



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
Criminal Appeal 405 of 2010**

PETER NJOROGE GACHANJA APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(An Appeal from original conviction and sentence in Nyahururu P.M.CR.C. No.730 of 2010 by
Hon. A.B. Mongare, Senior Resident Magistrate dated 3rd December, 2010)**

JUDGMENT

The appellant, **PETER NJOROGE GACHANJA** was convicted on a charge of robbery with violence contrary to **Section 296(2) Penal Code** and sentenced to death. He was acquitted on two other counts of robbery with violence.

The particulars of the charge for which he was convicted stated that on 12th March 2009 at MAILI SABA area in Laikipia West District, within the Rift Valley Province, jointly with others not before court, while armed with a dangerous weapon, namely an AK 47 assault rifle, robbed ELIJAH SAMBRIOT CHERUIYOT of his motor cycle make FOCIN registration No.KBF 406V, one Nokia mobile phone model 3610 and cash Kshs.20.000/= all valued at Kshs.95,900/= and immediately before or immediately after the time of the said robbery, threatened to use actual violence. On this count, he had faced an alternative charge of handling stolen good contrary to **Section 322(2) Penal Code**, that on 25th March 2009 at African Location Rumuruti in Laikipia West District, otherwise than in the course of stealing, he dishonestly undertook in his retention, one ignition key in respect of motorcycle registration No.KBF 406V make FOCIN and one knife, the property of ELIJAH SAMBRIOT CHERUIYOT, knowing them to be stolen goods.

ELIJAH SAMBRIOT (PW3) told the trial court that on 12/3/2009 he left his home in Rumuruti at about 5.00 a.m. and went to Nyahururu, using his motor cycle registration No.KBF 406V. On his way, at KAUKA Centre, he saw three armed people at a distance of about 200 meters away. They moved onto the road and stopped him. These people then took him into the forest and robbed him of Kshs.20,000/=, his wrist watch make SEIKO 5, his Nokia 3610 mobile phone, and his knife. They tied him against a tree, and then left with his motorcycle. He described his attackers as:-

“One short, one medium and dark, one who was armed was tall.”

Later on after arrests were made, PW3 identified the appellant at an identification parade, as one of the people who attacked him saying:

“He is the one who stopped me. He is the one who was armed. . . . He was very tall. . . . We were at the forest for long. . . .”

He had never seen the appellant before the date of the attack. He was able to identify the motorcycle's ignition key in court. Apparently this witness' motorcycle was recovered from a rider who on being apprehended said that the motorcycle belonged to one Gachanja (who is the accused). That rider remains at large.

On cross-examination PW3 stated:

“The person who had the motor bike is your accomplice. He was not arrested, he ran away. You were arrested with my motor bike. I know you were the one because besides having identified you, you were caught with my knife.”

It was PW3's evidence that when appellant was arrested, the Somali sword (knife) and motorcycle's ignition key were recovered from him.

PW3's son, DICKSON KIPROTICH SAMOEI's evidence was that on 24/03/2009 while at Rumuruti Town, he saw a motorcycle which looked like the one his father had lost. He followed it and when it stopped, he checked the insurance sticker which was still intact and he also noted that the radio aerial was still tied with a black rubber band just the way his father had done. When he approached the rider and inquired, the person said the motor cycle belonged to one GACHANJA . PW4 then switched off the motor cycle and took away the keys. He called his father, who arrived at the scene, and the rider upon seeing him, fled.

Although initially on cross-examination PW4 claimed to have seen the appellant with the motorcycle in Rumuruti Town, he clarified this and said he did not see the appellant with the motor cycle but a rider who said it belonged to Gachanja.

This witness also identified the recovered ignition keys and Somali sword, as belonging to his father. PW6 MESHACK NJOROGE aged 16 years confirmed to the trial court that appellant had given him a motor cycle to train how to ride, and the appellant never disclosed to him where he had got the motor cycle from. He picked appellant from an identification parade conducted by police Chief Inspector Zacheus Ngeno (PW7) confirmed the reports had been made to police, implicating the appellant in a series of robberies. He also confirmed that on 23/03/2009, a report had been made concerning theft of the motorcycle in question and that appellant had been seen riding it. When he arrested the appellant, he conducted a search on him and recovered an ignition key which started the motor cycle's engine. Appellant led police to a house where the firearm used in the robbery was recovered – the same was produced in court. The ballistics expert Chief Inspector **Alex Mdindi Mwandawiro (PW8)** confirmed that the firearm was capable of firing.

Inspector **TITUS KOTUT CHEREN (PW9)** who conducted the identification parade confirmed that appellant was identified by ELIJAH CHERUYOT and the standard 5 pupil who testified as PW6.

