



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.34 OF 2014**

**JOHN NJUE NJAGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera  
Cr. Case No. 4508 of 2012 delivered by Hon. D. M. Ochenja, on 7<sup>th</sup> October, 2012)*

**JUDGMENT**

John Njue Njagi was charged with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the case were that on 13<sup>th</sup> October, 2010, at Kitengela Township in Kajiado District within Rift Valley Province Jointly with another not before court, being armed with crude weapons namely; rungun, robbed Evans Bundi Miruka of a motorcycle Reg. No. KMCG 783X make Bajaj Boxer blue in colour valued at Kshs. 87,00/= and at the time of such robbery, used actual violence to the said Evans Bundi Miruka. The Appellant was tried and convicted accordingly. He was sentenced to death. He was dissatisfied with both the conviction and sentence, hence this appeal.

In his amended grounds of appeal filed on 21<sup>st</sup> June, 2016, he was dissatisfied with the trial court holding that he was properly identified, that the manner in which he was arrested left doubt that he was a culprit, that the evidence of the prosecution witnesses was not credible, that the trial court rejected his defence without giving reasons and that in any event the court shifted the burden of proof on him.

**Submissions**

The Appellant relied on written submissions filed alongside the amended grounds of appeal. On identification, he submitted that in the first report that the complainant made at Kitengela Police Station he did not indicate that he would be able to identify the person who robbed him. In this case, the complainant did not give a description of the Appellant so as to assure the police that he was one of the robbers. Furthermore, the Appellant was the sole identifying witness, in which case the trial court ought to have treated his evidence with a lot of caution given the circumstances that the robbery was committed.

The Appellant submitted that the learned magistrate did not properly apply the doctrine of recent possession. According to him, PW1 testified that he was arrested while trying to sell a tube from one of the tyres of the stolen motorcycle. It was said that the complainant (PW1) identified the tube because it had six patches. Unfortunately, PW3 who was the owner of the motorcycle was not asked to identify the

tube which gave doubt whether the tube brought to court belonged to PW3 or was the tube that was stolen.

The Appellant also challenged the credibility of the evidence relating to his arrest. He submitted that PW4 testified that he was arrested on 15<sup>th</sup> October, 2010. This was sharply contrasted by the evidence of PW1 who testified that he was arrested three weeks after the incident which could have been on or about 3<sup>rd</sup> November, 2010. Finally, he submitted that the case was not proved beyond a reasonable doubt.

Learned State Counsel Ms. Nyauncho opposed the appeal. She submitted that although no identification parade was conducted, the Appellant was properly identified by the complainant. He was arrested in possession of a tube for one of the tyres of the stolen motorcycle which PW1 identified through six repair patches. According to Ms. Nyauncho, PW1 was well placed to identify the tube as he is the one who used to take the motor cycle for repair. She submitted that PW4 corroborated the evidence of PW1 in that it was within his knowledge that the Appellant was rescued from a mob that wanted to lynch him after he was arrested with the stolen tube. Furthermore, before the robbery, the Appellant had asked PW1 to ride him to the Athi River Prison area. Moreover, the scene where the motorcycle was hired was well lit with security lights. PW1 also noted that the Appellant had a missing lower tooth which the trial court confirmed. PW1 also described the manner in which the Appellant was dressed at the time of the robbery. In his testimony, he stated that the Appellant was wearing a red-striped shirt which he (PW1) clung on to during the robbery forcing the Appellant to leave it behind with him. PW1 in turn, took it to the Police Station. Finally, she submitted that the charge was proved beyond all doubts and urged that the appeal be dismissed.

In rejoinder, the Appellant submitted that if PW1 had properly identified him, he would have properly described him to the police as his evidence was that there was sufficient lighting when he was hired by the robbers and there were other people who would have confirmed his identity.

