



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 234 OF 2016

GODFREY KIRUI.....APPELLANT

VERSUS.

REPUBLIC.....RESPONDENT

[An appeal arising from the Conviction and Sentence in Original Webuye SPM CR. 1060/2015 delivered on 25.11.2016 by T.M.MWANGI-SPM].

JUDGMENT.

The Appellant Geoffrey Kirui was charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of offence being; on the 4th day of October 2015 in Misikhu area within Bungoma County, Jointly with others before court while armed with dangerous weapons namely panga and a sharp metal bar robbed NELSON KHISA WANYAMA motorcycle registration KMDF 556X make TVS star red in color valued at Kshs.102,000/= and cash Kenya Shillings 600/= and/or immediately before or immediately after the time of such robbery wounded the said Nelson Khisa.

After full trial the learned Trial Magistrate found the appellant guilty of robbery with violence contrary to section 296(2) of the Penal Code and after considering the mitigation sentenced him to serve a sentence of 30 years imprisonment. Dissatisfied with the conviction and sentence the appellant preferred this appeal on the following grounds;

(1) THAT the Hon. Magistrate erred in law and facts by allowing the case to proceed against speculations of the constitution of Kenya 2010 particularly article 49[1][2] and article 50

(2) THAT Hon magistrate erred in law and facts by allowing the charge sheet failing to take proper account of credibility of the prosecution witness before him and thereby convicting me basing on the same in which I have suffered prejudice.

(3) THAT the trial magistrate erred in law and fact by basing its ruling and judgment on non-corroborated evidence and contradictory and divergent evidence

(4) THAT the trial magistrate erred in law by failing to read the original and amended charge sheets and their sub sequential link to the original of the main exhibit motor cycle in Bungoma Police Station and Busia.

Briefly the evidence before the trial court was The evidence before the trial that Pw1 Samuel Mukhamu Mutingu a boda boda rider in Misikhu stated that the boda boda belongs to him and he has other 5 motor cycles and he has hired boys to ride them. He testified that he hired Nelson Mandela to ride motor bike registration no. KMDF 556 X red in color TVs star and he bought it at Kshs.105,000/= and produced the receipt as exhibit 1,sale agreement as exhibit 2 and photos of lost motor bike as exhibit 3.Pw1 testified that he was phoned by the boy he had hired who claimed to have been injured and snatched motor bike.Pw1 stated that he went to the hospital to visit at Misikhu hospital Emmanuel clinic where he found the Nelson who had wounds on the head, foot and toe and took him to Webuye District Hospital.Pw1 testified he went back to record a statement at Misikhu.Pw1 testified that people said Joel was the suspect and the CID started to truck the boy Joel who was later arrested in Uganda with the motor bike.

Pw2 Nelson Khisa Wanyama testified that he lives in Misikhu and he is a bodaboda rider and he was hired to ride TC STAR Motor bike registration number KMDF 556 He testified that on 4.10.2015 a 7.30pm accused 2 and another unknown person told him to carry them and while riding towards Gofrey home he heard someone hit him with iron rod at the back of his head but does not know who hit him and he was stabbed on the ear.He became unconscious and later found himself at Webuye District Hospital. The Prosecution produced discharge summary as PMFI-4 and he was given P3 form marked PMFI-5.He testified he knew Godfrey and that he went to police station and identified Godfrey the appellant herein and identification parade form for identification of appellant marked as PMFI-5.

Pw3 is Chief Inspector John Ngangare and he testified that on 9.10.2015 the I.O. in this case requested him to do an identification parade and

he carried out the parade by calling out members at parade same size as accused and then called Pw2 and he identified the accused 2/appellant positively by touching him and he handed over the identification parade form to I.O. and produced the form as P-EXBIHIT 6.

