REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 5 OF 2012

(FORMERLY KISII HCCRA NO. 30 OF 2011)

CONSOLIDATED WITH

HOMA BAY CRIMINAL APPEAL NO. 4 OF 2012

(FORMERLY KISII HCCRA NO. 29 OF 2011)

BETWEEN

CALVIN OTIENO ODHIAMBO…….....…..1ST APPELLANT

RONALD OCHIENG ODHIAMBO…….....2ND APPELLANT

AND

REPUBLIC……..…….....…….....…..RESPONDENT

(***Being an appeal arising from the judgment of Homa Bay SRM's Court Criminal Case No. 1916 of 2010 dated 29th August 2011 by Hon C.A.S. Mutai, SRM***)

JUDGMENT

1. In the subordinate court, the appellants faced the following charge;

   Robbery with violence contrary to ***section 296(2)*** *of the* ***Penal Code (Chapter 63 of the Laws of Kenya)***.

   CALVIN OTIENO ODHIAMBO and RONALD OCHIENG ODHIAMBO on 6th December 2010 at Ndhiwa Town in Homa Bay County, being armed with a dangerous weapon namely pistol robbed JACKTON OMONDI OJWANG of a Bajaj motorbike, red in colour Reg No. KMCK 053N, one Nokia 1110, one jacket and Kshs. 3000/= all valued at Kshs. 87,200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Jackton Omondi Ojwang.

2. The appellants were convicted and sentenced to death after the trial. They now appeal to this court to contest the conviction and sentence. Before we consider the grounds of appeal, we shall set out in summary the evidence of the 6 witnesses marshalled by the prosecution.
3. The complainant, Jackton Omondi Ojwang, (PW 1) testified that on 4th December 2010, he had borrowed a Bajaj boxer red motor bike from Lazarus Otieno Yimbo (PW 3) to carry passengers.

At about 5.00 pm while at Ndhiwa, two people had requested to be taken to Kipinyi. Before they reached the destination, the 1st appellant pulled out a pistol and pointed it at him and told him to surrender the ignition key and motor bike. He raised alarm but to no avail. They drove off with the motor bike. He made a report at Ndhiwa Police Station at about 7.00 pm. He was later informed that the motorbike had been recovered and that two people had been arrested. He went to the police station where he identified the two appellants and the motor bike. He stated that he was with them for about 20 minutes when he carried them.

4. PW 2, APC Robert Cheruiyot, recalled that on 10th December 2010 he received a call from Corporal Okumu that two men were trying to sell a motor bike. An informer assisted them to locate the house where the suspects were. They found three men in a house who admitted being in possession of a motorbike but denied that they wanted to sell it. They traced the red Bajaj boxer motor bike in the mother's house without a registration number. The men were arrested. The 2nd appellant claimed that the motor bike belonged to his sister who was called and she confirmed that it belonged to her.

5. PW 3, Lazarus Otieno Onyimbo, a boda boda businessman confirmed that the motor bike KMCK 053M belonged to him and that he had given it to PW 1 on 6th December 2010. He identified the motor bike as the one he had purchased by producing a sale agreement and receipt for payment.

6. Inspector Jackson, PW 4, testified that he carried out an identification parade on 15th December 2010 at 9.00 am where the two appellants were identified by PW 1. A third suspect was not identified.

7. The investigating officer, PW 6, PC Patrick Mwangi testified that he was called on 11th December 2011 and informed that three suspects had been apprehended and were held at Ndiru AP Post. He proceeded there and found them together with the red motorcycle. The 2nd appellant informed him that the motor bike belonged to his cousin Susan Atieno. When he called her she confirmed that she had given him a motor bike so that he could earn a living. She was requested to come and identify the motor cycle. When she came she inspected the motor cycle and stated that it was not the one she had given the 2nd appellant. At that point he decided to charge the 3 suspects with handling stolen goods. However, however, on 15th December 2010, 3 men came from Ndhiwa after hearing a report over the radio of a stolen motorcycle. They came with documents to confirm ownership. Both PW 1 and PW 3 verified the identity of the motor cycle. He arranged for an identification parade to be conducted and thereafter charged the appellants with robbery with violence.

