



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 7 OF 2015**

**MUTISYA MBEVI NGUTHU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal Case No. 173 of 2013** by **Hon. S. K. Mutai Ag. PM** on 08/11/13)

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

1. **Mutisya Mbevi Nguthu**, the Appellant was charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence being that on the **10<sup>th</sup>** day of **August, 2013** at about **9.00 a.m.** at **Enyali – Kwa Mbelenzi area** in **Mutha Location**, in **Mutomo District** within **Kitui County**, while being armed with a dangerous weapon namely panga, robbed **Samuel Kioko Ngui** of a Motorcycle registration number **KMCZ 567Y Skygo Red in Colour** valued at **Kshs. 68,000/=**, and at or immediately before or immediately after the time of the said robbery wounded the said **Samuel Kioko Ngui**.

2. Facts of the case were that on the **10<sup>th</sup>** day of **August, 2013** PW1 **Samuel Kioko Ngui**, the Complainant was carrying water on motorcycle registration No. **KMCZ 567Y** make **Skygo** for sale. A person who was sitting on a can stopped him. He moved towards him and asked him for water. Then he raised his hand and cut him on the neck with a panga. The Complainant abandoned his motorcycle and ran into the bus. The person untied the jerricans he had on the motorcycle and drove it away. PW2 **Daniel Mulu Mbae** a fellow 'Bodaboda' Operator passed by. He stopped and assisted him by taking him to **Mutha Police Station** where he reported the matter. He was taken to **Kitui District Hospital** where he was admitted. The following day PW3 **Stephen Muema Ngui**, the Complainant's brother went to the scene of the incident with one **Felix Cosmas**. They saw a certain man pushing a motorcycle whom they followed. In the meantime PW4 **Mutua Mutinda** had gone to the bush to cut a tree and found a motorcycle and a sack. He cut a tree and later encountered a man who told him that a motorcycle had been stolen from **Mutha area**. He reported the matter to the Administration Police.

3. PW7 No. **2009018204 APC Dennis Okoth Oloo** with a colleague accompanied the reportee to the bush. They found the motorcycle which had no number plate. The sack/bag nearby contained a number plate, clothes and red shoes. They took the recovered items to the camp. PW3 and other people followed them to the Administration Police Camp. PW3 identified the motorcycle as his. The Appellant was arrested and taken to **Mutomo Police Station**. PW8 No. **69405 P C Benjamin Maundu** took over the exhibits. On **22<sup>nd</sup> August, 2013** PW6 No. **51152 Ag. Inspector Elias Opiyo Okumu** conducted an identification parade where the Appellant was identified hence this case.

4. When put on his defence the Appellant denied having either committed the offence or having been found with the motorcycle. He stated that he went home and was arrested the following day. He went to his brother's house and took his clothes. He saw his clothes which he was told that were on the motorcycle.

5. He called a witness **Munuu Mbevi** his mother. She stated that the Appellant was burning charcoal at **Mutha**. He went home at **10.00 a.m.** and had tea. He took a mat and went to sleep. She cooked for him food. The police went to their home and arrested him following allegations that he had assaulted someone, stole a motorcycle and his clothes were found on the motorcycle.

6. The learned trial Magistrate considered evidence adduced and reached a finding that the Appellant was positively identified by the Complainant, PW2, PW3, PW4, PW6, PW7 and PW8 as the person who cut the Complainant on the neck and robbed him of his motorbike. Secondly, the fact that the Appellant's clothes were found in a sack that was tied on the motorcycle stolen from the Complainant clearly linked him to the offence. He dismissed the defence put up as mere denials and convicted the Appellant. He sentenced him to serve **life imprisonment**.

7. Being dissatisfied with the conviction and sentence the Appellant appealed on grounds that:

- Evidence adduced was not corroborated.

- Hearsay evidence was admitted.
- The trial Magistrate shifted the burden of proof to the defence.
- The identification parade was not conducted in a procedural manner.

