Case Number:	Criminal Appeal 54 & 56 of 2015
Date Delivered:	28 Apr 2017
Case Class:	Criminal
Court:	High Court at Machakos
Case Action:	Judgment
Judge:	Pauline Nyamweya
Citation:	Victor Mwai Wangeci & another v Republic [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	H. M. Ngang'a
County:	Machakos
Docket Number:	-
History Docket Number:	Criminal Case No. 268 of 2014
Case Outcome:	-
History County:	Makueni
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 54 & 56 OF 2015

VICTOR MWAI WANGECI.....1ST APPELLANT

PETER WANJOHI NJIRAINI.....2ND APPELLANT

VERSUS

REPUBLIC.....**RESPONDENT**

(An appeal arising out of the judgment and sentence of Hon. H. M. Ngang'a RM in Criminal Case No. 268 of 2014, delivered on 9th April 2014 at the Senior Resident Magistrate's Court at Tawa)

JUDGMENT

The Appellants were charged and convicted of stealing a motorcycle contrary to section 278A of the Penal Code. The particulars of the offence were that on the 25th day of June, 2014 at Mbumbuni market trading centre in Mbooni East District within Makueni County, they jointly stole one motor cycle Registration number KMCS 507X Make SKYGO SG 125-3 valued at Kshs.68,000/ the property of Joseph Kanyingi. The 1st and 2nd Appellants were each sentenced to serve four (4) years imprisonment by the trial Court.

Being aggrieved with the conviction and sentence, both Appellants filed appeals against the decision of the trial magistrate. The 1st Appellant had initially filed a Petition of Appeal against the conviction and sentence on 15th April 2015. He however has now preferred an appeal against the sentence only, as stated in his withdrawal of appeal against conviction and application for sentence review/variation filed in Court dated 7th July 2016. His grounds for revision of the sentence are as follows:

1. THAT, at the time he was imprisoned the system of prison remission on most court sentences had been annulled hence his court sentence of four years is a net sentence without the one third usual prison remission

2. THAT, he is a first time offender and currently only 36 years of age.

3. THAT, he is married with three (3) school attending children aged 8, 10, and 14 years.

4. THAT, other than his wife and children who were all entirely dependent on him for their up keep and sustenance, he isalso responsible for his widowed and diabetic mother aged 61 years and his aged grandmother aged 78 years .

5. THAT, before his imprisonment he was the proprietor of a butchery business that has since collapsed owing to his dependants survival needs.

6. THAT his wife possesses little formal education and/or skills suitable to sustain the daily needs of all his dependants now subjected to abject poverty and deprivation.

7. THAT, to date he has served approximately 12 months of his sentence during which time he has undertaken a Grade III G,K Trade Test in tailoring .and enrolled for a Grade II examination.

8. THAT, he is deeply and sincerely reformed, rehabilitated and remorseful for my act of transgression.

9. THAT, he solemnly promises not to engage in any criminal acts in future.

10. THAT, he solemnly undertakes to abide by all terms and conditions that the Court deems appropriate to secure the success of my application.

The 1st Appellant also availed submissions in which he reiterated the above grounds, and urged that persons convicted in 2015 did not benefit from the re-introduced system of one-third remission, and that this is discriminatory and contravenes Article 19(3)(a) and 20 (4) of the Constitution

The 2nd Appellant has preferred an appeal against both the conviction and sentence in his Petition and Memorandum of Appeal filed in Court on 15th April 2015, on the following grounds:

1. THAT, the evidence adduced by the complainant was not corroborated by any independent witnesses present at the alleged scene;

2. THAT, the prosecution's evidence was riddled with contradictions and inconsistencies.

3. THAT, the burden of proof responsibility was shifted to accused persons contrary to accepted legal practice/principles ;

4. THAT, the case was not proven beyond a reasonable doubt.

The 2nd Appellant's Advocate , D.M. Mutinda & Co Advocates filed written submissions on his appeal dated 1st July 2016, wherein it was urged that it was only PW2 (Dominic Maingi Kilonzo) who stated that he saw the activities that took place with regard to the alleged theft of the motor vehicle in question .Further, that it was also alleged that a crowd gathered and came to assist PW2, however that no single witness was called to so prove and corroborate the evidence of PW2. In absence of such evidence, it was submitted that PW2'S evidence was not sufficient to sustain the conviction of the 2nd Appellant.

