



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCRA NO. 71 OF 2019**

**BONIFACE KIOKO MATHUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence of Hon. J. Mwaniki (SPM)*

*in Makueni Principal Magistrate's Court Criminal Case No. 84 of 2015*

*delivered on 9<sup>th</sup> April, 2019).*

**JUDGMENT**

1. **Boniface Kioko Mathuku** the Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars were that the Appellant on 12<sup>th</sup> February 2015 at Kikumini area Kikumini Location, in Makueni District within the Makueni County jointly with another not before court being armed with dangerous/offensive weapon namely panga robbed **Fred Musolo Kavoi** of his motorcycle registration number KMDL 007V make SKYGO valued at Kshs. 85,000/= and at the time of such robbery used actual violence and wounded the said **Fred Musolo Kavoi**.

2. He faced a second count of grievous harm contrary to Section 234 of the Penal Code. The particulars being that the Appellant on 12<sup>th</sup> February 2015 at Kikumini area Kikumini Location, in Makueni District within the Makueni County jointly with another not before court unlawfully did grievous harm to **Peter Mutinda**.

3. He also faced a third count of being in possession of forged currency note Contrary to Section 369 of the Penal Code. The particulars being that the Appellant on 12<sup>th</sup> day of February 2015 at Kiambani Market, Kikumini Location, Makueni District within Makueni County without lawful authority or excuse had in his possession one thousand shillings forged note knowing it to be forged.

4. After a full hearing he was convicted on all the three (3) counts and sentenced as follows:-

§ Count 1 – Twenty five (25) years imprisonment.

§ Count 2 – Twenty five (25) years imprisonment.

§ Count 3 – Discharged unconditionally under Section 35(1) Penal code.

The order was that the sentences run concurrently with effect from 12<sup>th</sup> February 2015.

5. A summary of the prosecution case is that PW1 Fred Musolo Kavoi who owns motorcycle registration No. KMDL 007V Skygo model 150E was riding home on 12<sup>th</sup> February 2015 at 7.30 p.m. His home is within Ngosini Village which is 1 km from Ngosini market. He produced receipts, purchase agreement, log book of the motor cycle as EXB 1a & b, 2 & 3. As he turned to enter the gate near a big tree he saw somebody ahead of him with a raised machete. He could see well as his head lights were on.

6. He shouted “thief” and when the person reached him he raised the machete to cut him but he blocked it with his left hand which was cut on the palm. He dropped the bike and took off running across the road. On checking he saw the attacker following him. A second person was lighting the motorbike. He recognized the first attacker with the machete as Titus Kaloki Kithuku and the second one was Boniface Kioko Mathuku the Appellant.

7. Both attackers are parents at Kathathaini Primary School where PW1 taught. He screamed and neighbours responded full swing. He called the assistant chief Stephen Kioko Nzioka who was Ngosini market. On reaching the said market he was told the motorbike had been ridden towards Kiambani market where their chief stayed. Word went round and he finally got word that the motorbike had been recovered.
8. Accompanied by neighbours they went to Kiambani area and he found his motorbike on the side of the road with its ignition key intact. The person who had the motorbike was locked up in the shop of Elizabeth Itumbi Kioki. The person was the Appellant herein.
9. He met Peter Mutinda (PW3) who had injury on the left eye and foot. He was one of those who had intercepted the attackers. Both PW1 & PW3 were treated at Makueni County Referral Hospital.
10. In cross examination he said the motorbike (EXB 12) was recovered 2-3 kms from the scene of attack.

He denied claims by the Appellant that he had seduced his wife after dropping his sister-in-law Mueni in shop.

11. PW2 Hollings Mutuku Mutisya the area chief of Kikumini location was on 12/02/2015 at 7.00 p.m. informed by his community members that PW1's motorbike had been stolen and it had been ridden past Ngosini East market towards Kiambani market where he was. He and others quickly organized for a road block. While there a motorbike came carrying two people. Those present were able to bring down the motorbike and those on board took off but one was apprehended. A community member was injured by one of the thieves using a machete. The arrested person was tied up with a rope. A wallet was recovered from his pockets which had an identification card in the names of Boniface Mutuku plus Kshs. 1,000/=.