8. In response thereto the Respondent/State filed a Notice of Enhancement of Sentence urging the court to exercise power pursuant to **Section 354 of the Criminal Procedure Code** to alter the sentence imposed by the trial court to the mandatory sentence stipulated for the offence as the trial court erred in sentencing.

9. This being the first appeal, the court, is duty bound to subject evidence adduced at trial to a fresh and exhaustive examination and come to its own conclusion bearing in mind that it did not see nor hear witnesses who testified at the hearing. (**See Okeno vs. Republic (1972) EA 32**).

10. Visual identification evidence adduced herein is of a single witness. In the case of **Abdulla Bin Wendo & Another vs. Republic (1953) 20 EACA 166**, it was held that:

**“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt. From which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”**

11. I must first and foremost consider if the charge herein was proved. In the case of **Johanna vs. Republic Criminal Appeal No. 116 of 1995** the ingredients for a charge of Robbery with Violence were stated to be:

**“(i) If the offender is armed with any dangerous or offensive weapon or instrument, or**

**(ii) If he is in the company with one or more other person or persons, or**

**(iii) If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”**

12. The Complainant was assaulted by a person who occasioned a cut wound on the left side of his neck. He was examined by PW9 **Daniel Mulwa** a Clinical Officer who classified the degree of injury sustained as harm. This was evidence of having been wounded at the time of the act. He was riding a motorcycle owned by his brother, PW3 which was taken away from him without his consent. This was robbery with violence.

13. The Appellant herein was identified as the person who robbed him. PW1 did not know the Appellant before. When he encountered his assailant he was duped to believe that he wanted to purchase the water he was selling. As he stepped to give him water he raised up his hand and cut him with a panga on the neck. The evidence as recorded is silent on where he got the panga from. However he left the motorcycle and ran into the bush where he was able to see the person take away his motorcycle. After he was assisted and taken to the Police Station he lost consciousness and regained his senses while at the hospital.

14. PW2 stated that he encountered the Appellant who was riding a motorcycle. Thereafter he heard a person calling out seeking assistance. He turned out to be the Complainant who was injured. The Complainant told him that the person who injured him had taken his motorcycle. He took him to the Police Station. He went on to state thus:

**“I brought him to the police station his family took him to hospital. We went to the scene and found a radio, panga, jerricans. The panga had blood stains.....”**

The witness did not divulge who was with him when he returned to the scene. His evidence was also silent on the type of motorcycle that the person he encountered whom he referred to as the Appellant was riding. This would have assisted the court to reach a conclusion as to whether he was the person who assaulted the Complainant. It is common knowledge that motorcycles are driven by many people. In order for the court to tell if the person he met riding the motorcycle was the one who had robbed the Complainant it was important for him to describe the motorcycle that he saw.

15. On cross examination PW3 stated that he knows the Appellant. His examination in chief was silent on this particular fact. It would have been important for the witness to tell the court how he knew the Appellant.

16. PW3 the owner of the motorcycle and brother to the Complainant on receiving the information went and found him at the **Mission Hospital**. After the Complainant was admitted in hospital he went back home. In his evidence he stated thus:

**“I went back home and the following day we met as a family and went to the scene. We followed where the motorbike’s marks led us to. We talked with people who told us that there was a man from Mbuvi’s family. On 12/8/13 I went with one Felix Cosmas motorbike being pushed by two men. (sic) We followed the motorbike and police officers came and arrested us. We went up to AP Line. I identified the motorbike as mine. The two (2) men said that the bike had run out of fuel. We followed footprints and found the accused who was arrested by police officers. The bike had no number plates. I identified**

**the bike by the frame numbers and my unique modifications. We found the number plate and clothes in a sack which was in a bush. Accused said the clothes were his..... We found the accused in his house.”**

17. Evidence adduced by PW3 suggests that at the outset the police abdicated their duty of investigating the case. They left it to civilians and moved in thereafter. After PW2 took the Complainant to the Police Station he went back to the scene and recovered a radio, panga which was blood stained and jerricans. When these items were handed over to the police they did not investigate. PW8 the Investigating Officer simply took them and retained them as exhibits without establishing how they were recovered.

