REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 76 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 478 of 2009 of the Senior Principal Magistrate's Court at Malindi: D.W. Nyambu – P.M.)

KATANA KAHINDI MWAVIRI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant **KATANA KAHINDI MWAVIRI** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at Malindi Law Courts. The Appellant was arraigned before the lower court on 31st March 2009 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that:

"On the 5th day of March 2009 at Sabasaba Muyeye Village in Malindi District within Coast Province jointly with another not before court, robbed DANIEL MUTINGA MWILI of one unregistered motorcycle make Bajaj chasis No. MD2DDM22RWF01667, one mobile phone make Nokia and cash Kshs.350/- all valued at Kshs.88,350/- and at the time of such robbery used actual violence to the said DANIEL MUTINGA MWILI."

The Appellant entered a plea of ***'not guilty'*** to the charge and his trial commenced before the lower court on 24th November 2009. The prosecution led by **CHIEF INSPECTOR NYAMAI** called a total of six (6) witnesses in support of their case.

The brief facts of the prosecution case were that on 5th Mach 2009 the complainant **DANIEL MUTINGA MWILI**, who operates a motor cycle taxi was about his business ferrying passengers as usual. At 1.00 A.M. a customer called him to ferry him from Maweni Bar to Kwachocho. **PW1** borrowed a motor-cycle from one **FRANCIS MAINA IRUNGU PW2** and went to collect his customer. After that trip and as he was returning another customer stopped him near Petra Mark Petrol Station and asked to be taken to Little Angels in Ngala Phase 3. They reached there and the customer directed the complainant towards Muyeye Village and onto a foot-path in the village. **PW1** then stopped and removed his helmet

suddenly a second man armed with a knife emerged from the bushes. The complainant began to struggle with the men. In the course of the struggle his right hand fingers were cut. The men stole the complainant's Nokia phone and cash Kshs.360/-. The second made rode off on the motor cycle. Members of public responded to the complainant's cries for help. The matter was reported to police. The complainant went to hospital where he was treated for his wounds. Later **PW2** told the complainant that he had been told there was a motor cycle for sale in Muyeye Village. **PW1** went to the scene and identified the motor cycle as the very one which had been stolen from him. The man found in possession of the cycle was the Appellant whom **PW1** identified as the man he had carried on that day. Appellant was then arrested and taken to the police station where he was later charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He opted to make a sworn defence in which he denied any involvement in the robbery. On 18th May 2010 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the offence of Robbery with Violence and thereafter sentenced him to death. The Appellant being dissatisfied with both his conviction and sentence filed this appeal.

The Appellant who was not represented by counsel at the hearing of the appeal relied entirely upon his written submissions which had been duly filed in court. **MR. NAULIKHA**, learned State Counsel appeared for the Respondent State and made oral submissions in which he urged the court to confirm both the conviction and sentence.

Being a court of first appeal we are mindful of our obligation to re-examine and re-evaluate the evidence adduced before the trial court and to draw our own conclusions on the same [see **AJODE –VS- REPUBLIC 2004 KLR 81**].

The fact that **PW1** did have in his possession a motor cycle on that material night is not in any doubt. **PW2 Francis Maina** told the court that it was he who had given the complainant the motor cycle to use to pick up a customer at 7.00 p.m. **PW4 LUCY WACHIRA GITHINJI** told the court that she was the owner of the stolen motor cycle. She states that she purchased it for Kshs.85,000/- and had given it to **PW2** to use for business as a boda boda taxi. **PW4** produced her receipt for the purchase of the cycle **Pexb3**. **PW5 PC. GABRIEL KOSGEI** is the scenes of crime officer who took photographs of the motor cycle. He produces said photographs as exhibits in court **Pexb2** as well as his report **Pexb4.** Both the complainant and **PW2** identify the motorcycle in the photographs as the one which was stolen on the material day.

The next crucial question is whether the incident described by **PW1** amounted to a robbery with violence as envisaged by S. 296(2) of the Penal Code. The key ingredients of this offence were set out in the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549** where the Court of Appeal held as follows –

"Robbery with Violence is committed in any of the following circumstances:
(a) The offender is armed with any dangerous and offensive weapon or instrument; or
(b) The offender is in company with one or more other person or persons; or
(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person."

The use of the word '***or'*** in this definition means that proof of **any one** ingredient will suffice to prove an offence under S. 296(2) of the Penal Code

In this case **PW1** told the court that although he was carrying only one passenger, a second man jumped out of the bushes and both attacked him. No doubt this was a carefully thought out plan. The man posing as a customer was to lure **PW1** to a deserted place whereupon his accomplice would jump out and both would steal the motor bike. It is clear that more than one person was involved in this incident. **PW1** told the court that the second man was armed with a knife which he did not hesitate to use to cut the complainant's fingers. This evidence is duly corroborated by **PW3 IBRAHIM ABDULAHI**, a clinical officer at the Malindi General Hospital. He confirms that he examined the complainant on 30th March 2009. He noted superficial scars on his left fingers and a scar to the knee. The injuries were found to be

approximately 25 days old which corresponds with the evidence of **PW1** that he was assaulted on 5th March 2009. Likewise **PW2** Francis Maina who rushed to the scene immediately after the robbery and found **PW1** soaked in blood. From the above we are satisfied that all the three ingredients for robbery with violence set out in the **Oluoch** case did exist and therefore this incident did meet the threshold of S. 296(2).