### **Evidence**

This being the first appellate court its duty is to re-evaluate the evidence on record and come up with its own conclusions and inferences but give due regard to the fact that it has neither seen nor heard the witnesses. See **Pandya vs Republic [1957] KLR 19, and Njoroe vs Republic [1987] KLR 19**. The case for prosecution is well summarized in the evidence of PW1 who was the complainant. It is important that I point he testified thrice. His initial testimony was taken by Hon. Onyango, SRM. The Appellant thereafter applied to recall PW1 for further cross-examination before the succeeding Magistrate, Hon. F. Nyakundi PM. The court noted that since the handwriting of Hon. Onyango was illegible, the evidence of PW1 should be taken afresh. He testified a third time before Hon. A.W. Mwangi on 11<sup>th</sup> July, 2012 after she took over the conduct of the trial from Hon. F. Nyakundi.

**PW1**, was a boda boda (motorcycle) rider in Kitengela town. On 13<sup>th</sup> October, 2010 at about 10.00 pm, he was at the bus stage in Kitengela town with David Odhiambo and Kelvin. His motorcycle was registration No. KMCG 783X. Two men approached him and asked him to ride them to the Kitengela Prison area at an agreed fare. On arrival at their destination, the man who sat at the back alighted and kicked the motorcycle as a result of which PW1 and the other passenger in the middle fell down. The middle passenger held his neck. According to PW1, the person who kicked the motorcycle was the Appellant. He then ordered one of the other men to kick him and he hit him with a rungu and he fell down. The robbers then left with his motorcycle. PW1 was left holding a blue sweater belonging to the Appellant. He then called his wife who together with the other three men went to the scene where he had been abandoned. He then reported the matter to Kitengela Police Station. He was issued with a P3 form to enable him seek treatment. He sought treatment at Kitengela Health Centre. After three days, a man by the name Ben called him and informed that there was a tube that was being sold to him. He went and identified the tube as belonging to the stolen motorcycle. It had been repaired six times and PW1 identified the repair patches to be similar to those of his tube. His further evidence was that the bus stop was well lit with security lights as a result which he was able to identify the persons who hired him to transport them to Kitengela Prison area.

The Appellant's further evidence was that one of the passengers was short and had a missing lower front tooth. The other passenger was tall. The short passenger was wearing a blue sweater and the tall one a jacket whose colour he could not remember. On arrival at the destination, the tall passenger alighted and removed some money which he intimated was for payment of the fare. The short passenger was left on the motorcycle and as the fare was being paid he held his throat and both started struggling. In the struggle, the Appellant pulled the short man's jacket which he was left with when they (robbers) fled. The short man then hit him with a rungu on his chest. He became dizzy and fell down. That is when the robbers escaped with the motor cycle. He received injuries on the chest, legs and knees.

**PW2, Geoffrey Wagela** who was a Clinical Officer at Kitengela Health Centre examined the PW1 on 18<sup>th</sup> October, 2010 on allegations of being assaulted by a person known to him. He had injuries on the chest and head. Both lower and upper limbs were tender. The injuries were one day old and the weapon used was blunt. He filled and signed the P3 form which he produced as evidence.

**PW3, Charles Okoth Ondeng** was the owner of the stolen motor cycle. He produced the purchase receipt dated 11<sup>th</sup> March, 2010 which showed that the motor cycle was purchased at Kshs. 77,000/= .His testimony was that he was only informed of the robbery on the fateful night and thereafter told that the Appellant had been arrested as he tried to sell one of the tubes of the motorcycle.

**PW4, Police Constable Alice Muriithi** was the investigating Officer. She received the report of the robbery on 13<sup>th</sup> October, 2010 at 11.40 pm. The report was made by PW1. PW1 also handed to the police a sweater he had snatched from one of the assailants. On 15<sup>th</sup> October, 2010 at around 9.00 am, police officers from Kitengela Police Station were informed that there was a person being bitten by a mob. They proceeded to rescue the victim who happened to be the Appellant. According to PW4, the Appellant was trying to dispose off a tube believed to have been stolen from the subject motor cycle. After compilation of the evidence, he found the Appellant culpable and charged him accordingly.

