



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 34 OF 2012

(From the original Conviction and Sentence in the Criminal Case No. 1670/2010 of the Senior Resident Magistrate's Court at Kwale: E. K. Usui Macharia – PM)

MBOVU NYAMAWI MGANDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein **MBOVU NYAMAWI MGANDI** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at Kwale Law Courts. The appellant together with another accused (who has not appealed) were both arraigned in court on 4th December, 2010 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that:

“On the 29th day of October, 2010 at Shimanya village in Kwale County within Coast Region, jointly robbed NICODEMUS KALUGO JONATHAN a motor bike make Sanlg valued at Kshs. 54,165/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said NICODEMUS KALUGO JONATHAN.”

Both accused persons also faced an alternative charge of **HANDLING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 322(2) OF THE PENAL CODE**. The appellant and his co-accused entered a plea of ‘*Not Guilty*’ to both charges and their trial commenced on 26th June, 2011. The prosecution led by **CHIEF INSPECTOR MUIRURI** called a total of six (6) witnesses in support of their charge.

PW2 NICODEMUS KALUGO JONATHAN told the court that on 29th October, 2011 he was working with a motor cycle registration number KMCJ 143X which he had hired for use as a boda boda taxi. At about 1.00 p.m. two young men approached him and requested for his numbers so that they could call him later for business. At about 5.00 p.m. **PW2** received the expected call. The two men asked him to pick them up and ferry them to Shimanya. **PW2** went and picked them. They agreed on a fare of Kshs. 300/=. Both men climbed onto the motor cycle and they rode off. At some point the men said they needed to alight as they were to proceed to their destination on foot. **PW2** stopped the motor cycle. The

two men then turned on him. One held his throat and demanded that he hand over the motor bike. **PW2** had no option but to comply. He saw the two men pushing the motor bike into a forest and he ran to seek help. **PW2** also alerted police as well as the owner of the motor cycle at out the theft. He next day the police and village chairman raided the house occupied by the suspects at 1.00 a.m. The motor cycle was found hidden behind the house. **PW2** identified it as the one stolen from him. He also identified two of the men found sleeping inside that house as his attackers. The two were arrested and taken to the police station.

Upon the close of the prosecution case both appellant and his co-accused were found to have a case to answer and were placed on their defence. They each denied the charge. On 28th February, 2012 the trial magistrate delivered her judgment in which she convicted both accused on the main charge of Robbery with Violence. The appellant was thereafter sentenced to death but his co-accused who was found to be a minor was ordered to be detained at the President's pleasure. Being dissatisfied with both his conviction and sentence the appellant filed this appeal.

Being a court of first appeal our obligation is to re-examined and re-evaluate the evidence on record and to draw our own conclusions on the same.

PW2 told the court that on the material day he was in possession of a motor bike registration number KNCJ 143X make Sanlg which he had hired for use as a boda boda taxi. **PW1 KYALO JOHN KALOKI** confirms that he is the owner of the said motor cycle and also confirms that he had hired the same out to **PW2** for use as a taxi at a rate of Kshs. 400/= per day. **PW1** produces as evidence of his ownership the log book **Pexb1** as well as a receipt for Kshs. 65,165/= being the purchase price of the motor bike **Pexb2**. There can therefore be no doubt that **PW2** had in his possession the said mot bike on the material day.

PW2 went onto narrate how while he was going about his business at about 1.00 p.m. he came across appellant and his co-accused. They asked **PW2** to give them his phone number indicating that they would require his services later on. At 5.00 p.m. the same day the two called **PW2** and asked them to pick them up and ferry them to Shimanya. **PW2** went and picked them and drove them to the point where he was robbed. At all times when **PW2** met the appellant and his companion it was broad daylight. He held conversations with them and the evidence is that he met them not once but twice. As such **PW2** did interact with the appellant and had ample time and opportunity to see him well. In the circumstances of this case there was no possibility of a mistaken identity. The very next day **PW2** accompanied police and the village chairman to a house in Lukore village where they found three (3) men sleeping. **PW2** was able to positively identify the appellant as one of the men who had robbed him. Although the evidence on identification is that of a single witness, we find the same to be both convincing and persuasive. The failure to conduct an identification parade does not in any way negate or water down such evidence. In any event given that **PW2** was present when the appellant was arrested an identification parade would have been superfluous.

Aside from the evidence on identification there is also the evidence of recovery of the stolen motor cycle which implicates the appellant. **PW2** told the court that the motor bike stolen from him was found hidden behind the house in which the appellant was arrested. This evidence was corroborated by **PW3 KOMBO MAMBO**, one of the community policing officers in Lukore village. He confirms that he and others raided the house of the suspect on the night of 29th October, 2010. **PW2** pointed out the appellant who was inside the house and **PW3** confirms that they recovered the stolen motor bike within the compound. **PW5 CORPORAL ANTHONY WAMBUGU** re-arrested the appellant and took possession of the motor bike. Both **PW1** and **PW2** identified the said motor cycle of which photographs were produced in court. There can be no doubt that this was the very same motor bike stolen from **PW2** the previous day.

The fact that the appellant was found in possession of the stolen motor bike the very day after it was stolen gives rise to the doctrine of '*recent possession*'. The appellant cannot explain how the stolen motor bike came into his possession. The only logical conclusion is that he was an active participant in its theft. We therefore find that the evidence against the appellant in this matter is water-tight. There can

be no doubt of his involvement in the theft.

In the circumstances of this case, there being more than one assailant and the threat of actual harm in that **PW2** was strangled to compel him to give up the motor bike make this incident a robbery with violence as envisaged by section 296(2) of the Penal Code. The trial magistrate gave due consideration to the appellant's defence but dismissed the same. We find no grounds to fault her on this. On the whole we are satisfied that the appellant was properly convicted. The appeal has no merit and is hereby dismissed. We further uphold the death sentence as provided by section 296(2) of the Penal Code.

Dated and delivered in Mombasa this 19th day of February, 2014.

M. ODERO

JUDGE

S. MUKUNYA

JUDGE