



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 170 OF 2009**

**BETWEEN**

**EZEKIEL MOKUA OBACHI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal arising from conviction and sentence of Mrs. Roselyne Oganyo,  
SRM in Kilgoris SRM criminal case No. 163 of 2008 dated 17/06/2008)**

**JUDGMENT**

1. This appeal arises from the conviction and sentence by the Senior Resident Magistrate Mrs. Roselyne Akinyi Oganyo in Kilgoris criminal case number 163 of 2008 dated and delivered on 23<sup>rd</sup> July 2009.

2. The appellant herein was charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 17<sup>th</sup> day of June 2008, at Nyangweta area in Etago Division, Gucha District within Nyanza Province, jointly with another not before the court, while armed with a pistol robbed **George Otieno Oula** a motor cycle **Registration No. KBA 912 R** and cash Kshs. 1200/= and a mobile phone make Nokia 1300 all valued at Kshs.105,200/= and at immediately before or immediately after the time of robbery used personal violence to the said George Otieno Oula.

3. The appellant denied the charge. The facts of the case are that at about 7.00 p.m. on 17<sup>th</sup> June, 2008 the complainant, George Otieno Oula (PW3) was hired by some two people who wanted to be ferried to Kosir trading centre from Rongo Market. But instead of dropping off at Kosir trading centre as earlier indicated, the two people asked PW3 to take them further on to a place called Inamba on the border between the Luo and Kisii people. It was while at Inamba that one of the two people produced a gun like object and held it facing down. The second person grabbed PW3's neck, threw him down and tied him up with a rope as they also gagged him with a dirty pair of Jeans. The two people then took PW3 deep into Nyakeyo forest in Kisii land next to a river. They tied PW3 onto a tree and disappeared into the night with the motor bike, a Nokia 1300 and cash 1200/=.

4. With the help of a good Samaritan and after he had freed himself from the tree, PW3 reported the matter to a nearby police station and on the following day reported to Rongo police station.

5. On the 9<sup>th</sup> July, 2008 at about 9.00 a.m. the stolen motor cycle was driven into the petrol station owned by **Jared Kerago Omeke (PW1)** by the appellant herein. The appellant purchased fuel for Kshs.800/= but because he did not have the money to pay, he left the motor cycle with PW1 as security for the value of the fuel.

6. The appellant did not come back that evening or the next day to collect the motor cycle, so PW1 decided to report the matter to the police at Nyamaiya police station, but he was locked up for two days at Ogembo police station on allegations that the motor cycle had been used to commit an offence, only to be released later when no-one picked him out at an identification parade. Subsequently, the appellant was arrested and charged.

7. The prosecution called 7 (seven) witnesses to prove its case against the appellant. PW1 was **Jared Kerage Omoke**, a businessman dealing in petroleum products at Nyamaiya area which is also the home of the appellant. He stated that at about 9.00 p.m. on the 9<sup>th</sup> July, 2008, while he was at his place of work, the appellant arrived at the petrol station riding a motor cycle and carrying one pillion passenger. The appellant asked for fuel worth Kshs.800/= and Twotee for Kshs.80/=. PW1 testified that the appellant did not have cash to pay, so he left the motor cycle behind, promising to come back in a little while to pay for the fuel and other purchases. The appellant however did not return either that night or the following day forcing PW1 to report the matter to Nyamaiya police station.

8. PW1 also stated that on his way to report the incident to Nyamaiya police station, he received a telephone call from the Nyamaiya police station OCS enquiring whether a motor cycle had been left at his petrol station. PW1 further testified that on the same 10<sup>th</sup> July, 2008, he was arrested in connection with the motor cycle but that he was released two days later after witnesses failed to pick him out in an identification parade. PW1 stated that the only reason why the motor cycle, make TVS Max 100 was left at his petrol station was that the appellant, whom PW1 said he knew well as a resident of Nyamaiya area had not paid for the 5 litres of fuel and the Twotee worth Kshs.80/=. He stated further that though it was night, he was able to recognize the appellant who went close to the solar light which he was using to serve his customers with fuel or kerosene. He also stated that after he filled the motorcycle with fuel, the appellant went away with the keys, contrary to the appellant's allegation that the keys to the motorcycle had been left with PW1.