Pw4 No.91717 Pc Dickson Oluoch testified that he was in the office doing his duties when inspector Ojwang informed him to inspect and prove arrest of a suspect who stole motor cycle registration No.KMDF556X.HE testified that they left for TOWRDS Mumias where they laid an ambush between Musikoma and Kahala market using tracking gadget and at 12 noon the suspect according to tracking device was at Magani. They shortly spotted the motor cycle being driven by suspect towards Bungoma Town. They followed and the suspect and at St. Dominion hospital the suspect tried to make a u turn but lost control and fell down and they arrested him and on arrest the suspect identified himself as Godfrey Juma Kirui and they arrested the suspect and took him to Bungoma Police station.

Pw5 No.23717887 I.O. Robert Ojwang testified that on 5.10.2015 at Bungoma office at around 9am was called by DCIO and told to proceed to his office at webuye and on arrival he met DCIO who informed him that he had gotten a tip from public on a suspect linked to robbery and complainant had been injured and robbed motor cycle KMDF 556 X TVS and on trying to locate the numbers of both suspects were showing they were in Busia. He testified they proceeded to Busia and tried to trace them but no success and they decided to come back leaving 2 officers in Busia.

He testified that on 6th October he received a call from one of officers in Busia that they had seen the bike with somebody been ridden they challenged him to stop but he speed off towards Kenya .he testified that he mobilized his intelligent officer to check and they traced the phone number of Appellant that showed he was at harambee so they staged and the suspect appeared riding the motor bike s they arrested him.the appellant told the officers that he was given the motor cycle by Joel who got it from Moses and he led them to Mombasa house where they arrested Joel but were unable to trace Moses who he said he is in Uganda.Pw5 states they reported the case at Busia Uganda Police and came back with the two suspects to Bungoma who they handed over to DCIO Bungoma East. On cross examination by appellant Pw5 stated that he found the motor cycle with the appellant who then informed him that he was given the same by 1st accused.

Pw6 No.53246 corporal George Kinguu testified that on 5.10.2015 he was called by inspector Ojwang in charge of flying squad to assist him in investigation in an offence of Robbery with violence which occurred in Misikhu involving a rider who had been injured and motor cycle stolen.He testified that DCIO had safaricom numbers of suspects that he had received from the public and the lines network were located in Busia.They left for Busia with other officer but they did not manage to arrest the suspects. He testified that the following day while at border post they spotted the motor cycle been ridden by a short man in brown leather jacket but they could not stop him immediately he crossed the border and went to Busia Kenya and Pw6 informed officer Ojwang that he had seen the motor bike and it and later on inspector Ojwang informed him they had intercepted the motor cycle registration number KMDF 5566 X TV star.

Pw7 Nicholas Mwoya AP at Webuye testified that on 19/10/2015 while on duty at weigh-Bridge he met 1st accused who he arrested because his picture has been circulating in their office as a wanted suspect.

Pw8 No.51042 corporal Andrew Ndero testified that on 4.10.2015 he got information that a robbery had occurred in Misikhu and he rsn to the scene and his colleagues took him to the hospital to see the victim (Nelson) who explained to him how the robbery happened that at around 7.30pm 2 people one he knows very well approached him and told him to take them home and on the way Godfrey who he knew started attacking him and they took money from him and left him injured and fled with his motor bike.

Pw9 No.54360 corporal Julius Kivula testified that on 5.10.2015 at 8 am he was told by his Boss the CID to investigate documents by corporal Ndero. The complainant had been hired to take by 2nd accused from Misikhu who later attacked complainant.Pw9 testified he took over investigation and he used informers and got number of 1st accused and also got number for 2nd accused/appellant which is 0708289384, they gave the numbers to Bungoma flying squad who tracked down the attackers. He testified that he recorded statement of complainant and the owner of the motor cycle and arranged for Identification Parade where the 2nd accused was identified by the complainant.

In his defence the appellant told court that on 6.10.2015 at around 7am he left home and went to the shamba. While at the shamba a lady phoned him and told him he has some vistoris who wanted to talk to him briefly. He testified that he went home and met 3 officers who said they wanted to talk to him and then they him in the boot and he did not know where they were driving to but drove to Nzoia Police Station and placed in the cell at 12pm and he saw his cousin Joel Mandela at the cell. He testified that he was remanded in the cell upto 9th and then taken to Webuye Police Station and paraded before a group of people. He states that he was remanded from 9th to 28th October 2015 and was connected to 1st accused in this case who he does not know. He stated that he was shocked to hear that he had been given Kshs.1000/= while upon arrest he had not been arrested while in possession of Kshs.1000/=.

