REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 183 OF 2012

JOSEPH MAINA WACHIRA ……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(AN APPEAL ARISING FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 1364 OF 2008 AT THE SENIOR RESIDENT MAGISTRATE'S COURT AT BARICHO ON 2.3.2010)

JUDGMENT

The appellant **JOSEPH MAINA WACHIRA** was charged with the offence of robbery contrary to section 296(1) of the penal code.

The particulars of the offence as stated in the charge sheet allege that on the 15th day of November, 2008 at Kagio Township in Kirinyaga District within Central Province, the appellant robbed **STEPHEN WACHIRA MUTUGI** of his bicycle make Fonex valued at kshs 6,000 and at or immediately before or after the time of such robbery used actual violence to the said **STEPHEN WACHIRA MUTUGI** .

The case proceeded to full hearing before the Resident Magistrate's court at Baricho. The Honourable trial magistrate HON. J.N. MWANIKI in his judgment delivered on 2nd March, 2010 made a finding that the prosecution had proved its case against the appellant beyond any reasonable doubt. He convicted the appellant and sentenced him to ten years imprisonment.

The appellant was dissatisfied with the judgment. He filed this appeal against both conviction and sentence raising six grounds of appeal which I reproduce verbatim:-

1. The learned trial magistrate erred in law and infact by basing his conviction on a single sided evidence which was not corroborated by any other witnesses apart from the arresting officer and the area incharge who were not eye witnesses but acted on total hearsay.
2. The evidence adduced by the prosecution side was full of doubts and inconsistent as the two acted on total hearsay.
3. The trial magistrate erred in law by convicting me with an offence which was not proved beyond reasonable doubts.
4. The learned trial magistrate misdirected himself as to belief that I was positively identified while the evidence adduced by the PWI was to the contrary as he stated that he was attacked at night, he had no torch and there was no light. How did he identify his assailants?
5. That the convictions are not in line with the evidence adduced.

The prosecution called a total of four witnesses. Briefly, the prosecution case is that on 13th November, 2008 at about 5.a.m., the complainant who testified as PW 1 was riding his bicycle ferrying about 50 litres of milk for sale. As he was riding over a bump, he was hit from behind and hand by some unknown assailants who also stole his bicycle valued at kshs 6,000. He sustained some injuries and went to hospital for treatment.

PW2 JOHN MURIITHI KABAARA an elder of Kagio town recalled that on 14th January,2008 (as reflected in the court record) members of the public found him at his home and handed over to him the appellant on the allegation that he had been found in possession of a stolen bicycle. He stated that he did not know the appellant before. He escorted the appellant to Kagio police post. He handed him over to PW3 NO. 45458 P.C. Presco Ogot together with the recovered bicycle..

According to the evidence of PW3, the elders who handed over the appellant to him alleged that they had arrested him in an abandoned house which was under construction in possession of the bicycle. He rearrested the appellant and took possession of the bicycle. He recalled that earlier that morning, the complainant had gone to the police post and reported to him that unknown people had stolen his bicycle on the previous day. He stated that the complainant had visible injuries and he referred him to hospital for treatment.

PW2 and PW3 both confirmed in their evidence that they were present at the police post when PW 1 identified the recovered bicycle as the bicycle which had been stolen from him on 13th November, 2008. PW 3 added that PW1 handed over to him a receipt confirming purchase of the bicycle bearing Serial NO. 1004809. As the appellant did not claim ownership of the bicycle nor explain its possession, he was charged with the offence which resulted in the conviction challenged in this appeal.

In his defence, the appellant gave a sworn statement . He denied having committed the offence. He testified that he was a resident of Endarasha and that on 13th November, 2008 , he had gone to Kutus to look for his sister . He lost his money and walked to Kagio where on advise of a watchman, he hid in a house under construction near a road to avoid being arrested by police who allegedly conducted patrols in the course of the night. He stated that early the following morning, a man went to the abandoned house and retrieved a bicycle from one of the rooms. He was also arrested and escorted to the house of PW2 and later to the police station . He testified that prior to the recovery of a bicycle , he had no knowledge of the existence of the bicycle in the house as he had not seen it.

When the appeal came up for hearing on 15th November, 2013 , the appellant made oral submissions . He drew the courts attention to an apparent contradiction in dates given by the complainant relating to when the offence was allegedly committed and the date PW2 claimed he was handed over to him.

According to the court record, the offence was committed on 13th November, 2008 but the record shows that PW2 testified that the appellant was handed over to him on 14th January, 2008 together with the recovered bicycle.

I am inclined to agree with Mr. Sitati for the state that the indication of 14th January, 2008 in the court record as opposed to 14thNovember , 2008 was caused by a typographical error since a consideration of the evidence of PW2 and PW3 as a whole shows that the appellant was handed over to PW2 and PW3 on 14th November, 2008 and not 14th January, 2008. There was therefore no contradiction in the evidence of PW1 and PW2.

In opposing the appeal, Mr Sitati submitted that the evidence adduced before the appellant in the lower court was credible and overwhelming . He urged the court to dismiss the appeal for lack of merit.

