



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 350 of 2002

GEOFFREY WACHIRA

GITHINJI.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Judgment arising from the Chief Magistrate's Court at Nyeri in Criminal Case No.2848 of 2001

by C. D. Nyamweya – S.R.M.)

J U D G M E N T

Geoffrey Wachira Githinji, the Appellant herein, was tried on a charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence are that: *on the 28th day of March 2001, at Gachika Village in Nyeri District of the Central Province, jointly with others not before Court, and while armed with offensive weapons namely iron bars robbed Francis Gachanja Kanuhi of a bicycle make Tom Frame Number M79462 valued at Kshs.4,500/= and at or immediately before or immediately after the time of such robbery wounded the said Francis Gachanja Kanuhi.*

At the conclusion of the trial, the Appellant was convicted and sentenced to suffer death. Being aggrieved the Appellant filed this appeal.

On appeal, the Appellant put forward the following grounds in his Petition of Appeal:

“1. The Learned Trial Magistrate erred in law and facts in basing my conviction upon a defective Charge Sheet which cannot sustain a conviction being inconsistent to the evidence in chief.

2. That he erred in law and facts in convicting on evidence which was tendered by unsworn Prosecution Witnesses.

3. That he erred in law and facts by convicting regardless of lack of interpretation of the Court Proceedings.

4. That he erred in law and facts in applying the doctrine of recent possession without considering the exact time elapsed before recovery of the said bicycle.

5. That he erred in law and facts in disregarding my defence without giving reasons as stipulated under Section 169(1) Criminal Procedure Code and Section 211 of the Criminal Procedure Code before defence.”

When the appeal came up for hearing, the Appellant was permitted to file and rely on written submissions. Miss Ngalyuka, Learned Provincial State Counsel urged this Court to dismiss the appeal on the basis that the Appellant was positively linked to the offence by the application of the doctrine of recent possession.

Before considering the substance of the Appeal, we wish to set out in brief, the case that was before the trial court. The Prosecution's Case was supported by the evidence of eight (8) witnesses. Francis Gachanja (P.W.1), the complainant, told the Trial Magistrate that on 28th March, 2001 at about 8.30 p.m. he was pushing his bicycle from *Kericho Trading Centre* towards his home at *Kahiga* when he was suddenly attacked from behind. He was hit on the head before losing his conscience. P.W.1 regained his conscience at 4.30 a.m. and found his bicycle missing. He crawled to the nearby house where he sought for help. P.W.1's relatives were informed and consequently they made arrangements to have him taken to Karatina District Hospital where he was admitted for eight (8) days. The incident was reported to Marwa Police Post where P.W.1 was issued with a P3 Form. On 22nd August 2001, police received information that a bicycle belonging to the complainant (P.W.1) had been sold by a man who was in the company of a lady at Kutus. The name of Jane Wateri Nderitu (P.W.3) was given to the police as the lady who accompanied the Appellant. P.W.3 was arrested as a suspect. She led the police to where the bicycle was sold. Stanley Migwi Njoroge (P.W.4) confirmed having bought the bicycle from the Appellant at Kshs.1,400/=. Both P.W.4 and the Appellant were arrested. The complainant (P.W.1) managed to positively identify the bicycle to be his. The Appellant's defence was supported by the Appellant's testimony and that of one independent witness. The Appellant alleged that he was framed up by a Policeman whom he had a grudge with over love triangle. The Trial Magistrate considered the evidence and came to the conclusion that the Appellant was connected to the offence by the doctrine of recent possession. The Trial Magistrate dismissed the Appellant's defence as unbelievable.

Having given in brief, the case that was before the trial court, we now turn our attention to the merits or otherwise of the Appeal. We will in the process re-evaluate the evidence in detail. In the first ground, it is argued that the Appellant was convicted on evidence which were inconsistent with the charge. It is the submission of the Appellant that the Charge Sheet indicates that the offence was committed on 28th March 2001, whereas the Charge Sheet further states that he was arrested on 25th March 2001. The Appellant further argued that the complainant's bicycle had an old frame but the evidence on record indicates that he managed to identify his bicycle by looking at the new frame numbers. On our part, we have carefully examined that particular piece of evidence *vis-a-vis* the arguments presented. It is clear on the face of the Charge Sheet that the date of arrest is stated to be 25th March 2001. It cannot therefore be true that the offence was reported before it happened. On the issue regarding the frame number, it is clear from the particulars of the charge that the complainant's bicycle was of frame No.M79462. The agreement entered between the Appellant and one Stanley Migwi Njoroge and produced as an exhibit in evidence was in respect of bicycle frame No.M79462. That is the frame number the complainant attached to his bicycle. We see no merit in the Appellant's ground of appeal.

The second ground argued on appeal is to the effect that the Appellant was convicted on the basis of unsworn evidence. It is the Appellant's argument that all the Prosecution Witnesses were not sworn before testifying. Miss Ngalyuka did not address us over this issue. We have perused the Record of Appeal and the original file of the trial court and it is clear that there is no indication whether or not the witnesses testified on oath. We do not comprehend why the Learned Provincial State Counsel did not address us over this ground. We find merit on this ground. Under **Section 151** of the **Criminal Procedure Code**, the law makes it mandatory for witnesses to testify while under oath. Failure to comply with the aforesaid provision will render the whole trial null and void. We will allow the appeal on this

ground.

The third ground which was ably argued by the Appellant is to the effect that the proceeding were conducted in a language he did not understand. Again, the Learned Provincial State Counsel did not address us on this ground. We have looked at the record and it is clear that the trial was conducted in English and Kiswahili languages. The Appellant has made a general allegation that there was no translation. He has not stated to this Court which language he does not understand between the two languages used at the trial. We are of the considered opinion that the aforesaid ground of appeal was not properly founded. It is dismissed for being without merit.

In the fourth ground of appeal, the Appellant argued that the doctrine of recent possession did not apply. He argued that the bicycle was an item which can change hands so easily that it is difficult to assign possession to any individual. He further argued that the frame and other identifying marks had been tampered with and removed. The Appellant pointed out that the evidence of P.W.3 should not have been relied on because she was not a credible witness since he differed over her with a Police Officer. Miss Ngalyuka on her part was of the firm view that the Prosecution had established the doctrine of recent possession. We have re-evaluated the evidence and we think the doctrine of recent possession was properly applied in this case. We are satisfied that the bicycle which was produced before the trial court was the one stolen from the complainant in the night of 28th March 2001. The Appellant's girlfriend (P.W.3) confirmed having seen the Appellant bring home the stolen bicycle on 29th March 2001. P.W.3 witnessed the Appellant sell the bicycle to P.W.4. P.W.1 positively identified the bicycle to be his. The bicycle was sold barely a week after it was stolen in a distant place. We are not convinced that P.W.3 had a grudge against Appellant. This finding disposes of the last ground of appeal. In short, we are convinced that the doctrine of recent possession applies to this case.

In the final analysis, we allow the appeal solely on the ground that there was no evidence from the record to show that the Prosecution's Witnesses gave sworn testimonies. We order the conviction quashed and set aside the death sentence. The Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 8th day of June 2012.

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J. K. SERGON
JUDGE

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J. WAKIAGA
JUDGE

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