9. The second prosecution witness was **Number 230290 Chief Inspector of police Ali Nuno**, the then OCS of Nyamaiya police station. He testified that some 3 days before the 3<sup>rd</sup> July, 2008 he received a report from OCS Rongo concerning the theft of a motor vehicle Registration Number **KAT 875G**, a Toyota G-Touring which had been stolen from the Awendo area. PW2 further testified that on the 3<sup>rd</sup> July, 2008, the appellant was seen driving the stolen motor vehicle at Nyamaiya market. That in addition, there was a warrant for the arrest of the appellant in connection with a robbery case at the Eldoret Law Courts involving the appellant from whom 3 vehicles had been recovered in connection with the Eldoret case.

10. PW2 went on to state that as he was trying to execute the warrants for the arrest of the appellant who was not known to him, he also received a report on the 11<sup>th</sup> July, 2008 of a robbery involving a motor cycle that had been robbed from the Rongo area, and that the same was being kept at Nyamaiya market by one **JARED (PW1)** who was known to him. That when PW1 finally went to the police station, PW2 was informed by PW1 that it was the appellant who had left the motor cycle in the possession of PW1 as security for fuel which had not been paid for by.

11. PW2 also testified that on the 12<sup>th</sup> July, 2008, he handed over the motorcycle to Jared and a boy called Dennis to officers from CID Ogembo for investigations. PW2 also stated that on the 20<sup>th</sup> August, 2008, he received information that the appellant had been seen with m/v Registration Number **KAX 981 M**, a white Toyota Corolla. As a result of that report, PW2 requested the OCS Etago police station to quickly mount a roadblock in order to intercept the Toyota Corolla car which had 4 occupants in it. A roadblock was duly mounted and 3 occupants of the car were arrested. PW2 also testified that on further investigations, it was found that the white Toyota Corolla Registration Number KAX 981 M had been

stolen from Nairobi. That the said motor vehicle was released to one Ekerosi who had since gone underground.

12. PW2 further testified that the motor cycle that had been left at Jared's was red in colour and bore frame number **MD 623FB3 571646001**. The motor cycle was produced as **P. Exhibit 1**. PW2 also stated that at the time of his arrest, the appellant who was with 2 others was the one driving motor vehicle KAX 981 M.

13. In his further evidence, PW2 stated that he had released Jared (PW1) after investigations revealed that the appellant had left the motor cycle in his possession as security for a debt on the 9<sup>th</sup> July, 2008. PW2 also testified that the appellant had jumped bail in the Eldoret court case. PW2 denied that he was giving false testimony against the appellant.

14. **PW3 was George Otieno Oula**. He testified how on 17/06/2008 at about 7.00 p.m., he was hired by 2 people unknown to him to take them first to Kosir trading centre and later to a place called Inamba on the border between Kisii and Luo. He stated further that when they got to Inamba, he was taken off his motor cycle, held by his neck and tied up with a rope, then he was thrown down. That the two people also gagged him using a pair of dirty jeans before driving him deep into Nyakeyo Forest where he was tied to a tree near a river and abandoned there and took off with the motor cycle.

15. Thereafter, PW3 said he managed to free himself from the tree using his mouth and was found by a man known as Crispin who took him to Etago police station. The following day, he was taken to Rongo police station by Crispin where he made a report. PW3 stated further that the person that robbed him of his motor cycle was armed with something that looked like a gun but he said he was not able to identify the two people because it was night. PW3 further testified that apart from the motor cycle, he was also robbed of a Nokia cell phone and Kshs.1500/= in cash, being his takings for the day. PW3 could not identify the appellant in the dock.

16. **Crispin Otieno** testified as **PW4**. He testified that he was the one who assisted PW3 after he had been robbed of his motor cycle on 10<sup>th</sup> July, 2008 and also escorted him first to Etago police station and to Rongo police station the next day. PW4 further testified that on a date he could not remember, he went to CID offices at Ogembo and identified one motor cycle using details of chassis number and engine number. PW4 gave the chassis/frame number on the bike in court as **MD 623F B3571G46001** which tallied with the details in the log book. It was also PW4's testimony that he had hired PW3 as a driver of the motorcycle for about 2 weeks before the robbery. PW4 produced a cash sale receipt dated 8<sup>th</sup> November, 2007 as **P. Exhibit 3** in PW4's name to show that he had purchased the stolen motor cycle and another for Kshs.100,000/= each.

