



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.94 OF 2009

(CONSOLIDATED WITH CRIMINAL APPEAL NO.93 OF 2009)

LESIATON LEPEYE LELERTE.....1ST APPELLANT

JULIUS REPEYE LELERTE.....2ND APPELLANT

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....RESPONDENT

[An Appeal from original conviction and sentence in Naivasha S.P.M.CR.C.NO.1940 of 2007 by Hon N. Njuki, Senior Resident Magistrate dated 18th March, 2009]

JUDGMENT

The two appellants in this consolidated appeal were jointly charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. It was alleged in the particulars of the offence that on the 4th day of October, 2007 at Gilgil Town in Naivasha District within the Rift Valley Province, jointly being armed with dangerous weapons namely, *rungus* and knives robbed Francis Njoroge Ngutu of his unregistered motorcycle make Ranger Ry 125cc valued at Kshs.85, 000/= and at or immediately before or immediately after the time of such robbery wounded the said Francis Njoroge Ngutu.

According to Francis Njoroge Ngutu (the complainant), a motorcycle *boda boda*, operator, the 1st appellant approached him at 4p.m. on the day in question and hired him to go take him to a certain Maasai Manyatta. On the way, they were joined by the 2nd appellant. After a short ride, the appellants asked the complainant to stop. They attacked him with *rungus* (clubs) and took away his motorcycle. The complainant called his colleagues and at the same time reported the robbery to police officers at a road block. He was referred to Gilgil Police Station where he was issued with a P3 form. He was treated for the injuries inflicted by the robbers. While at the hospital where he had gone for treatment, the complainant learnt that the motorcycle had been recovered and taken to Gilgil Police Station. He went to the station where he identified the two appellants and motorcycle.

James Gitonga, another *boda boda* operator confirmed that he saw the 1st appellant negotiating fare with the complainant on the day of the robbery.

Two hours after the robbery, the appellants were arrested by two guards on Marura Estate, Emaille Gichai and Joseph Mande Wawire.

According to the two witnesses, on the day of the robbery at 6pm they saw the two appellants pushing a motorcycle through the farm. Because the farm was a private property, they arrested them, we supposed for trespass. The police were called and Cpl. Peter Nzemia who had earlier on received the report of the robbery from the complainant went to Marura Estate where he rearrested the appellants and took possession of the motorcycle and a club.

The appellants in their sworn defense denied taking part in the robbery. They maintained that they were arrested as they grazed their livestock. After their arrest, they were taken to Marura Farm where they were accused of having stolen a motorcycle.

The learned trial magistrate (Njuki, SRM) in a one and a half page judgment found that the case against the appellants was proved beyond reasonable doubt and upon conviction, sentenced each of the appellants to death.

The appellants were aggrieved and have challenged the conviction on the following grounds:

1. that their plea was not recorded or that they did not plead to the charge.
2. that their Constitutional rights under **Section 72(3)(b)** of the of the repealed **Constitution** were violated;
3. that the evidence of being in possession of the alleged stolen motorcycle was flawed;
4. the alleged stolen motorcycle was not identified and/or there was no proof of ownership;
5. that there were contradictions in the prosecution case;
6. that the identification parade was not conducted
7. that the appellants were victims of circumstances
8. that their defence was not considered;
9. that the prosecution did not prove its case beyond reasonable doubt.

Learned counsel for the respondent supported the conviction submitting that the complainant was able to identify the appellants as the robbery took place in the afternoon (at 4pm). That shortly after the robbery the appellants were found with the motorcycle which had been stolen from the complainants.

We have considered the evidence presented before the trial court and the submissions by both sides. Being the first appellant court we must start by re-evaluating the evidence on record in order to make our own independent conclusion. While doing so, we are alive to the fact that we have neither seen nor heard the witnesses. See **Okeno V. Republic** (1972) EA 32. The complainant and his colleague, James Gitonga were categorical that it is the 1st appellant who approached the complainant to take him to a manyatta. The complainant testified that the 1st appellant was not known to him before this day. Before they began the journey the appellant and the complainant negotiated the fare after the former explained to him that he did not have sufficient money for the journey but that there was someone who had gone ahead who would pay the shortfall.

