



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**[Coram: F.A. Ochieng & G.W. Ngenye-Macharia JJ.]**

**CRIMINAL APPEAL NO. 256 OF 2011**

**NICHOLAS NDERITU.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

*{Being an appeal from the judgment of Hon. A. Alego, Snr Resident Magistrate dated*

*16/12/2011 at the Chief Magistrate's Court – Eldoret in Criminal Case No. 554 of 2011}*

**JUDGMENT**

The Appellant, **NICHOLAS NDERITU**, was convicted for the offence of Robbery with violence contrary to section 296 (2) of the Penal Code. He was then sentenced to suffer death as by law prescribed.

In his appeal, the Appellant challenges both the conviction and sentence. He cited the following Grounds of Appeal:

***“1. The Honourable trial court erred in law and facts by convicting the Appellant without noting that that the prosecution's charge was defective;***

- 2. That the Honourable trial court erred in law and facts in declining to effect the provisions of Section 207 of the CPC;***
- 3. That the Honourable trial court erred in law and facts in failing to note that the prosecution evidence was invalid and could therefore not sustain a safe conviction;***
- 4. That the Honourable trial court erred in law and facts in failing to note that the prosecution evidence was inconsistent;***
- 5. That the Honourable trial court erred in law and facts by declining to evaluate crown evidence alongside the defence case contrary to section 169 (1) of CPC”***

**Mr. Omwega**, learned State Counsel, opposed the appeal. In his considered view, the case against the Appellant had been proved beyond any reasonable doubt. His reason for so saying was that the Complainant was robbed of his motor-bike, and the Robbers were more than one in number. Furthermore, the said robbers are said to have injured the Complainant during the robbery.

Being the first appellate court, we have re-evaluated all the evidence on record, and drawn our own conclusions. The first step in the process of re-evaluation is always the charge sheet, as it spells out the offence and the particulars thereof.

In this case the particulars were as follows;

***“ NICHOLAS NDERITU: On the 27th day of November, 2010 at Pioneer Estate in Uasin Gishu District within Rift Valley Province, jointly with others not before court, while armed with pangas robbed MICHAEL KIMANI of his motor cycle Reg. No. KMCK 291 B TVS Star Sport, red in colour valued at Kshs 79,000/=, and at the time of such robbery threatened to use actual violence to the said MICHAEL KIMANI.”***

The Complainant, Michael Kimani was P.W.1. He testified that on 27th November, 2010 he carried out his regular work as a “ **boda boda**” operator. He did so until 3.00 a.m.

P.W.1 went on to say that at about 11.00 p.m., the Appellant was brought to the hotel called Paradise. The person who brought the Appellant was called Kiarie.

The Appellant told P.W.1 that he wished to go to Pioneer. He then asked P.W.1 if he had change for a currency note of Kshs 200/=. P.W.1 gave the change to the Appellant, who then gave him Kshs 50/=:, which was the fare.

Whilst P.W.1 was still trying to pocket the money, Kiarie grabbed his throat. Thereafter, three other people joined Kiarie in beating P.W.1. They not only beat him up, but they also cut him using pangas.

One of those assailants took the motor-cycle which P.W.1 had been using to operate his boda boda business.

P.W.1 managed to run away. And whilst he was escaping, P.W.1 noticed the assailants had a motor-bike Reg. No. KMCK 403 T.

Although P.W.1 testified that one of the assailants took his motor cycle, he is also on record as saying;

***“they never robbed me of anything.”***

After that incident, P.W.1 and his colleagues started looking for **PETER**, who used to ride the motor cycle Reg. No. KMCK 403 T. However, the efforts to trace Peter did not yield any positive results, as he had disappeared.

It was the evidence of P.W.1 that the Appellant was arrested by his colleagues. P.W.1 only arrived after the arrest had been effected.

During cross-examination, P.W.1 said that he was attacked at Pioneer. He explained that he had carried the Appellant on his motor-cycle.

