**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.16 OF 2016**

***(An Appeal arising out of the conviction and sentence of***

***Hon. Ochoi – PM delivered on 11th November 2015***

***in Kibera CMC. CR. Case No.4354 of 2013)***

**PETER NJOROGE.....APPELLANT**

***VERSUS***

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Peter Njoroge was charged with two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 17th November 2013 at 5.00 p.m. along Oloitoktok Road, Kileleshwa in Nairobi County, the Appellant, jointly with another not before court robbed Christopher Mingala and Kenneth Mingala (complainants) of their bicycles and during the time of such robbery threatened to use actual violence to the said complainants. He was alternatively charged with two counts of **handling stolen property** contrary to **Section 322(1)** of the **Penal Code**. The particulars of the offences were that on the same day and in the same place, the Appellant, jointly with another not before court otherwise than in the course of stealing, dishonestly retained two bicycles having reason to believe them to be stolen. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted of the two main counts of robbery with violence. He was sentenced to death. He was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that was not sufficiently creditworthy. He faulted the trial magistrate for relying on evidence that did not establish his guilt to the required standard of proof beyond any reasonable doubt. The Appellant faulted the trial magistrate for not appreciating that the ingredients that constitute the charge of robbery with violence were not established in the evidence that was adduced by prosecution witnesses, and therefore, the court could not have reached the verdict to convict the Appellant. The Appellant was aggrieved that the evidence of the complainants was admitted without the court taking into consideration that such evidence required corroboration in light of the fact that the complainants were minors. The Appellant took issue with the fact that his defence was not considered before the trial court reached the verdict to convict him. The Appellant was of the view that the evidence adduced by the prosecution witnesses had contradictions and

inconsistencies that rendered any conviction on it's basis untenable. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral submission made by Mr. Mung'ao on behalf of the Appellant and by Ms. Kimiri for the State. Whereas Mr. Mung'ao urged the court to reach a finding that the prosecution had not established the ingredients that constitute the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof, Ms. Kimiri for the State was emphatic that the evidence adduced by the prosecution witnesses established the guilt of the Appellant to the required standard of the law. Mr. Mungau urged the court to allow the appeal whereas Ms. Kimiri pleaded with the court to uphold the conviction and sentence of the Appellant.

Before giving reasons for its decision, it is imperative that the facts of this case is set out, albeit briefly. Christopher Mingala then aged 15 years and his brother Kenneth Mingala, then aged 17 years were on the material day of 17th November 2013 riding their bicycles around Kileleshwa Estate in Nairobi County. While they were riding along Oloitoktok Road within the estate, they were accosted by two men who wrested the two bicycles from them and made an attempt to ride off. Christopher and Kenneth stopped a motor vehicle which fortuitously happened to be a police vehicle. In the vehicle, was PW3 PC Henry Ojudi, then attached to GSU Headquarters performing VIP protection duties. They drove towards the direction that the two men had ridden the bicycles. They were able to apprehend the Appellant with one of the bicycles. The other man abandoned the other bicycle and managed to make good his escape. PW3 escorted the Appellant to Kileleshwa Police Station where he was booked and later charged with the offences that he was convicted. Both bicycles were recovered and were produced into evidence by PW4 Cpl Fredrick Muyodi, the investigating officer of the case.

When he was put on his defence, the Appellant denied committing the offence. He explained that he was arrested by a police officer while he was walking home from a shopping errand. He denied stealing the bicycle in question. He accused the police of charging him with the offences after they had failed to extort money from his mother.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the guilt of the Appellant to the required standard of proof on the two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

On re-evaluation of the evidence adduced, and upon considering the submission made by the respectful counsel of the Appellant and the State, it was clear to the court that this appeal would turn on whether the evidence adduced by the prosecution witnesses established the ingredients of the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The trial magistrate appreciated that for the prosecution to establish the two counts, they had to prove any one of the three ingredients that constitute the charge. This is what the trial magistrate said:

> ***"Therefore the existence of the aforesaid ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296(2) which I will state below and any one of which if proved will constitute the subsection***

*(1)* ***If the offender is armed with any dangerous or offensive weapon or instrument,***

*(2)* ***If he is in the company of one or more person or persons, or***

*(3)* ***If at, or immediately before or after the time of such robbery, he wounds, beats, strikes or use any other violence to any other person."***

Mr. Mung'ao for the Appellant argued that the prosecution did not establish any of these ingredients to establish the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** as contemplated by the law. No evidence was adduced to suggest that the Appellant used violence when he took the bicycle from one of the complainants. No evidence was adduced to establish that the Appellant was armed with any dangerous or offensive weapon. Mr. Mung'ao was of the view that the evidence adduced by the prosecution witnesses could not by any stretch of imagination establish the charge of robbery with violence as contemplated by the law. Ms. Kimiri for the State submitted that the fact that the Appellant was accompanied by an accomplice was sufficient proof to establish one of the ingredients of the charge which is that the Appellant was with another when he committed the offence.

It is clear to this court that the Appellant has a case when he states that the circumstances in which he stole the bicycle from one of the complainants did not fall into the category that is within the definition ascribed to **robbery with violence** in **Section 296(2)** of the **Penal Code**. The evidence adduced by the prosecution witnesses points to the fact that the Appellant grabbed the bicycle from one of the complainants and rode away on it. He did not threaten nor harm the complaint. Although he was in company of another man, the other man accosted the other complainant and seized the bicycle from him. The two acts of dispossessing the complainants of their bicycles were done independently of each and at a distance from each other. It cannot therefore be said that the Appellant was in company of an accomplice when he stole the bicycle from one of the complainant's possession. There was no evidence adduced by the prosecution witnesses to suggest that the Appellant was armed at the time he stole the bicycle from one of the complainants. In the circumstances therefore, this court agrees with the Appellant that the ingredients constituting the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** was not established.

This court however notes that the offence of **stealing** contrary to **Section 275** of the **Penal Code** was established. The Appellant was found in possession of the bicycle a few minutes after he had robbed the same from the complainant. The bicycle was produced as an exhibit during the hearing of the case. The same was released to the complainant after the Appellant expressed to the court that he laid no claim to the said bicycle. This court invokes its jurisdiction as provided under **Section 179** of the **Criminal Procedure Code** which gives this court powers to substitute a conviction on a more serious offence with a minor offence where the facts disclose a minor offence. **Section 179** of the **Criminal Procedure Code** provides thus:

*(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."***

In the present appeal, it is clear that the offence that was disclosed from the evidence that was produced by the prosecution witnesses was that of stealing. Stealing is cognate offence of robbery with violence. In the premises therefore, the conviction of the Appellant on the two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** is quashed and set aside and substituted with a conviction of one count of **stealing** contrary to **Section 275** of the **Penal Code**. On sentence, since the Appellant has been in lawful custody for nearly four years, this court is of the considered view that the Appellant has been sufficiently punished. In any event, the maximum sentence for the offence of **stealing** contrary to

**Section 275** of the **Penal Code** is three years imprisonment. The death sentence imposed upon the Appellant is therefore set aside and substituted by an order of this court commuting the Appellant's sentence to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2017**

**L. KIMARU**

**JUDGE**