REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 168 OF 2015

PETER MWANGI MURIMI.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. J. W. GICHIMU – PRINCIPAL MAGISTRATE dated 8th September, 2015 in Nanyuki Chief Magistrate's Court Criminal Case No. 1026 of 2014)

JUDGMENT

1. **PETER MWANGI MURIMI,** the appellant herein, was convicted before the Nanyuki Chief Magistrate's Court with the **offence of preparation to commit a felony contrary to section 308(1) of the Penal Code.** On conviction he was sentence to **7 years** imprisonment. He has filed this appeal against both conviction and sentence. There is a legal duty on the first appellant court, by which this court is required to reconsider the trial court's evidence, evaluate it itself and draw its own conclusion bearing in mind that the court had not seen nor heard the witnesses testify. See **OKENO –V- REPUBLIC (1972) EA 32.** In that case the Court of Appeal had the following to say:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence.The first appellate court must itself weigh conflicting evidence and draw its own conclusions.(Shantilal M. Ruwala vs R. (1957) E.A. 570).***
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> ***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 finds 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, see Peters vs Sunday Post (1958) E.A. 424."***

2. **George Wamario Ndungu (George)** on 28th July 2014 bought a motor cycle registration No. **KMBF 470 U**. He produced before the trial court a receipt evidencing that purchased. George was employed by G4S company. He hired his said motorcycle to **Patrick Kigotho (Patrick)** on 27th September 2014. The arrangement was that Patrick would pay George Kshs.300 daily for that hire. George, on 11th November 2014 met Patrick in Nanyuki town. George on asking Patrick why he was on foot was informed by him that the motor bike had been hired by someone, to go to Naromoru, but that person had failed to return it as agreed with Patrick. Because George was suspicious of that explanation he reported the loss of his motor bike at Nanyuki Police Station. On being arrested Patrick stated that he had hired the motorbike to

the appellant. George, on 16th November 2014, was informed by someone called Cliff that the appellant had stated that the motor biked was at Solio Ranch, in the possession of Kenya Wildlife Services (KWS) officers.

3. Jackson Munyoya an inspector of police was on 10th November 2014 in the company of Corporal Hussein Adan. They were both attached to Solio Ranch doing intelligence work of Wildlife related crimes. On that day at 10.00 p.m. they began what they said was their normal patrol of that Ranch. At about 2 a.m. they saw two motorbikes. They tried to stop those motorbikes using their torches but those motor bikes turned and were driven away. However because it had rained heavily one of the motor biker riders was unable to get away and left behind his bike. He ran away on foot. The two police officers found on that motor bike a sack which had axes, arrows, a bow and an empty jerrican. On 23rd November 2014 the motor bike was taken to Nanyuki Police Station.

4. Patrick in evidence stated that he had been employed by George to operate his motor bike at the cost of Kshs.300 per day. On 10th November 2014 at 5 p.m. the appellant requested Patrick to give him the motor bike. The appellant informed Patrick that he wished to use the motor bike that night to ferry some passengers and promised to return it to Patrick the following morning at 7 a.m. The appellant failed to return the motorbike as promised. It was on that day as Patrick went on foot in search of the appellant that he met George. Patrick was arrested, as stated earlier, and on being released he was informed by Cliff that the appellant had telephoned to say that the motorcycle was at Solio Ranch. The appellant was arrested on subsequent day.

5. The investigating officer Police Constable Moses Ochieng stated that he received information that the subject motor bike had been found in Solio Ranch. He was also informed that the motor bike had bow, arrows, axe and jerrican.

6. The appellant on being put on his defence stated that he was arrested on 22nd November 2014 while at his home by persons he did not know and who took him to Nanyuki Police Station. He denied having committed the offence.

7. The learned trial magistrate in his considered judgment concluded as follows:-

> ***"Having considered the evidence on record, I am satisfied that PW 4 (Patrick) gave the subject motorcycle to the accused (appellant) person. I observed PW 4 in court as he testified and I am satisfied that he spoke the truth."***

The trial magistrate proceeded to convict the appellant.

