



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**CRIMINAL APPEAL NO. 17 OF 2015.**

**GEOFFREY MTENYI AKWARI.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

*(Being an appeal from original conviction and sentence of M.L. NABIBYA – SRM. in Criminal Case No. 324 of 2014 delivered on 27<sup>th</sup> January, 2015 at Butali.)*

**JUDGMENT**

**INTRODUCTION.**

1.The appellant Geoffrey Mtenyi Akwari has filed this appeal against conviction and sentence by the learned Senior Resident Magistrate sitting at Butali Law Courts.

2. The appellant was charged with two counts, the first being the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code particulars of which are that on thy 23<sup>rd</sup> day of May, 2014 at Shamberere area Kakunga location Kakamega County jointly with others not before court, while armed with dangerous weapons namely panga and a hammer the appellant robbed NOAH JUMBA JONDA of motor bike Reg. No. KMDF 072X make TVS Chasis No. MD625NF5TE1A1158, Engine No. FF5AE1020509 valued at Kh. 97,000/= the property of the said NOAH JUMBA JONDA and immediately before the time of such robbery used actual violence to the said NOAH JUMBA JONDA.

3. The second count was that of handling stolen property contrary to section 322 (1), (2) of the Penal code particulars of which are that on the 23<sup>rd</sup> May, 2014 at Butali market Butali location in Kakamega North, District of the Kakamega County, otherwise than in the cause of stealing dishonestly retained a motor cycle reg. no. KMDF 072X TVS blue in Colour chassis No. MD625NF5TE1A21158 and engine No. FF5AE1020509 knowing or having reasons to believe it to be stolen property.

The appellant pleaded not guilty to the charges and his trial commenced.

**The Prosecution Case**

4. The prosecution called four witnesses. The complainant in his evidence told the court that on the 23<sup>rd</sup> May, 2014 at about 11.00 p.m. as he was heading back to his home from work as a bodaboda rider he was attacked at Shamberere. He operate his business on West Kenya – KambiyaMwanza Road. He had stopped to pick a call from his client who wanted him to take a patient to Malava hospital.

5. A motor bike from West Kenya direction came and slowed down near him and he thought it was a

colleague. One person alighted from the motor bike and told him he had a question, his instinct told him that this was not a good person and he put on his motor bike and tried to take off but the motor bike went off in the process. The man tried to cut him with a panga but his hairy jacket and helmet protected him. As he tried to run away he was cut on the left hand. The attackers then ran away with his motor bike.

6. He screamed and called for help using his mobile phone and his motor bike colleagues responded. He was taken to Malava District Hospital for treatment. He produced his P3 form dated 23<sup>rd</sup> May, 2014 as PMF1 1, motor cycle blue in colour – Pexhibit 2, Agreement PExh. 3(a), Receipts PExh 3 (b).

7. PW2 DAVID TISA SIMWA also a boda boda rider testified that he was called by his colleague as he was heading home on the 23<sup>rd</sup> May, 2014. His colleague told him that he was assaulted. As he was heading back to Kambi at stage Mahindi he saw two motor bikes which were being driven at high speed and he decided to stop his bike and he parked it in the middle of the road. He tried to stop the two bikes but they ignored so he followed them. At Kakoyi corner he found one motor bike which was carrying one passenger. He followed it. He asked why they had assaulted his colleague. This is the motor bike that had been stolen. At Butali market the occupants fell and one of them who had a panga approached him. He took a stone and hit him on the left eye and he fell down but managed to run away while speaking on the phone.

8. A crowd had gathered where he was and he explained to them what had transpired and where the stolen motor bike had been left. As he was explaining to the crowd that had gathered a motor bike came from Malava direction at a very high speed and attempted to pass i.e. KMDE 189Q which had three (3) occupants and he saw three occupants and identified the person who told him he had heard about him. The person was seated in the middle, and the one whom he had hit with a stone was sitting behind and was bleeding.

9. Members of the public apprehended them, the one he stoned was beaten to death, the accused was the one riding the motor bike KMDE 189Q while the third escaped. The police from Malava were called and they took the deceased and arrested the accused.