In addition, that the evidence of PW2, who was the key witness for the prosecution, did not in any way connect the 2nd Appellant with the commission of the alleged offence, as it was evident that the vehicle in question belonged to the 1st Appellant who testified that it was him who was with his car and he parked it himself. The 2nd Appellant was not found inside the car, and PW2 in his evidence did not state that he saw the 2nd Appellant near the motor cycle and, and he denied knowing the 2nd Appellant. Reliance was placed in this regard in the case of **Republic v Luka Patrick Mutembei [2005] eKLR**

Lastly, that that the evidence as adduced in trial court does not prove the crime of theft as envisaged in Section 268(1) and (2) of the Penal Code. It was submitted that if at all any crime was committed by the Appellants, then they ought to have been charged with attempted theft as no motorcycle was taken but rather there was an attempt to take the same.

The Respondent opposed the appeal in written submissions dated 6th March 2016 filed by Rita Rono, the learned Prosecution counsel. On the appeal against sentence by the 1st Appellant, the learned counsel stated that from the record of the trial court he said Appellant was facing a similar offence in Kithimani Law court in Criminal Case no 872/2014, and on the second issue of prison remission of one-

third of the sentence, attached a gazette notice that indicates that prisoners sentenced between 8th December 2014 to 23rd December 2015 cannot be issued with the one-third remission as the law cannot operate retrospectively. It was the prosecution's submissions that the sentence passed against the 1st Appellant was lawful, fair and lenient in view of the fact that the maximum sentence for the offence is 7 years, but the court in its wisdom gave a sentence which is half of the stipulated sentence despite noting that the offences are grave.

On the ground raised by the 2nd Appellant that the complainant testimony was not corroborated, the learned counsel submitted that PW2 was the only eye witness who saw motor vehicle registration number KBL 805Z approach and packed near the motor cycle, and saw one passenger cut the chain link that was locking the motor cycle, and the ignition wire of the motor cycle and try to ignite it, whereupon PW2 confronted the 1st Appellant who ran away and he gave him a chase with members of public.

Further, that PW2 was able to identify 1st and 2nd Appellants as the offence occurred during daylight. It was contended that the testimony of PW3 corroborated PW2's testimony in that he found the cut chain link and pliers that were used in the motor vehicle that the 2nd Appellant was driving, and that the doctrine of recent possession applied as the coat, padlock and the chain that PW3 had left in his motor cycle were recovered from the car which the 2nd appellant was driving. Reliance was placed on the decision in **Martin Kirimi Mugambi & Anor vs Republic, Criminal Appeal No.334 of 2013.**

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

Four prosecution witnesses gave evidence during the trial. PW1 was Joseph Kanyingi Inyenze, the owner of motorcycle registration number KMCS 507X, who testified that on 25th June 2014 at around 9.30 am, he went with his motorcycle to Mumbuni market where he parked it, outside the house of Dominic Maingi Kilonzo(PW2), and locked the front wheel with a chain link and padlock. He then went to the market to buy goats, and on coming back to where he had parked his motorcycle at 12 noon, he found people fighting and Dominic told him his motorcycle was being stolen by the Appellants. He also testified that the chain link had been cut and was in a motor vehicle registration number KBL 50B Z together with his black jacket that he had left on the motor cycle, and a snip smith and pliers. He identified the items in Court as well as his motorcycle.

PW2 was Dominic Maingi Kilonzo, who narrated the events that took place on 25th June 2014 after PW1 left his motorcycle outside his premises. His testimony which was the material evidence as he was the only eye witness, and will be reproduced later on in this judgment.

PW3 was Corporal Vincent Sululu who was stationed at Mumbuni Police station and he testified as to receiving a report of the theft of a motorcycle at Mumbuni market on 25th June 2014 at 1.00pm, and upon reaching the market he found the 2nd Appellant being beaten by members of the public. He rescued the 2nd Appellant and took him to the hospital, and also made arrangements to have the 2nd Appellant's motor vehicle registration No. KBL 805Z towed to the police station. At the police station he undertook a search of the said motor vehicle and found a container with petrol, an helmet, a padlock, chain, motor bike keys, a coat and pliers, which he identified in Court.