**P.W.2, RAPHAEL NJOROGE KAMAU** was also a boda boda person. He lived at Kamukunji Estate, Eldoret.

On 27th November, 2010, P.W.2 Left home to go to his place of work. A colleague of his told him about a nasty incident, saying that **PETER** had hidden KMCE 403 T.

Whilst that colleague was still talking to P.W.2, the Appellant called P.W.2, asking if Peter and the Appellant were being looked for. At that point, P.W.2 was perplexed.

P.W.2 testified that he was told that his motor cycle was involved in the robbery. And when he went to the police station, he met P.W.1 who narrated his story.

The Appellant called P.W.2, who told him to leave his motor cycle at the nearest police station. Two days later, the Appellant called P.W.2 again, and informed him where he had left the motor cycle.

P.W.2 went to that place, with the Flying Squad, and he found his motor cycle.

**P.W.3, CPL ROBINSON NAITIPA**, was at the police station on 27th July, 2010 when the Complainant reported that he lost his motor cycle at Pioneer.

On that night, the Appellant was riding a motor cycle KMCK 403 T. This is what CPL **Naitipa** said;

***“ Complainant left Sirikwa and went to Paradise Stage. Ironically, accused followed him. Motor bike KMCK 403 T was being ridden by accused. Accused went to paradise. Complainant got passengers to Pioneer at around midnight and dropped them near church in Pioneer. Complainant, while still giving change to his passengers got accosted. Complainant managed to see another motor cycle KMCK 403 T, which belonged to accused. They went away and left Complainant.”***

It is noteworthy that whilst the Complainant testified that the passenger he ferried to Pioneer Estate was the Appellant, the police officer testified that the Complainant had ferried passengers to Pioneer.

Of course, if the fare to Pioneer Estate was Kshs 50/=, then the said sum of Kshs 50/= which the Complainant received from the Appellant cannot have been sufficient to ferry passengers.

It is thus unclear whether the Appellant was the Complainant's passenger, or if the Complainant carried other passengers.

Secondly, the Complainant testified that he ran away to save his life. But the police officer said that the persons who robbed the Complainant, went away and left the Complainant behind.

Again, the facts about what transpired are not clear.

Another issue which is not clear relates to the time when the Complainant was robbed. He said that he worked until 3.00 a.m. However, he added that it was at about 11.00 p.m. when the Appellant arrived with **Kiarie**, and told the Complainant that he wished to be taken to Pioneer.

The Police officer emphasized that the Appellant was riding a motor cycle Registration Number KMCK 403 T. If that be the case, it is not clear why and how the Appellant was then also a passenger on the Complainant's motor-cycle.

The point we are making is that the story told by the Complainant is not consistent with the story told by the police officer.

Presuming that the Complainant recognized the Appellant as one of the persons who robbed him, the Complainant could have played a role in having him arrested. However, he played no such role.

There is no evidence to reveal the identity of the members of the public who arrested the Appellant, or why they did so.

**Corporal Naitipa** (P.W.3) appears to have alluded to the reasons for the arrest when he said that;

***“ I knew accused prior to his ordeal. He has been apprehended severally over the same allegations but there was no concrete evidence.”***

He was therefore the key suspect even in this particular instance. Curiously, however, the Appellant was so brazen about his conduct that he is said to have robbed a person who knew him well.

Thereafter, the Appellant phoned P.W.2 to ask him if Peter and the Appellant were being looked for. And if that was not sufficient, the Appellant called P.W.2 again, to tell him where they had left the motor cycle belonging to the said P.W.2. In other words, the Appellant was doing everything to draw attention to himself, as one of the people who had robbed the Complainant.

Frankly, the story does not sound realistic. Secondly, whilst P.W.2 said that it was the Appellant who phoned him, with information regarding the whereabouts of the motor cycle KMCK 403T; the police officer testified that the person who made the calls to P.W.2 was **PETER**.

Therefore, the evidence about that issue was not consistent.

Another curious aspect of this case was that the charge sheet indicated that those who robbed the Complainant simply threatened to use violence on the Complainant, yet the victim testified that he was actually beaten and cut with pangas. In effect, the evidence tendered did not support the charge.

