REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 151 of 2006

PETER KAMONJO NJOROGE………………..…..APPELLANT

VERSUS

REPUBLIC ……..……………………………………RESPONDENT

(From the original conviction and sentence in Criminal Case No. 127 of 2004 of the Senior

Resident Magistrate's Court at Githunguri by L. Mutai – SRM)

J U D G M E N T

The appellant PETER KAMONJO NJOROGE was charged with three counts of robbery with violence contrary to section 296(1) and one count of house breaking and stealing contrary to section 304(1) penal code as read with section 27a(b) penal code. Appellant pleaded not guilty to all the charges and the matter proceeded to hearing where upon he was convicted as charged on count 1 but on the other two counts the same were reduced to robbery contrary to Section 296(1). He was acquitted on the fourth count of housebreaking and stealing.

He was sentenced to death on the first count and to seven years imprisonment on the second count and five years on the third count. The complainant PW1 Joseph Musyoki Ngugi testified that on 27.7.04 at 7.00a.m. he was on his way to Kahawa West, cycling. Just before he reached Ruturo Market, he heard footsteps moving towards him and on looking behind, he saw the appellant. PW1 was cut on the face and he fell. The person cutting him then left with his bicycle. PW1 informed three men who happened to come along and one agreed to assist – and took PW1 to a clinic where he was given first aid and later to Kiambu District Hospital where he was treated. He reported to police. On 9.8.04 at about 4.30p.m. as PW1 was coming from the clinic accompanied by his wife, he met the appellant and another who was 10 meters behind him. The appellant was holding a panga under his arm pit, PW1 alerted the other person who then got help and when appellant was called, he saw PW1 and ran away but was arrested the next day. PW1 was shown the person arrested and he identified him as the appellant. The bicycle was never recovered. Prior to the incident, appellant was not known to PW1. On 5.8.04, PW2 Joseph Mbugua (complainant in count 3) was going home to market – he had a bicycle. Upon reaching Kahoya, he met a young man and they walked together chatting and the young man told him about the insecurity of the place. Upon reaching near St Anne's School Rioki, the man slowed down and hit PW2 hard on the back of the head and he fell down. PW2 had Kshs 1800/- in his shirt pocket and the young man (who is the appellant) tore part of the shirt and left with it. He also took PW2's wallet which only contained his identity card. PW2 had shop goods tied to his bicycle and all these were taken along with the bicycle make Eastern Star.

One Joseph Ndichu came along and found PW2 at the scene and took him home – later he learnt that a suspect had been arrested and upon going to the police station, he was shown the appellant – none of his property was recovered.

PW11, Felista Wanja Kinuthia is the wife to Simon Kinuthia (complainant in count 1). It is her testimony that her husband had left on his bicycle on 10.8.04 at 10.00a.m. to go and buy potatoes at the market. She went to wait for him at a spot by the river so as to help him cross the bicycle. She saw him coming from from the opposite side, then seemed that the potatoes on the load had fallen down and upon rushing to see what was happening, she found Simon Kinuthia lying on the ground and the bicycle was gone. All his teeth had been knocked down and he was bleeding – he also had a cut wound on his head.

He was admitted in hospital for two weeks, discharged, then fell sick again and eventually died. She identified the bicycle in court as exhibit 2, although she did not know who had stolen it or who assaulted her husband. PW4 Joseph Mburu confirms that on 27.7.04 at about 11.00a.m. he met PW1 lying on the way as he was going to Kahawa West. He confirmed seeing injuries on PW1's face and left hand and that he is the one who took PW1 to a clinic. However he did not witness the attack. PW4(Henry Mwaura Chege) and PW6 Peter Mwangi Waitherero are the one who apprehended appellant after realizing that he was cycling in a dangerous manner and on being asked to stop he had refused. They gave chase and caught him and recovered the bicycle he had – that is the same bicycle PW11 identified as belonging to her husband. When they recovered it, the bicycle had blood stains. A panga stuffed in his trousers and which had blood stains was also recovered. At the time of his arrest appellant was wearing two jackets, shirts and several trousers. He also had a pair of trousers, a pair of pliers and a torch. Some photographs were recovered from him which were identified by PW3 Beth Wangui Kariuki as being hers – they bore her portrait and were produced in court as exhibit and she said that her house had been broken into and the photos stolen.

PW7 PC Michael Kimani received a report from members of the public who came in with the suspect. The recovered bicycle and photographs were handed over to him and he rearrested the appellant. The matter was investigated by the late Sgt Shiabia. Doctor Samson Gitonga (PW8) examined Simon Kinuthia on 10.8.04, he had a history of assault as he was robbed by a person he could identify. His lips were swollen with lacerations, his teeth had been knocked off, there was a swelling on the left eye area and a swelling on the scalp with a deep wound on the near side of scalp. He assessed the degree of injury as grievous harm. He also examined Joseph Mbugua (PW4) who had a swollen head with a wound, a bleeding nose and ear he assessed his degree of injury as harm.

