REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 17 OF 2014

BETWEEN

EDWIN OCHIENG OGADA …………………..………..…. APPELLANT

AND

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

(Appeal from the original conviction and sentence in Criminal Case No. 204 of 2014 at the Chief Magistrates Court at Homa Bay, Hon. P. Mayova, Ag. SRM, dated 25th April 2014)

JUDGMENT

1. The appellant, **EDWIN OCHIENG OGADA**, was charged with offence of stealing a motorcycle contrary to **section 278A** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 23rd March 2013 at Tausi Hotel in Homa Bay District within Homa Bay County, he stole one motorcycle Engine No. WCH 93192 make BAJAJ Boxer Black in colour valued at Kshs 85,000/= the property of Pamela Joyce Adhiambo Onyango.

2. After a full trial, the appellant was convicted and sentenced to 5 years imprisonment. He now appeals against the conviction and sentence. He faults the trial court on the grounds set out in his petition of appeal filed on 30th April 2014. The grounds may be summarized as follows; that the complainant was given drugs which confused his mind before losing the motorbike, that he was not found in possession of the motorbike and that the identification parade where he was identified was not properly conducted. The appellant relied on written submissions which amplified the grounds of appeal.

3. The State, through Mr Oluoch, supported the conviction and sentence. He submitted that medical evidence was not necessary as there was sufficient evidence that the complainant was drugged and in terms of **section 143** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, it was unnecessary to call more than one witness to prove any fact. He contended that in cases of theft it was not necessary to recover the stolen item in order to prove theft and in the circumstances of the appellant's case, he could have disposed of the motor cycle. Finally, learned counsel, submitted that the identification parade was carried out in accordance with the law and the appellant did not raise any complaint before, during and after the identification parade.

4. As this is a first appeal, I am called upon to evaluate and appraise the evidence before the subordinate court before reaching an independent conclusion as to whether or not to uphold the conviction. In doing so, I have to make allowance for the fact that I did not see or hear any of the witnesses testifying.

5. The prosecution called 4 witnesses to prove its case and its case was as follows. PW 1, the complainant, purchased motorbike, which she gave PW 2 to run on her behalf. PW 2, a motorbike rider, confirmed that he entered into an agreement with PW 1 where he would run the motorbike, pay her Kshs. 300 per day and keep the excess for himself. PW 2 recalled that on 23rd March 2013 at about midday he met the appellant at Magina Stage. The appellant requested to be taken to Tausi Hotel in Rodi where he had rented room. Upon arrival, the appellant parked the motorbike, locked it, left with the key and followed the appellant to the room. The appellant told him that he wanted him to pick a lady to bring to the hotel. As he waited, the appellant offered him juice to drink and told him to go and pick the lady after having the drink.

6. PW 2 recalled that before finishing the drink, he passed out. He later woke up at Homa Bay District Hospital where he stayed until he was discharged on 26th March 2013. He neither had the motorbike nor the key. He made a report to the Police Station and to PW 1. On 4th April 2013 he was told was asked to go the police station where he identified that appellant as the person whom he picked and dropped at Rodi on 23rd March 2013. In cross-examination PW 1 admitted that he had seen the appellant before the identification parade. When re-examined on the issue he stated that he saw the appellant going to court and that the police did not show him the accused before the parade. He insisted that he would even have known him if he had seen him even without the parade.

7. PW 3, a police officer investigating the case, recalled that on 5th April 2013 at about 2.00 pm he received PW 1's complaint that the motorbike had been stolen. She informed him how PW 2 had been drugged. He organized for the identification parade to be conducted by PW 5, the Deputy OCS of Homa Bay Police Station. PW 5 gave an account on how he conducted the identification parade. He stated that was not involved in the investigation and that he conducted the parade in accordance with established procedures.

8. The appellant elected to give sworn testimony when called upon to make his defence. He stated that he was a taxi driver working in Kisumu and on 3rd April 2014 when he was involved in an accident near Olare Centre near Homa Bay at about 11.00 am. He stated that the accident involved a vehicle owned by PW 4. PW 4 demanded money from him and when he refused to pay he was arrested and charged. He further stated that he saw PW 4 talk to PW 2 on 7th April 2013 hence he was shocked when the PW 2 pointed him out at the identification parade. He accused PW 4 of failing to record his complaints about the conduct of the identification parade.

