



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 246 of 2009

DANIEL CHEGE GETHEMOAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The Appellant **Daniel Chege Gethemo** was convicted for the offence of robbery with violence contrary to **Section 296 (1)** of the **Penal Code**, and sentenced to serve 7 years imprisonment.

2. It had been alleged that on 23rd July 2008 at Marige trading centre in Kiambu district of the Central province, jointly with another not before the court they robbed Simion Maina Kang'ethe of a motor-cycle registration No. KBA 280R make Kin Road valued at Kshs.68,000/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Simion Maina Kang'ethe,

3. He had also been faced with an alternative **count** in which it was alleged that, on 24th July 2008 at Kamunyu village in Gatundu District of the Central Province, he dishonestly handled motor cycle KBA 280R Make Kin Road valued at Kshs.68,000/= the property of Simon Maina Kang'ethe.

4. He subsequently filed an appeal against both conviction and sentence, advancing seven grounds of appeal which have been summarised hereunder:

(a) The evidence of material witnesses was contradictory and in any case did not touch on the appellant;

(b) The stolen property was not found in the appellant's possession nor was he at the alleged scene of crime at the material time;

(c) The circumstances of identification were not favourable, and the sentence imposed upon him excessive;

5. The learned state counsel Miss Maina, opposing the appeal on behalf of the state, submitted that

there was sufficient evidence on record to support both conviction and sentence. She submitted that **PW1** was able to positively identify the appellant before he boarded the motorbike and that the doctrine of recent possession was applicable in the circumstances of this case she urged me to dismiss the appeal.

6. I have analysed and re-evaluated the evidence on record afresh bearing in mind the decision in **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.** In the said case the court of Appeal held that:

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

7. The facts of the case were that **PW1** was employed by **PW4** to operate his motor-cycle, and that on 23rd July 2008 he was informed by a bar maid at Guest Bar Kia Maiko that there were two patrons who wished to be ferried to Marigi Estate. He waited outside the bar till the patrons came out. They negotiated a fare of Kshs.100/=, and boarded the motorbike. When they arrived at Marigi Estate one passenger held **PW1** by the neck and told him to let go of the motorbike or he would be shot.

8. **PW1** let go of the motorbike, and the two men rode off on it. **PW1** shouted for help but there was no one nearby to assist him. Hereported the matter to the nearest police station. The next morning he informed his fellow motorcyclists and they formed search parties, which subsequently traced the motorbike to a garage owned by **PW6**, in Kimunyu Area.

9. **PW1** positively identified the recovered motorbike as the one stole from him and **PW2** identified that motorbike as the one he found under repair in a garage at Kimunyu. He also identified the appellant who was said to have brought it for repair and who tried to run away but was caught. **PW3** who was in the search party corroborated the evidence of **PW2**.

10. A Scene of Crime Officer photographed the motorbike and produced the photographs in court. The photographs showed that the name of **PW4** who is the owner of the motorbike, together with the serial number of the motorbike as reported by the owner, appeared on that motorbike.

11. Mr. Okach, the learned counsel for the appellant submitted that the appellant was said to have sat behind **PW1** who could not therefore have identified him. From the evidence however, **PW1** who was the complainant, testified that he positively identified the appellant while still in the bar before he boarded the motorbike, as there was light in the bar and at the door. He was certain that the appellant was the man who sat immediately behind him on the motorbike and who was later arrested. He also positively identified the motorbike which was recovered as the one stolen from him.

12. Mr. Okach also contended that at the very most the appellant should have been charged with the offence of handling stolen property, and not robbery contrary to **Section 296(1)** of the **Penal Code**, and that the sentence imposed upon him was therefore excessive.

13. The appellant was convicted under **Section 296(1)** of the **Penal Code** which provides for a sentence of upto 14 years imprisonment upon conviction for the offence of robbery. The definition of robbery is to be found in **Section 295** of the **Penal Code** which provides as follows:

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery”.