8. Both the appellants were put on their defence. They elected to give sworn testimony. They both denied that they committed the offence. The 1st appellant testified that he was a businessman selling second hand clothes and on 6th December 2010, he was at Awendo market. He closed his business at about 5.00pm and went to his house at Rodi. During that week he went about his usual business but on 10th December at about 6.00pm, after closing business, he met some people and was arrested.

9. The 2nd appellant stated that he was a businessman and on 6th December 2010, he was at his place of work at Homa Bay and nothing unusual happened. On 11th December he was arrested and charged.

10. In the judgment the learned magistrate was convinced that PW 1 had positively identified the appellants as the persons who robbed him on 6th December 2010 and that the appellants were connected to the robbery by reason of the fact that they were found in possession of the stolen motor cycle which was positively identified by both PW 1 and PW 3.

11. The appellants filed and relied on their amended petition of appeal filed on 30th April 2013. They

also filed written submissions to support their appeal. The grounds of appeal are rather convoluted but distilled to their essence, the appellants challenge the conviction on the grounds that the charges against them were defective, that the evidence and circumstances of their identification were not conducive for positive identification and that the learned magistrate erred in relying on the doctrine of recent possession.

12. As this is a first appeal, this court is enjoined to consider all the evidence afresh, evaluate it independently and reach its own conclusions having regard to the fact that it neither heard nor saw the witnesses (***Okeno v Republic*** **[1972] EA 32**).

13. During the hearing of the appeal, the appellants raised the issue that the identification parade was defective in that the parade identification forms they were given at the trial differed materially from those produced. This issue was dealt with by the ruling dated 7th November, 2013 where the court (Sitati and Maina JJ) dismissed an application seeking leave of the court to adduce additional police identification forms from Homa Bay Police Station. The 1st appellant pointed out that the difference between the two parade forms was the fact that the parade form he intended to rely on showed that he stood between No. 4 and 6 as opposed to the police form which showed that he stood between No. 4 and 5. He also stated that the police only conducted one parade as opposed to the two stated in evidence. The 2nd appellant supported the appellant's case but added that the evidence given by PW4 showed that the oral evidence differed from the document.

14. In the ruling, the court expressed itself as follows:

> *[20] In the case of **Mwangi v Republic [1976] KLR 127** the court of Appeal considered the question whether an irregularity in holding an identification parade would necessarily lead to the exclusion of evidence of identification. The court held: "that whether or not the conduct of an identification parade is so irregular as to necessitate its being disregarded in a question of degree to be decided in the light of the circumstances of each case. Accordingly, where two of the fourteen people in an identification parade were suspects, as the irregularity did not cause prejudice or require that the evidence be excluded, the court could properly admit the evidence." In the instant case, PWIV Inspector Jackson, the Deputy OCS Homa Bay presided over the identification parade in which during examination in chief stated as follows: "The parade had 10 members, they were within the station, they were of the same physical and size. I informed the suspects that I intend to conduct a police identification parade….. I started with Calvin. I told him the purpose of this parade. He was placed in between No. 4 and No. 5. I then called the witness and told him that the person who stole the motor bike might or might not be there. He went and touched the suspect Calvin. The witness took some time before he could identify him. I then took him outside and changed positions. The suspect placed himself between No. 7 and No. 8. I called the witness again. I asked her if she was sure I wanted her to try again. She identified the same suspect again. I took the suspect back to the cells, while I took the witness to the crime office"*
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> *[21] Inspector Jackson went on to testify that he called Leonard Ochieng and explained to him the purpose of the parade after which he placed him between No. 3 and No. 4. The witness was then called and identified the suspect through touching. Inspector Jackson also testified that the suspect made remarks before being returned to the cells. The duly filled and signed identification parade forms were produced in court as Exhibits VI(a) and (b).*
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> *[22] A look at Exhibit 6(a) of the identification parade deals with the 1st appellant. The number of people who took part in that identification parade was 10 and the 1st appellant is indicated to have stood between suspect 4 and 5 and later between suspect No. 7 and 8.*

[23] Exhibit 6(b) of the identification parade where the 2nd appellant was identified showed that the identification parade had 8 suspects and the suspect stood in between 3 and 4.

[24] The 1st appellant contends that the evidence of the identification parade should be discredited or rather a fresh trial should be conducted because the form produced in trial court shows that he stood between 4 and 6 suspect while the police form showed that he stood between number 4 and 5. He also contends that PWIV (the police officer) who conducted the identification parade stated that he conducted 2 parades for each of them when he only conducted one parade for the 2 of them. The 2nd appellant also contends that only one parade was conducted for the two of them.

