence is better when corroborated by other evidence. It must always be borne in mind that it is upon the prosecution to prove its own case beyond reasonable doubt. An accused person is not required to establish his innocence.
21. In the trial, PW2 testified that the Appellant talked to him through the mobile phone of one Kazungu Charo. He also testified that the Appellant switched off his mobile phone after taking away the motorcycle. A serious investigator would have availed Kazungu Charo as a witness. He should also have provided evidence from the mobile phone service provider showing that there was indeed such communication and that the Appellant's mobile phone was at one time indeed switched off as alleged by PW2.
22. This court is however alive to the limited financial resources availed to the investigative agencies and this appeal needs to be considered on the evidence that was adduced at the trial. Everything boils down to the credibility of PW2.
23. PW2's evidence has already been reproduced in this judgement. He told the court that he gave the Appellant his motorcycle as he knew

him and the Appellant had hired out his motorcycle to him (PW2) previously. The motorcycle was to be used for a specified journey and returned. After the Appellant failed to return the motorcycle, PW2 reported the matter to his boss (PW1) and the police. He named the Appellant at that time. When the Appellant was arrested, PW2 identified him. There is nothing from the evidence on record to suggest that PW2 was not a truthful person. The trial court was therefore correct in believing the evidence of PW2.

24. In his defence, the Appellant denied committing the offence. His evidence was on how he was arrested. His defence did not upset the firm case that had been established by the prosecution. In view of the evidence that had been adduced, the trial court was right in rejecting the defence advanced by the Appellant. In the circumstances the conviction of the Appellant was safe. The appeal on conviction is therefore found to be without merit and is dismissed.

25. As for the appeal on sentence, I must state that sentencing is at the discretion of the trial court. The sentence imposed was within what is provided by the law. However, it is noted that the trial magistrate, in passing the sentence, may not have taken into consideration the period that the Appellant had been remanded.

26. Section 333(2) of the Criminal Procedure Code provides that:

**“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**

**Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”**

27. The Appellant had been in custody from 7<sup>th</sup> December, 2014 to 22<sup>nd</sup> September, 2016, a period of about one year and nine months. The Appellant was a first offender who was sentenced to five years imprisonment for an offence with a maximum penalty of seven years. Considering that he had been in remand for close to two years it means that he was condemned to serve the maximum penalty. This was erroneous as no reason was stated as to why a first offender should attract the maximum penalty for the offence. In the circumstances, I allow the appeal on sentence. The sentence of five years imprisonment is set aside. The Appellant’s sentence is reduced to the period already served, meaning that he is instantly set free unless otherwise lawful held.

**Dated, signed and delivered at Malindi this 22<sup>nd</sup> day of November, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**