REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1336 & 1354 of 2002

(From original conviction (s) and Sentence(s) in

Criminal case No. 3019 of 2001 of the Chief Magistrate's Court at Thika

(Mary Kiptoo – SRM)

JOSEPH KINYA KAHUNGU……....………….....……...……..…..APPELLANT

VERSUS

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

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1354 OF 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 3019 of 2001 of the

Chief Magistrate's Court at Thika (Mary Kiptoo – SRM)

DANIEL KAMAU KAMANGA……....…………....……...……..…..APPELLANT

VERSUS

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

J U D G M E N T

JOSEPH KINYA KAHUNGU and **DANIEL KAMAU KAMANGA** were jointly charged with another **PETER NJOROGE NJENGA** with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The said co-accused was also charged with a second count of **BEING IN POSSESSION OF A FIREARM WITHOUT A FIREARM CERTIFICATE** contrary to **Section 4(1) (2) (a)** of **Firearms Act**. The co-accused was acquitted of all counts.

The two Appellants were convicted of the capital charge and each one of them sentenced to death. It is against this conviction that they have now lodged these appeals. We have consolidated them for ease of hearing and disposal having arisen out of the same trial.

The facts of the case are that the Complainant who worked with Kakuzi as a Mechanic was riding a motorcycle Reg. No. KAN 707 N along Kituamba Road on 30th April 2001, when two men on a motorbike, blue in color confronted him. One had a gun. He was asked to hand over the keys to his motorcycle. They also took the helmet, gloves, a radio and cash Kshs.1300/- from him. Later on the Complainants motorbike was recovered from PW2. The Complainant identified the 2nd Appellant herein one month later. PW2 said that on 30th, the same day of the incident, at 1.45p.m. the 2nd Appellant took the motor bike to his place. That on 9th May 2002 he went back with Police officers among them PW5 who recovered it, together with a helmet and gloves. All were identified as exhibit 2, 4 and 5 respectively. PW1 identified the motorbike, exhibit 3 as the one used by robbers. PW3 said that it belonged to him and that on 29th April 2001, he found it missing from his house when he went home. He learned later from his wife, not a witness, that the 1st Appellant had taken it away. The 1st appellant returned it the next day. Later 1st appellant went with police who took it away on 18/5/01. The police included PW5.

PW4, a security officer of Kakuzi gave the Appellant's names to the police as suspects. PW5 also recovered the pistol identified by the Complainant as one used in the robbery, exhibit 1, from the house of the Appellant and co-accused. In their defences both Appellants denied the charges.

The Appellants raised separate grounds of Appeal. The 1st Appellant challenged the conviction in reliance to the evidence ofPW3 which he said was hearsay evidence. The second ground he cited was that the learned trial magistrate acted in error when she rejected his defence while it raised reasonable doubt to the prosecution case.

The 2nd Appellant raised four grounds. One that the evidence against him was by a single identifying witness which was not watertight to sustain a conviction, two that the learned trial magistrate acted in error when she relied on the 2nd Appellant retracted and repudiated statement. Thirdly, that the conviction was based on flimsy and contradictory evidence. Finally that the defence he gave was reasonable and ought not to have been rejected. We have carefully considered these appeals, submissions by the Appellants which were written and oral submission by the learned State Counsel, **MRS. KAGIRI**. We have also subjected the evidence adduced before the trial court to fresh analysis and evaluation as expected of us as a first appellate court.

The learned counsel for the State conceded to the 1st Appellant appeal on the ground that the 1st Appellant was convicted on the strength of the evidence of PW3. Learned counsel submitted that the said evidence was hearsay and unreliable. Dealing with the 1st Appellant's appeal first, we agree that the conviction of the 1st Appellant was based on the evidence of PW3 which evidence was hearsay. PW3 said that he received report from his wife who was not a witness, that the 1st Appellant had collected the motorbike exhibit 3 from his house on 29th. That was one day before the incident. PW3 said that the motorbike was returned next evening but did not say by whom. PW3 said however that Police officers in company of the 1st Appellant went to his house and recovered the motor bike.

The motorbike was exhibit 3. The Complainant identified the motorbike as the one used in the robbery committed against him. The learned trial magistrate took the identification of the motorbike exhibit 3, on its face value without testing it. The learned trial magistrate ought to have scrutinized that evidence to satisfy herself that the same was used in the robbery in question and in which case then the 1st Appellant would need to give an explanation. All the Complainant said concerning the motorbike used to rob him was that it was blue. He could not tell its registration number. The Complainant's evidence, identifying the motorbike as the robbery vehicle was therefore not watertight and ought not to have been relied on. PW3's evidence also was hearsay and was inconclusive as the prosecution did not adduce any nexus between PW3's evidence and the robbery.

We noted that the statement of charge and caution recorded from the 2nd Appellant implicated the 1st Appellant. In that statement a motorbike registration No. KAB 752L Yamaha was cited as one used in

the robbery against the Complainant. PW3's motorbike was registration number KAB 752M Suzuki. It did not fit the description given in the Statement.

That charge and caution could not have been relied upon to provide circumstantial evidence against the 1st Appellant to the effect that he had PW3's motorbike used in the robbery in question, around the time the robbery was committed. The conviction against the 1st Appellant had no basis. We allow his appeal, quash the conviction and set aside the sentence.