9. I have evaluated the evidence and I find that motorbike was owned by PW 1 which she gave to PW 2 to run on her behalf. PW 1 produced documentary evidence that showed that she purchased it. It was stolen when PW 2 was drugged and was never recovered. Contrary to the appellant's contention, in order to prove the offence of stealing it not necessary for the thing stolen to be recovered or be brought to court as an exhibit. The prosecution must prove that the thing that was capable of being stolen and was actually stolen and I find that the motorbike which belonged to PW 1 was actually stolen.

10. The case against the appellant is circumstantial in nature as no one saw him steal. The inference that he stole the motorbike is drawn from the fact that he was the person who laced PW 2's drink with a substance that left him unconscious so that he could take the motor cycle. The drawing of such an inference depends mainly on whether PW 2 identified him. This case hinges on the identification of one witness, PW 2 who admitted that he was drugged after the encounter with the appellant.

11. The issue of identification has been the subject of various decisions of the courts. In ***Abdalla Bin Wendo & Another v Republic*** **[1953]20EACA 166**, the Court of Appeal for Eastern Africa had the following to say on the question 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.

12. In the case of ***Cleophas Otieno Wamunga v Republic*** **[1989] KLR 422**, the Court of Appeal held that evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger and that whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.

13. PW 2 testified how he met the appellant and took him to Tausi Hotel at Rodi. The incident occurred at about midday and the witness testified that it took less than 30 minutes to reach the town and he was at the hotel for less than 10 minutes. In light of the length of time taken and the closeness of the interaction between the appellant and PW 2, I hold there was sufficient time to mark and recognise the appellant as the person who gave him the drink laced with drugs. It was not necessary to call medical further evidence to prove the fact that PW 2 was drugged.

14. I have scrutinized the testimony of PW 4 together with the identify parade forms and I am satisfied that it was carried out in accordance with established practice. PW 5 testified that he was not the investigating officer and he did not know the appellant before. He informed the appellant of the purpose of the parade. He lined up 8 people and the appellant chose to stand between No. 6 and No. 7 and the PW 2 identified him. The appellant signed the identification parade papers by endorsing thereto, "*nimetosheka.*" The appellant did not raise any complaint before, during or after the parade was conducted and in this appeal the appellant has not demonstrated what error occurred during the conduct of the parade that would vitiate it.

15. Although I am satisfied that the identification parade was conducted properly, two issues must be considered to consider whether in fact the identification parade is vitiated. First, PW 2 admitted in cross-examination that he saw the appellant briefly in court. Ordinarily this would render the identification parade useless but in this case, the fleeting encounter was accidental and not at the police station did not affect the identification parade. The learned magistrate, in his judgment, held that the appellant was not prejudiced as the police officers never told PW 2 that the person he saw was a suspect or did anything that would point to the appellant as a suspect.

16. The second issue is that the record does not disclose the description given by the PW 2 to the police before the identification parade was conducted. On this issue, I would do no better that quote the Court of Appeal in the case of ***Nathan Kamau Mugwe v Republic*** **NRB CA CRA No. 63 of 2008[2009] eKLR where it observed as follows;**

> ***James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring upto the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade.... We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person…….As to the***

complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in *Gabriel Kamau Njoroge v Republic (1982 – 1988) 1 KAR 1134****, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness "SHOULD" be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.*** **[Emphasis mine]**

17. 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:

    [T]hat 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.

18. I find that the fact that PW 2 had seen the appellant before the identification parade did not render it useless. The circumstances were neither deliberate nor intended and were not geared towards pointing to the fact that the appellant was a suspect. Likewise, the fact that PW 2 did not describe the appellant when he reported the incident is not fatal to the parade. At the end of the day, it is the duty of the court to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. In the totality of the evidence and having exercised caution, I am satisfied that PW 2 was properly identified the appellant as the person who drugged him on 23rd March 2013.

19. Finally the prosecution case was based on circumstantial evidence. In ***Nzivo v Republic* [2005] 1 KLR 699** the Court of Appeal had this to say;

    In a case dependent on circumstantial evidence in order to justify the inference of guilt to the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference."

20. In applying the test propounded above, there can be no other explanation as to why the appellant lured PW 2 to a hotel and plied him with a drink laced with drugs and left him for dead other than to steal the motorbike. His defence that he was framed by PW 4 is a sham as he did not put any questions to him in cross-examination to suggest that he was being framed.

21. The prosecution proved its case beyond reasonable doubt. I therefore affirm the conviction. The circumstances of the case speak for themselves and I find that the sentence of 5 years imprisonment was very much deserved.

22. The appeal is dismissed.

DATED and **DELIVERED** at **HOMA BAY** this 15th day of **December** 2014

D.S. MAJANJA

JUDGE

Appellant in person.

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