After the close of the prosecution's case, the trial court ruled that the Appellant had a case to answer and was required to put in his defence. He gave a sworn defence in which he denied having been involved in the robbery. He recalled on 18<sup>th</sup> October, 2010 while in the house of one Sammy, a person visited Sammy and at the time, Sammy was carrying a small bag. He requested him to accompany him to Kitengela Town where he was to give him some money. Before they arrived in town, Sammy and his friend stopped at a junction which was crowded by many boda boda riders. Sammy then pointed at him to the boda boda riders after which he gave them the polythene bag he was carrying. He told them he found him in possession of the polythene bag. The riders interrogated him about the stolen motorcycle but he denied any knowledge about it. The riders then started beating him but he was rescued by the Police. He was injured but police took him to hospital where he was treated.

### **Determination**

After evaluation of the evidence on record I find the main issue for determination to be whether the case was proved beyond a reasonable doubt. Under this head is the question of whether or not the Appellant was properly identified. From the judgment of the learned trial magistrate, she convicted the Appellant on grounds that he was properly identified by PW1 by missing teeth from the front lower and upper jaw. Thereafter, he was found in possession of a tube from the stolen motorcycle which tube was positively identified by PW1. In the learned Magistrate's view, whereas the Appellant stated in defence that the tube was planted on him, he never gave a reasonable account of how he would have been framed yet the tube was produced in court. According to the learned magistrate, the prosecution's witnesses gave evidence in good faith and she had no reason of doubting them. She found the Appellant's defence as evasive and a mere denial which she dismissed. It is therefore important from the background of the case that I revisit the evidence on identification.

According to PW1, he was hired by the Appellant and another to transport them to the Athi River Prison area. He testified that he was able to identify particularly the Appellant with the help of the security light at the point that he was hired; at the bus stage. It is here that he saw the Appellant had front missing teeth

which the trial magistrate confirmed. PW1's further testimony was that the Appellant was wearing a black sweater with a red strip, blue jeans and a red muffin cap which covered his ears.

It is a well known principal of identification that if a witness alleges that he was able to identify his attackers, that testimony must be in consonance with the report he first makes with the police of the incident. The Appellant requested for the provision of the OB(Occurrence Book) abstract which bore the first report made at Kitengela Police Station. This was OB No. 110/10/010. The OB extract was provided to the Appellant and the court and it read as follows:

***“To station is one Evans Bundi C/O tel. no 0724-775830 a boda boda within Kitengela town and reports that on 13/10/10 at about 10 pm he was hired by two people to take them to prisons and on arrival, the two turned to be robbers and robbed the reportee of the motorbike registration No. KMCG 783X make Bajaj Boxer and they drove to unknown destination. The two were armed with rungun. Now seeks police help.”***

From the above report, it is clear that PW1 did not describe in any way the physical features of any of the robbers. It is also not stated that he was left behind with a sweater belonging to one of the robbers. Of particular interest which was emphasized by PW1 and the trial magistrate in her judgment was the fact of the missing teeth of the assailant. This was however neither noted in the first report. In lieu thereof, when recording his statement, PW1 would have described the physical appearances of his robbers. This was neither borne out of his testimony nor of the investigating officer PW1. That being the case, it is doubtful to believe that the person he described in court as short, dark, wearing a blue sweater with front missing teeth was obviously the Appellant. In any case, there was no evidence that only the Appellant had front missing teeth in the entire Kitengela area. There was also no evidence that to corroborate PW1's assertion that the sweater he took to the Police Station belonged to the Appellant.

The court cannot also overlook the fact that PW1 gave testimony three times. In his initial testimony on 26<sup>th</sup> May, 2011, he did not in any way describe the physical appearance of the Appellant. All he stated was that two men hired him and on arrival to their destination turned to be robbers. In that testimony, he described the Appellant as the person who kicked him and offloaded him from his motorcycle before it was stolen. It was only in his second testimony on 24<sup>th</sup> January, 2012 that he introduced the aspect that the Appellant was short and had some missing teeth. It is important to note that PW1 not having described how the Appellant looked, and had an opportunity of previously seeing him in court may have been influenced to describe his physical appearance in his later testimonies.