17. The next prosecution witness was **PW5, Dennis Obiero Zebedayo**. He testified that on 9<sup>th</sup> July, 2008, while at Nyamaiya shopping centre, he bought some kerosene from PW1 and just as he was leaving, he was stopped by two people who were on a motor cycle saying they wanted to buy fuel. Later, he said he was arrested and taken to Ogembo police station but later released. PW5 testified that the motor cycle in question was red in colour, but that it had no number plates, and that it was the appellant who was riding the same.

18. PW4 stated that on the night when he was stopped by the appellant, he saw the appellant clearly under an electric light. That he had known the appellant before and was also able to recognize the appellant's voice. PW5 also stated that his mother hailed from the same place as the appellant and that as such he knew the appellant well. PW5 also testified that the appellant knew how to drive cars though PW5 had never seen him riding a motor cycle, but confirmed that at about 9.00 p.m. on 9<sup>th</sup> July, 2008 he saw the appellant fuelling the red motor cycle at Jared's (PW1's) filling station. PW5 denied that he was a thief of motor cycles.

19. **PW6 was Number 89297 Police Constable Victor Keitan** who was attached to Etago police station on general duties. He testified that on 20<sup>th</sup> August, 2008 at about 7.40 p.m., he received

instructions from his OCS, CIP Kirui, to mount a roadblock to intercept dangerously armed men travelling in m/v registration No.KAX 981M. He testified further that when he and other officers who were dressed in civilian clothes stopped the suspected m/v, the occupants obliged and came out of the vehicle. PW6 stated that the appellant herein was the one driving the motor vehicle and was in the company of 2 other persons, namely **Daniel Nyakundi** and **Ondara Kingi**.

20. It was also PW6's testimony that the quick search they carried out on the m/v did not reveal anything suspicious, but the appellant and his colleagues were escorted to Etago police station where the 3 occupants were locked in for further investigations. The following day the 3 suspects were escorted to Nyamaiya police station. PW6 identified the appellant in court as the man he had heard being described as Ezekiel Mookua, the famous thug over whose head a warrant of arrest was hanging in connection with another robbery case in an Eldoret court, being **criminal case number 9231 of 2007**. PW6 produced the Warrant of Arrest from DCIO – Eldoret as **P. Exhibit 4**. PW6 also testified that the appellant together with former OCS Nyamaiya police station had been implicated in the robbery.

21. The last witness for the prosecution was **Number 65996 Police Constable Philip Kekagero** who was the investigating officer in the case. He was assigned to investigate the case on the 25<sup>th</sup> August, 2008. He recorded statements from the complainant (PW3) and also the owner of the motor cycle (PW4) and PW5, after which he prepared the file and the charges and presented the appellant to Ogembo law courts. The motorcycle was produced in court as **P. Exhibit 5**. PW7 also testified that after investigations, the two people who had been arrested with the appellant were released.

22. In his further evidence, PW7 stated that he never recovered the Nokia phone and the cash that were stolen from PW3. He also stated that he had good reason to believe the testimony of PW1 because PW1 made a report of the incident shortly after its occurrence, though PW3 did not mention names or identify the appellant on the parade.

23. At the close of the prosecution's case the appellant chose to give a long sworn statement but called no witnesses. In his evidence in chief, the appellant stated that he hailed from Muriango sub-location, South Mogirango Location of Etago Division in South Gucha District and that he was a driver by occupation.

24. He recalled that on 20<sup>th</sup> August, 2008, he closed his business after making good money and was going home driving **M/V Registration No. KAX 981 M** Toyota Corolla Saloon. He stated that before heading for his home he took the day's earnings to his boss. On the way home, the vehicle was stopped by police officers and everyone in the vehicle ordered out and to lie down, a command they obeyed. That after the appellant and his 2 passengers came out, the police quickly searched the car, but recovered nothing. The trio was then handcuffed and taken to Etago police station on foot. The next day all the 3 suspects were escorted to Nyamaiya police station and some days later, he was taken to Ogembo police station. The appellant stated he was questioned about the Eldoret case, which he said was withdrawn on 28<sup>th</sup> July, 2008 and about the motorcycle and a cell phone, he said he knew nothing about the same.

