



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO.301 OF 1999**  
**(From Original Conviction and Sentence in Criminal Case No.850 of 1999 of the Chief Magistrate’s Court at Mombasa – Jo-Anne Siganga, Ms – S.R.M.)**

**MIKE SIBEKA MUSYONYE.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

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

The Appellant was convicted of robbery with violence contrary to Section 296(2) of the Penal Code and was sentenced to death. His appeal is against conviction and sentence.

Briefly the prosecution case was that on 29.10.98 at about 5.20 a.m. PW.1 was at Beach Road when he was attacked by a gang of 4 robbers who robbed him of a bicycle Frame No.X593064. Those assailants were armed with knives and he was stabbed on the right hand. He was not able to identify any of those robbers. On 9.3.99 PW.1 found his said bicycle with PW.2 Daniel Kenga.The matter was reported to the Police. PW.2 when traced by the Police said he had borrowed the said bicycle from PW.3 Daniel Wambua. PW.3 when traced said he had bought the said bicycle from PW.4 Anthony Kyule. PW.4 when traced by the Police said he had bought the said bicycle from the Appellant. The Appellant was arrested and charged with the present offence. The Appellant denied any involvement in the robbery. There was no direct evidence linking the Appellant to the offence.The only evidence linking the Appellant to this offence is that of PW.4 who said that he had bought the said bicycle from the Appellant. But on cross-examination he admitted that there was no sale agreement nor was he issued with a cash sale receipt by the appellant.

The Trial Magistrate in convicting the Appellant invoked the doctrine of recent possession. But the Appellant submitted that the Trial Magistrate had erred in law and fact when he invoked the doctrine of recent possession since he was not found in possession of the said stolen bicycle.

The Trial Magistrate further at page 3 of his Judgement stated thus:

***“Either t he Accused was one of the robbers who robbed the complainant of his bicycle on the material date, or he was involved in the robbery in some way. The Accused’s defence is a sham intended to hide the truth from the court.”.***

This is shifting the burden of proof to the accused. The burden of proof is throughout on the prosecution and the accused has no duty to disclose anything. It is upon the prosecution to prove its case against the accused beyond any reasonable doubt.

As we have said earlier, the only evidence linking the Appellant to this offence is the recovery of the stolen bicycle whereby the Trial Magistrate invoked the doctrine of recent possession. This was despite the fact that the appellant was not in possession of the said bicycle when it was recovered. But even assuming that the said bicycle was recovered from the appellant, there was not sufficient evidence that the Trial Magistrate would base the conviction of the Appellant.

Where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond any reasonable doubt; and if a finding that he stole the articles depends on the presumption arising from his recent

possession of the stolen articles, such a finding would not be justified unless the possibility that he received the articles has been excluded. Further, there was no evidence connecting the appellant to the robbery except the recovered bicycle and the nature of the stolen bicycle did not point strongly to him being the thief having regard to the high degree of proof required on a capital charge and it would be unsafe to allow his conviction to stand.

We therefore allow the appeal, quash the conviction and set aside the sentence of death and it is ordered that he be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Mombasa this 4th day of October, 2001.**

**J.L.A. OSIEMO**

**J U D G E**

**G.A. OMWITSA**

**COMMISSIONER OF ASSIZE**