Dorcas Bathai (PW9) a clinical officer examined Joseph Musyoki (PW1) on 11.8.04 and noted a laceration on the scalp and laceration on the face. He had a red eye and a cut wound on the left hand – the degree of injury was assessed as grievous harm.

Upon being put on his defence, the appellant requested for time to prepare for his defence on 6.1.06 – and he was given a fresh date for 20.1.06. However on 20.1.06 the appellant was not produced and he was later produced in court on 27.1.06 where after he was given 8.2.06 as the fresh date for defence hearing. On 8.2.06 the appellant sought an adjournment saying he was not ready, although he said he had no reasons. This was opposed by the prosecutor on grounds that appellant was not sick and had not shown any reason why the defence case could not be heard, but the learned trial magistrate overruled this objection and gave appellant a fresh hearing date for 22.2.06.

True to form on 22.2.06, the appellant said he was not ready with his defence – he had no reasons save that he had appealed against judgment in other cases. The prosecution objected. At this point the learned trial magistrate considered that he had been given sufficient indulgence and since appellant did not wish to exercise his rights and the court could not compel him and the matter was set down for judgment.

In her judgment, the learned trial magistrate stated that all along PW1 did not know appellant prior to the material date, he was able to look at and see the appellant very well before the attacked him and before he stole his bicycle. He also noted that the attack took place during the day and that appellant's presence at the scene was not disputed. The learned trial magistrate was convinced that PW1 was robed off the

bicycle although the same was never recovered. The learned trial magistrate also found that the medical evidence confirmed that PW1 was assaulted on 27.7.04. The learned trial magistrate noted that –

"*Although the accused was charged with violence, I found that the prosecution witnesses were silent on nature of weapon used by the accused person against PW1 at the material time …… although accused hit him with a weapon, he was not able to see the same and so he could not elaborate on what weapon was used. It is also clear from the particulars on count 2, that no such weapon was included therein ……… the particulars further states that the accused person was all alone at all material times."*

It was on this basis that count 2 was reduced to Robbery contrary to section 296(1) Penal Code.

With regard to PW2 (Mbugua who is complainant in count 3, the learned trial magistrate noted that, " the offence took place during the day, PW2 had walked with the accused for some distances. They had shared a conversation and the court did believe that PW2 positively identified the accused well at the scene of crime."

The learned trial magistrate noted that PW2's evidence remained very firm on cross examination and had no reason to doubt the same.

With regard to the complainant in count 1, the learned trial magistrate stated that –

"*all along PW11 did not see the accused person hit her husband, she did identify the husband's bicycle which he was using on the material date. She did identify it both at Kiamumbi police station and also before the court …. from the evidence of PW5 and PW6, it was revealed that the bicycle aforesaid was recovered soon after the accused had been robbed…… the bicycle was recovered with the accused person ….. I was convinced that the late Simon was robbed by the accused person at all material times before he was injured. Even if there was no eye witness, the circumstances herein tends to link the accused person with the offence as charged. The evidence as laid is so overwhelming such that even in the absence of any other medical evidence, the same can stand on its own to arrive at a conviction."*

It is against this background that the appellant has filed his amended grounds of appeal stating that -

(i) The learned trial magistrate erred by relying on mere circumstantial evidence attributed by both PW4 and PW6 without adequately considering that the alleged chase was done in the coffee plantation where there were other people working and were not witnesses in this case.

(ii) The learned trial magistrate erred by failing to find that the identification claimed by PW1 and PW2 was a fleeting glance thus unreliable.

(iii) The learned trial magistrate erred by violating the provisions of Section 72(1) of the Constitution thus denying him a fair and impartial trial.

The learned trial magistrate failed to consider that for count 2 and 3 a parade was needed and the blood analyzed.

The appellant in his submissions stated that he was not the person who robbed the deceased one Simon Kinuthia. It is his contention that PW11 admitted that she could not identify whoever attacked Simon and that the investigations by Sgt Shiabia ought to have been revealed, narrated and produced in court by PW7 as they worked together – this was not done. He also takes issue with the description of the bicycle, pointing out that the particulars of the change are to the effect that the bicycle was make Avon S/N AR 52457, yet in court it was merely termed as a green bicycle in colour and that Simon Kinuthia ought to have been made to identify the said bicycle when he went to the police station to record his statement. We note that Simon's statement was not produced in court. There is no verification that he gave a limited description.

He also says that PW1 did not give any specific mark which could have established that the said bicycle really, belonged to the deceased and that PW11 merely stating that the bicycle belonged to the deceased was not enough.