This being a first appeal, this court has an obligation to re-evaluate and reconsider afresh the evidence on record against the appellant in order to reach its own independent conclusion as to whether the conviction of the appellant was sound and well founded in law. This is of course bearing in mind that this court did not have the benefit of seeing or hearing the witness . I am guided in this finding by the

following authorities:-

- **OKENO VR (1972) EA 32,**
- **MWANGI VR (2004)2 KLR 28**
- **KINYANJUI VR (2004) 2KLR 364**

Having considered the evidence on record, and the judgment of the learned trial magistrate , I find that the appellant's conviction was founded on the trial court's finding that the appellant had been found in possession of the complainants bicycle hours after it had been stolen. The learned trial magistrate applied the doctrine of recent possession and after evaluating the appellants defence , he found it unworthy of belief . In his view , the appellant failed to offer a satisfactory explanation to rebut the presumption inherent in the doctrine of recent possession which is to the effect that a person found in possession of recently stolen goods is presumed to be either the person who had stolen them or a handler of the same knowing or having reason to believe that they were stolen goods. After reflecting the appellants defence, the trial magistrate concluded that the appellant must have been among the persons who had stolen the bicycle from the complainant and convicted him with the offence as charged

After re-evaluating the evidence tendered in the lower court, I find that it is clear from the evidence of PW 1 that he did not identify his assailants on the material day who were also the people who robbed him of the bicycle .None of the witnesses who testified in this case was at the scene of the robbery and none claimed to have seen the appellant committing the offence .

This in effect means that there was no direct evidence before the trial court linking the appellant to the commission of the offence. He was convicted on purely circumstantial evidence showing that he had been found in possession of the stolen bicycle hours after it had been stolen. But for circumstantial evidence to safely found a conviction, the law is that it must point directly to the guilt of the accused person as charged leaving no possibility for his innocence .

In this case, I am satisfied that the fact of possession of the stolen bicycle which formed the basis of the appellant's conviction was not proved beyond any reasonable doubt by the prosecution as required by the law .

Unlawful Possession connotes knowledge of the existence of the stolen goods and can be either actual when a person is found in physical possession of the goods or constructive where though not having physical possession, an accused person is proved to have had knowledge and control of the stolen goods .

In this case, the appellant denied that he had any knowledge that there was a bicycle anywhere in the abandoned house in which he had allegedly sought refuge on the evening of 13th November, 2008 leave alone knowledge that it was stolen property. He claimed that he had not seen any bicycle but admitted that a man went there on 14th November, 2008 in the morning and removed a bicycle from one of the rooms where upon he was arrested. This claim by the appellant which was made on oath implied that the bicycle was recovered from a different room from the room or place the appellant was found and arrested . If this was the actual position, it would mean that the appellants claim that he had not seen the bicycle previously or that he was not aware of its existence was probably true.

Though there is no doubt that the bicycle recovered in that house was the same bicycle that had been violently stolen from the complainant on 13th November, 2008, without proof that the appellant had knowledge of its existence in that house or that he was found in its actual possession and he subsequently failed to account for its possession , there cannot be any basis for making a determination that the appellant been found in possession of recently stolen property and that the doctrine of recent possession applied in his case. It is important to note that none of the persons who arrested the appellant were called as witnesses by the prosecution to testify on the layout of the said house for instance to shed light on whether it had one or several rooms or to testify on the actual circumstances surrounding the appellant's arrest and recovery of the bicycle. There was therefore no evidence to show whether the appellant was arrested from the same room in which the stolen bicycle was recovered or he was in a different room or place .

Since those people did not testify in this case , there was no evidence presented to the trial court to show whether any circumstances existed from which an inference could be drawn that the appellant was aware of the existence of the stolen bicycle in the house in which he was arrested in the event that he was not arrested in its physical possession.

The appellant's claim in his defence that he had been in that house solely for the purpose of seeking refuge to avoid arrest by police officer s on patrol in the course of the night having been a stranger in the neighbour hood was not challenged by the prosecution. Infact the evidence of PW 2 seems to have supported the appellants claim when PW2 stated that though he was an elder in that area, he did not know the appellant . The appellant had claimed that he hailed from Endarasha and was a visitor in Kagio area where the offence was committed

In my considered view, the appellant's defence when compared with the rest of the evidence raised reasonable doubts in the prosecution's case whether or not he had been found in unlawful possession of the bicycle stolen from the complainant which doubts should have been resolved in his favour.

In view of the foregoing, it is my finding that the learned trial magistrate erred in not properly evaluating the evidence presented before him and in finding that the prosecution had proved the charges against the appellant beyond any reasonable doubt.

In the end, I find that the evidence on record was not sufficient to sustain a safe conviction .

In the circumstances, it is my decision that the appeal is merited. I therefore allow the appeal, quash the conviction and set aside the sentence . The appellant should be set free unless otherwise lawfully held.

C. W.GITHUA

JUDGE

DATED, SIGNED and DELIVERED at KERUGOYA this 17TH day of OCTOBER,2013 in the presence of :-

The appellant

Ms Macharia for the state

Kariuki Court clerk