14. In this case, I note that **PW1** had all the time to observe his passengers while they finished their drinks in the bar. According to his testimony the two were near the door and there was light in the bar. In his own words he stated:

“When I was waiting for the 2 people at the bar I saw them clearly as they were near the door and the lights in the bar were on. I did see their faces. I saw the face of the one who sat next to

me. He is the one who held my neck and ordered me to come out of the motor cycle.”

The robbers were two in number and employed force by holding him by the neck, and threats, by threatening to shoot him, to induce him to surrender the motorbike. The ingredients of robbery were therefore satisfied.

15. Secondly, I am in agreement with Miss Maina that the doctrine of recent possession was applicable in the circumstances of this case. Issues that must be considered before a court can rely on the doctrine of recent possession as a basis for conviction in a criminal case were set out by the Court of Appeal in the case of **Arum vs Republic 85 of 2005 KLR [2006] Vol. I Pg 233**. Before a court can rely on the doctrine of recent possession it must be established that:

(a) The property was found with the suspect;

(b) The property was positively the property of the complainant;

(c) The property was stolen from the complainant;

(d) The property was recently stolen from the complainant.

2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

3. In order to prove possession there must be acceptable evidence as search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot suffice, no matter from how many witnesses.”

16. In **Abdalla Juma Okengo and another vs. Republic cr. App 50 & 51 of 2009** (unreported), the Court of Appeal sitting at Kisumu applied the doctrine of recent possession where the complainant was robbed at 10 p.m. and the goods found in the possession of the appellant at 3.00 a.m. the same night. The court held that it was improbable that the goods had changed hand.

17. In this case the motorbike was stolen from **PW1** sometime after 10 p.m. on 23rd July 2008, since his passengers emerged from the bar at 9.55 p.m. They negotiated the fare then set off for Mirigi and he was robbed of the motorbike when he reached what should have been their destination. The motorbike was recovered hours later at about 4 p.m. the following day according to **PW6** in whose garage it was recovered. I find therefore, that in the instant case the doctrine of recent possession may be properly applied.

18. Bearing in mind that this is a criminal case, the onus of proof was on the prosecution and not the appellant to prove his innocence or explain himself. The prosecution however having laid all this evidence before the court, I assessed the defence evidence in rebuttal.

19. There is no doubt that the motorbike was recovered in the appellant's possession and that **PW1** was the constructive owner from whose custody it was stolen. The subject matter of this case being a motorbike, it is doubtful that it would have changed hands in the normal process within hours.

20. The appellant's unsworn defence was that for a fee of Kshs.100/- he assisted two men to push a motorcycle that had sustained a puncture into a garage. He was arrested when both men left him with the motorcycle in the garage and went to look for change. It was not a story that was easy to believe for the reason that he refers to the two persons as “**two men**” who therefore appear to be strangers to him and who would not have had reason to trust him with their motorbike.

21. Secondly, his demeanor when he tried to flee the scene a little while later when someone showed up asking whose motorbike it was did not lend itself to his innocence. His first instinct was to flee yet according to his testimony, he was waiting for his wages for an honest job of pushing the motorbike.

22. After a careful analysis of the evidence on record, I have no doubt in my mind that **PW1** was robbed of a motorbike on the night of 23rd July 2008 and that the appellant was one of those robbers. I find therefore, that the prosecution proved their case against the appellant beyond reasonable doubt, and that he was convicted for the right offence. I uphold the conviction.

23. On the sentence, **Section 296(1)** of the **Penal Code** provides for a sentence of upto 14 years imprisonment upon conviction. The appellant received a sentence of 7 years imprisonment. I have considered the value of the subject matter which was stated to be Kshs.68,000/=, and that the complainant was not injured during the robbery and further that the motorbike was recovered . I have also considered that the appellant has served 3 years and ten months out of the sentence of 7 years. I am therefore persuaded that it would be in the interest of justice for me to interfere with the sentence in favour of the appellant.

24. For the foregoing reasons the appeal succeeds only in regard to sentence. The appellant is sentenced to the period so far served and is therefore ordered set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **29th** day of **April 2013**.

L. A. ACHODE

JUDGE