25. The appellant testified further that on the 29<sup>th</sup> August, 2008, he and the other two people were taken for identification parade after finger printing had been done, that the complainant failed to recognize any of the parade members. Thereafter on the 30<sup>th</sup> August, 2008, the two people who had been arrested with the appellant were released, while he was taken to court in connection with the charge of robbery with violence. The appellant denied any knowledge of those charges.

26. During further evidence in cross examination, the appellant stated that he did not know how to ride a motor cycle. The appellant admitted that he knew both PW1 and PW2 and that he used to fuel at PW1's petrol station whenever he was doing taxi business. The appellant also stated that PW2 was not only a son to the appellant's cousin but that he used to work as appellant's conductor. The appellant denied that on the 9<sup>th</sup> July, 2008, he ever went to Nyamaiya since he was on duty at Kenyenyia and because it had rained. The appellant denied his presence at PW1's place on a motor bike on the 9<sup>th</sup> July, 2008. He also denied robbing PW3 of a motor bike, cash and a Nokia phone and damping him in the

forest.

27. In her judgment delivered on 23<sup>rd</sup> July, 2009, the trial court was satisfied that the prosecution had proved its case against the appellant beyond a shadow of doubt and proceeded to convict the appellant as charged and to sentence him to death as by law provided. The sentence was suspended pending the hearing and determination of Eldoret Criminal Case No. 9231 of 2007.

28. Being aggrieved by both the conviction and the sentence, the appellant appealed through the firm of M/s S.M. Sagwe & Co. Advocates vide the petition of appeal dated 4<sup>th</sup> August, 2009 and filed in court on the same day. The petition of appeal raises the following 7 grounds of appeal, that is to say:-

- 1. That the trial magistrate misdirected herself when evaluating the entire evidence on record before (sic) occasioning a miscarriage of justice.**
- 2. That the trial magistrate failed to consider the evidence adduced by the appellant by merely dismissing it without considering and giving its due effect.**
- 3. That the trial magistrate erred in law and in fact by finding the appellant guilty of the offence and (sic) charged when no identification parade was carried out.**
- 4. That the trial magistrate failed to note that the evidence of independent witnesses was contradictory.**
- 5. The trial magistrate erred in law by not making a finding on identification and recognition of the appellant.**
- 6. That the trial magistrate erred in law by not making a finding on the uncorroborated evidence of the prosecution witnesses.**
- 7. The trial magistrate erred in law in failing to test the demeanor of defence before her and thereby mis-directing herself.**

29. The appellant's plea to this court is to allow his appeal by quashing the conviction and setting aside the sentence of death that now hangs dangerously over his head and around his neck.

30. At the hearing of this appeal, Mr. Sagwe who appeared for the appellant compressed the 7 grounds of appeal into two major grounds in the following clusters: grounds 1,4 and 6 as ground number 1, ground 2,3 and 5 as ground number 2 while ground 7 was abandoned altogether.

31. With regard to the first cluster, Mr. Sagwe submitted that the appellant, not having been arrested in possession of any of the stolen items was erroneously convicted. It was further submitted that since the charge stated that the appellant and others were armed with dangerous weapons, such a weapon should have been produced before the court. Secondly, Mr. Sagwe submitted that the evidence relied upon by the prosecution was so contradictory that it was worthless and further that even the evidence adduced before the trial court did not support the particulars of the charge, including the Registration number of the motor vehicle allegedly stolen from PW3.

32. Under the said cluster covering grounds 2, 3 and 5, Mr. Sagwe submitted that the appellant was not positively identified by the complainant as one of the people who robbed PW3 of the motor cycle. Counsel argued that since the offence was committed at night, it was not possible, and this fact was admitted by PW3, for PW3 to identify his assailants. It was also submitted that even PW1 could not be said to have positively identified the appellant since the appellant is said to have gone to the petrol station at 9.00 p.m. where there was not sufficient light to enable PW1 clearly see and identify the appellant. Counsel for the appellant contended that the appellant was brought to court on insufficient

evidence. He urged the court to allow the appeal.

**33.** In response to submissions on behalf of the appellant, Mr. Mutuku for the Respondent submitted that the conviction by the trial court was all founded after evaluating the facts of the case, counsel submitted that the appellant rode the motor cycle into the petrol station, fuelled it with 5 litres but failed to pay and instead abandoned the same that had been robbed from PW3 and belonging to PW4, at the station as security for the unpaid sum of Kshs.880/=.

