REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 37 OF 2007

(From original conviction and sentence in Criminal Case No.982 of 2006 of the Principal Magistrate's court at Molo – R.K. KIRUI, Ag. PM)

PAUL MBUGUA KINUTHIA...............................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

Paul Mbugua Kinuthia and George Engonat Nyokoroko were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. In the alternative they were charged with handling stolen goods contrary to **Section 322(1)** of the **Penal Code.** After hearing both the prosecution and defence cases the court found the appellant Paul Mbugua Kinuthia guilty of the main charge, convicted him and sentenced him to death. George Engonat was acquitted. Paul Mbugua appeals against both conviction and sentence.

The petition of appeal contained 18 grounds of appeal but Mr. Tengekyon, counsel for the appellant, reduced them to the issue of identification, the recovery of the bicycle, shoes and burden of proof. Mr. Nyakundi opposed the appeal.

Before we address the grounds of appeal, the facts of the case as we understand them are as follows; the complainant herein is Michael Maritim Sang. He recalled that on 12/4/06 at about 7.00 p.m. he was walking from Salgaa towards Sarkish Flora Farm where he works. He was pushing his bicycle when he was suddenly held by the neck, pushed in a ditch where one person strangled him, and hit by people who suddenly attacked him beating him on the face severally. They took his bicycle and shoes. He was not able to identify any of the attackers. He reported the incident to the security guards at the gate of his work place, was taken to hospital and treated. On the next day, he was informed that his bicycle had been recovered, was taken to a plot where he was shown his bicycle and shoes which he recognized. He learnt that the person found with his bicycle was released to go to his place of work. Police were called and they proceeded to where the person worked and the appellant was identified by Shadrack Tonui (PW2) who had found him with the bicycle. PW2 recalled that on 12/4/06 about 7.00 p.m. he had met PW1 at the main gate to Sarkish Flora Ltd who informed him of the robbery. On his way, he saw 2 people with PW1's bicycle which he recognized, from the rubber bond on the middle frame and it had no carrier. The appellant claimed to be the owner of the bicycle. They met the appellant's landlord who decided to keep the bicycle till they came back for it the next day which they did and the appellant was arrested with

PW1's shoes. PW3 PC Wachira re-arrested the appellant and recovered the complainant's shoes from him.

PW4, James Kipkorir, an employee of Sarkosh Farm was one of the people who arrested the appellant's co-accused who was acquitted and handed him over to the police on 15/4/06. PW5, Hosen Kiptoo a Nursing Officer examined PW1 on 14/4/06 and found that he was injured on the head and chest.

The appellant gave an unsworn statement in him defence in which he generally denied having been involved in the commission of the offence.

On the question of identification Mr. Tengekyon argued that PW1 did not identify the assailants but PW2 claims to have been able to identify them though in his report to the police he did not give a description of the appellant neither was an identification parade held. He also submitted that the nature of the moon light was not given and it is doubtful whether PW2 met the assailants having left his place of work at 7.00 p.m. and PW1 was attacked about the same time. He said that the conduct of PW2 was suspect because it is unbelievable that he walked with the suspects till their place of residence.

In reply Mr. Nyakundi submitted that PW2 met the appellant and his co-accused and followed them to their residence and reported to the landlord and the next day, police arrested the appellant. PW2 was not present when the robbery occurred. He learnt of the incident from PW1 on the same night. He later met the appellant and others with a bicycle which PW2 recognised as the complainant's, PW1 said that he was robbed about 7.00 p.m. Similarly PW2 claims to have met the appellant about 7.00 p.m. PW1 never said whether it was full light or it was dark. It is our view that 7.00 p.m. is an estimate because it is unlikely that a person will keep looking at the watch to know when anything happens. It could have been earlier or after 7.00 p.m. By the time PW2 met the appellant it must have been night. PW2 in company of two others, did not just meet the appellant and pass, but they followed the appellant upto his residence They went upto the appellant's residence and he reported the incident/appellants to the landlord who asked PW2 to go with the owner of the bicycle on the next day. PW2 had ample time with the appellant and though it was not specifically alluded to, we do not think that when they went to the landlord resident, they met in the darkness. PW2 did not merely identify the appellant but found the appellant in possession of PW1's bicycle. PW1 also testified that he was first led to the plot where the bicycle had been left and later they met with PW2 where the appellant works in the company of police and he was arrested. PW2 also said the bicycle was recovered at the landlord's house where it had been left the night before. PW3, the arresting officer also corroborated PW1 and 2's evidence that the bicycle was recovered from the place it had been left. We are satisfied that PW3 did find the appellant in possession of PW1's bicycle, which the complainant had just been robbed of.

In respect to the shoes, Mr. Tengekyon submitted that it seems that there were two sets of shoes that were recovered because of conflicting evidence. Though PW1 told the court that the shoes were recovered where the bicycle was found, in cross examination he said that it was recovered by the police. PW2 said that the appellant had the complainant's shoes when arrested. PW3, the arresting officer, also, said he found the appellant wearing shoes which were identified as the complainant's. We find no contradiction in the prosecution evidence in regard to recovery of shoes. Only one set was recovered.

PW2 testified that the appellant's landlord was the person he left PW1's bicycle with and that he asked PW2 to go back the next day with the owner of the bicycle. PW1 said the landlord was called Paul. The said landlord was indeed a key witness to confirm whether or not PW2 went with the appellant in company of the appellant and the issue of recovery of the bicycle. The prosecution did not disclose why the said landlord who PW1 knew as Paul was not called as a witness. Mr. Tengekyon urged the court to draw an adverse inference, that the said landlord might have given evidence adverse to the prosecution case. In our considered view, though the landlord was not called as a witness, we find there to be overwhelming evidence that the appellant was arrested soon after the robbery while in possession of the complainant's property. The bicycle may have been at the landlord's house but the shoes were found on accused while at his place of work. We decline to draw any adverse inference.

After evaluating the evidence afresh, we are in agreement with the trial magistrate that the appellant was

found in recent possession of the complaint’s property and he failed to give any reasonable explanation as to how he came to be in possession of the same. We find no good reason to interfere with the conviction. The sentence prescribed is death and we uphold it. Accordingly, we dismiss the appeal.

DATED and DELIVERED this 14th day of February, 2011.

R.P.V. WENDOH
JUDGE

W. OUKO
JUDGE

PRESENT:
The appellant present in person
Mr. Omwega for the State.
Kennedy – Court Clerk.