



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 66 OF 2016

JULIUS KISUDI SHIKHUKHU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the Chief Magistrate Honourable T. W. Cherere in Eldoret Chief Magistrate's court Criminal Case No. 916 of 2014 dated 20th May, 2016)

JUDGMENT

JULIUS KISUDI SHIKUKU, the appellant herein, was charged together with another who was acquitted, in the main count with the offence of robbery with violence, contrary to *Section 296 (2) of the Penal Code*.

The particulars of this offence are that on the 27th day of January 2014 along Sango-Mautuma road at Shipande area, within Lugari sub-county of the Kakamega County, the accused jointly with others not before court while armed with dangerous weapons namely sword and rungun robbed *Evans Guzira Kidagisa* a motor cycle Registration number KMCY 848M, make Boxer 150, red in colour valued at Kshs. 93,000/- and immediately before the time of such robbery used actual violence to the said *Evans Guzira Kidagisa*.

The two faced an alternative count of handling stolen property, contrary to *Section 322(1)* as read with *Section 322 (2) of the Penal Code*.

The particulars of this offence being that on the 12th day of February 2014 at Kiganjo Estate in Makongeni, within Thika Sub-county of Kiambu County, the accused otherwise than in the cause of stealing, jointly and dishonestly retained a motor vehicle Registration number KMCY 848M, make Boxer 150, red in colour, knowing it to be stolen property.

The prosecution case is that the complainant in this case lived in Milimani, Lugari. He was operating a Boda boda, using motor cycle registration number KMCY 848M, make Boxer, red in colour. He was operating around Milimani and Turbo areas. On 20th January 2014 at about 7 p.m he was riding the said motor cycle from Lugari towards Milimani. He was alone. A wire which had been tied across the road trapped him on the chest, prompting him to fall down. Three men emerged from the right side of the road where there were many trees. They were armed with runguns and swords. They attacked him while on the ground, demanding for money and phone. A lorry appeared along the road, towards the scene. It had its headlights on. Using its light he was able to identify the appellant.

The appellant is the one who cut him with a sword on the head. The lorry passed and stopped slightly ahead. The complainant screamed for help. Three men alighted from the lorry and returned to rescue him. The assailant escaped with the motor cycle. They left behind the sword. He was given a lift in the lorry upto Turbo Health centre where he was treated as an outpatient. The same night, he reported the matter at Turbo police station. He was issued with a P3 form which was filled on 22nd December, 2014 by PW5. The clinical officer noted that the complainant's blue jacket and a cap were torn and blood stained. He had a cut wound on right forehead which was bleeding. The chest was painful, especially 7th and 9th ribs. He had back pains, bruises on the abdomen and a swelling on left hand. Both wrists were bruised. The right thigh was painful making him unable to use the right leg. He was treated as an outpatient. The injuries were caused by both sharp and blunt objects. The degree of injury was assessed as harm.

On 12/2/2014, *Timothy Seroney*, a police officer who was then attached to Makongeni police station, received a call from a good Samaritan who informed him that he had seen two people selling a motor cycle at Kiganjo area. This police officer, who gave evidence as PW3 called *PC Ondieki* and *PC Lemin*, to accompany him to the said area. When they arrived they talked to the owner of a scrap metal shop, called *Mustapha*. The appellant and the other suspect were sitting on a bench outside *Mustapha's* shop. They had a motor cycle registration No. KMCY 848M, Boxer in make and red in colour. They were asked whether they were selling the motor cycle, and answered in the affirmative. They were asked for ownership document and said they got burnt in their house in Western Kenya. The police suspected them. They were arrested and taken to Makongeni police station, in Thika. They were handed to the Deputy OCS, *Inspector Ngaira*. He interviewed the suspects who said they were from Lugari. They gave telephone numbers of their relatives there. The officer called them and they reported that the motor cycle had been stolen. The officers at Lugari police station were informed about it.

PW7 who was working at Lugari CID office, was assigned the case to investigate. He was informed by a CID officer namely *Kimathi Dolo*, that the motor cycle had been recovered in Thika and suspects arrested. He was asked to go for the motor cycle and the suspects at Makongeni police station. He went and the two suspects were handed to him. He also took a motor cycle Registration number KMCY 848N, Bajaj Boxer, red in colour. At Turbo police station he was handed a damaged helmet, torn jacket and a wire which was allegedly used to trap the victim. He had also obtained the motor cycle key from Makongeni police station.

PW7 requested PW6 to conduct an identification parade of which he did. The parade had 9 members. The appellant stood between member number 8 and 9. He was the only member wearing a reflective jacket. He was positively identified by PW1 on 20th February, 2014.

The suspects were then charged with the offence.

The appellant herein, who was the first accused person, gave sworn testimony in his defence and called no witness. His defence is that on 22nd January, 2014 he was not at the scene of crime at Lugari. On 27th January, 2014 he was in Thika, Kiambu where he was a labourer. On 3rd February, 2014 there was cessation of work for 2 weeks. On 12th February, 2014 he was in a rental house. He was called by a friend namely *David Wafula* who asked him to meet him at Kiganjo at noon. He went there at a place where he was directed. He waited for him outside a shop. About 15 minutes later, a police vehicle appeared and stopped where he was. Other people saw the police and ran away. He remained, and was arrested by the police. He was got into the vehicle where there were other suspects. He was not told the cause of his arrest. He was taken to Makongeni police station. At 3 p.m he was questioned and said he was from Lugari and was working in Thika. He disclosed that Turbo and Lumakanda were the nearest police stations to his rural home. On 14th February, 2014, together with his co-accused person, who was then a stranger to him, were driven to Lumakanda police station.