In his defence, the appellant testified that on 24/03/2009, he woke up and proceeded to his place of work where he remained until 5.00 p.m. He left for his home in Rumuruti, arriving at 6.30 p.m. before proceeding to NGOBIT BAR where he shared drinks with some friends. At 10.30 p.m., police in civilian wear stormed the bar and ordered everyone to come out with their identification cards, then lie down. The appellant resisted because the officers were not in uniform and a scuffle ensued between his group and the police officers – that is when the OCS arrived and they were arrested – eventually he was charged with robbery with violence.

The trial magistrate considered the evidence and noted that upon arrest, PW7 recovered a knife and ignition key which had been robbed off Elijah. Further Elijah positively identified these items. She also paid regard to the evidence of PW4 who spotted the motorcycle as it was being ridden within Rumuruti town and he was able to point out features which confirmed that it was the stolen motorcycle. The trial magistrate also took into account the evidence of **Meshack (PW6)** as to how he got to have the motorcycle from the appellant.

It was on account of these facts that the trial magistrate was satisfied that the evidence positively connected the appellant to the incident where Elijah was robbed. It was also observed that appellant had no explanation as to how he ended up with the motorcycle's ignition keys, or the knife belonging to PW1 so recently after the robbery, and she invoked the doctrine of recent possession.

In the amended grounds of appeal, the appellant challenges both the conviction and sentence on grounds that:

1. There was no proof of identification.
2. There was contradictory evidence by the witnesses.
3. The trial magistrate erred by invoking the doctrine of recent possession, and the evidence regarding recovery was fabricated.

Appellant filed written submissions, a large portion of it addresses evidence of witnesses in relation to count 2 and 3, where he was acquitted. It is important to note that the witnesses in those counts had nothing to do with the incident for which appellant was convicted as they were not in the company of PW3 nor did they witness that incident. The crux of his submissions is with regard to identification and the application of the doctrine of recent possession.

The appeal is opposed, and Mr. Omari on behalf of the State submitted that the appellant was properly identified at an identification parade. Secondly, PW6 clearly explained to the trial court how the appellant had lent him the motorcycle. He urged us to take into account the recovery of items related to the robbery, from the appellant, and that appellant could not give any explanation as to how he came to have these items. However appellant is adamant that if PW4 took away the key from the rider, then which is the other key that PW7 claims to have recovered from him.

From our re-evaluation and analysis of the evidence presented to the trial court, PW3 left his home at 5.00 a.m. and was attacked at KAUKA Centre while on his way to Nyahururu Town. It is not clear from the evidence whether by the time of the attack, daylight had set in, or what source of light enabled the witness to see and identify his attackers. The witness may have been able to make out figures in terms of height, but we are not satisfied that the prevailing conditions enabled him to clearly see and identify the faces of the attackers. We are guided by the decisions in **Charles O. Maitanyi v R 1986 KLR** regarding what factors a court ought to bear in mind when dealing with evidence of a single witness on identification under difficult circumstances.

On this limb, our finding is that there wasn't sufficient evidence led during trial, as to the conditions which enabled PW3 to identify the appellant.

However the conviction was not based purely on the identification by PW3, there was the evidence regarding recovery, and the link between the appellant and the stolen items. Granted, the appellant was not found in physical possession of the motor cycle. However a person riding the motor cycle (which was positively identified by PW3 and PW4 mentioned the appellant as the person who had given out the motorcycle. This person testified as PW6 and confirmed that indeed the appellant had given him the motor cycle to learn how to ride. This witness fills in what PW4 stated about someone who was found riding the motorcycle and who had mentioned the appellant as the owner.

We have considered the submissions by the appellant to the effect that there were contradictions in the evidence of prosecution witnesses regarding who had possession of the motorcycle. We find that on cross-examination PW4 clarified that it was not the appellant who had actual possession of the motorcycle so there is nothing fatal in that earlier mix-up.

If matters had ended at this stage, then perhaps appellant's grievance regarding the conviction would hold water, but that is not the case, because just apart from being mentioned adversely by PW4, there is the recovery of items belonging to PW3, by the police officers. From the record, there is nothing to suggest

that after taking away the key from the rider, PW4 gave it to police, in fact from the evidence of PW1 both in his evidence in chief, cross-examination and re-examination, recovery of the keys which were produced in court, and the Somali sword, were made from the person who was arrested. We are satisfied that this was a separate recovery and appellant had no explanation as to how he came to have both the keys and Somali sword, which had been recently stolen from PW3. We hold that the trial magistrate properly invoked the doctrine of recent possession.

With regard to the ingredients of the offence, the evidence shows that the appellant was in company of more than one person and they were armed – this satisfies what is contemplated by **Section 296(2) Criminal Procedure Code**. The upshot is that the conviction was safe and we uphold it. The sentence meted was in accordance with the law and we have no reason to interfere with it.

Consequently, the appeal is dismissed.

Delivered and dated this 31st day of July, 2012 at Nakuru.

W. OUKO
JUDGE

H.A. OMONDI
JUDGE