



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 72 OF 2013**

**DAVID MUKAI MUTETO.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 1719 of 2011 by Hon. M. K. Mwangi Ag. S P M on 15/01/13)*

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

1. **David Mukai Muteto**, the appellant, was charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars thereto being that on the **7<sup>th</sup> day of November, 2011** at **Thangathini Village**, within **Makueni County** jointly with another not before court robbed **Kennedy Mutiso Kyuli** of his **Motorcycle, Registration No. KMCP 168N** make **Yamaha**, **Mobile Phone** make **Nokia 1110** and cash **Kshs. 2,000/=** all valued at **Kshs. 64,500/=**.
2. He was tried, convicted on a lesser charge of **Robbery** contrary to **Section 296(1)** of the **Penal Code**, sentenced to serve **six (6) years imprisonment**.
3. Being dissatisfied with the conviction and sentence the Appellant appealed on grounds that:
  - There was no corroboration of evidence of identification.
  - Evidence adduced of the motorcycle's identity and its owner varied.
  - The doctrine of recent possession was not established.
  - The Prosecution's evidence was contradictory and inconsistent.
  - The Appellant's sworn evidence was ignored without any justification.
4. Facts of the case as presented by the Prosecution were that on the **7<sup>th</sup> November, 2011**, PW1 **Kennedy Mutiso Kyuli**, a beneficial owner of motorcycle registration number **KMCP 168N**, make **Yamaha** got communication from one **Ms. Nziu**, who requested for services of his motorcycle. He waited at **Mwaani** as instructed. At about **8.00 p.m.**, he was approached by two men, the Appellant and another who sought to use his mode of public transport services. They haggled over the fare but failed to agree. The two (2) ladies he was waiting for arrived. The two (2) men offered to give the sum that he had asked for. He took the ladies to their destination and returned to offer services to the Appellant and his mate.
5. On reaching a section of the road that was bad, he slowed down. The other person who sat at the back jumped off the motorcycle and pulled him of threatening to shoot him if he screamed. The Appellant

seized the motorcycle as his accomplice tied his hands. They took away his motorcycle. He rushed to a nearby market to seek assistance. In the course of the search they encountered the Appellant and another who ran away as they arrested the Appellant. The motorcycle was recovered.

6. When put on his defence the Appellant stated that he was on his way home having travelled from **Kibwezi** when he encountered people who pounced on him and beat him up. He lost consciousness. He regained the same to find himself at **Machakos Level 5 Hospital** being attended to by his wife. He denied knowing the reasons why he was charged.

7. The learned trial magistrate analyzed evidence adduced and reached a finding that the Appellant robbed the Complainant, ran away, concealed the motorcycle and as he escaped he was intercepted and arrested. He opined that the Appellant having been unarmed and violence having not been used, the offence committed was robbery hence the sentence meted out.

8. At the hearing of the appeal the Appellant relied upon his written submissions.

9. The State through learned counsel, **Mr. Shijenje** opposed the appeal. He submitted that evidence adduced by the Prosecution against the Appellant was sufficient. The Appellant requested for transport services while outside a well lit restaurant. He haggled over the price with the Complainant. Therefore there was no doubt as to the identification of the Appellant. The Appellant was later found having hidden the motor-cycle which was recovered after the arrest. Further, he submitted that even after the Appellant was convicted, in his mitigation he acknowledged committing the offence and promised not to repeat it. He called upon the court to dismiss the appeal.

10. This being the first appellate court, I am duty bound to re-consider the evidence, re-evaluate it and come to my own conclusion bearing in mind the fact that I never had an opportunity of either seeing nor hearing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

11. The first issue this court has to reconsider is whether identification in the circumstances was cogent. The Appellant herein was identified by the Complainant, a single witness. In the case of **Abdalla Bin Wendo & Another vs. Republic EA CA 168** it was stated that:

*“Subject to certain well known exceptions, it is trite that a fact may be proved by the testimony of a single witness but this rule does not lessen the need of testing with the greatest care the evidence of a single witness respecting identification especially when it is well known that conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which the judges 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.”*

12. According to evidence adduced, when the Appellant with his mate approached the Complainant it was between **7.00 p.m.** and **8.00 p.m.** He negotiated with them. Having failed to agree on the sum of money to be paid for services to be rendered he declined to carry them. Thereafter the individuals offered to pay what he had asked for – **Kshs. 300/=**. Therefore the Complainant returned and engaged them for the 2<sup>nd</sup> time. Per his evidence, when the two (2) individuals approached him at the outset, he was standing at the doorstep of the hotel, an area that was illuminated by a hurricane lamp. The Appellant in particular carried a bag.

13. At the time of his arrest, the Appellant had the same bag which contained assorted spare parts. His accomplice had a brown cardigan that the Complainant identified as his. In his defence the Appellant stated that when he arrived from **Kibwezi** he had many items that he had carried which included: maize, vegetables, loaves of bread and on encountering a family friend he left him with the stated items. Further, he stated that he was walking alone when he was arrested by **six (6)** people.

14. The time the Complainant spent with the Appellant and his mate was sufficient to enable him recognize him as a person who had negotiated with him and subsequently having returned to offer him

transport services would enable him to identify them. Identification of the Appellant by the Complainant in the circumstances was not difficult. The circumstances that prevailed resulted into the Appellant being arrested a few hours after the offence was committed. It was admitted by the Appellant that the Complainant was one of the persons who arrested him.

15. Immediately after the incident the Complainant sought assistance from a nearby market. PW2, **Brian Mwema Musyoka** untied the rope that was used to tie his hands. They mobilized some people and went after the persons. They encountered the Appellant and another who escaped. A search in the vicinity resulted into the recovery of the motor-cycle that was stolen from the Complainant.

16. It is submitted by the Appellant that the Prosecution was obligated to call evidence of crucial witnesses. He relied on the case of **Bukenya & Others vs. Uganda (1972) EA 549**. These witnesses would establish the truth even if the evidence may be inconsistent.

17. **Section 143** of the **Evidence Act** provides thus:

***“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”***

The witnesses that were not called by the Prosecution were passengers that the Complainant carried prior to returning to carry the Appellant and another. These were persons who did not witness the act of robbery. This court can therefore not make an inference that the evidence that was not called could have been adverse to the Prosecution.

18. PW3 **Josephine Muli**, the mother of the Complainant adduced evidence of ownership of the motor-cycle registration number **KMCP 168M Yamaha YM 150 – 3** by registration. The Complainant was therefore a beneficial owner of the motor-cycle. This evidence was not in variance.

19. In his defence the Appellant stated that he was on his way home having arrived from **Kibwezi**, evidence that was ignored by the trial court. In reaching its decision the trial court considered evidence adduced by the Appellant and found the Prosecution’s case overwhelming. The Appellant was not found in personal possession of the motor-cycle. But a search carried out resulted into the recovery of the motorcycle in a nearby thicket. The identification of the Appellant having been cogent, the only inference that could be drawn was that the Appellant must be the one who hid it whence it was recovered.

20. The sentence provided for the offence is imprisonment for **fourteen (14) years**. Therefore the sentence meted out was within the law.

21. Accordingly, this appeal lacks merit. It is dismissed in its entirety.

**Dated, Signed and Delivered at Kitui this 3<sup>rd</sup> day of February, 2016.**

**L. N. MUTENDE**

**JUDGE**