10. On cross examination by the accused, he told the court that he identified the motor bikes by the registration numbers and also saw the person he had injured. He used his motor bikes headlight to identify the bikes and the accused who he was following closely.

11. PW3 Christopher Otanga Tsuma produced documents to show that he was the owner of motor bike KMDE 189Q make TVS Star red in colour. In his evidence, he told the court that on 23<sup>th</sup> May, 2014 he sent the accused to bring shop items for him but accused never went back. After making enquiries of the accused person's whereabouts, he decided to go to Kakamega Police station where he didn't find him. He then went to Malaba Police station where he found the motor bike. He claims to have looked for the accused person and presented him to the police.

12. PW4 Pauline Marango, a clinical officer from Malava County Hospital produced the P3 form for PW1. PW1 had complained that he had been assaulted by 3 people unknown to him on the 23<sup>rd</sup> May, 2014 at about 11.00 p.m. and was injured on the hand. She examined him and he had a cut wound on the left wrist joint, he had a deep cut wound which interfered with the muscle. Small left finger had been crushed. The weapon causing the injury was sharp. He assessed the injury as harm. P3 form was produced as P.exhibit 1. The prosecution closed its case at this juncture.

### **Defence Case**

13. After considering the prosecution evidence the court was satisfied that a prima facie case had been established against the accused and put him on his defence.

14. He opted to give a sworn statement. He told the court that on the 24<sup>th</sup> May, 2014 he was at home sleeping. His uncle Alex then told him that their elder uncle Christopher had been arrested because the

motor bike he purchased had been recovered somewhere. They went together with his uncle Alex to see Christopher. On 25<sup>th</sup> May, 2014 they were called again by Malava Police Station. At the police station Alex and Christopher talked but didn't tell him what they had talked about. Accused was thereafter arrested and charged. He denied knowing what had happened. He closed his case at this juncture.

### **The Appeal**

15. The appellant filed his petition of appeal on 3<sup>rd</sup> February, 2015. The home made grounds upon which the appeal was based are as follows:-

- (1) That I did not plead guilty to the above appended charge;*
- (2) That the trial court convicted me on the evidence of a single eye witness;*
- (3) That the trial court erred both in law and in fact in convicting me yet the evidence on record was uncorroborated, fabricated and an afterthought;*
- (4) That the trial court erred both in law and fact in convicting me yet I was not found with any of the alleged stolen properties;*
- (5) That the trial court convicted me without jurisdiction;*
- (6) That the trial court rejected my defence which was cogent enough to exonerate me from any wrong doing;*
- (7) That more grounds will be adduced when I get the lower court proceedings;*
- (8) That the sentence meted was very harsh in the circumstances. He wants the appeal allowed, conviction quashed and sentence set aside and he be set at liberty.*

16. The appellant filed his written submissions which he relied on fully. Mr. Oroni for the state opposed the appeal and relied on the evidence on record. He maintained that the prosecution proved its case and this conviction was proper as the defence did not shake the prosecution's case. He supported the conviction.

17. The appellant in a rejoinder stated that PW2 was not at the scene, there was no parade, the I.O. did not testify, OB was not produced in court he was not arrested with anything connecting him with the incident and none of the witnesses knew him.

18. This question as to the duty of the first appellate court, was answered in the cases See **Okeno vs. Republic 1972 E.A. 32 and Mwangi vs. Republic 2006 2KLR 28** where the court stated the duty of an appellate court on first appeal as follows:-

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination”.***

19. The above position was enunciated in the case of **Pandya vs. Republic** where the court held that **“an appellate court ought to treat the evidence as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expect ....affirm a conviction on evidence that has been reviewed.”**

20. In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is the function of a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

21. Thus this being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

***“An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. ”.***

22. This court has no doubt that the complainant was attacked by three persons on the 23<sup>rd</sup> April, 2015 who stole his motor bike and injured him. According to his testimony he was not able to identify or see his attackers. He only called PW2 whose evidence was that, after receiving PW1’s call he was able to trace his (PW1’s) attackers. One of the attackers was beaten by the mob and died whereas one escaped and one was arrested, who is the appellant. PW3 proved that he was the owner of motor bike KMDE 189 Q make TVs Star.