In our estimation, this exchange provided the complainant sufficient opportunity and time to be able to identify the 1st appellant. There is also the evidence of James Gitonga who saw the 1st appellant negotiate the fare with the complainant. Having agreed on the fare, the complainant and his passenger left for the manyatta. After a short ride the 1st appellant asked the complainant to pick up his friend who was ahead of them. The two appellants talked in Kimaasai language before instructing the complainant to take them close to the manyatta and not inside. Again we are satisfied that, being in the afternoon, the complainant

was able to see the 2nd appellant well as he stopped to pick him up and also as he (2nd) and the 1st appellant talked in the Kimaasai language. This was also a second opportunity for the complainant to identify the 1st appellant again.

Although the appellants were pillion passengers the complainant had clearly seen them. Indeed he was specific that the 2nd appellant sat right behind him, between him and the 1st appellant on the pillion seat. That was yet another opportunity for the complainant to identify the appellants. It is the 2nd appellant who first threatened the complainant with his club by pressing it against his throat. The 1st appellant dismounted the motor cycle and attacked the complainant on the head with a club. The 1st appellant got hold of the complainant by the throat and with the 2nd appellant they dragged him into the bush. Their final words to the complainant were that he would get his motorcycle in Samburu.

We have no doubt from these events that the complainant spent considerable time with his assailants and was therefore able to positively identify them.

In addition to this evidence, the appellants were arrested shortly after the robbery and had in their possession the complainant's motorcycle. This evidence is based on the doctrine of recent possession. It is now established that evidence of recent possession is circumstantial evidence, which depending on the facts of each case, may support any charge. When an accused person is found in possession of recently stolen property and he fails to provide reasonable explanation to account for his possession a presumption of fact arises that he is either the thief or a receiver.

The complainant must, however, positively identify the recovered item as his. See **Andrea Obongo V. Republic** (1962 EA 542 and **Leonard Odhiambo Ouma & Another V. Republic** Criminal Appeal No. 176 of 2009.

Other than the direct evidence of identification, there is the evidence of being in possession of recently stolen motorcycle. The two guards at Marura Estate were independent and credible witnesses. The insinuation by the appellants that they were arrested for grazing in a private land was properly dismissed by the learned trial magistrate. They completely failed to give account of how they came by the motorcycle. Although the complainant did not give the details of the motor cycle as it had not been registered, he & his witness, James Gitonga were able to positively identify the motorcycle.

Having come to the conclusion that the appellants were the persons who robbed the complainant and in the process used actual physical force on him, we find no merit in grounds 3, 4, 5 and 6.

The appellants have also challenged the trial on the ground that their pleas were not recorded or in the alternative that they did not plead to the charge. We have pursued the record and it is clear to us that no plea was taken before the commencement of the trial.

However, three times in the proceedings, the trial magistrate recorded that; "*Accused still pleads not guilty.*" Is the failure to take the appellants' plea before the commencement of their trial fatal? The answer to this question has now been settled. In **JAO V. Republic**, Criminal Appeal No.176 of 2010, a recent decision of the Court of Appeal (delivered on 1st July 2011) the court said:

The appellant nevertheless raised one issue of law which was conceded by learned Senior State Counsel Ms. Nyamosi as it was apparent on the face of the record. The issue is that the trial court did not take a plea in the case before commencing the trial. It is apparent on the record that the appellant was taken before the Chief Magistrate Makadara on 29th October, 2001 when the charge and particulars thereof were put to him but he was not required to plead because there was no consent from the Attorney General to prosecute. It took another 11 months of mentions before it was confirmed on 9th September 2002 that the consent had been issued. A date was fixed for trial which commenced on 2nd October, 2002 without the plea being taken. The response by Ms. Nyamosi to this anomaly was that it did not invalidate the charge or the trial as the appellant fully

participated in cross-examining all the witnesses and testified in his defence. There was therefore no prejudice and the irregularity was curable under *section 382* of the Criminal Procedure Code (CPC).