[25] If the appellants are to be believed that only one identification parade was conducted for the 2 of them we will refer back to ***Mwangi v Republic (Supra)*** *where 2 suspects were placed among 14 people in an identification parade and the Court of Appeal held that whether or not the conduct of an identification parade is so irregular as to necessitate its being disregarded is a question of degree to be decided in the light of the circumstances of each case.*

[26] In our considered view therefore, in as much as the appellants contend that the identification parade was conducted irregularly it is to be borne in mind that the same parade was conducted with more than 8 people in the parade, the inconsistencies as to where the appellants were placed in the parade to us are immaterial and did not cause prejudice to the appellants. Further, the identification parade forms which the appellants seek to produce were within their possession during the trial and the fact that they failed to produce the said forms does not amount to such evidence having been unavailable at the trial.

[27] We are therefore in agreement with the prosecuting counsel that the evidence of the identification parade was not the only evidence available to the court in deciding the case. Having looked at the record we are of the view that there existed other evidence which tended to connect the appellants to the offence charged.

15. We are therefore satisfied that the identification parade was carried out properly. In any case, the evidence of PW1 supports positive identification. The incident occurred at 5pm when there was adequate light. The appellants were not disguised. They negotiated the fare with PW1 and he was with them for at least 20 minutes and the appellants were carried on the motorbike. All these facts negate any case of mistaken identity. PW6 confirmed that when PW1 reported the incident he stated that he would be able to identify the appellants if he saw them. We therefore conclude that the identification of the appellants was safe and free from error.

16. We now turn to consider the application of the doctrine of recent possession. Mr. Oluoch, learned counsel for the State submitted that the learned magistrate did not appreciate the law on the doctrine of recent possession as he relied primarily on the evidence of identification.

17. As we are bound to evaluate the evidence and come to our own conclusions, we find that there was ample evidence to conclude that the appellants were guilty of the offence by reason of application of the doctrine of recent possession. We are therefore called upon to examine the evidence in light of well-established principles. In ***Andrea Obonyo and others v Republic*** **[1962] EA 542**, it was stated that, *"(i) where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt and if a finding that he stole the article depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the article has been excluded…"* In ***Malingi v Republic*** **(1989) KLR 225** the Court of Appeal while dealing with recent possession stated that *"By the application of the doctrine the burden shifts from the prosecution to the accused to*

explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn, that he either stole or was a guilty receiver."

18. Bearing the above stated principles in mind we find that the motor bike was stolen from PW 1 in circumstances that amount to robbery with violence. It was identified by PW1 and PW3 as belonging to PW3. The motorcycle was recovered four days after the incident and it was in possession of the appellants.

19. Under **Section 4(a**) of the ***Penal Code,*** *"be in possession of " or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person."* The finding of the stolen motor cycle within the homestead where the appellants were caught satisfies the element of possession. PW 5 testified that the 2nd appellant claimed that the motor bike was given to him by his sister confirming therefore that it was in his possession.

20. We have also considered the alibi defence of the appellants. The appellants did not furnish a reasonable account of their being in possession of the motorcycle. The possibility of the motor cycle belonging to the 2nd appellant's sister was excluded by the fact that PW1 and PW 3 affirmatively proved that the motorbike belonged to PW 3. It was therefore unnecessary to call the 2nd appellant's sister to testify. Furthermore none of appellants laid claim to it, in addition to the fact that when Susan Atieno eventually saw the motor bike in the presence of PW6, she stated that it was not the one she had given to the 2nd appellant.

21. Finally, we have looked at the charge, whose contents we have set out above. We are satisfied that it contains sufficient particulars of facts necessary for the appellants to understand the nature of the case that was facing them.

22. We find that the charge facing the appellants was proved beyond reasonable doubt and having analyzed the entire evidence, we conclude that the appellants were properly convicted.

23. The conviction and sentence are affirmed and the appeal dismissed.

SIGNED at HOMA BAY this day of July 2014

R. N. SITATI **D. S. MAJANJA**

JUDGE **JUDGE**

DATED and **DELIVERED** at **HOMA BAY** this **1st August 2014**

D.S. MAJANJA

JUDGE

Appellants in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of

Public Prosecutions for the respondent.