REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 72 OF 2012

(From the original Conviction and Sentence in the Criminal Case No. 1287/201 of the Chief Magistrate's Court at Mombasa: J. Gandani – SPM)

YUSUF MARTIN ONJALA……..…….APPELLANT

VERSUS

REPUBLIC……..…RESPONDENT

JUDGMENT

The appellant **YUSUF MARTIN ONJALA** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at Mombasa Law courts. The appellant was first arraigned in court on 9th May, 2011 where he faced the following charges.

COUNT NO. 1

"ROBBERY CONTRARY TO SECTION 296(1) OF THE PENAL CODE

> **"On the 6th day of May, 2011 at Kizingo along Dedan Kimathi road in Mombasa District within Coast Province jointly with another not before court robbed JOSEPHAT MUIA KIVUTI of one bicycle valued at Kshs. 4,000/= and at or immediately before or immediately after such robbery threatened to use actual violence against the said JOSEPHAT MUIA KAVUTI**."

In addition to this first count the appellant faced an alternative charge of **HANDLING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 322(2) OF THE PENAL CODE**. The particulars were that

> **"On the 6th day of May, 2011 at Likoni Ferry in Mombasa District within Coast Province, otherwise in the cause of stealing dishonestly retained one bicycle knowing or having reason to believe it to be stolen goods."**

The appellant entered a plea of *'Not Guilty'* to both charges and his trial commenced on 26th June, 2011. The prosecution led by **CHIEF INSPECTOR WAITHAKA** called a total of three (3) witnesses in support of their case.

The brief facts of the case were as follows. **PW1 JOSEPHAT MUIA KAVUTI** told the court that he

works as a supervisor with Red Mamba Security Company in Mombasa. On 6th May, 2011 at about 7.00 p.m. he was on patrol in the Kizingo area using a bicycle. As he rode along Dedan Kimathi road he came to a road bump. He slowed down in order to negotiate the bump. Two men who were standing by the side of the road grabbed his bicycle. The appellant held on to his bicycle seat whilst the other man grabbed his radio-call hand set. **PW1** struggled and he managed to keep hold of his radio. However his assailants managed to take off with the bicycle. **PW1** phoned his fellow supervisor **JACOB WASIKE PW2** and reported what had befallen him. He then went to report the matter at Central police station.

On his part **PW2** confirms that his colleague **PW1** phoned him at about 7.45 p.m. and informed him that he had been robbed of his bicycle. **PW2** advised him to report the theft to the police. At about 11.00 p.m. whilst **PW2** was going about his normal duties in Likoni he noticed a man get off the ferry with a bicycle. **PW2** recognized the bicycle as that belonging to **PW1**, which he knew well. **PW2** then apprehended the man who turned out to be the appellant and took him to the ferry police post container. The man was locked up. Upon completion of police investigations the appellant was charged with this present offence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied having robbed **PW1** of his bicycle. On 5th March, 2012 the learned trial magistrate delivered her judgment in which she convicted the appellant of the offence of Robbery with Violence contrary to section 296(2) of the Penal Code and sentenced him to death. Being aggrieved the appellant filed this present appeal. The appellant who appeared in person during the appeal relied upon his written submission which had been duly filed in court. **MR. MUREITHI** learned state counsel who appeared for the respondent state opposed the appeal.

Being a court of first appeal our duty is to re-examine and re-evaluate the evidence adduced in the trial court and to draw our own conclusions on the same [see **AJODE VS. REPUBLIC 1982 KLR**].

At the outset we note with great concern that the appellant was convicted under section 296(2) of the Penal Code yet he was **not** charged with an offence under that provision of law. The charge sheet clearly reads **"ROBBERY CONTRARY TO SECTION 296(1) OF THE PENAL CODE"** *[our emphasis]*. We have carefully perused and examined all the copies of the charge sheet including the original copy. Not a single one refers to the offence of Robbery with Violence under **section 296(2)** of the Penal Code. The charge sheet in the original file refers to **section 296(1)** of the Penal Code. This provision refers to the offence of simple robbery as opposed to the more serious offence of Robbery with Violence. We note that the charge reads *'Robbery'* and **not** *'Robbery with Violence'*. The **particulars** of the charge makes no reference to the perpetrators being armed with dangerous or offensive weapons. There is no claim that actual violence was meted out to the victim. The particulars only refer to a **threat** of the use of violence. All these fortify our belief that the charge which the appellant faced was that of simple robbery and **not** that of aggravated robbery.