12. Soon thereafter the motorbike owner came with other people. He identified it. He also identified the arrested person as a parent at his school. The OCS Makueni sent officers who took away the suspect and those injured. He identified the Appellant as the person who had been apprehended. He also identified the brown jacket worn by Appellant, his white cap and torch (EXB 9, 7 & 4). He also identified the Appellant's wallet and the Kshs. 1,000/= inside of it (EXB 6 & 8), and the rope he used to tie him (EXB 10).

13. In cross examination he said he had the Appellant locked up to save him from the crowd that was baying for his blood.

14. PW3 Peter Mutinda Wambua is the Complainant in the 2<sup>nd</sup> count and was injured in the process of intercepting the robbers. He explained that he was cut by the pillion passenger using a panga. He was injured on the left eye and has lost sight in it. He said the Appellant was arrested with the panga he had assaulted him.

15. PW4 Nahashon Kagwe Mukisi a medical doctor examined PW1 and assessed his injury on the palm as "harm". He produced the P3 (EXB 11). He also examined PW3 who had a wound on the left side of head, injury on left eye, a bruise below the left knee. He assessed the injury as "grievous harm". The patient lost sight in left eye.

16. PW5 Elizabeth Kitumbi Kioko said she was at her shop at Kiambani on 12/02/2015 at 7.00 p.m. She heard noises. On checking she saw the chief (PW2) carrying a man who had been lifted up. PW2 requested her for a place to put the man. She allowed him the space and the person being carried was put in her shop. He had been tied by a rope. Others present included Musyoka Mweu, Musyoka Ndunda and PW3 who was bleeding. Later a police vehicle came and the tied up man was taken away.

17. During cross examination she said the other shops next to hers were already closed. Even the club in Kiambani had been closed. She denied having been given Kshs. 1,000/= by the Appellant and he was waiting for change.

18. PW6 Cpl. Esther Kingosi and others were instructed by the OCS to go to Kiambani market to get a suspect who had been arrested by the chief. She investigated the case. They found the suspect (Appellant) in a shop with his hands tied. PW1 arrived there and he was bleeding on the head. He explained what had happened before he was robbed off his motorbike. The witness produced all the exhibits which had been identified by the witnesses as exhibits 1a – 10. She said upon investigations she found the Kshs. 1,000/= found in the Appellant's wallet to have been fake.

19. The Appellant gave a sworn statement of defence. He testified that on 22/02/2015 he came to Wote town to collect his child's birth certificate from the D.C's office. He left that office at 2.00 p.m. having been directed to get forms from the D.C's office. He bought a crate of soda and left for Kalawa using Joy Tours matatu. He left the sodas at Kiambani and took a matatu to Kalawa alighted at Kwambuko of Kiambani and went to buy credit for his phone. He gave out Kshs. 1,000/= and waited for change of Kshs. 900/=. The shopkeeper Elizabeth (PW5) told him to wait for change.

20. Suddenly a crowd of people entered the shop. They beat him asking if he is the one who had given a fake note. The police came and he was taken to Makueni police station. he stated that PW1 knows him as he teachers in a school attended by his children. His brother's wife teaches in the said school and PW1 used to have a relationship with her, since her husband is deceased. That he later tried to seduce the Appellant's wife in his presence. He was very bitter with PW1.