The next key question for determination is that of identification. The incident occurred at 1.00 A.M. It was night but **PW1** describes at page 11 line 23 that due to security lights at the scene he was able to see clearly –

"There was a security lamp that illuminated that foot-path. There were houses near the road. I could see clearly"

It must be remembered that the Appellant was a customer whom **PW1** had picked some distance away. No doubt they talked as they negotiated the payment. The two spent an adequate amount of time in each others company. **PW1** engaged the Appellant in a struggle for a period of time thus allowing him an opportunity to get a close-up view of his face. We are convinced by the very vivid account which the complainant gave of events of the day that he was truly able to observe events and persons well. The fact that there was adequate light at the scene is captured by the learned trial magistrate on page 39 line 6 where she observes:

"When the accused attacked him [the complainant] at Muyeye it was at a place that had security lamp nearby. Visibility was clear. He was able to see the accused clearly while they wrestled"

We are well aware that in such cases of identification by a single witness the court is required to exercise greater care and must warn itself adequately before relying on such evidence to render a conviction [see **MAITANYI –VS- REPUBLIC [1986] KLR 198].** Our perusal of the judgement reveals that the learned trial magistrate did so warn herself at page 38 line 8 where she renders herself thus:

"I have warned myself as I am bound to being the trial magistrate of the dangers of convicting an accused person based on the sole identification of a witness. It falls upon me to be absolutely certain that the identification is perfect and free from any possibility of error or mistake"

It is evident that the learned trial magistrate did warn herself in line with the **Maitanyi case**.

Aside from this evidence of identification, there is yet other compelling evidence linking the Appellant to this offence. This is the evidence of recovery of the motor-cycle. **PW2** told the court that about three (3) weeks after the robbery he was informed that there was a motor cycle for sale within the village. **PW2** posed as a customer and was directed to the seller who was said to be selling the motor-cycle at a ***'throwaway price'***. He saw the motor-bike and recognized it as the one he had given **PW1** to use, which was later stolen. **PW2** says he was able to positively identify the motor-cycle by way of a mark on its body showing where he used to place the basket whilst carrying fish. **PW2** alerted **PW1** that he had found the stolen bike. They alerted police**. PW6 PC. JONES NYAMBATI** told the court that police went to the house in Muyeye Village in which house they found the Appellant asleep. The motor-bike was recovered in that house. **PW4** was shown the motor-bike and she positively identified it as her bike which she had handed to **PW2** for use as a boda boda taxi. The Appellant was therefore found in possession of the stolen motor-bike barely two weeks after it had been stolen. This is a case where the doctrine of recent possession applies. In the case of **ARUM –VS- REPUBLIC [2006] E.A. 10**, the Court of Appeal held as follows:

"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is, there must be positive proof, first that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant, thirdly, that the property was stolen from the complainant, and lastly the property was recently stolen from the complainant"

There is concrete evidence that the complainant was robbed of a motor-bike. The recovered motor-bike was positively identified by the owner **PW4** as well as **PW2** and **PW1** both of whom had intimate knowledge of the bike due to their regular use of the same. **PW4** did in addition avail documents to prove her ownership of the motor-bike. The fact that this stolen motor-bike was found in the possession of the appellant is also not in any doubt. The Appellant himself does not deny this. He concedes that he was found with the bike but claims that one '***FONDO'*** brought it him. The appellant did not call the said ***'Fondo'*** as a witness to confirm this defence. The learned trial magistrate aptly considered and disposed of this defence thus in his findings at page 39 line 19 of his judgement –

"In his defence accused said that Fondo gave him the motor cycle which he used. He sent word to Fondo to bring documents of ownership but to no avail. PW1 said he never heard accused say anything like that. PW2 said he heard the accused say he had been given the motor cycle to use only at night. PW6 denied that the accused said he was given the motor cycle by Fondo. I find his defence a mere denial and I dismiss it."

We are in total agreement with this finding. The Appellant did not raise the issue of this Fondo with any witness during cross-examination and it is clear that this defence is nothing but an afterthought which the trial court rightly dismissed. Lastly on this point, the question of ***'recently stolen'*** is relative to the subject matter. In this case it was a motor-bike a large bulky and expensive item which cannot be quickly and easily disposed of. Possession of such an item fifteen (15) days after its theft does in our view constitute ***'recent possession'***. The only conclusion that can be drawn is that the appellant was an active participant in its theft. Combined with the positive identification by **PW1** we find there to have been watertight evidence against the appellant. The prosecution witnesses gave evidence which was cogent, clear and reliable and proved the case beyond a reasonable doubt. The conviction rendered by the trial court was sound and we have no hesitation in confirming the same.

The Appellant was accorded an opportunity to mitigate after which he was sentenced to death. This is the lawful sentence provided by S. 296(2) of the Penal Code and we confirm that sentence. Finally this appeal fails in its entirety. The conviction and sentence of the Appellant by the trial court are hereby confirmed and upheld.

Dated and Delivered at Mombasa this …15th…… day of March 2011.

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H. OMONDI **M. ODERO**

JUDGE **JUDGE**