



IN THE HIGH COURT AT HOMABAY

CRIMINAL APPEAL NO. 28 OF 2013

BETWEEN

WILSON ODIDA OPIYO APPELLANT

AND

REPUBLIC OF KENYA RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 197 of 2013 at Principal Magistrate's Court at Rongo, Hon. P K. Rugut, Ag SRM dated on 23rd September 2013)

JUDGMENT

1. The appellant, **WILSON ODIDA OPIYO**, was charged with the offence of stealing a motor cycle. He was convicted and sentenced to serve three years in prison. He now appeals against the conviction and sentence. The charge was brought under **section 278A** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and the particulars were as follows;

WILSON ODIDA OPIYO on the 22nd day of May 2013 at Kadera Kwoyo sublocation within Migori County in the Republic of Kenya stole motor cycle reg. KMCW 843 K Bajaj Boxer Blue in colour valued at Kshs. 80,500/= the property of JOAN ADHIAMBO OTIENO.

2. The prosecution case was supported by three witnesses. The complainant, Joan Adhiambo Otieno (PW 1) testified that she was the owner of the motorcycle. On 22nd May 2013 she was introduced to the appellant by Timon Ouko (PW 2) to be her rider. They agreed on terms of employment and she handed over the motor cycle to him. On 25th May 2013, PW 2 alerted her that the motorcycle was missing and that they were looking for it. Later that day, the appellant, PW 2 and one Nixon visited her to inform her that the motorcycle was missing. The appellant informed her that a worker had asked for the motorcycle near his home and did not return it. She reported the matter to Kamagambo Police Station.
3. PW 2 confirmed that he introduced the appellant, his cousin, to PW 1 on 22nd May 2013 as she needed a rider. After introduction on that day the appellant was given the motorcycle. He testified that on 25th May 2013, the appellant informed him that he had given the motor cycle to someone called Nick who did not return it. He called Nick and Nick told him that the motorcycle was lost. He reported the loss of the motorcycle to PW 1.
4. PW 3, PC Daniel Choge, the investigating officer recalled that he received the complaint and investigated the matter. He stated that the motorcycle was never recovered. He interrogated the appellant who stated that he had given the motorcycle to someone whom he could not identify.

5. When the put on his defence, the appellant denied that he had ever met the complainant or worked for her as alleged. He also denied knowing PW 2. He testified that on the material day he was working at a Jaggery where he was employed and that he was with his two brothers.
6. The learned magistrate analysed the evidence and came to the conclusion that the prosecution had proved its case. She based her reasoning on the fact that the evidence of PW1 and PW2 proved that the appellant had been given the motorcycle and that the evidence against him was so watertight as to exclude the possibility of another person having stolen the motorcycle.
7. The appellant appeals against the conviction on four broad grounds. First, the charge sheet was defective as the appellant was charged under **section 238A** of the **Penal Code** which prescribes the penalty for stealing a motor vehicle. Second, the record of the proceedings indicates that the translation was in English/Dholuo/Swahili. Counsel for the appellant, Mr Nyauke, contended that it was not clear which language was used hence the appellant's rights to have the proceedings conducted in a language he understands was violated. Third, the facts and evidence show that appellant was an employee and he should have been charged under the provisions of **section 273** of the **Penal Code** which provides for the offence of stealing by agent or servant. Last, that sentence meted upon the appellant was harsh and excessive in the circumstances.
8. The State through, Ms Andabwa, opposed the appeal. She submitted that even though the charge sheet was defective, it disclosed a known offence and that such an error was curable by application of **section 382** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. She noted that the record showed that the accused understood the nature of the proceedings and that an interpreter was present at all times. She cited the case of **Kyalo Kalani v Republic Nairobi CA Criminal Appeal No. 586 of 2013 [2013]eKLR** in support of the argument. Counsel submitted that the prosecution proved its case beyond reasonable doubt and that the sentence was below that maximum provided in law and was neither harsh nor excessive in the circumstances.
9. As this is a first appeal, this court is enjoined to consider all the evidence afresh, evaluate it independently and reach its own conclusions having regard to the fact that it neither heard nor saw the witnesses (**Okeno v Republic [1972] EA 32**).
10. The charge sheet as framed did not identify the particular section which the appellant was charged. **Section 278A** of the **Penal Code** under which the appellant was charged states, "*If the thing stolen is a motor vehicle within the meaning of the **Traffic Act**, the offender is liable to imprisonment for seven years.*" Clearly, the section does not disclose any offence but that is not the end of the matter. **Section 134** of the **Criminal Procedure Code** dealing with the framing of charges states that, "*Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*" [Emphasis mine] The charge as framed is lucid, it discloses the offence which the appellant was charged and it one of stealing contrary to **section 268** of the **Penal Code**. It meets the terms of **section 134** of the **Penal Code**. I do not think that the failure to include the specific section applicable was fatal to the charge and the appellant was not thereby prejudiced nor was a failure of justice occasioned. Such an error is curable under **section 382** of the **Criminal Procedure Code** which provides;

