REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 43 OF 2011

BEUMAZI NDORO CHAKA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1353 of 2009 of the

Senior resident Magistrate's Court at Kwale – Hon. Usui Macharia - SRM)

JUDGMENT

The above mentioned appellant was Convicted and Sentenced to suffer death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the charge being that:-

> ***"On the 7th day of September, 2009 at about 5:10 a.m. at Mirihini village Mwereni Location in Msawbweni Kwale County, jointly, with another not before the Court, robbed BAKARI MWAREJA one bicylcle make Phoneix valued at Ksh. 3,500/= and at or immediately before or immediately after the time of such robbery wounded the said BAKARI MWAREJA".***

The main grounds for appeal are;-

1. That the charge was defective for reason of omission of the words **"while armed with dangerous or offensive weapons"** and further that Section 296 (2) of the Penal Code does not define the offence of robbery with violence

2. That the doctrine of recent possession was not applicable in this case as the stolen item (bicycle) was not recovered from the Appellant.

3. That the learned trial magistrate did not consider his defence.

The duties of the first appellate Court were considered in the Court of Appeal Case of **Okeno –Vs- Republic (Criminal Appeal No. 75 of 1971) EALR (1972) E.A.** whereby it was held,

> ***" It is the duty of the first appellate Court to re consider the evidence, evaluate it itself and draw its own conclusion in deciding whether the Judgment of the trial Court should be upheld".***

The Complainant is a cattle trader in Mwangulu and Kinango trading centres. On the 7th day of September, 2009 at 5:10 am. he was riding his bicycle when he met three men who were armed with pangas. They proceeded to cut him on the head and the left shoulder. They made away with his bicycle after chasing him and cutting him on the back. After recuperating at a nearby home he went and reported the matter at Mwangulu police post.

Later on 20th day of September, 2009 he recovered the bicycle from one **JUMA BEMDUDU** who said that he had bought it from the appellant five (5) days before. The Accused was later arrested and charged with this offence.

JUMA BEMDUDU (PW3) is a farmer and also a laboratory technician at Mariakani. It is he who bought the bicycle subject matter of this case for Ksh. 1,500/= from the Appellant. Later he learned that the Complainant had been attacked and his bicycle stolen. The matter was reported to the area chief and the Accused was arrested.

At page 4 line 20 of the Judgment the learned trial magistrate had this to observe,

> ***"I am satisfied that the Accused sold the Complainant's bicycle to the said witness. Its further on record that the bicycle was sold on 13th September, 2009. The robbery occurred on 7th September, 2009 about six (6) days before the recovery. Because of the short duration between the time of the robbery and that of recovery the Court will rely on the doctrine of recent possession and find the Accused defence does not offer any explanation as to how he came into possession and find the Accused defence does not offer any explanation as to how he came into possession of the same and that he must be presumed to be part of the gang that attached and robbed the Complainant".***

In the Court of Appeal Case of **<u>ARUM –Vs- REPUBLIC EALR 2006 EA.</u>** The constituents elements of the doctrine of recent possession were held to be thus,

> ***"Before a Court can rely on the doctrine of recent possession as a basis for Conviction in a Criminal trial, the possession must be positively proved, that is, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively identified as the property of the Complainant, thirdly, that the property was stolen from the Complainant and lastly that the property was recently stolen from the Complainant".***

As noted by the learned trial magistrate the robbery took place on the 7th day of September, 2009. The Complainant was not able to identify the attackers. The bicycle which was stolen form the Complainant was recovered from PW 3 on 20th September, 2009 and who testified to have bough it from the appellant on 13th September, 2009. In his defence the appellant denied having sold a bicycle to PW 3 in his unsworn statement.

In the present case the stolen property which is a bicycle was not physically found with the Appellant but there is overwhelming evidence to the effect that he had sold it to one **BEMDUDU PW 3** who operates a chemist at Burhani Shopping centre.

The bicycle was the property of the Complainant. The Accused did not contest ownership but merely stated that he did not sell the bicycle to PW 3. This bicycle was stolen on 7th September and sold to PW 3 on 13th September, 2009 a period of six (6) days. Prior to that the Accused had been seen with the bicycle by PW 3 who had assumed that it was his. We are of the considered view that the period was recent and the doctrine of possession was applicable in this case.

On the issue as to whether the charge was defective for having been preferred under section 296 (2) of the Penal Code. The Court of Appeal in the case of **<u>Mwaura & others – Vs- Republic Criminal Appeal No. 5 of 2008</u>** cited with approval the case of **<u>Simon Materu Munialu –Vs- Republic</u>** **<u>(2007) eKLR (Criminal Appeal No. 302 of 2005)</u>** where it was held,

"The ingredients that the appellant and for that matter any suspect before the Court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Peen Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in Section 295 which creates the offence of robbery. In short Section 296 (2) is not only a punishment section but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an Accused person facing such offence with robbery under Section 295 as read with Section 296 (2) of the Penal Code as that would not contain the ingredients that are in Section 296 (2) of the Penal Code and might create confusion".

On the issue as to whether failure to include the words ***"While armed with dangerous weapons or offensive weapons"*** would make the charge fatally defective it should be noted that a charge of robbery with violence can be grounded on any of the three limbs found under Section 296 (2) of the Penal Code namely:-

(a) Armed with any dangerous or offensive weapons or

(b) Is on the company with one or more or other person or persons.

(c) At or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence.

In the present case the appellant was charged with another not before the Court and there is evidence to the effect that the attackers were three (3) in number.

We also find that there is evidence to the effect that the complainant was wounded during the attack. We are of the considered view that the charge was not defective and the trial magistrate correctly applied the doctrine of recent possession. We find no reason to interfere with both the Conviction and Sentence.

The appeal has no merit and we disallow it.

Judgment delivered dated and signed this 29th day of May 2014.

.... **…............**

M. ODERO **M. MUYA**

JUDGE **JUDGE**

<u>In the presence of:-</u>

Learned State Counsel …................

The Appellant …..................

Court clerk …......................