



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CRIMINAL APPEAL NO. 79B OF 2015**

**RONALD KIBET SANG alias ONE RACE....1<sup>ST</sup> APPELLANT**

**ROBERT KIMUTAI KORIR.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**(Being the appeal from the original conviction and sentence in Criminal Case No. 1093 of 2014 PM's Court Bomet- Hon Kiage-RM)**

**JUDGMENT**

The two appellants were convicted and sentenced to five years imprisonment each for the offence of stealing a motor cycle Contrary to Section 278A of the penal code.

The particulars being that on the 5<sup>th</sup> day of October 2014 at Kapkagicha shopping centre, Bomet County jointly stole a motor cycle make Bajaj registration KMDE 703C valued at Kshs.105,000/- the property of Richard Langat.

This is the first appellate court. It has a duty to evaluate and reconsider the evidence on record so as to arrive at its own conclusions.

***Okeno –v- R- 1972 EALR***

The court has also to bear in mind that unlike the trial court it did not have the opportunity to observe the demeanor of the witnesses.

The grounds for the appeal are that;

- (1) The conviction was against the weight of evidence adduced.
- (2) There was no proper identification
- (3) Exhibits relied on were not property produced before the court.
- (4) That the trial magistrate did not consider and appreciate the evidence by the defence.

**Brief facts**

Bernard Kibet Kirui (PW2) was an employee of PW1 (Richard Langat).

Richard Langat owned a motor cycle registration No. KMDE 705C which he had entrusted to Bernard for boda boda operations.

It is Bernard's evidence that on the 5<sup>th</sup> day of October 2014 upon close of the days work at 7.00 p.m. he parked the motor cycle at a petrol station at Tengecha centre and proceeded to play pool nearby. When he finished playing pool at midnight he went to check his motorbike but he found it missing. He tried to search for it but in vain. He later decided to report the matter to the complainant (PW1). The following day they reported the matter to police at Mogogosiek where he was briefly held and later released so as to follow up on the search. later they received information that there was a motor cycle that had been recovered at the Bomet Police station. They proceeded there and identified it. It was motor cycle registration number KMDE 705.

Nancy Chepkirui Langat (PW3) is the mother of Robert (1<sup>st</sup> appellant) she testified in court of how her son went home with a motor cycle

and informed her that he had been hired by one Bernard Kirui as a rider for a fee and that he would arrive at home at about 11.00 p.m. and park it overnight. Later on 10.10 2014 police went to her place of work and instructed her to take them to her house which she did. The time was around 11.00 a.m. Upon opening they recovered the motor cycle in question. She was taken to police station where she was briefly held before she was later released after her son was arrested.

PC Benard Ngeno (PW4) did testify that on the 9<sup>th</sup> day of October, 2014 at about 10.00 p.m. while in the company of senior sergeant Meme, PC Jumba and PC Langat doing patrol duties within Bomet Town they received information that some six youngmen had accosted a member of public at Chepkesoi village in Kyogony location and members of public had chased them and they had fled by using two motorbikes towards Bomet town. The registration numbers of the motor cycles were given as KMDH 568F and the other one as KMDE 705O. They proceeded to the scene and upon reaching oil point petrol station they saw two motor bikes parked next to the petrol station. There was a group of youths nearby. The officers blocked the exit route with their police landrover and managed to arrest the rider of motor cycle registration No. KMDH 568F. Two youths managed to flee on foot. The 1<sup>st</sup> and 2<sup>nd</sup> appellant fled by the use of motor cycle registration No. KMDE 705O. The witness managed to identify the two men as he knew them before and the area was well lit. They conducted a search on the rider of the other of the motor cycle and they recovered five rolls of bhang. He was subsequently charged in criminal case no. 1089 of 2014.

Acting on information received they proceeded to the house of Jackson Kipngetch Kirui alias Paul. A search was conducted in his house and an assortment of shop goods were recovered.

He also disclosed that the motor cycle they were using the previous night was being kept in the home of Robert Kimutai (1<sup>st</sup> appellant). He also disclosed to have been hired by the 2<sup>nd</sup> appellant to take him to Sondu. Reinforcements were called from the police station. One of the suspects led them to the home of 1<sup>st</sup> appellant. The two suspects managed to flee. The mother of the 1<sup>st</sup> appellant was sought for at her place of work. She went and opened her house where the motor cycle registration No. KMDE 705O was recovered. It was taken to police station. The two appellants were arrested on 11<sup>th</sup> and 12<sup>th</sup> October respectively. They were initially charged with being in possession of suspected stolen property before the owner was traced and the charges were later substituted. It was later found that the registration No. of the motor bike had been interfered to read KMDE 705O instead of KMDE 705C.

The learned trial magistrate did observe in his judgment that no prosecution witness saw the two appellants steal the motor cycle.

He therefore relied on the doctrine of recent possession to convict the appellants. He relied on the famous case of Arum –V- R(2006) 2EA where it was held: “Before a court can rely on the doctrine of recent possession as a basis of a conviction in a criminal case. The possession must be positively proved, that is there must be positive proof that the property was found with the suspect. Secondly, that the property is that of the complainant. Thirdly, that the property was stolen from the complainant and lastly; that the property was stolen recently stolen from the complainant.

The learned trial magistrate was of the view that there was no dispute as to ownership of the motor cycle. Secondly, he was of the view that there were no dispute as to whether it was recently stolen. Further that there were no dispute that it was stolen from the complainant. The only dispute was whether it was found in possession of the accused persons. According to the charge sheet the theft took place on 5/10/2014.

According to the evidence of PW4 PC Bernard Ngeno the motor cycle was recovered on 10/10/2014. This is barely a span of five days. A period of 5 days in respect of recovery of a motor cycle is deemed recent.

I do concur with the learned trial magistrate that ownership of the motorcycle was not in dispute as none of the appellants contested ownership.

On the issue as to whether they were found in possession of the motor bike. There is evidence that the two appellants were seen riding the motor bike on the 9/10/2014 by the arresting officers who knew them before. Secondly, the mother of 1<sup>st</sup> appellant did concede that her son had taken the bike to her house and he was using it on allegation that he had been hired by one Bernard (PW2).

The 2<sup>nd</sup> appellant was seen by the arresting officers riding the motor cycle on 9/10/2014 at a petrol station an area which was well lit.

I am satisfied that all the ingredients of theft were proved by the prosecution beyond reasonable doubt. I find no reason to interfere with the conviction as it was safe. The sentence of five years is lawful. The appeal has no merit and is disallowed. Both conviction and sentence are upheld.

**Judgment delivered dated and signed in open court this 10<sup>th</sup> May 2017 in the presence of learned counsel for the prosecution M/s Kiptoo, the appellants present court assistant Mr. Rotich.**

**M. MUYA**

**JUDGE**

**10/5/17**