

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 5 OF 2016

PETER MWANGI MAINAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 482 of 2013 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

The appellant was charged with the offence of stealing a motor cycle contrary to section 278 (A) of the Penal Code. The particulars were that the appellant on 13.6.2013 at Kisumu Ndogo Village in Malindi District within Kilifi County, stole one motor cycle registration number KMCZ 384Z Bajaj boxer red in color valued at Kshs.93,000/= the property of Michael Mungoti.

The appellant was convicted and sentenced to serve three years imprisonment. The grounds of appeal are that the appellant is remorseful and begs for mercy. The sentence is harsh taking into account the fact that the appellant is a first offender. That the offence was committed without the appellant's knowledge and that the appellant should be given an opportunity to reform. The appellant's submissions are expounding on the above grounds. The appellant submits that he ought to have been granted a non-custodial sentence. He is a first offender and there was need to heal both parties. He was held in custody for quite some time. The owner of the stolen property recovered the motor cycle. The appellant submits that he is still young and remorseful and promises not to commit another offence again.

The State opposed the appeal. Mr. Fedha submitted that the evidence against the appellant is credible. The appellant was arrested with the stolen motor cycle in Nyahururu. He was arrested while in control of the motor cycle.

The record of the trial court shows that four witnesses testified for the prosecution. PW1 MICHAEL MUNGOTI is a mason. He owns the stolen motor cycle registration number KMCZ 384Z. On 28.5.2013 he gave the motor cycle to his friend Wambua who was to pay him Kshs.350/= per day. On 14.6.2013 Wambua went to his work place at about 7.00 pm. He told him that the motor cycle had been stolen the previous day. He told him to go and report at the Malindi police station. On 24.8.2013 the police called to inform him that the motor cycle had been recovered from the appellant in Nyahururu. He went to Nyahururu with Cpl. Okumu and brought the motor cycle to Malindi. The appellant was also brought to Malindi and was charged in court.

PW2 JOEL MUNDI GICHERU resides in Kisumu Ndogo, Malindi and is a boda cyclist. On 13.6.2013 he was sleeping at his place when the appellant went there at about 1.00 pm. His wife opened the door and told him that the appellant was calling him. The appellant used to operate the motor cycle during the day while he operated it during the night. The appellant told him that he was late for work and wanted the motor cycle as he had a customer. PW2 gave the appellant the motor cycle. He had an arrangement with Wambua whereby he was to pay him Kshs.400/= per day. Wambua tried to call the appellant but he could not reach him. The matter was reported at the Malindi police station. The appellant was later arrested in Nyahururu. PW3 Sgt. GEORGE MATIKA was stationed at the Malindi police station. He investigated the case. The report was made at the station on 14.6.2013 at about 4.00 pm. He gave out a signal of the lost motor cycle to various police stations in the country. On 24.7.2013 he got information from Nyahururu from Mairo Inya police station stating that the appellant had been arrested. He was informed that the police were able to identify the motor cycle since it had a sticker from the County Government. He sent Cpl. Thomas Okumu to Nyahururu who brought the motor cycle and the appellant. The appellant was later charged with the offence. PW4 Cpl. ERIC MUGANDI is a scene of crime officer who was stationed at Malindi police station. He produced photographs of the stolen motor cycle which were taken by his colleague P.C. Kosgei on 30.7.2013.

In his unsworn defence the appellant denied committing the offence. He testified that he resides in Kisumu Ndogo. On 6.6.2013 at about 8.00 pm he received a call from home informing him that his uncle had passed away. The next day he went to his boss to pick up the motor cycle he used to work with but found his wife. He told her that he was proceeding home. His boss was asleep. He travelled upcountry and stayed there for two months. He returned in August and when he went to his boss he was told that the motor cycle was missing. He asked him to go together to the police station and he was put in the cells. He was later charged with the offence.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence does prove that PW1 was the owner of the motor cycle. It is also established that the motor cycle was stolen. According to PW2, the appellant used to operate the motor cycle during the day. He was given the keys for the motor cycle on 13.6.2013 and since then the motor cycle could not be traced. The case does not involve a motor cycle that was stolen from a building or forcefully taken from the cyclist.

It is clear from the evidence that the motor cycle was placed in the hands of the appellant. The defence evidence does not raise doubt on the prosecution case. The appellant admits that he used to reside in Malindi. He was arrested in Nyahururu with the motor cycle. I do find that the prosecution did prove its case beyond reasonable doubt. The disappearance and recovery of the motor cycle is clearly explained by the prosecution evidence. The evidence points at the appellant's guilt.

The next issue involves the sentence. Section 278 (A) provides a maximum sentence of seven (7) years imprisonment. The appellant was sentenced to serve three (3) years. The sentence is quite fair. The appellant absconded during the hearing of the case. He escaped from lawful custody and was sentenced to serve two years imprisonment. The trial court ordered that the three years sentence should begin after the appellant serves his two years sentence. I do find that order to be drastic. Since the appellant was sentenced separately in another case, the two sentences should run separately but at the same time. The appellant must have served his two years imprisonment by now for the offence of escaping from lawful custody.

In the end, the appeal on conviction is disallowed. The appellant shall serve three (3) years imprisonment from the date of conviction, 5.2.2016. That is the same date he was sentenced. The sentence of two years imprisonment for escape from lawful custody to be served from the date of conviction for that offence and should not be tied to this suit.

Dated and delivered in Malindi this 16th day of February, 2017.

S.J. CHITEMBWE

JUDGE