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.

11. On the issue whether the proceedings were conducted in a language the appellant understood, I find that the record is clear that there was an interpreter and though the language used recorded as English/Dholuo/Swahili, I am satisfied that the appellant understood the nature of the proceedings against him and was able to follow the same. The Court of Appeal in ***Kyalo Kalani v Republic (supra)*** noted that the right to understand proceeding is a fundamental right under **Article 50(2)(m)** of the Constitution. The issue whether the accused understands the proceedings is not one of form but of substance and the record shows the appellant understood the proceedings against him. He participated in the trial and was able to cross-examine witnesses. He also opted to give sworn testimony in his defence.
12. As regards the argument that the appellant ought to have been charged with the offence of stealing by servant or agent, I hold that the Director of Prosecutions and those who act under his direction have the right to charge a person with any offence provided, in their view, there is sufficient evidence to sustain the charge. That the appellant ought to have been charged with another species of stealing does not, of itself, invalidate the charge. It remains the duty of the prosecution to prove on beyond reasonable doubt the charge against the accused.
13. The case against the appellant was based on circumstantial evidence. The learned magistrate properly directed herself on the law concerning circumstantial evidence enunciated in ***Ndurya v R [2008] KLR 135*** where the Court of Appeal held that before convicting someone on the basis of circumstantial evidence, the court has to be sure there are no other co-existing circumstances which would weaken or destroy the inference of guilt (see also ***Sawe v Republic [2003] KLR 364*** and ***R v Kipkering arap Koske and Another 16 EACA 135***).
14. The prosecution case was that the appellant was an employee who was given the motorcycle by his employer. In order to prove the offence of stealing the prosecution had to prove that there was intent to deprive the complainant permanently of the motorcycle. The prosecution evidence was merely that the appellant gave the motorcycle to someone else to use. This fact, without more, does not prove the *mens rea* of the offence of stealing nor does the fact that the appellant did not have the complainant's permission to give out the motorcycle prove the appellant's state of mind. The fact that the appellant was an employee entitled him to be in possession of the motorcycle. The prosecution failed to prove the felonious intent which was necessary to found a conviction.
15. PW 2 testified that the appellant informed him that he gave the motorcycle to Nick and that he called Nick who informed him the motorcycle was lost. The prosecution did not call Nick to testify. It is not clear who this Nick was. Was he the Nixon who had accompanied the appellant and PW 2 to report the loss to PW 1. Is he the person who could have stolen the motorcycle? The prosecution did not call Nick to testify. In ***Nguku v Republic [1985] KLR 412***, the Court of Appeal observed, "*That where a party fails to produce certain evidence, a presumption arises that the evidence produced, would be unfavourable to that party.*"
16. For the reasons I have stated, I am afraid the evidence presented by the prosecution is not watertight. The appeal is allowed, conviction and sentence quashed. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at HOMABAY this 11th JUNE 2014.

D. S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke and Company Advocates for the appellant.

Ms Andabwa, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.