23. He claims to have sent the appellant to buy shop items on the 23<sup>rd</sup> May, 2014 the date the robbery occurred. The appellant did not come back. After searching for the appellant, he reported at Malava Police Station where he found his motor bike.

24. In his defence, the appellant claims that it was his uncle Christopher (PW3) who had been arrested after his motor bike was recovered somewhere. They went to see him on the 24<sup>th</sup> May, 2014 together with his uncle Alex and on 25<sup>th</sup> May, 2014 they were again called by Malava Police station and it is then that he was arrested and charged.

25. From the evidence on record and submissions by the accused the case herein was not investigated. The investigating officer did not testify nor did the arresting officer give his evidence. Why I bring the investigation part herein is because it is not clear when the appellant was arrested. Was it at the scene of crime on the 23<sup>rd</sup> May, 2014 by the police from Malava Police Station as PW2 has testified to or was it at Malava police station on the 25<sup>th</sup> May, 2014 as PW3 would want us to believe. These issues can properly be answered by the investigating officer and/or the arresting officer. The weapons alleged to have been used by the appellant ought at least to have been produced before the trial court. If the appellant was arrested immediately after the incident he must have had the panga and hammer with him. Thus the police ought to have recovered from where they arrested the appellant.

26. PW1’s helmet and jacket also ought to have been produced as evidence which were never produced although it is not in doubt that the accused was attacked as this has properly been corroborated by PW4 the clinical officer who produced the P3 form.

27. The offence herein occurred at night. The circumstances to identify a person at night are difficult. PW2 was the only one who claimed to have seen the accused together with others on a motor bike. PW1 who was attacked did not see his assailants. PW2 has claimed to have managed to identify the accused with the help of the motor bikes lights. As properly stated:-

***“PW2 had only a fleeting moment to observe the assailants using light whose intensity and brightness he did not give. He did not testify on the length of time he observed the attacker and how long it took. He was a single identifying witness and the need for testing his evidence with greatest care was obvious.”***

28. There was need at this point to have an identification parade because PW2 who was not at the scene and the circumstances to identify the accused then was difficult. In the recent Court of Appeal decision in Criminal Case No. 389 of 2009, **PETER MAINA MWANGI & JACKSON KIMARU VS. REPUBLIC**, the court reiterated the importance of an identification parade in cases where identification evidence was crucial. It said at page 6 of its judgment that:-

*“In this case, I admitted that she did not give the description of the 1<sup>st</sup> appellant to the police before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that its evidence ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions. Her ability to identify her attackers should have been tested by an identification parade.”*

29. The court proceeded to allow the appeal and said at page 7 of its judgment that:-

*“From the foregoing, we are convinced that there was no proper testing of the evidence of identification and recognition by the two lower courts. Had the evidence been thoroughly tested and analysed we cannot be sure that the lower courts would still have come to the same conclusion.”*

30. This court also finds that the evidence in this case was not tested. PW2 did not give a description of the assailants to the police or even to the court as he testified. His evidence contradicted that of PW1 and PW4 on the time the offence was committed.

31. In conclusion, I find that the case herein had a lot of flaws that create doubt to my mind as to whether the appellant committed the crime. The prosecution did not prove its case beyond reasonable doubt. I need not be labour more on the grounds of appeal as the appellant has properly laid out the circumstances under which the appeal should be allowed. In conclusion and for the reasons stated above the appeal herein is allowed, the conviction quashed and the sentence set aside.

32. The appellant should be set free forthwith unless he is otherwise lawfully held.

**SIGNED, DATED and DELIVERED at KAKAMEGA this 1<sup>ST</sup> day of SEPTEMBER, 2016**

**C. KARIUKI.**

**JUDGE.**

**In the Presence of:-**

.....N/A..... **for the Appellant**

.....NG’ETICH .....**for the Respondent.**

.....ANUNDA ..... **Court Assistant**