



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.28 OF 2011

BETWEEN

DOUGLAS MOKAYA ISANDA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from original conviction and sentence of the SRM's Court at Keroka
in Criminal case No.1198 of 2010 – by Hon. J. Were (SRM) delivered on 8th March 2011).*

JUDGMENT

Introduction

1. The appellant herein Douglas Mokaya Isanda was the accused in Senior Resident Magistrate's Court at Keroka in Criminal case No.1198 of 2010. He was charged with robbery with violence contrary to **section 291 (2)** of the **Penal Code**. The particulars of the charge were that on the 15th day of May 2010 at Bocharia sub location in Masaba District within Nyanza Province, he robbed Dennis Oyaro [of] one motor bike make TVS red in colour valued at Kshs.82,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Dennis Oyaro.
2. The appellant pleaded not guilty. During the trial that followed, the prosecution called 6 witnesses. The complainant, Dennis Oyaro testified as PW1 while PW2 was Evans Nyagota Nyakundi. PW3 was Dr. Mbeki Joab. Peter Omari Mokaya testified as PW4 while Number 88971 Police Constable Vincent Njoroge and Number 2008050334 APC Dalmus testified as PW5 and PW6 respectively.

Facts and the Evidence

3. The facts and the evidence emerge from the testimonies of the 6 prosecution witnesses. Dennis Oyaro, (the complainant) testified that at about 6.00 p.m. on 15th May 2010, he reported for duty as a motor cycle rider of a motor cycle that had no registration number. It was of TVS make and red in colour.
4. As he rode the motor cycle on his way to fill the motor cycle with fuel, the appellant herein

- stopped him and asked to be taken to Metamaywa. They agreed on fare of Kshs.100/=, although the complainant said he felt apprehensive even as he agreed to take the appellant to metamanywa. After dropping the appellant at his destination, the complainant was paid the agreed Kshs.100/=, but as he turned to return to Keroka, the appellant hit him twice on the head with a panga, felling him to the ground. After the complainant fell off the motor cycle, the appellant held him by the throat and hit him again on the head with a panga.
5. At that very time, Peter Omari Mokaya (Omari) whose home was in the vicinity of the attack at Metamaywa village was at home. The time was about 9.00 p.m. He was servicing his own motor cycle in the sitting room of his house. He went out of the house for a brief moment to answer to the call of nature. He heard some sounds from the path near his home. He was armed with a torch so he went towards the place where the sound had come from. He lit his torch and saw a person lying on the ground and bleeding from the head.
 6. On seeing that person bleeding, Omari blew a whistle as he also screamed. He also ran towards the gate. Other people responded to the whistle and Omari's screams. On enquiring from the victim who was lying on the ground, Omari was told the victim had been attacked by somebody who had also stolen his motor bike. Omari rushed to the main road where police were manning a road block and informed the police about the incident. The police responded quickly, went to the scene of the attack and took the victim to Masada Hospital where he was admitted overnight.
 7. The matter was also reported to Keroka police station and in the morning on the 16th May 2010, the owner of the stolen motorcycle, Evans Nyagota Nyakundi who testified as PW2, (Evans) was informed of the loss of his motor cycle. Evans informed the chairman of the area about the loss as he also went to check on the complainant who was admitted at the hospital. At the hospital, Evans met other boda boda riders who asked for details of the motor cycle. He provided the details and also reported the incident to Keroka police station.
 8. On the same 16th April 2010, while Evans who worked as a teacher, was in school, he was informed through telephone that a suspect had been arrested at Kegati. Evans went to Kegati and saw the suspect who he said resembled his (suspect's) mother. Evans also said that the suspect had visited his (Evans') home about 4 times. Though the suspect had no identity card of his own, he had his mother's identity card. The suspect who was arrested at Kegati and who carried his mother's identity card instead of his own is the appellant herein.
 9. Evans confirmed to the court vide a receipt produced in court as an exhibit that he had bought the motor cycle from A.M. Tailor at Kisii on 26th February 2010 for Kshs.82,000/=, though he had registered the same in the name of one Jared Mokora, a brother to his (Evans') wife. Evans testified further that the person he had employed was the said Jared Mokora and not the complainant herein.
 10. In his further testimony during cross examination, Evans denied that he had framed the appellant in this case. Evans also testified that on the day of arrest, the appellant led the police to where the motorcycle was at Kapsabet AP Post, and that the appellant asked to be forgiven.
 11. PW5, Number 88971 Police Constable Vincent Njoroge stated that after the appellant was arrested, he (appellant) informed the police that the motor cycle was at Kaptembwa in Nandi Hills. Together with the appellant, PW5 went to Kaptembwa and recovered the motor cycle which was identified by the registered owner.
 12. Apart from charging the appellant with the offence, PW5 also issued a P3 form to the complainant and took photographs of the unregistered motor vehicle. PW5 told the court that the motor cycle had been detained at Kaptembwa AP Post on suspicion of being stolen since the appellant had been unable to avail ownership documents to the police at Kaptembwa in Nandi Hills.
 13. During cross examination, PW5 stated that he did not conduct an identification parade because the appellant was known to the complainant. PW5 once again confirmed that the motor cycle had been detailed at Kaptembwa AP camp because the appellant failed to avail documents of ownership. PW5 produced photographs of the motor cycle – **P. Exhibit 1(a) and 1(b)**.
 14. Number 2008050334, APC Dalmus of Kaptembwa DC's Office testified that on the 10th September 2010 at about 10.30 a.m., while he was on patrol duties together with a female colleague, one Mohammed Abdir, they encountered the appellant who was riding an unregistered motor cycle, a red TVS. They took the appellant to the D.O.'s office at Kaptembwa where the appellant was asked to produce proof of ownership of the motor cycle. The appellant was released to go to Kisii to fetch the documents, but before he could bring the documents the appellant was

