



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Criminal Appeal 148 of 2011**

**KELVIN INGOTSI PIUS ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(An appeal arising from the Chief Magistrate's Court at Kakamega*

*In Criminal Case No. 2093 of 2010 [R. NYANKUNDI, CM])*

**JUDGMENT**

The appellant, **KELVIN INGOTSI PIUS** was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the offence were that on the night of 26.10.10 at about 7.30 p.m. at Milimani Estate in Municipality Division in Kakamega District of Western Province jointly with others not before court robbed DOMNIC GACHERU one motorbike make BAJAJ BOXER red in colour reg. No. KM CJ O58P valued at Kshc.60,000/= and cash Kshs.4,500/= and immediately after the time of such robbery used actual violence to the said DOMNIC GICHERU.

In the alternative, the appellant was charged with the offence of handling stolen goods contrary to Section 322 (2) of the Penal Code.

The particulars of the charge were that on the 18<sup>th</sup> day of November 2010 at Municipality Division in Kakamega District of Western Province otherwise than in the cause of stealing dishonestly retained one motorbike make BAJAJ BOXER red in colour valued at Kshs.60,000/= knowing or having reason to believe it being stolen property.

After a full trial, the appellant was convicted for the offence of robbery with violence and sentenced to seven years imprisonment. The appellant was aggrieved by the conviction and sentence and appealed to this court.

The appellant raised several grounds of appeal which can be summarized as follows:-

- The trial magistrate erred in relying on evidence of recent possession.
- The evidence adduced by the prosecution witnesses was contradictory.
- Crucial witnesses did not testify.

- The defence of alibi raised by the appellant was not considered.
- The prosecution case was not proved beyond reasonable doubts.

During the hearing of the appeal, the appellants relied on written submissions. The submissions essentially expounded on the grounds of appeal.

Mr. Orinda appeared for the State. He submitted that the conviction was supported by the evidence.

This being a first appeal, it is the duty of this court to re-evaluate the evidence and draw its own conclusions (*see OKENO V R. [1972] EA 32*).

The case for the prosecution was that on the 26.10.10, the complainant, PW1, **DOMINIC GACHERU GACHEBI** was operating a “*boda boda*” business using a motor cycle reg. No. KMCJ 058P. The motor cycle belonged to PW2, **JOHN NJOROGI** who was the complainant’s employer. On the material day at about 7.30 p.m., the complainant was riding the said motor cycle along State house road in Kakamega when he was stopped by two men. The complainant stopped. The two men jumped at the complainant while pointing a knife at him. The two men boarded the motor cycle and commanded the complainant to ride the motor cycle around. They later ordered the complainant to stop and robbed him of Kshs.4,500/=. A third assailant joined them. The complainant was held by the neck by one of them while the appellant rode the motor cycle away. The other two assailants were left struggling with the complainant and cut him with a panga on the right hand.

The complainant later looked for assistance and was taken to hospital for treatment.

The robbery was reported to the police. Investigations commenced. The owner of the motor cycle (PW2) notified motor cycle repairers about the robbery and asked them to alert him if they spotted the motor cycle.

On 18.11.10 PW2 was tipped off by a motor cycle operator, PW4 ASMAEL WESUNGA about a motor cycle that had been taken to his workshop for sale. While posing as a buyer, (PW2) went to see the motor cycle. After verifying the motor cycle was his, PW2 made a report to police. PW2 returned to the workshop with a police officer. The appellant on seeing them started running away but he was arrested and escorted to the police station. The appellant was subsequently charged with the offence herein.

In his defence, the appellant gave a sworn statement of defence. No witnesses were called.

The appellant denied the offence and termed this case as a frame up by the owner of the motor cycle (PW2) with whom he had a dispute over a mobile phone the appellant had sold to him.

