



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 60 OF 2013**

DOMINIC GICHOVI Alias COUNCILLOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(Being an Appeal from the Sentence and Conviction of D.A. OCHARO Senior Resident Magistrate Embu in Criminal Case No. 565 of 2011 on 15th June 2012)***

**J U D G M E N T**

1. **DOMINIC GICHOVI Alias COUNCILLOR** the appellant herein was charged jointly with others with the offence of stealing from a locked motor vehicle contrary to Section 279(g) of the Penal Code, malicious damage to property contrary to Section 339(1) of the Penal Code with an alternative count of handling stolen property contrary to Section 322(1) as read with 322(2) of the Penal Code.
2. He was tried and acquitted of the principal counts but convicted of the alternative count and sentenced to 5 years imprisonment. His co-accused were both acquitted of all counts. The particulars of the alternative count as stated in the charge sheet were as follows:-

***On the 28th day of March 2011 at Embu Town within Embu County, otherwise than in the course of stealing dishonestly retained one Samsung mobile phone S/Nos 354134041227982 and 354135041237989 valued at Ksh.6500/= the property of WILSON MOMANYI MOENGA, knowing or having reasons to believe it to be stolen good or unlawfully obtained.***

3. He filed this appeal against conviction and sentence. His main ground is that the evidence adduced was not sufficient to sustain a conviction. And further that his defence was not considered.
4. When the appeal came for hearing he presented the Court with his written submissions. He basically denies knowledge of the phone he is accused of giving to PW1.
5. Ms. Ingahizu for the State opposed the appeal. She submitted that the appellant was found with stolen phone, and he gave no explanation for the possession. She further submitted that the evidence adduced corroborated each other.
6. PW5 (Lucy Mutai) woke up on 24/3/2011 at her house at Kaunda estate to find her motor vehicle KAU 180N broken into through the window. Stolen therefrom was her phone Samsung GT – C5130 S/NO.35808903218313 valued at Shs.7000/= and cash Shs.3000/=. She reported the matter to the

police who started investigations.

7. PW6 (PC Mugambi) Eustace was assigned the work of tracing the culprits in the case using the serial number of the phone. The CID officers traced the stolen phone to Yatta Auto Tyres to PW1 whose sim card had been used in the phone.

8. PW1 (Peter Musembi Watheka) who was found with the phone explained that the same had been given to him by the appellant who had borrowed Shs.1000/= and promised to refund it in 2 days but did not. He said he knew the appellant very well as he used to assign him duties of washing tyres and he had been borrowing little money from him.

9. PW2 who works with PW1 confirmed he too knew the appellant and that PW1 had mentioned to him the issue of the phone in issue.

10. In his unsworn defence he denied the charges. He also denied knowing PW1 nor selling him any phone.

11. This is a first appeal and this Court is enjoined to reconsider and evaluate the evidence adduced at the trial and arrive at its own conclusion while bearing in mind that it did not see nor hear the witnesses. The Court of Appeal in the case of **BORU & ANOTHER VS REPUBLIC [2005] 1 KLR 649** stated the duty of a first appeal Court as follows:-

***“A duty is imposed on a Court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial Court be upheld, as well as to deal with any questions of law raised on th appeal.”***

12. I have now considered the submissions by the appellant and the State plus the grounds of appeal. I have equally considered the evidence adduced in the trial Court.

13. From the evidence on record its clear that there was no eye witness to what happened to PW1's vehicle. She woke up to find it already broken into and her property stolen.

14. The only evidence to this offence was the recovery of the phone (EXB1).

15. Indeed PW1 produced material before the Court to confirm that indeed EXB1 was her phone. This was the box of purchase (EXB5). Secondly she is the one who gave PW3 and her team the serial number to the phone which enabled them to track it.

16. The issue the Court had to address was the finding of this phone. PW1 who was found with this phone was to be treated as an accomplice. He was arrested and charged. The Rule of Practice on accomplice evidence is that this kind of evidence requires corroboration. See the case of **KINYUA VS REPUBLIC [2002] 1 KLR 256** where the Court of Appeal stated the following on accomplice evidence:-

- i. ***The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the aid of assessors, on the dangers of doing so.***
- ii. ***Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.***
- iii. ***If the Court decides that the accomplice witness' evidence, though credible, requires***

*corroboration, the court must look for, find and identify the corroborative evidence.*

iv. *The trial judge did not explicitly direct himself and the assessors on the nature of accomplice evidence and the weight to be given to it as required by law. However this omission would not invalidate the trial and the conviction in the circumstances of this case.*

17. In the instant case the PW2 testified that he knew the appellant well as he used to perform casual work at Yatta Auto Tyres Embu. He even loaned him little money here and there. On this 26/3/2011 11 a.m. the appellant came to him and explained that his mother was sick and he urgently required a loan of Shs. 3,000/=.

18. PW1 told him he only had Shs.1,000/= and required security. That is when the appellant gave the phone (EXB1). He promised to refund the cash within two days which he did not do.

19. PW1 then inserted his sim card in the phone and found it to be working. He would henceforth use it when the battery in his own phone was low.

20. This evidence of PW1 is corroborated by that of PW2 who stated that when he saw PW1 with the Samsung phone (EXB1) he asked him if he had purchased a new phone. To which PW1 replied that it was the appellant who had given it to him as security for Shs.1,000= which he had given him for taking his mum to hospital.

21. PW2 also confirmed he knew the appellant very well as PW1 with whom he works used to give him casual jobs at Yatta Auto Spares.

22. It is PW1 who identified the appellant to PW3 when he found him in remand over a similar complaint by one David Muthee.

23. The defence of the appellant was a mere denial. He denied knowing PW1. The learned trial Magistrate believed PW1 and PW2 when they said they knew the appellant very well.

24. My finding is that the learned trial Magistrate analyzed the evidence well and came to the correct conclusion that the appellant is indeed the person who left this phone (EXB1) with PW1. He failed to explain how he had come to possess the phone. He knew it was stolen and that is why he was using it as security to get money from the likes of PW2. The conviction is well founded.

25. From the facts of this case PW5's locked motor vehicle was broken into when the phone plus Shs.3000/= were stolen. The appellant was sentenced to 5 years imprisonment for being a handler. He may as well have been the thief. I find the sentence of 5 years though lawful to have been a bit too harsh. I reduce the sentence to 3 ½ years. The orders are that the appeal against conviction is dismissed.

26. The sentence of 5 years is set aside and to one of 3½ years from date of conviction. To that extent only does the appeal succeed.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 2ND DAY OF MAY 2014.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Ms. Mbae for State**

**Appellant**

**Mutero/Kirong CC**