We have considered the issue and we agree with Ms. Nyamosi that the irregularity was curable under *section 382* of the CPC. The requirement under *section 207* of the CPC for calling upon the accused person to plead serves the purpose of determining whether he admits the offence charged, in which case there would be a summary determination of the case, or denies the truth of it in which case a formal trial would be held. If there was no express denial but a refusal to plead, the trial would still proceed as if a plea of not guilty was entered.

One more example will suffice. In the case of **Penginipo Hassan Kuvua V. Republic**, Criminal Appeal No. 131 of 2004, the plea was taken by a magistrate who had no jurisdiction to hear the case. The prosecutor was also unqualified. But the trial commenced before a magistrate with the requisite jurisdiction and prosecution conducted by a qualified prosecutor. The question that arose was whether the trial was a nullity on account of failure to take plea. The court delivered itself on the question as follows:

“We must admit that the matter caused us very considerable anxiety, but in the end, we have come to the conclusion that the appellant’s trial in the subordinate court was not a nullity. No trial took place on the 28th November, 2002. What went on in court on that day, was all a nullity. The magistrate did not have power to try the appellant, and his purported recording of the plea must be ignored as a nullity. That magistrate subsequently mentioned the case of 16th December, 2002, 31st December, 2002 and on 14th January, 2003. But no one can seriously treat the mention of a case as being the same thing as the trial of the case.

The proper trial of the appellant opened before M/s Mbatia on 30th January, 2003 and she herself had jurisdiction to try the appellant and Inspector Mutangili was entitled to prosecute the case. True M/s Mbatia did not formally record any plea from the appellant but it is clear to us that the appellant was not admitting the offence against him. Witnesses were called and testified in the appellant’s hearing; he cross-examined them and in the end he himself gave sworn evidence denying his involvement in the crimes charged against him.

In those circumstances, it would be unreasonable and wholly artificial to hold that the failure by the trial magistrate to record a formal plea of not guilty from the appellant invalidated his trial. It is clearly implicit from the record that the appellant would have pleaded not guilty to the charges had M/s Mbatia read them out to him. The position would have been totally different if the appellant had purported to plead guilty before the first magistrate and M/s Mbatia then merely took over to record the facts in support of the charges without having herself read out and explained the charges to the appellant.

If in those supposed circumstances, she had purported to find the appellant guilty on his own plea, the conviction arising from such proceedings would have inevitably been quashed. But in the circumstances prevailing in this case which circumstances clearly show that the appellant denied the offences, we are unable to agree with the appellant and Mr. Monda, that the failure by M/s Mbatia to formally read out the charges to the appellant and record his answer to those charges rendered his trial before M/s Mbatia a nullity.

The failure, in our view, is an irregularity curable under Section 382 of the Criminal Procedure Code.”

That ground must fail for those reasons.

The last matter is on the issue of the applicants’ constitutional rights under *section 72(3)* of the former Constitution. Again we shall draw our answer from the several decisions of the Court of Appeal and this court on the consequences of violation of the rights under the forementioned provision. In **Jeremiah Kiiru Nyambura V. Republic**, Criminal Appeal No.271 of 2005, the court has reiterated that the

violation of that provision did not go to the guilt or innocence of the accused person. That it only entitled the accused person to certain remedies spelled out in the former Constitution.

The last issue we wish to deal with is the ground by the 1st appellant that the trial court failed to consider that he was only 17years of age. That position is not borne out of the record. We have seen on record a medical certificate of age which estimated the 1st appellant's age as 19 years.

For the reasons stated the appeal fails and is dismissed.

Dated, Signed and Delivered at Nakuru this 24th day of February, 2012.

W. OUKO

JUDGE

H. A. OMONDI

JUDGE