The appellant filed hand written submissions in support of this appeal. He submitted that he was not represented by a lawyer and the evidence by prosecution was overwhelming on him. He submitted that there was error on part of prosecution who did not amend the charge sheet and prayed that the high court orders afresh trial.

Ms.Njeru for the state opposed the appeal. In his submissions in court he stated that the charge sheet was amended and was allowed to recall Pw4 to testify. On evidence of prosecution was not corroborated she submitted that that complainant testified that the appellant asked him to carry him home on his motor cycle but on his way he was attacked and that he knows the appellant because he has carried him before. She also submitted that ID parade was carried out by pw3 and that PW4,Pw5 and Pw6 placed the appellant at scene of crime and they tracked appellant through his mobile number and there was no contradiction in the evidence.

This is a first appeal. The duty of this court is well stated in the case of **Okeno v Republic 1972 EA**.

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 570). It is not the function

of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings, and conclusions. It must make its own finding and draw its own conclusions. Only then can it decide whether

the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses."

From the evidence and submissions the issue that lends itself for determination is whether from the evidence the appellant committed the offence of robbery with violence.

The ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

"296. Punishment of robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) 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**, he shall be sentenced to death."

The Court of Appeal in the case of **Odhiambo & Another v Republic** (Omolo, Githinji & Deverell JJA) (2005) 2 KLR 176 explained the ingredients of the offence of robbery with violence as follows:

"The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295."

The evidence in this case is circumstantial evidence premised on two main areas; opportunity to commit the offence and possession of the property stolen during robbery.

In the case of **Abanga alias Onyango vs Republic** (supra), the Court of Appeal stated as follows in regard to circumstantial evidence:-

"It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."

In the instant case the PW2 testified that on 4.10.2015 at 7.30pm the appellant accused 2 and another unknown person told him to carry them and while riding towards Godfrey home he heard someone hit him with iron rod at the back of his head but does not know who hit him and he was stabbed on the ear and attackers stole motor cycle registration no.KMDF 556 X red in colour TV's star. He became unconscious and later found himself at Webuye District appellant The Complainant stated that he knew the appellant because he had carried him before. Also Pw3 conducted an ID and the complainant positively identified the appellant.

The missing motor cycle registration No. KMDF 556 X red in colour TV's star was also recovered and found in possession of the appellant by Pw4,Pw5 and Pw6 who placed the appellant at the scene of crime.

Possession in law includes not only having in ones personal possession but also knowingly having anything in the actual possession or custody of another person or having anything in any place whether occupied by oneself or not for the benefit of oneself or another person. The appellant upon arrest and interrogation led the police to Mombasa House to locate accused 3 who he claimed gave him the motor cycle that was found in his possession. This therefore brings into play the doctrine of recent possession of stolen property.

The principles of the doctrine of recent possession, are as in **ISAAC Nganga Kahiga Alias Peter Kahiga V. Republic** – Criminal Appeal No. 272 of 2005 (U/R) which was cited, with approval in **Richard Oduor Adera V. Republic**, [2010] eKLR-

"It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly 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 properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses."

In the instant case the property was found with the appellant who easily led the police officers to where the 3rd accused was who he claimed gave him the motor cycle. The stolen property was positively identified by pw1 as belonging to him by production of receipts. The act of leading the police to where his fellow accomplice was, clearly shows that it was the appellant and 3rd accused who stole the motor cycle in appellant possession.

I am satisfied that the prosecution proved its case beyond reasonable doubt against the appellant on the count of robbery with violence contrary to Sec. 296(2). I find the conviction was proper and uphold the same. I note that the appellant was given an opportunity to mitigate. The offence committed is serious. I affirm the sentence of 30 years imposed. The appeal is therefore dismissed.

Dated and Signed at Bungoma this 28th day of February, 2019.

S.N. RIECHI

JUDGE.