The learned trial magistrate therefore erred in convicting the appellant of a more serious offence than that with which he was charged. Similarly the learned trial magistrate erred in imposing the death sentence whereas section 296(1) provides for a maximum sentence of fourteen (14) years imprisonment. We find that the learned trial magistrate failed to establish exactly which charge the appellant was facing. She convicted him of an offence for which he was not charged and proceeded to impose an unlawful sentence. We therefore have no qualms in quashing the appellant's conviction and in setting aside the unlawful death sentence imposed.

Having said that we will now proceed to analyze the evidence in order to determine whether the offence of simple robbery was sufficiently proved, warranting a conviction under section 296(1) of the Penal Code.

PW1 told the court that the incident occurred at about 7.00 p.m. It was therefore dusk and must have been slightly dark. No doubt there was low visibility. **PW1** himself confirms this in his evidence at page 4 line 13 when he says

"It was slightly dark but if one was close you could see their faces clearly."

He confirms that darkness had started to fall but does not say how it was possible to see their faces. **PW1** claims that he saw the appellant well yet he does not mention what source of light if any was available at the scene. The incident occurred on a public road in the city of Mombasa. **PW1** does not indicate whether or not there were any street lights which would have enabled him to see the appellant. The court cannot assume that there were street lights at the scene. This must be made clear from the evidence of the witnesses. For **PW1** to simply assert that he saw the appellant well without stating how this was possible in the dusk renders that identification vague and unreliable. Matters are made worse by the fact that the police upon arresting the appellant failed to conduct any identification parade at which this identification could be properly tested. **PW1** told the court that he merely pointed out the appellant through the window of a container at the police station. This is not the proper manner in which to conduct an identification parade. In this regard we can only cite with approval the sentiments of the learned trial magistrate found in her judgment at page 20 line 9 thus:

> **"The fact that the suspect who had the bicycle was arrested when the complainant was not there, it is mandatory that the police should have conducted a proper identification parade. The courts have times without number emphasized on this issue but it appears that the Kenyan police officers have never really understood this requirement. The kind of identification that was done at the police post in Likoni does not meet the criteria as set out in the Police Act."**

No more need be said on this point. We find that the identification of the appellant by **PW1** was unpersuasive, unreliable and did not pass muster. This is more so given the fact that this is identification by a single eye-witness which must be more closely interrogated.

Does this flaw in identification let he appellant completely off the hook? Not so. **PW1** said that he was robbed of a bicycle which he proceeds to describe this at page 4 line 14:

> **"My bicycle was a mountain bike. I can identify it as I had painted red oxide on it and it had aged. The seat was old."**

PW2 who was a colleague of **PW1** told the court that he knew the bicycle well and could recognize it. These are bicycles which had been issued to them by their employer to use in their duties as security guard supervisors. **PW2** states that on the very same day at 7.45 p.m. he saw the appellant getting off the ferry at Likoni pushing the said bicycle. **PW2** states at page 7 line 9:

> **"I know Josephat's bicycle. It has red oxide paint on it."**

The existence of the red oxide paint is a mark which made this particular bicycle unique. **PW2** apprehended the appellant and handed him over to the police. At no time did **PW2** lose sight of the appellant. The bicycle was kept by the police and **PW1** was able to positively identify the recovered bicycle as the one which had been stolen from him barely one hour before. The bicycle was produced in court as an exhibit **Pexb1**. The trial court also noted that it was coloured by red oxide.

The fact of having been found in possession of the stolen bicycle hardly an hour after it had been stolen gives rise to the doctrine of **'recent possession'**. The key elements of the doctrine of recent possession were set out by the Court of Appeal in the case of **ARUM VS. REPUBLIC [2006] 2EA 10** where it was held:

> **"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, 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 property was recently stolen from the complainant."**

From our own analysis of the evidence we are satisfied that all three ingredients have been met in this case. **PW2** has positively identified the appellant as the man he saw pushing the bicycle off the Likoni ferry. **PW1** has positively identified the bicycle as his stolen property. The same had been stolen from **PW1** on the same day and within that same hour. In his defence the appellant denies having been found in possession of the bicycle. He states that it was planted on him. There is no evidence of any pre-existing grudge which would make **PW2** fabricate evidence against the appellant. We dismiss this defence as a mere denial. Taking the evidence as a whole and relying on the doctrine of recent possession we are satisfied that it was appellant who stole the bicycle from the complainant. We therefore substitute a conviction for Robbery contrary to section 296(1) of the Penal Code. In place of the unlawful death sentence imposed by the trial court we impose a sentence of seven (7) years imprisonment to run from the date of first conviction in the trial court. This appeal therefore fails to that extent.

Dated and delivered in Mombasa this 8th day of May, 2014.

M. ODERO **M. MUYA**

JUDGE **JUDGE**

In the presence of:

Mr. Dzumo for State

Appellant in person

Mutisya Court Clerk