**34.** Counsel submitted further that the prosecution's case was not hinged on identification of the appellant at the time of commission of the offence but on the doctrine of recent possession of the stolen motor cycle. In counsel's view, there were no contradictions in the prosecution's evidence.

**35.** As concerns the weapons used in the commission of the offence, counsel submitted that though none of these were recovered in the cause of arresting the appellant, there was sufficient evidence on record to show that at the time of the commission of the offence, the appellant was with another person and that the two of them were armed with something that looked like a gun. Mr. Mutuku urged the court to dismiss the appeal.

**36.** In reply to the Respondent's submissions, counsel for the appellant submitted that according to the evidence on record, the motor cycle allegedly stolen from PW3 was red and not registered and that its chassis number was not visible. Further, that there was no evidence confirming that the appellant and his alleged accomplice were armed as alleged by the prosecution.

**37.** We have now carefully reconsidered and evaluated the evidence as it is our duty to do as the first appellate court. We have also considered the submissions made by both counsel at the hearing of this appeal. We have also taken a long and careful look at the judgment of the lower court. The purpose of doing all the above is for us to be able to reach our own conclusions in this matter and to confirm whether the findings of the lower court were founded on sound legal principles.

**38.** In reconsidering and evaluating the evidence, we do agree with counsel for the Respondent that the case against the appellant rests squarely on the doctrine of recent possession for the simple reason that PW3, George Otieno Oula, from whom the motor cycle was stolen, admitted in his evidence that he was not able to identify his attackers because it was night. All he could remember was that the attackers were two. He was also unable to identify the appellant at the identification parade. The question that we must answer now is whether there is sufficient evidence on record upon which this court can reach the conclusion that the doctrine of recent possession was properly applied by the trial court. The critical evidence in this regard is that of PW1, PW3, PW4, PW5 and PW7.

**39.** The evidence of PW1 is that on the 9<sup>th</sup> July, 2008 at about 9.00 p.m., while he was at his petrol station, the appellant arrived there riding on a motor cycle and carrying one pillion; that the appellant who was well known to PW4 (and this fact was alluded to and admitted by the appellant in his sworn testimony) informed PW4 that he was going for fuel from PW1's petrol station.

**40.** The question that arises is whether that same motor cycle allegedly left at PW1's petrol station by the appellant herein is the same motor cycle that the appellant was seen riding, and whether this is also the same motor bike that was allegedly stolen from PW3 by two people whom he could not identify. PW3 did not give any registration particulars of the stolen motorcycle. PW1 said he could identify the motorcycle because one of the side mirrors was broken. The court noted that the motor cycle that was produced in court had both side mirrors broken. In this case, was the motorcycle that was in court the same motorcycle that had been left by the appellant at PW1's petrol station?

**41.** What did the investigating officer, PW7 find during his investigations? According to PW7, the motor cycle had no number plate, but that he was given details of the chassis and frame numbers from the owner, who was PW4.

**42.** After considering all the evidence above, we find that the evidence linking the appellant to the

motorbike allegedly left at PW1's petrol station is shaky. First of all it is not clear how the information to the effect that a stolen motor bike had been left at PW1's station got to the police at Nyamaiya. PW1 stated that on his way to report the incident to the police, the OCS telephoned him and asked him whether he had a motorcycle at his petrol station.

43. The second piece of evidence that seems not to support the prosecution's case is whether the meeting between PW3 and PW4 after the incident on 17<sup>th</sup> June, 2008 was coincidental or whether, PW3 as employee of PW4 simply went to report that he had been robbed?

44. All in all, we find the prosecution's evidence wanting in the sense that it is not clear to the court whether the motor cycle that was produced in court was the same motorcycle that the appellant allegedly abandoned at PW1's petrol station and whether it was the same motorcycle that was stolen from PW3. These gaps can only be for the benefit of the appellant.

45. In the circumstances, we allow this appeal, quash the conviction and set aside the sentence of death.

46. The appellant shall be released forthwith from prison unless he is otherwise lawfully held.

47. It is so ordered.

**Dated and delivered at Kisii this 24<sup>th</sup> day of February, 2011.**

**ASIKE MAKHANDIA  
JUDGE.**

**RUTH NEKYO SITATI  
JUDGE.**

In the presence of:

Mr. Moracha for Sagwe (present) for Appellant

Mr. Mutai (present) for Respondent

Mr. Bibu Court Clerk