We also feel obliged to address one other issue. The issue arises from the testimony of the police officer, who said;

***“ I knew accused prior to this ordeal. He has been apprehended severally over the same allegation but there was no concrete evidence.”***

Taking cue from that piece of evidence, the learned trial magistrate expressed herself as follows, in the Judgment;

***“He seemingly knows how to set traps to his victims and steal their motor bikes.”***

Thereafter, the trial court went on to hold as follows;

***“ This court upholds the evidence adduced by the prosecution. Accused was positively identified by all the witnesses, and the Investigation Officer further confirmed that accused is a habitual offender for such crimes; only that he had always been “swift” not to be apprehended, but this time he was unfortunate. In view of the foregoing, this court finds that the accused person is guilty of the offence herein and he is herein convicted accordingly.”***

There can be no doubt at all that the trial court was partially influenced by the evidence which the Investigating Officer gave, concerning other instances where the Appellant had been allegedly involved in the thefts of motor cycles.

By putting forth such evidence, the Investigating Officer was telling the Court about the bad character of the Appellant. To our minds, such evidence is governed by Section 57 (1) of the Evidence Act which stipulates as follows:-

***“ In criminal proceedings, the fact that the accused person has committed or been convicted or charged with any offence other than that with which he has been charged, or is of a bad character, is inadmissible unless-***

***(aa) such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue; or***

***(a) the proof that he has committed or been convicted of such other offence is admissible under section 14 or 15 to show that he is guilty of the offence with which he is then charged; or***

***(b) he has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character; or***

***(c) the nature or conduct of the offence is such as to involve imputations on the character of the complainant or of a witness for the prosecution; or***

***(d) he has given evidence against any other person charged with the same offence: Provided that the court may, in its discretion, direct that specific evidence on the ground of the exception referred to in paragraph (c) shall not be led if, in the opinion of the court, the prejudicial effect of such***

***evidence upon the person accused will so outweigh the damage done by imputations on the character of the Complainant or of any witness for the prosecution as to prevent a fair trial.”***

In effect, the basic rule is that evidence about other offences which had been committed by the accused person or evidence of the bad character of an accused person are not admissible in evidence, unless such evidence falls within the exceptions specified. The rationale for that legal provision is that just because a person has a bad character or a record of previous convictions or of previous criminal cases, should not be the basis for a trial court determining the case before it.

The court is supposed to make decisions on the basis of the evidence tendered before it, on the matter in issue.

If the court admitted evidence of bad character or of previous convictions or of previous cases against an accused person, it is probable that such evidence would cloud the otherwise objective mind of the court. Yet the truth is that even a person with a previous bad record may not have committed the offence that he was suspected of.

In the case of MUGO -VRS- REPUBLIC [1966] E.A. 124 AT PAGE 128, Rudd Ag. C.J and Dalton J. expressed themselves thus;

***“ We have no doubt that the objective of S. 57 (1) (a) was to prohibit evidence of previous offences where its effect would be merely tendentious. It was intended to prohibit evidence of previous offences or charges where the only effect of such evidence would be to show merely that the accused had a tendency or propensity to commit offences similar to that with which he had been charged and to prohibit evidence merely of bad character where the accused's character has not been put in issue in one of the accepted ways in which that can be done.”***

In this case, the evidence of the previous instances ought not to have been admitted.

Having admitted the said evidence, the learned trial magistrate concluded that the Appellant was a habitual offender for crimes similar to the one he had been charged with, before that court. In other words, the court's opinion of the Appellant was clouded by matters which were not in issue in the current case.

The Investigating Officer had testified that there had been no concrete evidence against the Appellant in those other earlier instances. Therefore, that evidence ought not to have led the trial court to conclude that the Appellant was a habitual offender.

In conclusion, we hold that there was insufficient evidence to sustain conviction. Accordingly, the conviction is quashed and the sentence is set aside. We order that the

Appellant be set at liberty forthwith unless he is otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT ELDORET, THIS 29TH DAY OF MAY, 2014.**

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**FRED A. OCHIENG**

**JUDGE**

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**G.W. NGENYE-MACHARIA**

**JUDGE**