18. PW3 was not at the scene of the crime. However, in company of his family they followed marks of a motorbike. It is not stated what made them believe the marks were for his motorcycle. They talked to people who gave them information about a man in **Mbevi's** family. The Appellant herein bears a name **Mbevi**. The persons who divulged information about a man in **Mbevi's** family were not called as witnesses. Whatever was stated about the **Mbevi** family cannot be admissible in evidence as it was speculation that was not established.

19. With regard to the motorcycle PW3 stated that he went with **Felix Cosmas** who was not called as a witness, and a motorcycle that he identified as his was being pushed by two (2) men. These two (2) men allegedly told them that they found the motorcycle having run out of fuel. These two (2) men were neither treated as witnesses nor suspects. These were vital witnesses. I say so considering the fact that PW3 stated that they followed the motorcycle and police officers went and arrested them.

20. The evidence adduced by PW3 as to how the motorcycle was recovered is contradicted by evidence adduced by PW4. He stated that he found the motorbike with a sack in the bush and went to report to the Administration Police. PW7 the AP Constable alluded to having gone to the bush with PW4 and found the motorcycle.

21. With such a contradiction evidence of the two (2) men who were first seen with the motorcycle was important. In the case of **Bukenya vs. Uganda (1972) EA 549** it was stated:

***“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but his needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and if appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”***

22. There is a contradiction as to where the motorcycle was recovered and by whom. In the premises it was imperative for the Prosecution to call the two (2) men who were first seen with the motorcycle. According to PW4 after their arrest the two (2) men are the ones who produced the Accused. Evidence called having been inadequate, it was important for the two (2) persons to have been called to clarify issues that left loopholes in the Prosecution case.

23. Some clothes stated to belong to the Appellant were recovered. PW3 stated thus in respect of the Appellants' arrest and recovery of clothes:

***“We followed footprints and found the accused who was arrested by the police officer. The bike had no number plates. I identified the bike by the frame numbers and my unique modifications. We found the number plate and clothes in a sack which was in the bush. Accused said that the clothes were his. .... These are the shoes of the Accused. .... We found accused in his house.”***

24. PW4 stated thus:

***“I went to the bush and found a motorbike with a sack..... I went to Kinakuni market and I met a man who told me that the bike had been stolen in Mutha. I went to AP Line and reported that I had found a motorbike in the bush. We went and found the same bike. We found the number plate inside the sack. We pushed the bike and 2 men found us and we took the bike to the camp. We were arrested and the 2 men went and brought the accused..... These are the accused's clothes that were in the sack. Accused said that the clothes in a sack were his.”***

25. PW7 the Administration Police Officer stated that:

***“.... I and my colleague visited the place with Mutua and found a red motorbike with no number plate. It had a bag which contained the number plate of the motorbike, clothes and red shoes. .... A suspect was found around the area. We went to the place where the motorbike was and found the accused whom we arrested and escorted to Mutomo Police Station. .... We recovered the motorbike, number plate, two open leather shoes and bag with assorted clothes. Accused said that the clothes were his. On cross examination he stated that the clothes were in a bag that was tied to the motorcycle.”***

26. The allegation that the Appellant admitted that the clothes were his was an admission of an incriminating fact. In his defence the Appellant explained that he was arrested a day after he went home. When he was arrested he went to his brother's house and took his clothes. He had a motorcycle. He was told that there was a stolen motorcycle and he saw his clothes and was told that they were on a motorcycle.

27. Section 25 of the Evidence Act defines a confession as:

**“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”**

28. Section 25A of the Evidence Act provides thus:

**“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.**

**(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”**

29. In reaching his decision the learned trial Magistrate stated that the fact that the Accused’s clothes that were found in a sack tied on the motorbike that was stolen from the Complainant linked him with the offence.

