



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**HCRA NO.30 OF 2006**

**1. FRANCIS OMWENGA OPIYO            )**  
**2. WYCLIFFE NDOMBI MUSIBAY    ).....APPELLANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G E M E N T**

The appellants Francis Omwenga Opiyo and Wycliffe Ndombi Musibayi were jointly charged and convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Both were condemned to suffer death in the manner authorized by the aw.

In their petitions of appeal the appellants present the following grounds:

- a) that there was no positive identification**
- b) that all the ingredients of the offence were not proved**
- c) that some important witnesses were not called**
- d) that the defences were rejected without consideration**
- e) that the doctrine of recent possession as relates to the 2<sup>nd</sup> appellant was not established**

Mr. Masiga for both appellants argued the grounds of appeal. He submitted that the offence took place at around 5.00a.m. when it was dark. The conditions of identification were poor and not conducive to positive identification as regards the 1<sup>st</sup> appellant. For the 2<sup>nd</sup> appellant, Mr. Masiga submitted that the doctrine of recent possession was not established in that the recovered part of the bicycle was not properly identified. The defence also argued that the defence of the appellants were not considered.

The state opposed the appeal arguing that the evidence against the appellants was overwhelming and that PWI knew the appellant before the incident. The second appellant did not explain recent possession as required.

PWI testified that on the 28<sup>th</sup> February 2006 around 5.00a.m. he was at Tanaka area of Busia town carrying out his bicycle boda boda business. He stopped at a place to wait for a passenger. He was attacked by two men who robbed him of his bicycle. He told the court that there was moonlight and he was able to identify his attackers. PWI knew the 1<sup>st</sup> appellant before the incident because he was also a boda boda operator. Before the 2<sup>nd</sup> appellant joined the 1<sup>st</sup> appellant, PW1 was able to identify 1st appellant by his voice when he ordered that the bicycle be surrendered to him. PWI led police to the place where the accused persons lived. The 1st accused was arrested but no recovery was made. The second

accused escaped on seeing the police. PW1's bicycle in a dismantled state was recovered.

PW2 was a bicycle taxi operator. He met PW1 on the Kisumu/Busia Highway immediately after the robbery. PW2 gave PW1 a lift to the police station. The witness testified on how police recovered the bicycle, arrested the 1st appellant while the 2<sup>nd</sup> appellant fled.

PW3 testified that he was repairing the dismantled saddle of PW1's bicycle on 28/02/05 around 10.00a.m. in presence of his customer the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant fled on seeing police while police took the saddle with them. He said that the police did not produce the saddle save the carrier in court. PW3 described how the 2<sup>nd</sup> appellant was dressed that day and that he was known by the nick name "Taa Mbili".

PW4 is the Clinical Officer who filled the P3 form for PW1. The patient had tenderness on the chest caused by a blunt object. The injury was assessed as harm.

PW5 is the police officer who received the complainant's report at Busia Police Station on 29/02/05 at 10.00a.m. He was led to the houses of the suspects and arrested the 1st appellant. In the house of the 2<sup>nd</sup> appellant, PW4 found his wife. A saddle of PW1's bicycle was recovered from the workshop of PW3. It had been taken there by the 2<sup>nd</sup> appellant for repair who fled on seeing the police. The 2<sup>nd</sup> appellant was arrested in May 2005 for another offence and also charged with the offence in this case.

The 1<sup>st</sup> appellant gave an alibi defence and also narrated how he was arrested from his home as he rested outside the house. He was later to be joined with the 2<sup>nd</sup> appellant whom he did not know and charged in this case.

The 2<sup>nd</sup> appellant said he is a radio repair apprentice. On 24/02/05 he went to Uganda to buy radio spare parts. On his return, he was arrested at a bus stage waiting to board a vehicle. He was later charged with the offence but he denies that he robbed PW1 of his bicycle.

The trial Magistrate warned himself of the danger of relying on the evidence of a single identifying witness. The court relied on the case of Abdallah bin Wendo 1967 E.A.L.R. and satisfied itself that positive identification had been established. As for the 2<sup>nd</sup> appellant, the court relied on the evidence of recent recovery to convict him.

The incident occurred at around 5.00a.m. when it is normally dark. However, PW1 testified that there was moonlight that morning and the light enabled him to identify the first appellant. PW1 testified the robbery by holding onto the bicycle as the first appellant pulled it away. The first appellant spoke to PW1 in Kiswahili ordering him to release the bicycle to him. PW1 told the court that he knew the first appellant before the incident because he was his colleague in the bicycle taxi business. In his defence, the first appellant told the court that he did the said business. The defence counsel Mr. Masiga argued that the voice identification was unreliable because the actual words said by the aggressor were not quoted. We are aware of the law on voice identification and it is required that the exact words uttered be cited. The trial magistrate did not deal with the requirement. We come to a conclusion that voice identification was not established.

On cross-examination by the first appellant, PW1 said that there was moonlight that morning and that the said light aided him to see the appellant. The trial court which had the advantage of observing the demeanor of PW1 took him as a credible witness. In the presence of the moonlight, the conditions of identification were conducive to positive identification. The magistrate warned himself on relying on the evidence of a single identifying witness.

As for the second appellant PW1 also identified him at the scene. However, trial court relied on the evidence of recent possession. PW1 knew the place both the appellants lived. He led police there and in the house of the 2<sup>nd</sup> appellant, the bicycle was recovered without the saddle. The saddle was later

recovered at the workshop of PW3. PW3 confirmed that it is the 2<sup>nd</sup> appellant who had taken the saddle to him for repair and that he had fled when he saw police approach the workshop. The second appellant was a customer to PW3 and had been to the workshop the last time two weeks before the incident. PW3 knew the 2<sup>nd</sup> appellant even by his nickname "Taa Mbili." There was therefore no possibility of mistaken identify. In his defence, the 2<sup>nd</sup> appellant merely denied committing the offence but did not explain the recent position of the stolen bicycle part. Neither did he make any attempt to rebut the evidence of PW1, PW3 and PW5 in cross-examination which highly connected him with the commission of the offence. The recovery was made one day after the incident. PW1 identified the bicycle as his by the frame number. Both the bicycle and the saddle were produced in evidence.

The trial magistrate considered the defences of the appellants and rejected them in view of the overwhelming evidence of the prosecution. When the offence was committed, the first appellant was in the company of another person. Threats and violence were used on the complainant to an extent that he sustained injuries.

It is our finding that all the ingredients of the offence were proved in relation to the first appellant. For the 2<sup>nd</sup> appellant, the doctrine of recent possession was well established by the prosecution. The appellants were therefore properly convict. In conclusion we find that the appeal has no merit and dismiss it accordingly.

The conviction and sentence are hereby upheld.

**D.A. ONYANCHA**  
**JUDGE**

**F.N. MUCHEMI**  
**JUDGE**

Judgement dated and delivered on the 8th day of November 2011  
In the presence of the appellants, the State Counsel Mr. C.O. Okeyo.