escorted to Kaptembwa by police officers in connection with the violent robbery involving the motor cycle. PW6 identified the appellant as the person who he and his colleague had stopped when he was found riding a motor cycle without number plates and as being the same person who was escorted to Kaptembwa AP Post by PW5.

15. PW3 was Dr. Mbeki Joab. He filled a P3 form in respect of the complainant on 1st June 2010. PW3 stated that on examination, the complainant was found to have had multiple cut wounds on the head. There was a fracture on the posterior occipital region. Dr. Mbeki opined that the weapon used to inflict such injuries was sharp such as a panga or a knife. The P3 form was produced as **P. Exhibit 2**.

The Defence Case

16. At the close of the prosecution case, the appellant was put on his defence. The appellant elected to give sworn evidence in which he told the court that on the day of the alleged offence, he was in Kisii town doing his usual hawking business. He also stated that on the day of his arrest, he had gone to Kegati also to hawk his wares. The appellant denied that he ever hired the complainant to take him to Metamaywa as alleged. He also denied ever being taken to Kaptembwa AP Post by PW5 to recover the motor cycle. He denied any knowledge of the case against him.
17. During cross examination, the appellant testified that he did not know the complainant at all; and that the first time he saw both the complainant and PW5 was when the two appeared to testify against him in court.

Judgment of the Trial Court

18. After carefully analyzing all the evidence that was placed before it, the learned trial court reached the conclusion that the prosecution had established its case against the appellant beyond any reasonable doubt. The learned trial court found the appellant guilty as charged and convicted him of the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The appellant was sentenced to suffer death as by law provided.

The Appeal

19. The appellant was aggrieved by both conviction and sentence and is before this court on appeal seeking to have the judgment of the learned trial court overturned. In his petition of appeal filed in court on 20th June 2011, the appellant sets out the following 5 grounds:-

1. *THAT the learned trial magistrate erred in law and in fact in convicting the appellant when the prosecution had not proved its case beyond any reasonable doubt.*
2. *THAT the learned trial magistrate erred in law and in fact in convicting the appellant on the strength of contradictory and flimsy evidence.*
3. *THAT the learned trial magistrate erred in law and in fact in failing to appreciate that the case against the appellant was a fabrication resulting from conflicts between the appellant and the complainant.*
4. *THAT the learned trial magistrate misdirected himself grossly in not warning himself of the fact that the evidence adduced by the key witness was based on mere personal opinion.*
5. *THAT the learned trial magistrate erred in law and fact by sentencing the appellant to death when there was no evidence to support such a sentence.*

20. Reasons wherefore the appellant prays that this appeal be allowed, conviction be quashed and the sentence of death set aside.

The Submissions on Appeal

21. When this appeal came up for hearing before us, the appellant was represented by Mr. Bigogo Onderi of Bigogo & Co. Advocates while the State was represented by Mr. Tom Imbali, Principal Prosecution Counsel. Regarding grounds 1, 2 and 5, counsel for the appellant submitted that the

prosecution never proved its case beyond any reasonable doubt against the appellant, that the complainant never clearly identified the appellant as the person who robbed him of the motor cycle and injured him during the robbery. Counsel also submitted that the appellant could not have been the one who hit the complainant on the head with a panga because during cross examination, the complainant stated in part:-

“I can’t tell if you had a weapon on you. You had a black paper. I didn’t see a panga in the paper bag.”