21. Upon his conviction and sentence he the following grounds of appeal;

*a. That the learned Trial Magistrate erred in law and fact by failing to analyze and re-evaluate the whole trial record and observe that, the chain of evidence from prosecution witnesses were not tight and cogent to establish the alleged prosecution circumstantial evidence.*

*b. That learned Trial Magistrate erred in law by acting upon fleeing glance, and dock identification, which does not have weight in law.*

c. **That** the circumstantial evidence in the instant case did not irresistibly point to the Appellant to the exclusion of all others so as to justify conviction.

d. **That** the mode of arrest is suspect as the chasers lost the sight of the attackers hence it lacked concrete nexus to link the accused person with the scene of crime and the alleged recovered items were not positively identified.

e. **That** essential prosecution witnesses, especially those alleged to have arrested the Appellant (members of public) were not availed in court to ascertain the circumstances that led to the arrest of the accused arrest was arrested.

22. In his written submissions, on ground one he submits that PW1 did not identify him and that's why he did not give his names to the chief and assistant chief when he called them. He has dismissed the evidence of PW2 saying he was not part of those who chased him and he did not explain how he had identified him. For PW3 he says he was in the vicinity but did not identify anybody. On this ground he says there is no witness who gave any concrete evidence.

23. The Appellant argues that what the witnesses termed as identification was pure dock identification. That PW1 never gave his names to those who responded to the distress calls. Further he states that PW2 – PW5 all said it was at night and they were not able to identify anyone as it was at night.

24. He submits that this case is hinged on circumstantial evidence citing the cases of **Republic –Vs – Kipkering Arap Koske & Anor (1949)16 EACA 135; Abanga alias Onyango –Vs- Republic Cr. Appeal No. 32 of 1990 (UR)**. He adds that he was arrested on pure suspicion which cannot found on conviction.

25. He contends that the manner of his arrest was not explained. That those who arrested him never testified. PW6 who testified did not arrest him. Thus the court had merely relied on dock identification to convict him. He contends that the recovery of the stolen items was by members of the public and they were not from him. It is his submission that a proper identification parade should have been conducted for the witnesses to identify him. Instead of them taking him to a police station they took him to a shop and locked him there. He claims that this was not proper.

26. In response to these submissions the learned prosecuting counsel submitted in opposition to the Appeal that the evidence adduced sufficiently linked him to the offence charged. She contends that PW1 was able to identify the attackers were parents at the school where he taught. There was light from the motorbike.

27. He screamed as the attackers took off with the motorbike. His neighbours gave chase and the attackers were cornered though one escaped. It was her submission that there was no miscarriage of justice, as his identification was one of recognition.

### **Analysis & Determination**

28. The duty of the Appellate Court is to re-analyze and reconsider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See **Okeno –Vs- Republic 1972 EA 32**. In **Kiilu & Anor –Vs- Republic[2005] I KLR 174** the Court of Appeal stated thus;

*1. Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, point to guilty, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.*

*2. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.*

29. The main issue for determination before this court is whether the conviction is sustainable on the strength of the evidence adduced in the trial court. Robbery with violence is defined under Section 296(2) of the Penal Code as;

***“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, eh shall be sentenced to death.”***

30. From the evidence of PW1 he was attacked by two people who robbed him of his motorbike registration No. KMDL 007V make Skygo valued at Kshs. 85,700/= one of the people assaulted him on his left hand.

These facts confirm that indeed a robbery with violence took place.

31. The next issue to determine is whether the Appellant was clearly and positively identified as PW1's assailants. The Appellant contends that the Complainants did not identify him owing to the fact that it was dark. He challenged PW1's identification by recognition and stated that the same was not sufficient as PW1 never gave his names to those he reported to.

32. In **Anjoni & Others –Vs- Republic (1976 – 1980) KLR 1556 at 1568**, the Court of Appeal stated as follows;

***“The recognition of an assailant is more satisfactory, more, assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.”***

33. In Francis **Kariuki Njiru & 7 Others –Vs- Republic [2001] eKLR** the Court of Appeal stated that;

***“The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered.***

***Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”***

34. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him.

35. In the instant case the Complainant (PW1) said he saw and recognized the attackers as parents in the school where he taught. He did not give their names to the police or any relevant authority. The learned trial Magistrate in his judgment acknowledges that omission by the investigations when he said at page 4 lines 15-16 of his judgment as follows;

***“The issue of identification was not properly handled though.”***

36. The reason why the recognition at the scene will not be relied on by this court is that the same was not properly handled by the investigators.