MRS. KAGIRI opposed the 2nd Appellant's appeal on behalf of the State. Learned counsel submitted that the evidence against the 2nd Appellant was that of identification by PW1 and of possession of recently stolen motorbike given in evidence by PW2. PW1 submitted that he was able to see the 2nd Appellant face to face at the time of robbery and he subsequently identified him. On this issue first, the learned State Counsel did not say when the Complainant was able to identify the 2nd Appellant. The Complainant's evidence was that he identified the 2nd Appellant one month after the incident, while at the Police Station. No identification parade is said to have been held. The Complainant did not lead to the arrest of the 2nd Appellant. The Complainant's evidence of identification was therefore dock identification. The learned trial magistrate needed to subject the Complainant's evidence to two tests before relying on it. See **OLWENO vs. REPUBLIC (1990) KLR 509**. The first test is whether the conditions under which the Complainant, the single identifying witness, claims to have identified the 2nd Appellant. From the evidence adduced, the Complainant saw the 2nd Appellant at the time he was asked to hand over keys, gloves and helmet which he promptly did and the robbers left. The Complainant did not say how long the incident took but from his explanation it must have been short indeed. The fact that he saw him again one month later, and not in a properly conducted identification parade, that evidence was not credible.

The second test is whether the single evidence of identification by the Complainant could be relied upon, without any other evidence to sustain a conviction. Our finding on this is that PW1's evidence could not stand alone to sustain a conviction.

Learned counsel submitted that PW2 corroborated PW1's evidence. That evidence of PW2 was independent of PW1 and ought to have been treated on its own merit. PW2's evidence, counsel said, showed that the 2nd Appellant took the Complainant's stolen motorbike to PW2 saying it had broken down and needed a mechanic to repair it. The 2nd Appellant took the Complainant's motorbike to PW2 the same afternoon that it was stolen from the Complainant. He said he would go back for it but never did so until he took police officers to PW2. Learned counsel submitted that the 2nd Appellant was known to PW2 before he took the motorbike to him. Learned counsel submitted that the 2nd Appellant had also confessed to the offence in the charge and caution.

The Appellant stated that the prosecution evidence was contradictory. He challenges the evidence of PW5 the arresting officer as not disclosing the informer who led to the 2nd Appellant's arrest. We do not find this issue of any material importance since the evidence adduced clearly shows that the 2nd Appellant was arrested in the house of his co-accused which fact the 2nd Appellant admitted. Who led to his arrest is immaterial. The 2nd Appellant also challenged the admission of the statement he made to the police and recorded by PW7 **IP MULI** on 4/5/01. The court conducted a trial within trial after the 2nd Appellant retracted the statement. We are satisfied that the learned trial magistrate took the necessary precautions and conducted the trial within trial as required. The reasons she advanced for admitting it are sound. The admission cannot be faulted. It is also our view that even without this retracted confession by the 2nd Appellant there was other strong evidence against him.

The 2nd Appellant challenges the rejection of his defence by the learned magistrate. His defence was that on the day of the robbery, he worked the whole day. That on 14th his uncle, one **KAJOMBA** and not a witness in the case sent for him in order to help in repairing his motor bike. He says he spent the night where his uncle sent him and that it was from there that police in company with the accused who was

acquitted in this case found and arrested him.

There was evidence by PW2 who knew the 2nd Appellant before as he had been employed there before by the 2nd Appellant's cousin. PW2, as we have already stated herein above, said that the 2nd Appellant took to him the Complainant's motorbike – exhibit 2, moments after it had been robbed off the Complainant. This is a circumstantial evidence. The issue is whether the inculpatory facts are incompatible with the innocence of the 2nd Appellant and incapable of explanation upon any other hypotheses other than of guilt. See **PAUL vs. THE REPUBLIC 1980 KLR 100**. The 2nd Appellant pushed the Complainant's motorbike to the home of PW2 and told him that it was his and that it needed repairs and that he needed PW2, whom he knew before, to keep it for him to enable him get a mechanic. In cross-examination the 2nd Appellant suggested to the witness that he was not telling the truth to which PW2 repeated what he had said in examination in chief and maintained that it was the truth. PW2 had also said that the 2nd Appellant led police to his, PW2's house, to recover the same motor bike. The 2nd Appellant did not challenge either PW2 or PW5 the Police Officer concerning the recovery of the motor bike.

In his defence, the 2nd Appellant did refer to the events narrated by PW2 or PW5 concerning the motor cycle. He denied involvement in the offence and then explained how he was arrested which narrative tied up with that of PW2 and the co-accused (2nd accused) in the case.

We find that the inculpatory facts are incompatible with the innocence of the accused. They are also incapable of explanation upon any other hypothesis than that of guilt. See **MUSOKE vs. REPUBLIC 1958 EA 715**.

We have analyzed the evidence before court and are satisfied that there are no other co-existing circumstances in this case which would weaken or destroy the inference of the 2nd Appellant's guilt from the circumstantial evidence before us. See **TAYLOR ON EVIDENCE** (***12th Edition pages 66 and 67***).

There exists no other rational conclusion than that the 2nd Appellant was in possession of the Complainants motorbike moments after it was robbed of the Complainant at gunpoint by a group of three. That due to the short lapse of time between the robbery and the 2nd Appellant's possession of the stolen motorbike then the 2nd Appellant was more the robber than the handler of the motorbike.

We are satisfied that there was sufficient evidence before the trial court to justify the conclusion which the magistrate reached, that the 2nd Appellant had stolen the motorbike. We find the 2nd Appellant's appeal without merit and dismiss it accordingly. We uphold the conviction and confirm the sentence.

The upshot of this appeal is that the 1st Appellant's appeal is allowed, conviction quashed and sentence set aside. He should be set free unless he is otherwise lawfully withheld.

The 2nd Appellant's appeal fails and is dismissed.

Dated at Nairobi this 25th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA, M.S.A.

<u>JUDGE</u>

Read, signed and delivered in the presence of;

Appellant(s)

Mrs. Kagiri for State

Ann/Eric– CC

…………………………

LESIIT, J.

<u>JUDGE</u>

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MAKHANDIA, M.S.A.

<u>JUDGE</u>