22. Counsel also submitted that there was such fundamental contradiction in the complainant’s evidence that the same ought not to have been accepted by the trial court. Counsel also submitted that the trial court failed to prove the ingredients of the offence of robbery as set out under **Section 296 (2)** of the **Penal Code** which reads:-

“If the offender is armed with any dangerous or offensive weapon, or instrument, or is in company with one or more other person or persons, of if, at or immediately before or immediately after the time of the robbery, he wound, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

23. To drive the point home that the appellant was not identified during the alleged robbery, reliance was placed on the Court of Appeal decision at **Nyeri in CRA No.10 of 2002 – Henry Kimathi – vs- Republic** (unreported) where it was held that where a victim alleged injury using a weapon on the body of the assailant, but which weapon the victim does not see, then it is clear that in such circumstances, the prosecution had failed to prove that the assailant had used or threatened to use the weapon on the victim of the robbery and as such an offence under **Section 296 (2)** of the **Penal Code** had not been proved but one under **Section 296 (1)** had been proved.

24. Counsel submitted that the issue of identification of the appellant would have been settled if an identification parade had been conducted, but as admitted by PW5, no such parade was conducted.

25. On the doctrine of recent possession, counsel for the appellant submitted that the same was not applicable because of the long period between the time of the alleged robbery and the recovery of the motor cycle. Counsel further submitted that no documents were placed before the court to confirm that PW2 was the registered owner of the subject motor vehicle. Reliance was placed on **Nakuru Court of Appeal CRA No.13 of 1986 – Samuel Mwaura Njihia –vs- Republic** in which the appellant was charged and convicted of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** a charge that was premised on identification of the appellant by the evidence of the complainant only, and the appellant’s possession of a stolen car two days after the incident. It was held that the fact that the appellant was a sole identifying witness in difficult circumstances, the trial court needed to warn itself of the dangers of such identification as set out in **Abdullah Bin Wendo –vs- R [1953] EACA 166** and **Roria –vs- Republic [1967] EA 583**.

26. Counsel further submitted that the appellant’s alibi defence was not displaced by the prosecution’s evidence, and that the trial court did not sufficiently address the issue. Reliance was placed on the Court of Appeal decision in **Nyeri CRA No.123 of 2001 – Jonathan Mutisya Valaiu –vs- Republic** (unreported) and urged us to find and to hold that the appellant herein bore no responsibility to prove the alibi. Counsel urged us to allow the appeal.

27. In response, Mr. Imbali for the respondent submitted that the evidence given by the prosecution witnesses was both credible and consistent. He also submitted that though the appellant was arrested some 4 months after the incident, he (appellant) led the police to Kaptembwa AP Post where the subject motor cycle had been detained after the appellant who was arrested with it, failed to prove ownership. On the issue of ownership counsel submitted that PW2 produced the purchase receipt which was adequate proof in the circumstances.

28. Regarding the issue of recent possession, Mr. Imbali submitted that the same was applicable in this case because it is the appellant who was found in possession of the motor cycle after the same

had been violently stolen from the complainant, that the appellant could not explain how he came into possession of the motor cycle and finally that it was the appellant who led PW5 and other officers to Kaptembwa AP Post where the motor cycle had been detained on suspicion of the same having been stolen after the appellant failed to produce documents of ownership. Mr. Imbali urged us to dismiss the appeal in its entirety for lack of merit.

The Duty of this Court

29. This appeal before us is a first appeal. As a first appellate court, we must reconsider and evaluate the evidence afresh. In this duty we are guided by the principles set out in such cases as **Pandya – vs- R[1957] EA 336**; **Okeno –vs- Republic [1972] EA 32** and **Abdul Hameed Saif –vs- Ali Mohammed Sholan [1955] 22 EACA 270**.
30. In evaluating the evidence afresh however, we are mindful of the fact that unlike the trial court, we can neither see nor hear the witnesses to benefit from observing their demeanour. We have carefully reconsidered and evaluated the evidence afresh and also weighed and considered the judgment of the trial court.
31. From the petition of appeal, and the submissions from respective counsel the following are the issues that stand out for our determination:-
1. *Was the appellant positively identified as the person who violently robbed the complainant of the motor cycle that was finally recovered at Kaptembwa AP Post in Nandi Hills?*
 2. *Is the doctrine of recent possession applicable in this case?*

Findings and conclusions

32. As concerns the first issue, we do not think that the complainant positively identified the appellant at the scene of the alleged robbery. Apart from the fact that the complainant was injured during the attack, and the allegation that he carried the appellant on the motor bike from Keroka to Metamaywa, at about 6.00 p.m., the complainant left out crucial details such as what time the alleged robbery took place, and in this regard, the appellant could have told the court how long the ride from Keroka to Metamaywa took.
33. In the case of **Wamunga –vs- Republic [1989] 2 KLR 424**, the Court of Appeal, said that:-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.”