The last witness (PW4) was PC Ndogai Roba Murea also stationed at Mumbuni Police Station, who testified that he was told by the OCS that there was an incident happening at Mumbuni market and that on the way they met members of the public who had already arrested the 1st Appellant and were taking

him to the police station. On arriving at the market they found the 2nd Appellant being beaten by members of the public, and after the 2nd Appellant was taken to the police station they were left to guard motor vehicle registration No. KBL 805Z which was suspected to have been used in the theft. He produced as exhibits the items recovered from the said motor vehicle. He also stated that the motorcycle KMCS 507 S was taken to the police station by the owner.

I have considered the arguments by the Appellants and Prosecution, and find that the issues for determination by the court are firstly, whether the evidence adduced in the trial Court supported the charge of stealing of a motorcycle, and if so, whether the 2nd Appellant was convicted on the basis of sufficient evidence, The last issue is whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute, and whether the said sentence is amenable to reduction and /or variation.

On the first issue, the 2nd Appellant argued that the charge was defective as the offence of stealing was not supported by the evidence that was presented by the Prosecution. The Court of Appeal in **Yongo vs Republic** ***[1983] KLR, 319*** did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

“In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars.”

This holding was explaining the circumstances when a charge is considered to be defective in substance, so as to guide a court when it is altering the said charge. In order to find out if there was an error made in this respect, one must interrogate the elements of the offence of stealing. Section 268 of the Penal Code defines stealing as follows;

(**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.

Under section 268(5) a thing cannot be taken unless the accused person has moved the thing or caused it to move, in other words, there has to be asportation. In the present appeal PW2 in this regard testified as follows in the trial Court on 12th February 2015:

I remember 25/06/2014 around 9.30 a.m, I was at Mbumbuni where I repair motor bikes. As I repaired a mzee, Joseph Kanyingi Kinyezi came near my work and parked his motorbike and told me he is going into the market I keep a watch.

It was on a Wednesday, a market day. The motorbike was KMCS 547S black in colour, Skygo. He had chained the front wheel with a chain. As I worked I saw white saloon car KBL 805Z come. I saw two people in the said car. It came near adjacent to where the motor bike was parked. The people in the car stayed like 30 minutes inside. I saw the men seated in the front passengers seat lower the seat and crossed to the back seat.

He opened the back door of the left side. I saw him remove tinsmith red in colour. I saw him cut the chain on the front wheel of motorcycle and removed the chain and put it in the car. I pretended to be working.

He stepped out of the car, removed pliers and at the ignition wire. I saw the plier was whitish in colour. I saw him step on motor bike and attempt to start the bike. I chased him to inside the market and arrested him. When I arrested him I screamed and the people came. I told them the person was stealing the motor bike. We took him back where the motor bike was and he was asked where the items he used to cut the chain was and he said they were inside the car. He was told to bring the car keys and he said the driver is inside. He showed where the driver was. The driver was standing a distance from the car.

He opened the car and the chain he had cut was found inside the car. The car had a

white cap, one litre petrol in white container, two keys, one of a motor bike. Members of public started beating them. People screamed and a lot of people carne. At that time Kanyingi (PW1) had come back. The chain was found in the back seat. Two pliers were also found in the back seat same as the petrol. Tin smith was found in the car too.

By luck a police officer came and stopped the mob justice and arrested them. The car and the motor bike were taken to police. I was the one who pushed the motor bike to Mbumbuni police station and I recorded my statement. The car was pulled by another GK car to the police station. Earlier, motor bike was parked from a distance of (2 inches) from where the car came to park. When he cut the chain he pushed the motor bike for a distance of about 10 meters . I ambushed him and chased him"

PW1 also testified that when he came back he found the motorcycle about 20 metres from where he had left it.

