



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO. 146 OF 2014

FRANCIS MWANGUOAPPELLANT

VERSUS

REPUBLICRESPONDENT

[Being appeal from original conviction and sentence in Criminal Case No. 763 of 2013 made on 19th December 2013 by the Senior Principal Magistrate's Court at Voi (the Hon. S.M. Wahome, S.PM)]

JUDGMENT

INTRODUCTION

[1] This is a judgment on first appeal from original conviction and sentence of the Senior Principal Magistrate's Court at Voi Criminal Case No. 763 of 2013. The appellant was convicted for the offence of Stealing a motorcycle contrary to section 278A of the Penal Code and sentenced to imprisonment for 4 years on 19th December 2013.

[2] *The particulars of the offence were that –*

“PARTICULARS OF OFFENCE: Francis Mwanguo - On the 16th day of July, 2013 at Sofia Estate within Taita Taveta County, jointly with another already convicted and others not before court stole a Haojin Motorcycle registration number KMCY 064A valued at kshs. 86, 500/= the property of Jackson Mwalimo.”

[3] The prosecution called 4 witnesses and the appellant when put on his defence gave sworn testimony but called no witnesses.

THE APPEAL

[4] The appellant set out his grounds of appeal in Mitigation Grounds of Appeal in which he principally seeks the reduction of sentence and urges that it took too long for the appellant to be arrested and arraigned in court; that a non-custodial sentence was appropriate 'less severe sentence'; that the scene of crime was unknown as the complainant said his motor cycle was stolen at Sofia while the accused was charged with theft at Mgambonyi

[5] according to the evidence adduced before the court; and that his conviction had resulted in the breakdown of his family and increased level of poverty.

[6] During the hearing of the appeal, the appellant filed written submissions in court while, Ms. Nyakoni,

Counsel for the Director of Public Prosecution (DPP) made oral submissions in response thereto, and judgment was reserved.

THE ISSUE FOR DETERMINATION BEFORE THE COURT

[7] The issue for determination before the court is whether on the evidence presented before the court the plea of guilty the appellant to charge of stealing a motor cycle contrary to section 278 A of the Penal Code. Some specific question arose about the length of delay in arresting and charging the accused and the scene of crime.

DETERMINATION

[8] The prosecution Evidence before the court was as follows:

PW 1: JACKSON MWALIMO

He gave his motor cycle KMCY 064A to Shungula on daily hire of Kshs. 400/= daily. Shungula had gone to Kishushe and he PW1 had gone to Kishushe in vain. The accused later brought the motor cycle in the company of Macdonald who later stole the motorcycle and he reported the matter to Voi police station.

He later learnt that Macdonald was at Mgabubonyi with the motor cycle. The accused, Maina and Willy went and got the motorcycle. The accused took possession of the motorcycle, and Maina and Willy informed the complainant that appellant had it. The police arrested Macdonald who had first stolen the motor cycle. He pleaded guilty and was jailed. The father of Macdonald was unhappy as the accused had the motor cycle and Macdonald had been jailed and they arrested the accused and took him to Voi police station.

PW 2: WILLY MJOMBA

A boda boda rider said that on 27/7/2013 on 10.00 am the accused told me that his father was sick and he needed to go Mgambonyi to pick a motor cycle at Wundanyi. The motorcycle belonged to PW 1. With Maina and the accused they got the motorcycle from Macdonald Mwadime and the accused took possession of it and rode away using Ndi route alleging that that the motorcycle belonged to his father. The accused disappeared. He later told he PW1 and told him that the motorcycle was given to the accused whom they searched for the accused, arrested and took Voi police station The motorcycle was never recovered.

PW 3: FRANCO MAINA

A boda boda rider stated that he on the material date 27.7.013 at 10.00am at Caltex area Voi, hired by PW2 and the accused to go to Wundanyi to pick the motorcycle of PW1 the father of the accused. They went to Wundanyi and found Mwadime with the motorcycle, which they took and gave to the accused who rode away using Ndi Area as he was going to see his father. He later told PW1 that it had been picked by his son, the accused but he had not received the motorcycle. They later looked for the accused at Voi and arrested him.

PW4: PC EDWIN WAKOLI

Investigating officer who testified largely on information given by the witnesses in the case.

[9] In his defence, the appellant raised an alibi defence that he was away on the material date 27/07/013 at

work at Tingoni to dig a grave as someone had died whose burial was at 4.00pm and that he was subsequently, after 2¹/₂ months, on 5/10/013 arrested by two young men who told him that he had stolen a motorcycle and later taken to Voi Police station and charged with the offence before the court.

Analysis of Evidence

[10] Upon analysis of the evidence before the court in accordance with its duty as first appellate court, this court determines that the accused's guilt is established by the testimony of PW2 and PW3 who were with accused when he went to recover the motorcycle which belonged to PW1 whom the accused alleged to be his father. There was no question of identity of the appellant, as the witnesses all testified to know the accused. The accused's denial of any knowledge of the witnesses and alibi defence were when weighed against the consistent evidence of all the prosecution witnesses clearly a mere denial which could not raise a reasonable doubt to the prosecution case.