34. In **Abdala Bin Wendo & another –vs- Republic** supra) at page 168, the Court stated the following on the issue of identification:-

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions following a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

35. It is also thus clear that if the trial court had put the complainant’s evidence under careful scrutiny, he would have found that the said evidence fell short of identifying the appellant beyond any

- reasonable doubt, as the person who hit the complainant on the head with a panga soon after he (complainant) had dropped the appellant at Metamaywa.
36. The second issue for determination is whether the doctrine of recent possession is applicable in the circumstances. The evidence on record is that on the night of 15th May 2010, the complainant was robbed of a motor cycle. On the 10th September 2010, the appellant was arrested within Kaptembwa area riding a motor cycle, TVS red in colour without a registration plate. When asked for documents of identification, the appellant told PW6 and his colleague that the same were in Kisii and that he would go and fetch them. The appellant never took the documents to Kaptembwa as promised.
37. However, on the 16th September 2010, the appellant was arrested at Kegati and once he was taken to the police at Keroka police station, he was interrogated by PW5 concerning the subject motor cycle and he volunteered information that the motor cycle was at Kaptembwa AP Post. He was escorted to Kaptembwa AP post in Nandi Hills and the motorcycle which was later identified by Evans to be his and for which he (Evans) produced a purchase receipt, was recovered.
38. Considering the entire evidence, we have no doubt in our minds that the motor cycle which was stolen from the complainant on 15th May 2010 was the same motor cycle that was recovered from Kaptembwa AP Post and that it was the appellant who had it in his possession when he was arrested on 10th September 2010 at Kaptembwa riding a motor cycle without registration documents.
39. In Isaac Nganga Kahiga –vs- Republic – Criminal Appeal NO.272 of 2006 (CA Nyeri) it was held that:-
- “... the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly, that the property is positively the property of the complainant, thirdly the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant.”**
40. Can it be said that the possession in this case being discovered 4 months after the incident is recent possession, so as to pin down the appellant to the offence that was committed on 15th May 2010? In Matu –vs- Republic [2004] 1 KLR 510, the appellant was found guilty and convicted of the offence of robbery with violence on the basis of the doctrine of recent possession where the time lag between the date of the robbery and the discovery of the goods was 20 days. The Court of Appeal held that in the case that time lag was not unreasonable. It is our humble view in the instant case that considering the nature of the goods in question namely a brand new motor cycle, and the demand for the same in various parts of the country, the time lag of about 4 months between the date of the alleged offence and the recovery of the motor cycle was not unreasonable in the circumstances.
41. We are thus satisfied that the fact that the appellant was found in possession of the motor cycle, without any proof that he was the owner thereof and his failure to produce proof of ownership after he promised to do so, is sufficient to lead to the conclusion that the appellant participated in the robbery in which the complainant was injured on 15th May 2010.
42. In his testimony, the appellant simply denied being at the scene and denied ever being carried by the complainant on 15th May 2010. He also simply denied that he was arrested at Kaptembwa while in possession of the motor cycle. Our conclusion on the issue is that the appellant participated in the robbery in which the motor cycle was stolen and the complainant was injured on 15th May 2010. We find no reason to doubt the evidence of both PW5 and PW6 as to how the complainant’s motor cycle was detained at and also recovered at Kaptembwa AP Post. We also find that the appellant’s denial of the case against him is hollow and of no probative strength against the prosecution case against him.
43. In conclusion and for reasons other than those relied upon by the trial court, we find that this appeal has no merit on both conviction and sentence and is accordingly dismissed. R/A within 14

days
44.It is so ordered.

Dated, signed and delivered at Kisii this 24th day of July, 2014

R.N. SITATI

E.M. MURIITHI

JUDGE.

JUDGE.

In the presence of:

Mr. Bigogo for the Appellant

Mr. Majale for the Respondent

Mr. Bibu - Court Assistant