The question to be answered therefore is whether by the act of pushing PW1's motorcycle there was taking , conversion or possession of the said motorcycle by the 1st Appellant. It is my view that the taking

of the motorcycle was not complete in the circumstances of this appeal, as the 1st Appellant was stopped in his tracks by PW2, and neither did he deprive PW1 of ownership and possession of the said motorcycle, as PW1 testified that he came and took possession of his motorcycle, and took it to the police station. In **Joseph Kariuki vs Republic (1985) KLR 507** it was held by the Court of Appeal in similar circumstances where the Appellants therein forced the owner out of her vehicle and attempted to drive it away but it stalled, that no theft had been thereby been committed as the car had not been moved or taken.

The offence disclosed by the evidence was therefore one of attempted stealing of a motorcycle as the evidence points to the 1st Appellant having the intention to take the motorcycle and taking steps to actualize this intention, only to be cut short by PW2. Therefore the charge was to this extent defective and the Appellants ought to have been charged with the offence of attempted stealing of a motorcycle

Section 388 of the Penal Code in this regard defines an attempt as follows:

(**1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

The evidence adduced before the trial Court does prove that the 1st Appellant indeed did attempt to steal PW3's motorcycle. As to the acts by the 2nd Appellant and whether he was also guilty of the same offence, he was seen by PW2 who observed him for a considerable time as he came and parked the car he was driving namely motor vehicle registration number KBL 805Z , and in which the 1st Appellant was a passenger. After a period of time, which PW2 stated was after about 30 minutes, the 1st Appellant then got out of the car and proceeded to cut the chain link that had tied the motorcycle and attempted to ignite it and push it. The acts of the 2nd Appellant upto this point indicate an intention to steal PW1's motorcycle together with the 1st Appellant.

In addition, the chain link and padlock cut from the said motorcycle was found in the 2nd Appellant's car, as was PW1's jacket which was on the said motorcycle. It is thus evident that the 2nd Appellant was a willing participant in the attempted theft. Lastly , this evidence of the items recovered from the 2nd Appellant which were produced as exhibits by PW4 , was corroboration of the account given by PW2 , as was the evidence that the Appellants were arrested by members of the public at the scene of the attempted theft.

On the last issue as regards the revision of the sentence meted out on the Appellants, section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

" In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence".

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

In the instant appeal, this Court has found that the 1st and 2nd Appellants were wrongly charged with the offence of stealing, and ought to have been charged with the offence of attempted stealing of a motorcycle. The provisions of **section 179** of the *Criminal Procedure Code in this regard empower a* court to convict an accused person for an offence which he was not charged but which is proved and was a lesser offence than that charged. The said section provides as follows:

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

It was explained by Asike-Makhandia J. (as he then was) in ***Kyalo Mwendwa v Republic*** **[2012] eKLR that** the *jurisdiction of the Court is to impose a substituted conviction for a minor cognate offence only.* An attempt to commit a felony or misdemeanour is an offence under section 389 of the Penal Code which also provides for the penalty as follows:

"**Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.**

The offence of attempted stealing of a motorcycle contrary to section 278 A as read together with section 389 of the Penal Code is in this regard a lesser cognate offence as it carries a lesser sentence than that applicable to the offence of stealing of a motorcycle.

The sentence of 4 years imprisonment meted on the Appellants was therefore unlawful to the extent that the charge under which they were convicted was defective, and as section 278A of the Penal Code provides for a maximum sentence seven years imprisonment, while they would have been liable to a maximum sentence of three and a half years imprisonment which is the applicable sentence for the offence of attempted stealing of a motorcycle contrary to section 278A of the Penal Code as read together with section 389 of the Penal Code.

I hereby therefore quash the conviction of the 1st and 2nd Appellants for the offence of stealing of a motorcycle contrary to section 278A of the Penal Code, and substitute it with the conviction of the 1st and 2nd Appellants for the offence of attempted stealing of a motorcycle contrary to section 278A as read together with section 389 of the Penal Code pursuant to the provisions of section 179(2) of the *Criminal Procedure Code*.

I also note that the 1st and 2nd Appellants have already served three years of their sentence., I accordingly sentence the 1st and 2nd Appellants to time served for their conviction for the offence of attempted stealing of a motorcycle contrary to section 278 A as read together with section 389 of the Penal Code. The 1st and 2nd Appellants be and are hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE