REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

HIGH COURT CRIMINAL CASE NO. 12 OF 2017

DOMINIC ETIR .... 1st APPELANT

EKUTAN LORON .... 2ND APPLEANT

-VERSUS-

REPUBLIC .... RESPONDENT

[An appeal from conviction and sentence from original Lodwar Senior Resident Magistrates CR. 418 of 2011 by E K Mwaita Principal Magistrate]

JUDGMENT

The 1st appellant Dominic Etir (was the 1st accused in the lower court) and second appellant Ekutan Loron was the 2nd accused. They were both, with another Ekukule Ekitoe who was acquitted charges with the offence of Robbery with violence contrary to section 296 (2) of the penal code.

Particulars of the offence are that on the 26th day of May, 2011 at Kalemchuch in Kakuma Turkana West District within Turkana County, jointly with others not before court, while armed with dangerous weapons namely knives and clubs robbed Philemon Niyonkuru of a Tiger Motorcycle Registration, No. KMCN191U. Engine number 161FMJ1007429 and Frame/Chatis number LSRPCKL14AAB00344 valued at Ksh. 76,000/= and at the time of such robbery, used actual violence against the said Philome Niyonkuru.

They also faced an alternative charge of handling stolen property contrary to section 322 of the penal code.

The particulars of the charge are that on the 9th day of June, 2011 at Nakoros Manyatta in Turkana West District within Turkana County otherwise than in the course of stealing, jointly dishonestly retained a motorcycle make TIGER registration No. KMCN 191U, Engine number 161FMJ1007429 and frame/chatis number LSRPCKL14AABoo344 knowing it to be stolen property.

The 1st and 2nd appellant premised their appeal on the following grounds.

1. **The trial magistrate erred in law and facts by convicting him on contradiction evidence from the prosecution.**

2. **The complainant in the case stated that he was robbed by people armed with riffles and in the charge sheet it was stated that knives and clubs, which were never brought before honourable court.**

3. **The said motorcycle was recovered from one Lore's home yet he did not testify before court.**

4. **The identification parade not properly conducted**

5. **This was a mere mistaken identity from the complainant and the police went ahead and charge me.**

The evidence before the trial court was that PW5 Cherkur Philomon was employed my Oscar Bimimma as motor cycle rider fo his motor cycle registration number. KMCU 191u to do bodaboda business within Kakuma area. On 25/5/2011 at about 2 pm he got a Congolese customer who asked him to take the customer to the reception centre for new Refugee Arrivals. The customer rode as pillion passenger and Philemon rode towards Kaletut road. On the way he met a group of people who tried to stop him. He did not stop. As he tried to come to a corner, he met three men sitting down who then hit the passenger with a metal and they fell down. He rose up and rode the motorcycle away and on going further he met four men who had guns. They ordered him to stop. He complied and they robbed beat him up and him of the motor cycle and the helmet. He ran away and reported the matter to police and was taken to hospital.

On 8/6/2011 PW1 Rashid Oloo who repairs motor cycle at Kakuma was at his place of work when two people came and asked him to go and repair a motorcycle. They took him to Nakoros where they found a motor cycle covered with a polythene paper. The people removed a front tyre to come and repair. While at Kakuma they met a person who wanted a motorcycle rim and the people who had it agreed to sell. Rashid became suspicious and informed police. When the two people came to the garage to sell the rim, they were arrested. The two people are the 1st and 2nd appellant.

PW4 Police Constable Geoffrey Cheboi acting on information went to the hotel of Mbugua at Kakuma and arrested 2nd appellant. He asked him about the motor cycle. 1st appellant mentioned 2nd appellant as the person who knew more about the motor cycle. 2nd appellant led him to Nakoros are where they found the 1st appellant. They arrested him. On interrogation he led them to a home in the next village where they recovered a motor cycle in a structure, without front wheel and number plate. They took possession of it and took the appellants to the police station.

The 1st appellant gave sworn evidence stating that on 9/6/2011 he left school to go for treatment when while on the way he was arrested and taken to Kakuma police station where an identification parade was conducted and he was picked by the complainant.

The 2nd appellant testified that on 14/6/2011 he went to sell a goat when he met people he thought were customers who then arrested him and took him to the police station. An identification parade was conducted and was picked by the complainant.

The 1st appellant filed written submissions. He submitted that there were material contradictions in the prosecution evidence; in particular on the issue of the commission of the alleged offence and the names of the complainants and the treatment notes produced, he submitted that the person in whose house the motor cycle was allegedly recovered from was not called as a witness and lastly that the charge as drafted is incurably defective.

