REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, & DULU, JJ.)

CRIMINAL APPEAL NO. 583 OF 2005

BETWEEN

MICHAEL MUSYOKI MBINDYO……………………..….... APPELLANT

-AND-

REPUBLIC………………………………………………...RESPONDENT

(*Appeal from the Judgement of Senior Resident Magistrate S.M. Mokua dated 23rd December, 2005 in Criminal Case No. 3550 of 2004 at the Thika Law Courts*)

JUDGEMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that the appellant, while in the company of another person not before the Court, at Thika Town in Thika District, Central Province, on 2nd May, 2004 robbed ***Francis Kirika Njuguna*** of one bicycle, Raja by make valued at Kshs.2,500/=, and at, or immediately before, or immediately after such robbery, used actual violence on the said ***Francis Kirika Njuguna***. An alternative charge, of handling stolen goods contrary to s.322(2) of the Penal Code (Cap.63) was also brought against the appellant.

The learned Senior Resident Magistrate found the appellant guilty on the main charge, convicted him, and sentenced him to the mandatory death sentence provided for by law.

The appellant's appeal is based, firstly, on the contention that the conviction cannot be sustained because it was based on the testimony of a single identifying witness which was not corroborated; that the exhibits admitted for use in evidence, had not been recovered in the appellant's possession; that the trial Magistrate had wrongly rejected his defence, in particular his alibi defence.

The appellant brought to Court written submissions, and expressed the preference that the respondent's counsel should make her submissions first, and he would then respond.

Learned State Counsel, ***Ms. Gateru*** opposed the appeal, and supported conviction and sentence. She urged that there was strong evidence on record to support the appellant's conviction.

Two persons had robbed the complainant (PW1), and one of them had been armed with a cleaver (or *panga*) which he used to cut the complainant, whose resulting injuries were confirmed by the doctor

(PW4). PW2 and PW3 who were Police officers, arrested the appellant barely ten minutes following the commission of the offence – having received a report from the complainant. When the appellant was arrested he was riding the very same stolen bicycle, which PW1 positively identified, and even produced his documents of ownership thereof. It was learned counsel's submission that, there could be no doubt the appellant committed the offence.

Of the appellant's claim that his defence was not considered, counsel submitted, to the contrary, that, indeed, the defence evidence was duly considered, and rejected. ***Ms. Gateru*** urged that the appellant's case was devoid of merit, and should be dismissed.

In his verbal response, the appellant submitted that he had not been properly identified as the culprit; for there was conflicting evidence as to the exact place where he had been arrested. He contested the authenticity of the allegedly purchase receipt for the subject bicycle, which the complainant had produced.

The learned Magistrate noted that the offence had taken place at 6.00 pm, and at that time visibility was good. While walking towards the Police station to report the incident, the appellant met Policemen who were in the neighbourhood, on patrol; and these Policemen went straight in the direction the robbers had taken. The appellant was soon thereafter seen riding the bicycle, with his accomplice as a pillion passenger. PW2, ***P.C. Paul Mwaniki*** had confirmed the complainant's evidence; PW2 and his fellow officers on patrol, turned into Kianduthu Road, which the complainant identified as the one taken by the robbers; and soon thereafter, the Policemen saw the suspects riding away. The Police officers arrested the appellant, while the appellant's accomplice escaped. The complainant, upon making his report, had described the clothing worn by the robbers; and when the robbers were sighted, the complainant identified them, and on that basis, the Police officers arrested the appellant. The Police officers recovered the bicycle, as well as the cleaver which one of the robbers had used to cut the complainant at the time of robbery.

The passage in the judgement, in which the learned Magistrate found the appellant to be the culprit, thus reads:

> ***"The prosecution witnesses are very consistent…. The complainant said ….he was attacked by two men. PW2 and PW3 followed the attackers and, indeed, got [the] two men; however, one managed to escape. The attackers [at the time of the theft] …were armed with a dangerous weapon, namely a panga…PW5 gave testimony which proves that violence was used against the complainant ….The complainant had injuries on the head. The evidence on record is clear, that a robbery took place… The complainant told the Police officers that one of the attackers was [wearing] a jacket. That bit of evidence is corroborated by that of PW3. The attackers took off, riding on the complainant's bicycle. PW2 and PW3 gave testimony that the complainant identified the accused and another, who were riding on his bicycle…., and immediately the accused was arrested. There was concrete evidence to show that the bicycle belonged to the complainant."***

Of the appellant's unsworn testimony, the learned Magistrate observed that all it tried to do was to give the impression that the appellant "was arrested for no apparent reason."

The learned Magistrate also observed that the appellant had given no explanation of the fact that he was found in possession of recently stolen goods, namely the complainant's bicycle.

The learned Magistrate did not, just as we do not, believe the appellants testimony. We too, agree that the prosecution had proved their case beyond reasonable doubt, and we thus hold that the appellant had been properly found guilty, and convicted of the offence of robbery, contrary to s.296(2) of the Penal Code (Cap.63).

We find that the arrest of the appellant had more-or-less been effected in conditions of hot pursuit, a situation which rendered it so easy to properly identify him as one of the two robbers who deprived the

complainant of his bicycle, and inflicted physical injury upon him. The very item stolen, namely the bicycle, was recovered from the appellant while he was using it; the very instrument of violence used upon the complainant, namely the *panga*, was recovered from the appellant; these situations are the mark of the best form of identification for a criminal, when visibility is good – and the evidence placed before the trial Court was that visibility was good.

We would also apply the doctrine of ***recent possession***, on the basis of which a conclusion is to be made that the appellant, who was riding the complainant's bicycle only so soon (some ten minutes or so) after it had been stolen, was the thief, or was one of the thieves; and it is properly demonstrated that the selfsame thief had obtained possession of the bicycle through robbery with violence.

This scenario proves, in our view, beyond reasonable doubt, that the applicant, with his accomplice, had committed robbery as charged, contrary to s.296(2) of the Penal Code (Cap.63).

We therefore dismiss the appellant's appeal; uphold his conviction; and affirm sentence.

Orders accordingly.

DATED and DELIVERED at Nairobi this 25th day of October, 2007.

J.B. OJWANG G.A. DULU

JUDGE JUDGE

Coram: Ojwang & Dulu, JJ

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Ms. Gateru

Appellant in person