37. The trial court made a similar finding. The only other evidence linking the Appellant to this robbery is the recovery of the Complainant’s stolen motorcycle.

38. PW1 produced all relevant documents (EXB 1a, b, 2 & 3) and proved being the owner of the motorbike (EXB 12). He explained how he was robbed of EXB12 and the attackers went away with it towards Nzosini market then to Kiambani direction.

39. PW2 the area chief confirmed receiving the report of the robbery and together with villagers erected a road block on the Kiambani road. A motorbike carrying two people came to the road block, and was intercepted. The rider and passenger dropped and took off but one of them was arrested. This was also PW3’s evidence. He was cut with a panga by one of those on the said motorbike. The said assailant was arrested by the mob. There is no reason why PW2 and PW3 would lie against the Appellant.

40. The Appellant argued that all those who witnessed his arrest should have been availed to testify on his arrest. He reckons that he was mistaken as he had gone to PW5’s shop to buy airtime and he was arrested as he waited for PW5 who had gone to get him change. PW5 denied this assertion by the Appellant.

41. He also said PW1 had framed him up because he knew that PW1 secretly seduced his late brother’s wife and his own wife. PW1 denied all these in cross examination. The Appellant’s wife and sister-in-law were not called by the Appellant to give evidence.

42. It is also noted that the villagers who intercepted the motorbike could not all be called to testify. It is not about the number of witnesses testifying but the weight of the evidence given.

There would be no need of calling witnesses to severally come and repeat the same evidence before the court.

43. The Appellant and another were found in possession of a motorbike which had been robbed from PW1 in less than two (2) hours. In the case of **Isaac Ng’ang’a Kahiga alias Peter Ng’ang’a Kahiga –Vs- Republic Cr. Appeal No. 272 of 2005 U/R** the Court of Appeal found the following to be the required elements for proof of recent possession.

***“It is trite that before a court of law can rely on the doctrine of recent possession as a basis and for conviction in a criminal case the possession must be positively proved.***

***In other words there must be positive proof***

- (i) That the property was found with the suspect.***
- (ii) That the property is positively the property of the Complainant.***
- (iii) That the property was stolen from the Complainant.***
- (iv) That the property was recently stolen from the Complainant.***

*The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”*

44. The Appellant denied having been found in possession of the motorbike. He stated that he was not at the scene but at PW5’s shop to buy airtime. PW5 was very clear in her evidence as to how the Appellant came to be in her shop. This was supported by the area chief (PW2).

45. I find that all the elements in respect to recent possession as outlined in the Kahiga case (Supra) have been established in this case. There was no satisfactory explanation offered by the Appellant to show how he came to be in possession of PW1’s stolen motorbike.

46. It has also been established that during the stealing of EXB 12, the thieves were armed and PW1 was assaulted in the process. PW4 who examined PW1 confirmed the injury on PW1. I therefore find that EXB 12 having been found in the possession of the Appellant and another in less than 2 hours after the robbery confirms that he was one of the robbers.

47. It has also been confirmed by PW2 and PW3 that the latter was injured (EXB 11) in the process of the recovery of the motorbike. The Appellant has been identified as the person who caused this injury on PW3. The doctor’s evidence confirms that the injury was assessed as grievous harm as PW3 lost his sight in the left eye as a result of the injury (EXB 13). The Appellant was found in possession of a fake Kshs. 1,000/= note (EXB 8) in his wallet (EXB 6).

48. In totality I find that the prosecution proved its case against the Appellant on all the three counts. I find no reason to make me interfere with the learned Magistrate’s findings, on both conviction and sentence which I uphold.

**49. The appeal is entirely dismissed.**

Orders accordingly.

**Delivered, signed & dated this 30<sup>th</sup> day of January 2020, in open court at Makueni.**

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**H. I. Ong’udi**

**Judge**