The 2nd appellant Ekutan Lorun submitted that the present charges are as a result of ethnic rivalry between the Turkana and the Refugee at Kakuma: Complainant who had identified then at the identification parade had been with them in Lodwar. Remand before the parade and knew them well.

He further submitted that mzee Lore, in whose home the motor cycle was recovered was not called as a witness. He faulted the evidence of the clinical officer as dates for treatment were not indicated and finally the names of the complainant kept changing whenever he testified.

Mr. Kimanthi for the state opposed the appeal. He submitted that an offence of robbery and violence is committed when the assailant is armed with dangerous weapon or when they are in company of two or more people, which was so in this case. He submitted that the evidence of PW4 is clear that it is the appellant who lead them to where the motor cycle was recovered, and the appellant had been looking for a buyer of a rim taken from the motor cycle.

This is a first appeal. The duties of a first appellate court is to re-examine the evidence, and make its own conclusions but all the time giving allowance to the fact that it did not hear or see the witnesses giving testimony (Ekeno –v- R 1972 EA, 32)

The appellants were charged with offence of robbery contrary to section 295 as read with section 296 (2) of the penal code which provides:

> **Any person who steal anything, and, at or immediately before or after the time of stealing it, uses or threatens to use actual violence to any person in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retain, is guilty of the felony termed robbery.**
>
> **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, beat, strike or uses any other personal violence to any person. He shall be sentenced to death.**

The ingredient of the offence of robbery with violence which must be proved by evidence **are that there was theft of item, or property, that the robber was armed with a dangerous or offensive weapon, or was in company of one or more people or immediately before or immediately after this such robbery he threatened to or used actual violence on the complainant. (see Oluoch vs R 1983)KLR. The prosecution must also tender evidence of identification of the accused as the person who committed the offence.**

The learned trial magistrate in his Judgment stated the basis of his finding of guilty of the appellant as follows:

> **I am fully satisfied that the connection of accused 1 and accused 2 to this crime has been proved by the prosecution beyond any reasonable doubt. Even in t he absence of an identification parade, I would have still come to the same conclusion basing it on the principles of recent possession. The suspects were about 13 in number who attacked the complainant. The law provides that two or more qualifies an offence of this nature.**

To invoke this doctrine the prosecution must establish first that the property was found with the suspect; secondly that the property was positively identified by the complainant, that the property was stolen from the complainant that the property was recently stolen from the complainant. The proof of tome will depend on the easiness with which the stolen property can move from one person to another (**see Arum v r Kisum C.A CR 85 of 2005**) the prosecution must also establish that there were no co-existing circumstances which point to any person as having been in possession of the item. Once the prosecution has established the above the burden shifts from the prosecution to the accused to explain possession of the item complained of; if he fails to do so an inference is drawn that he either stole it or was a guilty receiver.

It is evident that the basis of the finding of guilt of the appellant was the alleged recovery of the motor cycle and the rim from the appellants which brought into play the doctrine of recent possession as a basis conviction.

The evidence relied upon by the trial court on recent possession of stolen property in that given by Rashid Oloo (PW2) and Police Constable Geoffrey Cheboi (PW4) Rashid Oloo in his evidence stated.

> **Two customers (men) came and said his bike was broken in the bush. They said it was in the village. I told them to wait. They did so. After that we went to that place. I used my motor cycle. We went towards Nakoros – about 20 kms. We reached Nakoros. We found the bike covered with a polythene. We opened it and found that the hands were bend. We then came back to take the spanners. On the way we found a certain Sudanesse looking for a rim for a bike. We went back to Nakeros. I started to repair it. We decided to remove the front tyre for adding pressure. When we arrived at the garage, they sold the rim to the sudanese mzee. I got suspicious and wondered why they were selling it. I called the police and explained. The next morning a police officer came to my garage. I waited for the two suspects. They arrived and the police then took them to the station and investigated the matter. I was not paid by them.**

As being cross-examined by the 1st appellant the witness replied

> **When you were arrested by police, I was not there. I only directed them to Mbugua hotel where I knew you were there. You said the motor cycle was damaged and needed to be repaired.**

PW4 Police constable Cheboi in his evidence testified.

