



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.51 OF 2013

(Appeal originating from Hon. A. M. Obura in Kilifi PM CR. No.1091 of 2011)

ATHMAN NGOA ALI.....APPELLANT

VRS

REPUBLICRESPONDENT

JUDGMENT

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 the night of 27 and 28th October 2011 at Kilifi Town in Kilifi county within the Coast Province, stole one motor cycle registration number KAW 2732, Make Yamaha valued at Ksh.280,000/= the property of Kilifi Town Council.

The appellant was also charged with an alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code. The appellant was convicted with the main count and sentenced to four years imprisonment. The grounds of appeal are that the trial court did not properly consider the evidence on record, the charge sheet was defective, the evidence did not meet the threshold of proof beyond any reasonable doubt, the evidence was contradictory and that the sentence was harsh.

Mr. Odhiambo, counsel for the appellant argued all the ground together. Counsel contends that the prosecution did not prove its case. No one saw the appellant stealing the motor cycle. There was no breakage at the scene. The area where the motor bike was parked was enclosed. There were neighbours in the compound but were not called to testify. The arresting officer and an enforcement officer of Kilifi County Council were not called to testify. It is alleged that the appellant was arrested at a road block but the person who arrested him did not testify.

It is further submitted that the occurrence book from Kijipwa Police Station was not produced. Someone is alleged to have been arrested at a road block and there was no evidence that that person was the appellant. The investigating officer testified that the motor cycle was stolen at 8.45 p.m. yet the complainant did not give that information. A work ticket that had alterations was produced and it is established that the motor cycle was returned at the offices of the county council. The appellant in his defence testified that he had a dispute over money with the complainant but that was not considered. The alternative charge was not proved.

Mr. Nyongesa, State Counsel, opposed the appeal. Counsel maintains that the appellant was found in possession of the motor cycle which had been recently stolen. The appellant was arrested at a road block. He was stopped by the police but he ignored. The police chased the appellant and arrested him. The alleged police officer who was not called had similar evidence to that offence. PW2 identified the appellant at the person they arrested. The motor cycle was stolen on 27/10/2011 and the appellant was

arrested the following day 28/10/2011. The doctrine of recent possession applies.

I have gone through the record of the trial court. Three witnesses testified for the prosecution. PW1, Eliud Charo was an employee of the Town Council of Kilifi. On 27/10/2011, he had taken an enforcement officer home and while on his way back the motor cycle registration number KAW 273Z Yamaha AG 100 burst its bulb. He could not see and therefore decided to park the motor cycle at his home as he was near his home that time. He has neighbours in the compound. The following morning, he found the motor cycle missing. He reported the matter to Kilifi Police Station. He then went to report to his bosses. At about 10.30 a.m his bosses informed him that the motor cycle had been traced at Kijipwa Police Station. He went there with the enforcement officer and found the motor cycle. He noted that the initial wire had been cut. They were shown the appellant who was in the cells. He does not sign the work ticket as he is not a signatory.

PW2 P. C. Keneedy Kiplagat was based at Kilifi Police Station. On 28/10/2011 at about 3.00 a.m he was manning a road block at Kijipwa along the Malindi-Mombasa Highway. He was in the company of PC Nthenge, PC Nyaga, Corporal Mathenge and PC Lagat. They saw a motor bike coming from the Kilifi direction and they stopped it. The rider refused to stop. They used the spikes to stop him. The rider left the bike and fled towards the quarry. They managed to arrest him and took him to Kijipwa Police Station. The motor cycle was KAW 273 Z Yamaha. The person they arrested was the appellant. The motorcycle had a parastatal serial number with the logo of Kilifi Town Council.

PW3, Sergeant Charles Murage was based at Kilifi Police Station. PW1 reported the matter on the 28/10/2011 at about 7.50 a.m. He received a report that the motor cycle had been recovered at a road block. The motor bike was taken to the police station by corporal Ngetich of Kijipwa Police Station who also took the appellant to the station. He visited the scene but there was no break in. He charged the appellant.

In his sworn defence, the appellant testified that he knows complainant PW1 but did not know his house. At one time, the appellant bought coral blocks from him and paid a deposit of Ksh.12,000/= leaving a balance of Ksh.6,000/=. PW1 promised to send the money by m-pesa but did not do so. This was February 2011. In October 2011 he saw PW1 at Barclays Bank Kilifi and he confronted him. PW1 promised to pay. Later 3 police officers went to his house and arrested him. He was taken to Kijipwa Police Station to pick his accomplice. He denied stealing the motor bike.

The main issue for determination is whether the prosecution proved its case as required. It is clear from the evidence that no one saw the appellant stealing the motor cycle. The evidence is circumstantial. It is the evidence of PW1 that the motor cycle was stolen outside his house. It is clear from the evidence that the stolen motorcycle was recovered the following day at Kijipwa road block. Counsel for the appellant submitted that there was a person who was allegedly arrested at Kijipwa road block and there was no evidence to show that that person was the appellant. It is also contended that the police officer who arrested that person did not testify and that the occurrence book of Kijipwa Police Station was not produced. PW2's evidence is quite clear. He was in the company of four other colleagues. They stopped a motor cycle rider who dropped the motor cycle and fled. They chased that person and arrested him. That person was the appellant. They took him to Kijipwa Police Station. According to him, the recovered motor cycle had parastatal serial number and the logo of Kilifi County Council. PW1 identified the motor cycle to be the one that had been stolen.

Given the evidence on record, it is clear to me that, it is the appellant who was arrested at Kijipwa Road Block and not someone else. There was no need for the production of the occurrence book. The other four police officers had similar evidence to that of PW2. PW2 categorically stated that he was close behind the officer who arrested the appellant when they were chasing him. He is the one who recorded this statement. The defence evidence did not raise any doubt on the prosecution case. The appellant in his cross-examination never mentioned about the debt of Ksh.6,000/=. He never talked of the coral blocks business. Whenever one is put on defence and opts to testify, he is expected to give evidence that would create doubt on the prosecution evidence. There is no doubt that PW2 arrested the appellant. The motorcycle was stolen at night and recovered the following morning. A report was made to Kilifi Police

Station by PW1. The contentions by Mr. Odhiambo that there was no break in at the scene and that the motor cycle was returned to the offices of Kilifi County Council, does not disprove the fact that the appellant was found in possession of the stolen motor cycle. There is no evidence that there was a watchman where the motor cycle was kept. According to PW1, the ignition wire was cut. There was no need to show that there was a break in at the scene to prove the case. The time of the theft is immaterial. All what was supposed to be proved was the theft and the recovery.

From the evidence on record, it is established that the motor cycle was stolen at PW1's house. PW1 had parked the motor cycle and took the keys. The same night, at about 3.00 a.m PW2 arrested the appellant at Kijipwa road block. The appellant was coming from the Kilifi side. It is the same stolen motor cycle that PW2 found with the appellant. The trial court correctly convicted the appellant as the doctrine of recent possession applied. The trial court noted that the appellant was found with the motor cycle a few hours after it had been stolen.

In the end, I do find that the prosecution proved its case and the conviction is safe. Under section 278 A the maximum sentence is 7 years imprisonment. I do find that the 4 years imprisonment imposed by the trial court is fair. The appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 3rd day of June, 2015

SAID J. CHITEMBWE

JUDGE