30. The onus was upon the Prosecution to prove the fact that the clothes belonged to the Appellant and that they were there as proof that he committed the offence. The purported informal admission made in the course of proceedings was erroneously received by the court as it failed to comply with the provision of **Section 25A** of the **Evidence Act**. Such evidence was inadmissible.

31. In his defence the Appellant having wondered how his clothes were found tied on the motorcycle or in the bush near the motorcycle favouring the discrepancy in evidence. The trial court was duty bound to analyze evidence adduced and interrogate what actually transpired. This does not seem to have been the case.

32. An identification parade was carried out in the matter where the Appellant was identified by the Complainant. The procedure to be adopted in conducting identification parade was set out in the case of **Republic vs. Mwangi s/o Manaa (1936) 3EA CA 29** where the Court stated thus:

**“(i) An accused should always be informed he may have his advocate or friend when a parade takes place.**

**(ii) The investigating officer may be present but he or she is not permitted to carry out the identification parade.**

**(iii) None of the witnesses are allowed to see the accused before the parade.**

**(iv) There must be at least eight persons as far as possible of similar age, height, general appearance and class of life.**

**(v) The accused must stand at any position.**

**(vi) Exclude every person who has no business there.**

**(vii) Careful notes be recorded after each witness leaves and if identification had been made or not.**

**(viii) Witnesses may ask accused to walk, speak, see him with a hat or not, if so, then all parade members must do likewise.**

**(ix) The witnesses must touch the person identified.**

**(x) Accused to be asked if satisfied with the parade at its termination.**

**(xi) There should be no influence. Witnesses should be told instead you will see “a group of people who may or may not contain the suspected person” NOT “Can you see the suspect in the parade”**

**(xii) Be fair.”**

PW8 the Investigating Officer only stated that an identification parade was conducted by **Inspector Opiyo** and the Accused was positively identified by the Complainant. He was silent on what he did prior to the witness identifying the suspect.

33. PW6 the **Ag. Inspector** stated how he went to the cells and saw the suspect. He went on to state thus:

**“I arranged for people to be called and I had secured the witness at the canteen. I got 8 members of the parade. I informed the accused about the purpose of the parade and he agreed by signing. Accused had no representative. I paraded 8 people of the same features and then called the accused and asked him to choose where to stand. He stood between No. 7 & 8. I called the witness to come and asked him to identify the accused. He picked the accused by touching him. Accused said that he was satisfied with the parade but denied knowing the complainant. I signed the form.”**

34. The Appellant disputed the manner in which the parade was conducted. The fact that parade members were of the same features and

whether three other people who were arrested were also members. In his evidence the Parade Officer stated that the accused had no representative but he did not tell the court if he informed the Appellant of his right to have an Advocate or a friend present. The Complainant was made to sit at the canteen. It was not expressly stated whether or not he was in a position to see the suspect as he was removed from the cells. The officer paraded 8 members of same features. It is unlikely that they could have had same features. The officer needed to clarify this fact.

35. In the case of **Kipwenei Arap Masoruk & 2 Others vs. Republic (1930) 12 KLR 153** the Court stated that:

**“an identification parade is a matter of opinion expressed by a witness and its value depends on the circumstances under which it is given.”**

The Appellant herein was arrested on the **12<sup>th</sup> August, 2013**. He was in custody until the **22<sup>nd</sup> August, 2013** when he was made to take part in an identification parade. It is unlikely that other parade members were of the same general appearance like him at the point of being identified. Had the identification parade been held soon after his arrest the Court could have no reason to doubt the scrupulous fairness of the exercise done.

36. Another question that remains unanswered is whether the three suspects who were arrested and later released without being treated as witnesses also took part in the parade.

37. Having re-considered evidence adduced and the manner it was recorded by the trial Court, I find that it was unsafe to convict in the circumstances.

38. Therefore I allow the appeal, quash the conviction and set aside the sentence imposed. The Appellant shall be released forthwith unless otherwise lawfully held.

39. It is so ordered.

**Dated, Signed and Delivered at Kitui this 11<sup>th</sup> day of January, 2017.**

**L. N. MUTENDE**

**JUDGE**