> **At about half an hour, they called me. I went to the centre in a hotel for Mbugua at Kakuma. I was told of accused 2. I arrested him. We boarded the police vehicle to the station. I asked him if he had any information about the motor cycle. He said that the motorcycle had been sent by accused 1 so as to sell the spare part and accused 1 knew where the motorcycle was. Accused2 mentioned accused 1 by name alias K K. I now went to look for the accused 1 at Nakeros. At Nakeros, we found accused 1. We arrested him. I asked him about the motorcycle. He told me that the motorcycle was in the next village and it was for the other four men who had called him to go and train them how to ride. We went to the next village which was about 500 metres. At the village we entered into a certain structure and found the motorcycle without the front wheel, the front tyre and the number plate. We took it and returned to the station. At the first village, we arrested accused 1. He then took us to where the four men were who had hired him to train them. We didn't find them.**

The alleged possession of the motor cycle by the appellant is based on the evidence of PW2 Rahid Oloo. His evidence is that the appellant approached him to repair his motor cycle from which they removed then rim to sell at Kakuma arousing his suspicion. The rime was said to have been sold to mzee Mohamed Adeu Arun who his evidence made reference to giving money to some two boys. However on being cross-examined by the appellant he said he did not know them and therefore the appellant would not be the people he bought the rimi from. On the motorcycle police constable Cheboi testified that having arrested 2nd appellant, he led them to 1st appellant who was known as K K. They met him at his home in Nakoros and he was asked about a motor cycle. He led them to the next village about 500 meters away where they recovered a motor cycle. The 1st appellant explained that he had been hired by 4 people to train them to ride. The motor cycle was recovered from a structure which the witness police officer belonged to one Loree. Who was however not called as a witness. However he confirmed that they did not search the 1st appellants' house. This was on 9/6/2011 and the robbery according to the complainant occurred on 26/5/2011.

Was the motor cycle recovered in the possession of the 1st appellant? The evidence is that the motor cycle was not recovered from his house; at least not in the house he was found sleeping. On being interrogated is when he led police to a structure in another village where the motor cycle was recovered in the home of mzee Loree. Loree was not called as a witness in the case to confirm if it is appellant who had taken it there. The first appellant explanation was that he had been hired to train some 4 men on how to ride the motor cycle and that explains how he came to know of its where about.

The motor cycle was stolen on 26/5/2011 and recovered on 9/6/2011 14 days after the robbery. There was no effort by the investigating officer to discredit the explanation of the 1st appellant that he knew of the existence of t he motor cycle as a result of being hired to train some people how to ride. The approach taken by the prosecution that since he had them to the place where it was recovered them place where it was recovered then he was in recent possession is clearly wrong.

To rely on the doctrine of recent possession, the prosecution must establish not only possession but also demonstrate that the appellant did not give a reasonable explanation as to how he came to be in possession and if he fails to do so an inference is drawn that he either stole it ot was guilty as a receiver. Where their explanation is given early, it is the duty of the prosecution to demonstrate to the satisfaction of the court that the appellant has not given a reasonable explanation and therefore not discharged the evidence burden. Upon evaluating the evidence. I am satisfied that the prosecution evidence against the appellant on the issue of recent possession was not sufficient for the trial court to rely on the doctrine of recent possession as a basis of finding the appellant guilty of the offence.

The 2nd issue for determination is whether the complainant identified the appellants as among the people who assaulted and robbed him. This is both at the scene of the robbery and at the identification parade.

The complainant testified that he was attacked by 3 groups of people. The first group comprised of 6 people he met at the hill, 3 men who had a metal bar, he met around the c corner and 4 men he met who had guns. They all attacked him together when he was stopped by the people with guns.

He said they attacked him for 30 minutes and later testified that it was one hour. They were not people he had known before but he was able to see them. He did not give his description to police however, PW9 CIP Benjamin Iwade the OCS Kakuma conducted the identification

parade where the appellants were picked by the complainant. The appellant in their submissions state that after they were arrested, the complainant too was arrested and place in custody. There were remanded at the same places and were taken from Lodwar remand to Kakuma Police Station where the parade was conducted. The other person called Lochi Loree in whose home the motorcycle was found also participated in the parade and picked the 1st appellant. PW10 the investigating officer confirmed in his evidence that the complainant had also been arrested being investigated for air offence of stealing by servant The appellant attack the credibility of the identification parade because it was done and yet they had been with the appellant as he had been in custody; and therefore the complainant has seen the complainant had been held in custody with the appellant before the parade; then if follows that the integrity of the identification parade had been severely compromised and any evidence arising there from is of doubtful probative value. It is my finding therefore that the appellant were not positively identified as the people who robbed the complainant.

In the result, I allow this appeal quash the conviction and set aside the sentence of Death imposed on the 1st appellant Dominic Etiir, 2nd appellant Ekutan Loron for the offence of robbery with violence contrary to section 296 (2) of the penal code. The 1st and 2nd appellant be set free unless otherwise lawfully detained.

Dated and signed at Lodwar this 19th day of December 2017.

S N RIECHI

JUDGE