The appellant also submitted that it was impossible for a stranger riding on a bicycle and another one walking, to clearly identify the assailant who was only walking and that an identification parade ought to have been conducted for purposes of corroboration citing the decision in *Kaveta and others versus Republic Criminal Appeal No. 65 of 1986* which held that where the evidence is based on identification, the court should closely examine the circumstances in which the identification by each witness came to be made.

Appellant also argued that the production of the Occurrence Book could not be underrated to see whether witnesses did identify appellant clearly and how they reported – here the appellant sought to rely in the case of -

Republic versus *Mohammed bin Ali 1942 EACA 72* which held that the first report should be put in evidence so as to check whether or not a witness can identify a suspect and with what means.

Basically the entire tenor of the appeal's argument is that of identification.

In opposing the appeal, the learned State Counsel Mrs Kagiri submitted that though the witnesses did not see who carried out the attack, PW11 was able to demonstrate to court that at the time of the attack, deceased (in count 1) had a bicycle make Avon, green in colour which was stolen from him at the time of the attack and that this same bicycle was recovered from the person of the appellant on the day he was arrested by PW4 and PW5 and that it happened to be the same day that deceased was attacked by the appellant. It was the recovered bicycle which connected appellant to the deceased complainant, as appellant had no reasonable explanation as to how he came by the same taken on the very day that the complainant was attacked. The appellant also contested the question of the learned trial magistrate relying on circumstantial evidence saying that it must always be narrowly examined if only because evidence of this kind may be fabricated citing the decision in *Teper versus Republic* *(1952) AC 480.* He has quoted a passage from some book not stated saying Joseph commanded the steward of his house, "put my cup, the sliver cup in the sacks mouth of the youngest" and when the cup was found there, Benjamin;s brothers too lastly assumed that he must have stole it – the judges said –

"*It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstantial (?) which would weaken or destroy the inference.*

It is the appellant's contention that the circumstantial evidence did not meet the required standard of proof. To this, the learned State Counsel's response is that the circumstances under which PW5 and PW6 identified appellant were clear and consistent and that the court should take note of the appellant's manner of dressing at the time, his conduct

(i.e. refusing to stop when asked to do so) having a panga hidden Inside one of the trousers, having a pair of pliers and a torch and that all these factors do not point to any innocence. on the part of the appellant and that this evidence was never challenged by the defence. It is therefore argued by the learned State Counsel that both circumstantial and direct evidence point to no other persons except the appellant.

We note that the incidences took place on different different dates. The complainant in count 1 died as a result of injuries sustained in the attack. There is of course no evidence on record that he ever named or described his attacker. The deceased wife simply saw as though the load he had seemed to be falling – she did not see who attacked him but clearly when she rushed to his aid, he had injuries and his bicycle make Avon was missing. It is that very day at about 11.00a.m. that PW6 (Peter Mwangi Waitherero) saw the appellant riding a bicycle dangerously and when he tried to stop him on account of his dangerous riding, appellant rode on. He and others persuaded appellant – initially PW6 pursued him using his bicycle, but that bicycle broke down or got damaged and PW6 continued pursuing him on foot and

shouting to some people who were ahead to stop him. So appellant was chased in the coffee farm and he dropped the bicycle. There is nothing to suggest that at any moment during this chase PW6 lost vision or sight of the person he was pursuing – and it was one person, not several persons being perused so as to raise the issue of likelihood of mistake. Unfortunately PW6's only evidence with regard to the bicycle is recorded in this manner.

"***T****he bicycle before court – identified."* The learned trial magistrate did not record its make or serial number – thus giving justification to the appellants lament that there is nothing in terms of description to confirm that this is the same bicycle that was robbed off the deceased.

PW5 (the other witness who apprehended appellant also refer to sighting him cycling past and one Mwangi (presumably PW6) told him to stop the person who was cycling past other person "*dropped the bicycle and ran into the coffee plantation. We chased the person with Mwangi… we managed to apprehend the person. We asked about the bicycle he had dropped,…. The bicycle before court MFI-2…."* Again no details are given by PW5 as regards descriptive aspects of the bicycle.

Even the police officer PW7 to whom the bicycle was handed over to makes no descriptive mention of the bicycle at all.

Then of course there are the dried blood stains noted on the bicycle and panga which were recovered from the appellant – the same was never taken to the Government analyst for matching to confirm that the blood belonged to the deceased Simon Kinuthia. Without such analysis it is not possible to say whether the blood stains on the recovered belonged to the deceased, any other person or maybe even some animal then, it was unsafe for the learned trial magistrate to draw adverse conclusions against the appellant to the exclusion of any other person with regard to the attack against Simon Kinuthia, for the simple reason that there were several possible explanations regarding the blood stains on the panga and the bicycle.

