



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL APPEAL NO. 86 OF 2014**  
**(FORMELY KISII HCCRA NO. 245 OF 2012)**

**BETWEEN**

**BENJAMIN CHACHA BIGAMBE .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 175 of 2012 at Principal Magistrate's Court at Kehancha, Hon.A. P. Ndege, SRM dated on 4<sup>th</sup> October 2012)*

**JUDGMENT**

1. The appellant, **BENJAMIN CHACHA BIGAMBE**, was charged with the offence of stealing a motorcycle contrary to **section 278(a)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 5<sup>th</sup> April 2012 at Kehancha Township in Kuria West District within Migori District with others not before the court, he stole motorcycle registration No.KMCQ 885X make TVS Blue in colour valued at Kshs. 80,000/- the property of Eric Magari Turuka. The appellant was convicted and sentenced to five years imprisonment.
2. The appellant now appeals against the conviction and sentence on the basis set out in the memorandum of appeal filed on 15<sup>th</sup> October 2012. He argued that the prosecution did not prove the offence as the totality of the evidence was that he had hired the motorcycle from the complainant and had not stolen it. In his supplementary grounds he reiterated the fact that he borrowed the motorbike. Mr Mwongera, learned counsel for the respondent, opposed the appeal and submitted that in essence the appellant admitted the offence in his mitigation and that the prosecution proved the offence beyond reasonable doubt.
3. As this is a first appeal, I am required to review the evidence and come to an independent conclusion as to whether or not to uphold the conviction bearing in mind that I neither saw nor heard the witnesses testify.
4. It was common ground that complainant, PW 1, owned the subject motorcycle and that on 5<sup>th</sup> April 2012, the appellant came to him at about 1.00 pm and borrowed it. They agreed that the appellant would return it to him at about 4.00pm. PW 2 was present when the agreement was made. PW 1 testified that when the appellant did not return at 4.00pm. He testified how he made several efforts to locate the appellant but the appellant dodged him. After PW 1 lodged a complaint, the appellant was located on 9<sup>th</sup> April 2014 and was arrested near the Tanzania border

- at Mali Ngumu shopping centre without the motorcycle. The motorcycle had not been recovered by the time the appellant was charged.
5. The appellant elected to give an unsworn statement. The tenor of his statement was that on the date he was to return the motorbike he was unable to go back because he was arrested at Kilgoris. Thereafter he tried to call the PW 1 but PW 1 threatened him and he feared for his life until the time he was arrested. He confirmed that he had not returned the motorbike.
  6. The learned magistrate found guilty of stealing. He concluded that, “*The unchallenged and undisputed evidence of facts as disclosed herein points to the accused’s client’s guilt in having acted fraudulently when he took the complainant’s motorcycle upon tricking the complainant that he was borrowing the motorcycle for short-term use. He went away with the motorcycle herein and thereby permanently deprived the complainant of the use or ownership thereof.*”
  7. The definition of stealing is contained in **section 268 (1)** of the **Penal Code** which states, “*a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property is said to steal that thing or property.*” Under **section 268(2)(a)** of the **Penal Code**, a person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with an intent to permanently deprive the general or special owner of the thing of it.
  8. In this case, the appellant’s took PW 1’s motorcycle ostensibly to use and return it on the same day. His explanation that the tried to return the motorbike but was threatened by PW 1 is without merit and was properly dismissed by the learned magistrate. He was evasive and could not even explain what happened to the motorcycle even after he was arrested. The motorcycle had not been recovered to date. The only conclusion is that the prosecution was able to prove that he intended to deprive the complainant permanently of the motor cycle.
  9. It is well established that the appellate court may interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see **Wanjema v Republic [1971] EA 493**).
  10. In considering the sentence, the learned magistrate took into account that the accused had a conviction involving a similar offence in **KehanCHA Criminal Case No. 236 of 2015** and that the appellant had not returned the motorcycle.
  11. Under **section 278A** of the **Penal Code**, the maximum sentence for stealing a motor cycle is 7 years imprisonment. I have considered the facts and circumstances the learned magistrate took into account in sentencing the appellant and do not find any error in the sentence imposed.
  12. The appeal and sentence are affirmed. The appeal is dismissed.

**DATED and DELIVERED at MIGORI this 7<sup>th</sup> day of April 2015.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Mwongera, Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.