



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL REVISION APPEAL CASE NO. 150 OF 2011**

*[Being an appeal from the judgment in Kimilili SRM court criminal case No. 437 of 2011]*

**GODFREY WANJALA JUMA ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

The Appellant **GODFREY WANJALA JUMA** being dissatisfied with both his conviction and sentence filed an appeal. He was charged with the offence of robbery contrary to Section 296 (1) of the Penal Code. That on the night of 25th April 2011 at Kamusinga village in Chebukwabi location in Kimilili, Bungoma District jointly with others not before court robbed Michael Wanyonyi Wafula of a bicycle make "RELI" frame No. V14268 worth Kshs. 2,800/= and immediately before or after the time of the robbery threatened to use actual violence to the said Michael Wanyonyi Wafula. There was an alternative charge of handling stolen goods contrary to section 322 of the Penal Code. He pleaded not guilty to both counts.

**Summary of the prosecution evidence:**

The prosecution called 4 witnesses in support of their case. **PW1, Michael Wanyonyi Wafula** who was the complainant testified that he reported to work on 25th April 2011 at 6.30 p.m. He worked for PW2 as a night guard. At about 11 p.m, the rains started pounding the area. While patrolling, he saw 8 people in the compound who wanted to know whereabouts of his employer. He told them she was in the house and subsequently, they ordered him to lie down. Shortly thereafter, they left the home and he discovered his bicycle was missing. He immediately woke up his employer and informed her of the incident. The employer (**PW2**) advised him to report the incident to the police.

The next day, while on his way to report the incident to the police he met the Appellant and another person with his bicycle. He arrested the appellant and took him to the village elder. **PW2, Electine Kisiangani** confirmed being the employer of **PW1**. She also confirmed PW1 woke her up at midnight to inform her that some 8 people had gone to her home. **PW1** informed her that his bicycle was missing and she advised him to report the matter to the police the next day. At 7.00 a.m, The next day, **PW1** called her that he had met a suspect with his bicycle. She went to the scene and helped **PW1** in arresting the Appellant whom they took to the village elder.

**PW3** is the son to **PW2**. He gave similar evidence as **PW2**. He was informed of the incident at night by **PW1**. **PW4** the police officer while on duty on 26.4.2011 at about 9.30 a.m received the Appellant and the bicycle brought in by the complainant and members of the public. He arrested him. He identified the bicycle before court which he produced as exhibit P1.

## **Appellant's evidence**

The Appellant gave unsworn statement and did not call any witness. He testified that he lives at Chwele. On 25th April 2011 while going to work, he boarded a vehicle to Kimilili. After alighting, he requested a lift on a bicycle to Shikendu. On the way, they met a person (the complainant) who stopped them saying that the bicycle was his. The rider ran away. The appellant was taken to the village elder where he later learnt the bicycle was robbed. He did not know the bicycle.

## **Was conviction safe**

**PW1** saw eight people in the compound at about 11 p.m. The people descended on him demanding that he tell them where his employer was. They ordered him to lie down. He was not injured. Later he discovered his bicycle was stolen. He did not identify any of the thugs. Section 295 of Penal Code which is the descriptive part of this offence provides thus;

***“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.”***

At the time **PW1** said the thugs descended on him, he did not have his bicycle. Infact he does not say where the bicycle was throughout his evidence. The thugs only asked the whereabouts of his employer and thereafter left. It is after they had left that he discovered his bicycle was missing. It is inferred from the evidence on record that the force used if at all was not to obtain or retain the bicycle. The prosecution did not prove the intention of force used was towards obtaining the bicycle. It is always the burden of the prosecution to prove its case beyond reasonable doubt. In the instant case, there was also no proof that the eight people were armed.

On the issue of identification, none of the prosecution witnesses identified the Appellant at the scene. **PW2** and **PW3** were alerted of the incident after the 8 people had left. **PW1** said he did not identify any of them. The trial court had no basis at all to link the Appellant to the robbery. The conviction was therefore not safe on count I for the offence of robbery.

This court has powers under section 354 to substitute the conviction for the alternative charge. Is there evidence to convict the appellant on the alternative count of the charge of handling stolen property contrary to section 322 (1) (2) of the Penal Code?

**PW1** on his way to report the incident to the police, met the Appellant with the stolen bicycle in company of another person. He positively identified the bicycle as his. He was not satisfied with the explanation given that it was purchased. He does not say whether it is the appellant or the person who ran away who gave this explanation. He arrested the Appellant and took him to the village elder. The Appellant in his defence told the court that he requested a “lift on a bicycle then on the way a person appeared stopped them and told him that it was his. The rider ran away.” The learned Magistrate found this defence “as cheap merely intended to save the accused's skin.”

The burden of proof always rest with the prosecution. **PW1** admitted he met two people with his bicycle. He did not say whether the Appellant was the rider or the pillion passenger. He admitted one of the two people ran away. The Appellant gave an explanation that he was merely given a lift and it is the rider who ran away. I find his explanation that he was given a lift and it is the rider who ran away as believable. He said he did not know the bicycle was stolen. It was incumbent upon the prosecution to prove that the appellant knew the bicycle was stolen. **PW1** does not indicate if the Appellant attempted to ran away like his colleague so that guilt could be inferred on his behaviour. In my view the fact that he did not run away strengthened his assertion that he did not know the bicycle was stolen. I therefore find that there is no basis for me to convict the appellant on the alternative charge.

In conclusion, I find the appeal is merited. I hereby quash the conviction and set aside the sentence. The

Appellant is set at liberty forthwith unless lawfully held.

**JUDGMENT DATED AND DELIVERED** this 14th day of October 2013

**A. OMOLLO**

**JUDGE.**