It is our conclusion that with regard to count one –

(a)   there was insufficient evidence relating to the description of the bicycle so as to confirm that it is the same one referred to in the charge sheet or the same one that belonged to the deceased.

(b)   The circumstantial evidence in relation to the attack on deceased does not inculpably point to the guilt of the appellant to the exclusion of anyone else especially because no one witnessed the attack.

Of course given the hall marks of the attack and the features thereto, there is strong suspicion that the appellant was the culprit BUT suspicion, no matter how strong cannot be the basis for a conviction. We therefore find the conviction on count 1 unsafe and it is quashed and the sentence thereto set aside.

With regard to count 2 which was a charge of robbery with violence contrary to section 296(2), but reduced to simple robbery – the attack was at 10.00a.m. and the learned State Counsel submitted that all the circumstances for identifying the attacker were positive and that a few days after the incident, he spotted the appellant and attempted to arrest him along with his friends, but appellant ran away.

Mrs Kagiri (the State Counsel) pointed out that a P3 form was produced to show the kind of injuries he suffered due to the cut inflicted by appellant on his face. She asked the court to note that the complainant was able to demonstrate that the bicycle he was riding was stolen by the complainant and the same was never recovered. BUT he was clear is his mind that the appellant was his attacker. We do confirm that PW1 stated that the attack was during the morning hours and this would be a time when there is sufficient light to enable the complainant in count 2 i.e. Joseph Musyoki Ngugi to see and identify anyone he encountered. He had heard footsteps moving behind him and upon looking back he was the appellant – he was able to see the appellant before the attack. Infact before circumstances could be described as difficult. He encountered appellant a second time on 9.8.04 at about 4.30p.m. When appellant ran away and then at the Kiamumbi police station. This would then negate the need for an identification parade since PW1 had already seen him at the police station, any subsequent identification parade would have been prejudicial to the appellant. We therefore do not find any fault in the absence of such parade. The

complainant's bicycle was robbed off him and he never recovered it. The medical officer who examined PW1 found that he had a laceration on the scalp and face and the left eye was red. The left hand had a cut wound and probable weapon used may have been sharp. The degree of injury was assessed as grievous harm and the P3 form was produced as exhibit 5. The learned trial magistrate reduced this charge to simple robbery saying the evidence tendered that. We are of the view that the evidence as considered by the learned trial magistrate to be proper in arriving at the conviction, there was no error in her finding. As regards count three which was also reduced to simple robbery, we take note that Joseph Mbugua was attacked at 5.00p.m. which was still daylight.

He(PW2) infact met appellant, they walked together as they chatted along the path – so PW2 had ample opportunity to see and observe the appellant's appearance, the conditions for identification were also favourable as it was still daylight. The length of time is not disclosed, but contrary PW2 to what appellant says, did not just have a fleeting, sudden glance of his attacker, he walked and talked with him and there can be no question of mistake because as Pw2 says, no one else appeared on that foot path. Was the first report by any of the witnesses even called for by the appellant to establish that no details of the attacker had been received or made by the victims? We find no such request in the lower court proceedings and the decision in *Republic versus Mohamed Bin Ali 1942 EACA 72* cited, does not come to his aid at all.

As for count 4, its not clear why the trial magistrate completely absolved the appellant, he was found with items on his body to some of which belonged to PW3 (Beth Wangui Kariuki). Certainly no one saw him break into the home of Beth and steal from there but as the learned state counsel observed , nine days after PW4's home had been broken into and property stolen there from, appellant was arrested by among others PW4 and PW5 and upon being searched PW3's photographs were recovered from him. She says appellant ought to have been convicted at least of handling stolen property and the trial magistrate misdirected herself. Mrs Kagiri's argument is that the person who is found in possession of recently stolen goods has the burden of explaining how he came to have them. The four photographs were mentioned in the charge sheet and PW3 identified them in court. The appellant never claimed that they belonged to him nor did he offer an explanation as to how he came to have them and so the doctrine of recent possession was applicable.

Our finding is that the learned trial magistrate acted properly in finding that the charge of house breaking and stealing was not proved but misdirected herself by finding the appellant completely innocent of any wrong whatsoever. There definitely was an offence of handling stolen goods contrary to section 322 (2) penal code disclosed by the evidence and we find as much.

Consequently in compliance with section 179(2) Criminal Procedure Code, the offence in count 4 is reduced to one of handling stolen goods contrary to section 322(2) and appellant is convicted on this reduced charge.

Consequently the finding in count four is substituted with the above and appellant will serve one year imprisonment to run concurrently with the other sentence from date of sentence in the other counts.

Delivered and dated this 8th day of May 2006 at Nairobi.

J.B. OJWANG **H.A. OMONDI**

JUDGE. **JUDGE.**