The learned trial magistrate also failed to warn himself of the dangers of convicting the Appellant based on evidence of a single identifying witness. There are certain conditions that must be considered before a court convicts an accused person on basis of the evidence of a single identifying witness. In **Maitanyi vs Republic [1986] KLR 198** at P.200 the Court of Appeal held that:

***“Although the lower court did not refer to the well-known authorities Abdalla Bin Wendo & Another vs Reg. [1953] 20 EACA 166 followed in Roria vs Rep [1967] EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***

***“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with 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, pointing to guilt, 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 possibility of error”***

In the present case, it is safe to conclude that the conditions of identification were not favourable. It was at night at 10.00 pm when PW1 was hired. Although he testified that there was sufficient security light, he

did not demonstrate how sufficient that light was. Besides, at the time he was approached by the robbers, he was in the company of two men known to him, namely Odhhiambo and Kevin. None was called to corroborate his evidence that the bus stage was well lit. In the foregoing, I find it difficult to hold that the evidence of identification was sufficient in proving that the Appellant was one of the persons who robbed PW1.

This then leads me to conclude that the only evidence available that would have incriminated the Appellant was his being found in possession of the allegedly stolen tube; and that the same having recently stolen, he must have been involved in the robbery.

According to PW1 he identified the tube with six repair patches. In my view, this is a laughable mode of identification since there existed no evidence that only PW1's tube within Kitengela had been repaired six times. Moreover, it is also doubtful how PW3 who was the owner of the motorcycle had no idea about the repairs. In any case, the person to whom the tube was being sold was not called to testify. He would have shed light on why he suspected that the tube was a stolen property. Moreover, the robbery had taken place on 13<sup>th</sup> October, 2010 whereas the arrest of the Appellant was on 15<sup>th</sup> October, 2010. Although only three days had lapsed since the robbery, the nature of the subject property, being a tube is one that can change hands so frequently within a short period. Therefore, it was erroneous of the learned trial magistrate to conclude that merely by the existence of six repair patches the Appellant was the robber. I find, in the circumstances, that the learned trial magistrate did not properly apply the doctrine of recent possession. The principals to be followed in the application of the doctrine of recent possession were well enunciated in the case of **Malingi vs Republic (1989) KLR, 225** in which the Court of Appeal stated that:

***“By application of the doctrine (to wit doctrine of recent possession) the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there're are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver. (emphasis is ours).*”**

In the present case, there is no doubt that a motorcycle was robbed of PW1. One of its components, of course, was a tube from one of the tyres. However, PW1 was not able to identify the adduced tube to the satisfaction of the court that it belonged to him. In that regard, no inference can be drawn that it was the Appellant who stole the motor cycle or that the tube produced in court belonged to the motor cycle.

The other important issue raised was that the learned trial magistrate did not consider the Appellant's defence. It is however clear from the judgment that the court summarized it before dismissing it as lacking merit. His contention in that regard has no merit.

On evaluation of the entire evidence, there is no doubt that a robbery occurred against PW1 whose elements were established. He was robbed by a gang of more than one person who used force and inflicted injuries on him with the use of rungu. In the course of the robbery, he lost a motor cycle. However, the evidence falls far short in establishing that the robbery was perpetrated by the Appellant. Respectively I find that the prosecution did not prove its case beyond a reasonable doubt. I find the appeal meritorious. I quash the conviction and set aside the death sentence. I order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

**DATED and DELIVERED** in Nairobi this 26<sup>th</sup> day of JULY, 2016

**G.W. NGENYE-MACHARIA**

**JUDGE**

***In the presence of:***

1. Appellant in person.
2. Ms. Akuja for the Respondent.