8. The appellant in ground Number one argued that he was not arrested by the police at Solio Ranch. The appellant was correct to so argue. Indeed he was arrested in Nanyuki town on 22nd November 2014. The trial court was also alive to that fact. The trial court found, in my view correctly, that the prosecution's evidence against the appellant was circumstantial. The trial court correctly set out in its judgment the conditions that ought to be met where the evidence is circumstantial. The trial court cited the cases **SOMO VS REPUBLIC (2003) KLR 364** and **JAMES MWANGI V REPUBLIC (1985) KLR 522**. The Court of Appeal in the case **MUSILI TULO V REPUBLIC (2014) eKLR** considered how the court should apply circumstantial evidence and stated:-

> ***"It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-***
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> > ***(i) The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;***

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

Those principles were set out in the case GMI v REPUBLIC (2013)eKLR which echoes the locus classicus case of R. v KIPKERING ARAP KOSKE & ANOTHER, 16 EACA 135.

In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of MUSOKE V R. (1958) EA 715 citing with approval TEPER V. R (1952) AL 480, thus:-

"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

9. As stated above the trial court believed the evidence of Patrick, that he lent the appellant the motor bike which was later recovered at Solio Ranch. The appellant count would rarely interfere with the trial court's finding on fact, unless it is demonstrated that the trial court misdirected itself or acted on matter which it ought not to have acted on or failed to take into consideration on matters it should have and in doing so it arrived at the wrong conclusion. In my view, none of the above conditions apply to the trial court's conclusion that it believed Patrick and accordingly this court will not interfere with that conclusion.

10. Further the circumstantial evidence led by the prosecution was unchallenged by the appellant. The prosecution led evidence through George and Patrick that it was the appellant who informed them that the motor bike was left at Solio Ranch. Indeed that was where the motor bike was recovered and where the axe, arrows, bow and a jerrican were found. Indeed the trial court in its judgment was correct in the assessment of that evidence when the learned magistrate stated:-

"The accused (appellant) was at Solio Ranch at 2 a.m. armed with weapons which can be used in poaching with the Ranch."

11. It follows from the above that the fact the appellant was arrested in Nanyuki town, and in the absence of his explanation of where he was on the night of 10th November 2014, the first ground must and does fail. This court finds that the prosecution's circumstantial evidence was cogent and firmly established.

12. The second ground raised by the appellant is not supported by the evidence tendered by the prosecution. The appellant on that ground stated that there was discrepancy between the particulars of the charge: which particulars stated that the motor bike was found at Solio Ranch on 10th November 2014: and the date George stated his motor bike went missing, that is on 27th September 2014. The second ground of appeal misapprehended the prosecution's evidence. The prosecution's evidence was that George Purchased the motor bike on 28th July 2014 and it was on 11th November 2014 he realized, on finding Patrick walking that the motor bike was missing.

13. The second ground of appeal is rejected.

14. Similarly the appellant misunderstood the evidence of the prosecution in raising ground three of appeal. The prosecution's evidence was to the effect that the two police officers, carrying out intelligence work at Solio Ranch, recovered a sack on the motor bike in which was an axe, arrows, bow and jerrican. The police did not say that they received those items, as alleged by the appellant.

15. The third ground of appeal is rejected.

16. The fourth ground of appeal questions the credibility of Patrick. I had earlier on in this judgment stated that the trial court believed the evidence of Patrick. This court did not find a basis of interfering with that finding of the trial court.

17. It follows that the fourth ground of appeal also fails.

18. In the end the appellant's appeal against conviction fails. His appeal against sentence also fails because the sentence of 7 years imprisonment is the minimum sentence under **Section 308 (1)** of the Penal Code. **The trial court's conviction is upheld and the sentence is confirmed.**

DATED AND DELIVERED THIS 25TH DAY OF JANUARY 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Peter Mwangi Murimi ……

For the State: ….....

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE