



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 2 OF 2015

MWANIA MUTUA A.K.A. MUTISYA MUEMA.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal Case No. 219 of 2013** by **Hon. S. K. Mutai Ag. P M** on 01/04/14)*

J U D G M E N T

1. **Mwania Mutua alias Mutisya Muema** was charged with the offence of **Robbery with Violence** contrary to **Section 296 (1)** of the **Penal Code**. Particulars being that on the **25th** day of **September, 2013** at **Kyambi area** in **Katulani** within **Kitui County** robbed **Musyoka Kiema** a **SKYGO 125-3 Motorcycle** registration number **KMDB 814Z** valued at **Kshs. 70,000/=** the property of **Jeff Kitheka Kiema** and immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Musyoka Kiema**.

2. In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)(2)** of the **Penal Code**. The particulars of the offence being that on the **5th** day of **October, 2013** at **Mutha Market** in **Mutomo District** in **Kitui County** otherwise than in the course of stealing, dishonestly undertook the disposal of a **SKYGO 125-3 Motorcycle** registration number **KMBD 814Z** knowing or having reason to believe it to be stolen.

3. He was tried, convicted and sentenced to serve **14 years imprisonment**.

4. Being dissatisfied with the conviction and sentence he appealed on grounds that:

- It was unsafe to base the conviction on evidence of the identification parade which was done contrary to the police force standing orders.
- Crucial witnesses were not called.
- No evidence of possession of the motor-cycle was adduced.

5. Facts of the case were that PW1, **Jeff Kitheka Kiema** purchased a motorcycle type **SKYGO 125-3** frame number **F3PCJ 208 PB 005806** Engine Number **05095159** which he entrusted with his brother, PW2, **Musyoka Kiema**. On the **25th** **September, 2013** while he was operating the motorcycle he was hired by a customer at about **7.30 p.m.** They used the **Kyambiti** route and found the road impassable. He opted to turn back. While in the process of turning, a rope was tied around his neck. He struggled and removed the helmet from his head. His assailant threatened to kill him. On seeing the person remove a piece of metal from his pocket he ran away. He reported the matter to the Administration Police **Maluma**

Camp the following day.

6. On the **4th October, 2013** PW3 **Muluvi Ndua** who had motor cycle registration No. **KMCM 3342** make **SKYGO** was hired by the Appellant to take him to **Mbitini**. On arrival at the stage they found two (2) women that the Appellant talked to. He left and returned with a blue motorcycle and another person. They haggled over the price. The other person ran to the police station and made a report. They were arrested. An identification parade was conducted where the Appellant was identified by PW2 as the person who robbed him of the motorcycle. Subsequently he was charged.

7. When put on his defence, the Appellant gave sworn evidence. He recalled having been at his aunt's shop at **Mutha** on the **25th September, 2013**. He stated that on the **27th September, 2013** he took his grandmother who was ailing to **Kitui District Hospital** for treatment. On the **5th October, 2013** while coming from the Hospital using motor-cycle registration number **KMCM 3342** owned by **Muluvi Ndua** as means of transport he encountered people at **Mutha Market**. He learnt that a person had been arrested while in possession of a motorcycle. He went to check only to find the person was known to him. They went to **Mutha Police Station** where he was placed in custody and forced to record a statement. The other person was released while at **Mutomo Police Station**.

8. In his written submissions the Appellant faulted the trial court for relying on identification evidence that was not cogent.

9. The State through **Ms. Awour** opposed the appeal. She submitted that the charge was proved to the required standard. She urged the court to affirm the conviction and enhance the sentence imposed by the trial court which was illegal.

10. This being a first appeal, I am duty-bound to re-evaluate all the evidence adduced at trial and to draw my own conclusions. In doing so I have to appreciate the fact that I neither saw nor heard witnesses testify at trial (**See Njoroge vs. Republic (1987) KLR 99; Okeno vs. Republic (1972) EA 32**).

11. The manner in which the identification parade was conducted has been faulted. Such an issue was considered in the case of **David Mwita Wanja & 2 Others vs. Republic Criminal Appeal No. 117 of 2005** where the court stated thus:

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this court emphasized that the value of identification parade was held with scrupulous fairness and in accordance with the instructions contained in police force standing orders. (See R. V. Mwongo s/o Mahaa (1936) 3 EA CA 29). There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia V. Republic (1986) KLR 422 where the court stated at page 424:-

“It is difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interest of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be conducted by the witness that the man in the dock, is a person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

Indeed, police form 156 which is designed pursuant to force standing orders issued by the Commissioner of Police under **Section 5** of the **Police Act Cap 5 Laws of Kenya** and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be

observed. As far as is relevant to this case, **Standing Order 6(iv)(d)** and **(n)** state as follows:

“6(iv) wherever it is necessary that a witness be asked to identify an accused/suspected person, the following must be followed in detail:-

.....

.....

.....

(d) The accused/suspected person will be placed at least with eight persons, as far as possible of similar age, height, general appearance and class of life himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

.....

.....

.....

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;”

12. PW6 who conducted the identification parade stated that he informed the Accused of the purpose of the parade and he endorsed the parade form. He arranged the parade comprising of **nine (9)** members. The Accused stood between position 3 and 4. The witness was called and he picked the Accused. On cross examination the witness stated that the Accused signed the parade form prior to the parade being conducted.

13. The witness failed to state the appearance of persons who took part in the parade. It cannot be assumed that the persons generally looked like the Accused and of a class similar to his. This may have been prejudicial to the Accused.

14. PW2 stated that he recognized the Accused by voice. He alleged that he was a person he knew very well as his customer and even knew his home.

Ordinarily an identification parade is carried out for a witness to identify a person who was unknown to him/her having seen him/her at the time of occurrence of the offence. If indeed PW2 saw the Appellant and heard his voice. Having known him per the allegation, nothing would have been easier than divulging what he knew at the point of reporting to the police.

15. A question arose whether the identification was visual or voice in the circumstances. At the outset PW2 said that he saw the Appellant since there was electricity and he was his customer. When re-called for further cross examination he stated that he identified the Appellant by voice. In the case of **Choge vs. Republic (1985) KLR 1 (14a)** the court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the Appellant’s voice and recognized it and that conditions obtaining at the time the recognition was made were such that there was no mistake in testifying to that which was said and who had said it. **(See also Karani vs. Republic (1985) KLR 290).**

16. There was no indication that while at the parade the witness identified the Appellant by voice.

17. PW4 acted on information received and arrested the Appellant. He recovered a motorcycle that he

identified as registration number **KMDB 814Z**. It was his testimony that he got the information at **5.45 a.m.** On cross examination he stated that there were two (2) motorcycles but only one had been stolen. He got the information from his informer that the Appellant wanted to sell the motorcycle. At the point of being assigned the duty of investigating the case PW5 found two (2) suspects having been arrested and there were two (2) motorcycles. In the course of his investigations only one suspect, the Appellant, was identified.

18. PW3 the Appellant's co-suspect stated that he was hired by the Appellant to take him to **Mbitini** where he got a motorcycle. A man went to where the Appellant had left him with the motorcycle and they negotiated over the price. The alleged person was not called as a witness. PW4 said his informer told him that the motorcycle was being sold and he was not called as a witness. In the case of **Kigecha Njuga vs. Republic (1965) EA 773** the court stated thus:

“Informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their lives may be in danger. But if the prosecution desire the courts to hear the details of the information an informer has given to the police, clearly the informer must be called as a witness.”

19. In his defence the Appellant stated that he was using PW3's motorcycle registration number **KMCM 334Z** on his way to **Kitui**. He met people at **Mutha** and got information that a person had been arrested with a motorcycle. He went to **Mutha Police Station** to find the person was known to him. He was arrested. The Prosecution had a duty of disapproving the defence put up wherever possible. The person who was alleged to have haggled over the sale of the motorcycle was not called as a witness to tell the court the details of the alleged sale. And if he was the informer the details of information given to the police. The person who was called as a witness was PW3 who was arrested with the Appellant and later released after he was not identified.

20. PW3 was arrested because he was suspected to be the Appellant's accomplice. In the case of **Kinyua vs. Republic (2002) 1 KLR 256** the Court of Appeal stated thus:

“(i) The firm rule of practice is that evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice is telling the truth upon the aid of assessors on the dangers of doing so.

(ii) Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of a witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct itself accordingly.

(iii) If the court decides that the accomplice witness' evidence, though credible requires corroboration, the court must look for, find and identify the corroborative evidence.....”

21. In **Karanja & Another vs. Republic (1990) KLR (Criminal Appeal 92 of 1990)** the court of Appeal stated that:

*“Although there may be cases of an exceptional character in which an accomplice's evidence alone convinces the court of the facts required to be proved, the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons. The accomplice is likely to swear falsely in order to shift guilt from himself. As a participant in the crime, he is an immoral person who is likely to disregard the sanctity of an oath. He gives his evidence either under a promise of a pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution – see **Asumani Logini s/o Muna vs. Republic (1943) 10 EA CA***

92. An accomplice is of course a competent witness but corroboration should be found for his evidence before a conviction can be based upon it. The corroboration which should be looked for is, as laid down in the case of Baskerville (1916) 2 KB 659, some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.”

22. In reaching his finding the learned trial magistrate stated thus:

“I find that the evidence of PW2 is confirmed by the evidence of PW1, PW3, PW4, PW5 and PW6 respectively. The five witnesses actually confirmed that the motorcycle registration number KMDB 814Z was stolen by the accused on the material night of 25/9/2013 Likewise I find the defence put forward by the accused is not only wanting but also unconvincing hence the same does not challenge the prosecution’s case which I find strong and credible. The accused in his defence never elaborated how he came across the motorcycle registration number KMCM 334Z owned by PW3. Neither did he call the said Muluvi Ndua (PW3) to substantiate his claim....”

23. It is apparent that the trial court did not make a finding on the credibility of PW3 as a witness. Further, the trial court shifted the burden of proof to the Appellant by arguing that he did not call PW3 as a witness to substantiate his claim. The legal burden of proof in Criminal Cases rests on the Prosecution throughout the trial. The burden can never shift to the Accused. He has no obligation to prove his innocence. **(See Woolmington vs. DPP (1935) AC 462.**

24. The police arrested both Accused and PW3 for suspicion of having stolen the motorcycle registration number KMDB 842. There was no corroboration of PW3’s evidence that the Accused possessed the motorcycle prior to being recovered by the police.

25. Having re-evaluated evidence adduced I find that convicting on evidence adduced was unsafe. Consequently I allow the appeal by quashing the conviction and setting aside the sentence passed. The Appellant shall be set at liberty unless otherwise lawfully held.

26. It is so ordered.

Dated, Signed and Delivered at Kitui this 20th day of July, 2016.

L. N. MUTENDE

JUDGE