On 20th February 2014 he was called from police cells, told to wear a reflector jacket and then taken to a room where he joined others in a parade. He was identified. Others in the parade had no reflector jacket and their hands were folded, unlike the appellant. On 21st February, 2014 he was charged with a strange offence of which he did not commit.

The 2nd accused gave unsworn testimony in his defence and called two witnesses, his sister and his father. His defence is that on 17th January, 2014 he was schooling at Shemberere Technical Institute in Malaba. He was sent home for non-payment of school fees. The father did not have money. He sent him to get money from his sister in Thika.

The sister was living in Thika, Makongeni Estate, she was working as a labourer at Kabuku. The second accused person went to her house on 18th January, 2014. He requested her to pay his school fees. She did not have money. She took him to Kabuku farms where he was also employed on 24th January 2014. On 29th January, 2014, the 1st accused who is their neighbor at their rural home, called the 2nd accused. The 2nd accused told him he had gone to Thika to get school fees, but secured a job. The 1st accused requested him to also get him a job. On 30th January 2014 the 1st accused called 2nd accused and told him he was in Thika, Makongeni. The 2nd accused together with his sister went for him. They found him with a red motor cycle. On 30th January, 2014 the 1st accused also secured employment. He was living with the 2nd accused in his sister's house. A few days later the 1st accused (appellant) said he wanted to sell the motorcycle. Later he said he had found a buyer. The 2nd accused accompanied him to Makongeni to sell it. He said ownership documents were destroyed in a house fire. The second accused was not aware that the motor cycle was stolen. Upon arrest he told the police the motor cycle was for the appellant. He knew nothing about the commission of the offence.

The trial court evaluated the evidence. The court was not convinced by the evidence of identification of the appellant during the commission of the offence. The identification parade was as well dismissed as it was not done in compliance with the law. The court relied on doctrine of recent possession and found the appellant guilty of the offence. However, the 2nd accused explanation on how he got into possession of the motor cycle was found plausible and was accordingly acquitted. The appellant who was convicted of the offence was sentenced to death.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

1. The doctrine of recent possession was improperly invoked by the trial magistrate.
2. The whole evidence was not properly evaluated by the trial court before arriving at the decision.
3. The prosecution case is contradictory.
4. Identification of the appellant as the culprit did not meet the legal threshold.
5. The prosecution case had no probative value and was short of establishing the offence beyond reasonable doubt.
6. The appellant's defence was not properly weighed.

The appellant offered written submissions, while the state opposed the appeal orally. I have weighed all that was placed before this court in this matter. The judgment of the lower court shows that all issues in this matter were properly evaluated by the trial magistrate. She dismissed the claimed identification of the appellant at the scene, by the complainant on the grounds that the incident happened at night and the appellant was a stranger to the complainant. The evidence was therefore of identification rather than recognition and the circumstances as disclosed did not favour positive identification of the appellant. Rightly relying on the finding in the case of *Maitanyi -vs- Republic (1986) KLR 198 and also David Masinde and another -vs- Republic, criminal Appeal No. 33 and 34 of 2004*, the trial court rejected the evidence of identification of the appellant at the scene of the alleged robbery.

The conducted identification parade was equally rejected for it fell short of meeting the required legal threshold. The appellant was the only member in the parade who was wearing a reflective jacket of which made him stand out from the other members. The complainant had not described him in his first report to the police which made his ability to pick him out in the parade suspect.

In finding the appellant guilty of the offence, the court relied purely on the doctrine of recent possession. The case of *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic, Criminal Appeal No. 82 of 2004* was relied on. The court rightly found that the prosecution was able to prove beyond reasonable doubt that:

- i. The motor cycle Registration Number KMCY 848M, make Boxer 150, Red in colour was recovered from the appellant.
- ii. The said motor cycle belonged to the complainant.
- iii. The said motor cycle was robbed from the complainant on 27th January, 2014.
- iv. The said motor cycle was recovered from the appellant on 12/2/2014 of which was 16 days from the date it was robbed.

The easiness with which the stolen property could change hands was evaluated by the trial court and I agree with it that 16 days is “*recent*”. The appellant in his defence of which actually amounts to mere denial and of which is effectively challenged by the facts of the prosecution case and the co-accused’s defence, does not challenge at all the principles upon which the doctrine of recent possession is legally and rightly invoked by the court. The appellant’s defence case was therefore rightly rejected or dismissed by the trial court.

Given the foregoing considerations, I do find that the conviction is merited and is accordingly confirmed.

On sentence, the record shows that appellant is a first offender. In mitigation he said his mother died while he was in custody and prayed for leniency. The court expressed that there was only one sentence to the offence which is death. However, we now all know that the death sentence is not mandatory and it is not the only sentence available for the offence. Probably if the trial magistrate was aware of that then, would have considered a lesser sentence. Given the circumstances I do vary the sentence from death to 30 years imprisonment, to run from 20th May 2016, the date he was sentenced by the lower court.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 11th day of October, 2018

In the presence of:-

1. Appellant
2. Ms Mokuia for State
3. Mr. Mwelem Court Assistant