[11] There is no merit to the complaint that the appellant was only arrested two and a half months after the incident as there is time limitation in criminal prosecution. It depends on when the prosecution have completed investigations inot a crime and apprehended a suspect. There was evidence that the witnesses PW2 and PW3 had to look for the appellant after he took the motor cycle and disappeared with it on the pretext that he would return it the owner. It was after they learnt from the owner that he had not received the motor cycle that they started looking for him. The time taken for his arrest and charge from the date of the theft is understandable in the circumstances.

[12] The scene of crime in this case is not a relevant consideration as no exhibits were recovered which required the preservation and presentation in court of the evidence collected at the scene of crime. What the appellant may find startling as a lay man is that an item may twice be stolen by two different people even from different places. Theft is the taking without the owner's consent of something capable of being stolen with the intention of depriving the owner of the permanent use of the thing stolen, as defined in section 268 of the Penal Code as follows:

“268. Definition of stealing

(1) 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.

(2) 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 any of the following intents, that is to say

(a) An intent permanently to deprive the general or special owner of the thing of it;

(b) An intent to use the thing as a pledge or security;

(c) An intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”

[13] In taking the motorcycle from Macdonald Mwadime under the pretext of taking it back to the owner PW1 and then failing to return it to the owner and converting to his own use or failing to account for its whereabouts the appellant must be taken to have stolen the motorcycle. The charge sheet ought to have given the particulars of the offence as indicating theft at Mgambonyi rather than Sofia estate but the court takes the view that the appellant was not prejudiced by this mis-description as the particulars contained sufficient information as to the nature of transaction charged being the theft of the Motor Cycle whose registration particulars were clearly given in the particulars. The appellant was therefore guilty as charged of stealing a motor cycle contrary to section 278 of the Penal Code.

[14] In accordance with section 382 of the Criminal Procedure Code, the appellant’s complaint as regards the ‘scene of crime’ cannot justify the setting aside of the conviction as it was not shown that the appellant was prejudiced in any way in meeting the allegation of theft in charge as drawn. Section 382 provides as follows:

“382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

Findings of the trial court

[15] The trial court found the appellant guilty as charged after establishing that-

“The prosecution called witnesses who were candid. PW 1 knew the accused and introduced McDonald to him. McDonald stole the motorcycle but the accused was given the said motorcycle KMCY 064A in the presence of PW 2 and PW 3 after lying that PW 1 was his father and was sick. The accused in his craftiness’s pretended to use Ndi route to part way with PW2 and PW3 and that is the last that was ever heard about that motorcycle. The accused stunned the court by failing to cross-examine PW3 who categorically said that the accused had been given the motorcycle. The accused also failed to share the evidence of PW 1 and PW 2. I have to doubt that the accused was given the stolen motorcycle in the presence of PW2 and PW3 and now that he cannot account for it, he must have stolen it and disposed it. I find that the prosecution has proved its case to the required standard and the accused is convicted as charged with stealing a motorcycle contrary to

section 278A of the Penal Code.”

I agree with this finding of the trial court on conviction.

Appeal against sentence

[16] The sentence of 4 years of the maximum 7 years for which a person convicted for theft of motor vehicle is liable under section 278A of the Penal Code appears to be explained in the tone of the order by reason that another person Macdonald Mwadime had been jailed while the appellant ended up with the motorcycle. The learned trial court said:

“Court

***The accused ended up with the motorcycle and Macdonald Mwadime was jailed.
The accused is sentenced to four (4) years imprisonment.”***

It would appear that the appellant’s sentence expressed the court’s displeasure that Mwadime was jailed while the appellant who was also guilty of the theft retained the motor cycle. The appellant should not be punished any more than the offence calls for merely because another person who might have been involved in the transaction leading to the charges has been jailed for his own part in the crime or related crime. The moral blame worthiness for which the accused should pay is for the crime he has committed not for any collateral conviction, hardship or suffering of persons who may have been jointly or severally guilty of a crime related to the accused’s charges before the court. It is also noteworthy that the said Macdonald Mwadime independently pleaded guilty to the charge of theft of the motor cycle in a different case long before the arrest and charge of the appellant.

[17] Noting the accused’s mitigation before this court and the trial court and the fact presented by the prosecution that the appellant was a first offender, I would consider that a sentence of imprisonment for a term of 3 years would be appropriate punishment in this case.

ORDERS

[18] Accordingly, for the reasons set out above, I find that appellant’s appeal herein against the conviction is without merit and dismiss the same. However, as regards the sentence, I consider that a sentence of imprisonment for three (3) years for the charge of stealing a motorcycle contrary to section 278A of the Penal Code for which the appellant was convicted is sufficient punishment.

[19] I, therefore, set aside the sentence of imprisonment for four (4) years and substitute therefore a sentence of imprisonment for a term of three (3) years from the date of the judgment of the trial court on 19th December 2013. In accordance with section 3 of the Community Service Order Act, 1998, the court will consider whether the appellant is suitable for a Community Service Order and, for that purpose, the court calls for Community Service Officer’s report to be filed within the next 30 days for consideration during the next Session of the Court in August 2015.

DATED AND DELIVERED THIS 9TH DAY OF JULY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Appellant in person

Ms. Karani for the Respondent

Ms. Linda Court Assistant.