According to the appellant, he had sold a mobile phone to the motor cycle owner. The phone developed problems and the appellant was to replace it or refund the money. The appellant resold the phone at Kshs.2,500/= and used the money. The appellant delayed in refunding the motor cycle owner his money. On 18.1.2010 while the appellant was at a club watching soccer the motor cycle owner confronted him demanding the refund. A struggle ensued when the motor cycle owner tried to take the appellant’s phone. The motor cycle owner thereafter made arrangements to have the appellant arrested.

The appellant further stated that the police officer who arrested him demanded Kshs.20,000/= bribe from him but he was only able to raise Kshs.5,000/= which the police officer took together with the appellant’s mobile phone but the phone was later returned to him.

Having considered the submissions made before us during this appeal and having re-evaluated the evidence adduced before the trial magistrate’s court, it is clear that the conviction of the appellant was based on the evidence of recent possession of a stolen motor cycle.

PW1, the complainant in his evidence stated that he was not able to identify any of his attackers. It was

dark. The evidence of the complainant however shows that he was robbed of the motor cycle in question. The evidence of the clinical officer, PW3, **BENTER OTIENO** confirmed that the complainant sustained a cut on the right hand. PW3 filled in the P3 form which confirmed the injury. The P3 form was produced as an exhibit.

The evidence of PW5, PC **BARNABAS MWARABI** confirmed that a report of the robbery was made and the police officers visited the victim at the hospital. The report was booked in the O.B. and investigations commenced. PW2 testified as the owner of the motor cycle. He produced the motor cycle's log book (Exh.3) and gave motor cycle details as Engine No.DUMBSJ67869 Chassis frame No.MD2DDDMZZSWJ05360. The photographs of the recovered motor cycle (exh.2) reflect the same chassis/frame number.

According to the evidence of PW2, he had circulated information to motor cycle repairer about the robbery. That is how he ended up being tipped by PW4, a motor cycle repairer. The evidence of the motor cycle owner (PW1) and the repairer (PW2) gave a consistent and corroborative account of evidence on how the motor cycle was recovered while the appellant was trying to sell the same. The motor cycle owner (PW1) denied having bought any telephone set from the appellant or having any grudge against him. The motor cycle repairer also denied having fabricated evidence against the appellant and denied knowledge of any sale transaction of a mobile phone between the appellant and the motor cycle owner.

The gist of the defence by the appellant is that this case was framed up on him by the motor cycle owner because of the dispute over the mobile phone. There is however no reason why PW4, the mechanic would frame up the appellant. The evidence of the complainant (PW1) leaves no doubt that he was robbed of the motor cycle in question and injured. A report was made to the police officers who visited the scene. It would be difficult for the motor cycle owner to marshal all the aforesaid events in order to frame up the appellant.

The robbery took place on 26.10,2010. The motor cycle was recovered on 18.11.2010. This is a period of about one month. The motor cycle cannot be said to have been recovered so recently to directly link the appellant with the offence of robbery.

However, the evidence of the motor cycle owner and repairer in regard to the recovery shows that the appellant attempted to run away when he saw the police officer. This is a sign of guilt. It is also clear from the evidence of the motor cycle owner that the appellant had no documents for the motor cycle. The evidence of the motor cycle repairer (PW4) shows the attempted sale was being made in a clandestine manner.

With the foregoing, we find that the alternative count of handling stolen goods was the one proved beyond any reasonable doubt.

Consequently, we quash the conviction for the offence of robbery with violence and set aside the sentence imposed.

We have considered the mitigation that was offered by the appellant during the trial. We have also taken into account the value of the motor cycle and the fact that it was recovered. The appellant had no previous convictions.

We have also considered that the appellant has been in custody since the month of November 2010.

We sentence the appellant to imprisonment for two years. Sentence to take effect from the date of sentencing by the lower court on 14.7.2011.

***Delivered, dated and signed at Kakamega this 24<sup>th</sup> day of October, 2012***

**S. J. CHITEMBWE**

**JUDGE**

**B. THURANIRA JADEN**

**JUDGE**