



**REPUBLIC OF KENYA**

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

**Coram: Fred Ochieng & G.K. Kimondo JJ**

**CRIMINAL APPEAL NO. 53 OF 2010**

**SILAS KIPCHUMBA KERICH :::::::::::::::::::::::::::::::  
::::: APPELLANT**

**=VERSUS=**

**REPUBLIC :::  
::::: RESPONDENT**

***[Being an appeal against the judgment of Hon. G.A. Mmasi, (SRM), dated 24/03/2010***

***at the Chief Magistrate's Court Eldoret in Criminal Case No. 2399 of 2009]***

**JUDGMENT**

The Appellant, **SILAS KIPCHUMBA KERICH**, was convicted for the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code. He was then sentenced to death.

The prosecution's story is that the Appellant was with his brother, when they asked the Complainant to provide them with a **“taxi service”**, using his father's motor-cycle.

At some point, the brothers asked the Complainant to stop, as the Appellant needed to make a phone-call.

After the Complainant stopped the motor-cycle, the 2 brothers assaulted him, and then tied him up, using ropes. The Complainant lost consciousness.

When the Complainant regained consciousness, the brothers had disappeared. The motor-cycle had also disappeared.

Eventually, the motor-cycle was recovered at a place called Kaptagat.

The appellant was arrested about 20 metres away from the place where the motor-cycle had been recovered. At the time of his arrest, the Appellant was asleep, inside a vehicle.

According to the Complainant, he had known the Appellant even prior to the incident in issue. It is for that reason that he was persuaded to ferry the Appellant (with his brother), using his father's motor-cycle.

It would thus appear that this was a case of recognition.

But the Appellant asserts that the conviction was not founded upon sound evidence.

Mr. Kigamwa, the learned advocate for the Appellant, submitted that the Complainant did not see the person or persons who stole his motor-bike.

Secondly, when the said motor-bike was recovered, it was not in the Appellant's possession.

Thirdly, the appellant pointed out that the only items which the Complainant said he lost to the 2 brothers, were a mobile phone and some Kshs 2,000/= in cash. Curiously, however, those items were not mentioned in the charge sheet.

The Appellant's other contention was that the prosecution failed to establish how the Complainant's father identified him, whilst the Complainant did not testify that he had told his father about the identity of his assailants.

The particulars of the motor-bike which was allegedly stolen from the Complainant was also said to be very unclear. The Appellant pointed out that the Frame number cited in the charge sheet was different from the one given by the Complainant's father.

The scene of crime was also said to be unclear as the complaint testified about a place called Kiplombe, whilst his father said it was at Maili Nne.

The identity of the Complainant was also said to be unclear. The charge sheet gave a name that was not the same as that given by the Complainant when he was testifying.

In answer to the appeal, **Mr. Munene**, learned state counsel, submitted that the prosecution had proved the case beyond any reasonable doubt.

The respondent submitted that the Appellant was positively identified as one of the persons who robbed the Complainant.

The ingredients of the offence of robbery with violence were also said to have been proved, as the Appellant was in the company of another person, and they were armed with pangas. They also assaulted the Complainant, before robbing him.

The owner of the motor-bike is said to have proved that the recovered motor-bike was the one which had been stolen, as he demonstrated that the Engine number on the said motor-bike was the same as the one cited in the charge sheet.

The respondent said that the owner of the house from which the motor-bike was recovered, is the person who told the owner of the motor-bike that it was the Appellant who had taken the motor-bike to his house.

On the issue regarding the identity of the Complainant, the Respondent submitted that there was an error when the trial court recorded the name.

Being the first Appellate court, we have re-evaluated all the evidence on record.

We note that the Complainant's name is ELLY KIRUI KIPKOECH. That is the name on the charge sheet.

However, that person did not give evidence. Instead, the person who testified as the Complainant, gave his name as KIWI HENRY KIPKOECH.

The difference in the names is not merely of a typographical nature.

In those circumstances, it cannot be said that there was simply an error.

But even assuming that there had been a genuine error, it was the obligation of the prosecution to either seek an appropriate amendment of the charge sheet, or to otherwise tender an explanation that would enable the court be persuaded that the two sets of names refer to the same person.

The prosecution did not demonstrate that the person who testified as the Complainant was the same person as the person cited in the charge sheet.

The Item which was stolen from the Complainant was a motor-bike. Its particulars were:

<b>Make</b>	-	<b>TVS</b>
<b>Engine Number</b>	-	<b>OF5L81478338</b>
<b>Frame Number</b>	-	<b>MD625GF5281L</b>

The receipt which was produced in evidence indicated a different Frame Number as follows:-

**MD 625 GF 5281L47317**

The engine number provided by P.W. 2 was the same as that on the charge sheet. However, that still begs the question why the Frame Number on the charge sheet did not match the one on the receipt.

The Complainant testified that those who attacked him were armed with a panga. But the charge sheet did not indicate that the robbers were armed with any weapons.

The Complainant testified that the assailants strangled him and then robbed him of his mobile phone, plus Kshs 2,000/=.

As those items were taken from the Complainant when he was still conscious, he would have been sure about the identity of those who took them. But then, the charge sheet failed to mention the phone or the money.

The Complainant had walked about 20 metres away from the spot where he parked the motor-bike. It is there that he was assaulted. He lost consciousness.

When he came to, the Complainant found the motor-bike missing. In those circumstances, it was reasonable to presume that it was the same people who had assaulted him, that had also stolen the motor-bike. But, in the same vein, there is no certainty about who may have stolen the motor-bike when the Complainant was still unconscious.

The charge sheet states that the Complainant was robbed at MAILI NNE.

P.W.2 said that the robbery took place at KIPLOMBE. It is not clear whether or not those two names refer to the same place.

On the issue of identification, it would have been expected that if the Complainant had recognized the Appellant, he would have given his name to the Police and to his father (P.W.2).

P.W.2 told the court that the Complainant informed him that:-

***“one suspect was Fundi of Mteja and other the young man***

*who had been shot on the hand. We met the one who had been shot on the hand. We questioned him. He said he was with Sila, and Sila is the one who robbed the Complainant”.*

Thus, it is not the complainant who identified the Appellant. He had identified “*Fundi was Mteja*” and another person who had been shot on the hand.

It is the latter person who thereafter identified Sila, as the person who had robbed the Complainant.

It is also noteworthy that the identity of the person from whose house the motor-bike was recovered, remains a mystery. We say that that is noteworthy, because it is that person who allegedly told the Complainant's father, that it was the Appellant who had taken the motor-bike to his home.

P.W. 3 testified that the owner of the house from where the motor-bike was recovered, escaped. That development should have caused alarm bells to ring. It was strange that an “*innocent person*” would have run away after directing the members of the public to where they arrested the alleged robber.

For all those reasons, we find that there were many more questions than answers, provided by the prosecution.

The foundation of the conviction is of doubtful integrity. We therefore allow the appeal, quash the conviction and set aside the sentence.

We direct that the Appellant be set at liberty forthwith, unless he is otherwise lawfully held.

**DATED, SIGNED AND DELIVERD AT ELDORET,**

**THIS 21ST DAY OF NOVEMBER, 2013.**

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**FRED A. OCHIENG**

**JUDGE**

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**G.K. KIMONDO**

**JUDGE**