



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 12 OF 2016**

**(CORAM: J.A. MAKAU – J.)**

**STEPHEN JUMA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against both the conviction and the sentence dated 23.2.2016, in Criminal Case No. 141 of 2015 in Bondo Law Court Before Hon. M. Obiero – P.M.)***

**JUDGMENT**

1. The Appellant **STEPHEN JUMA** was charged with three (3) counts of Robbery with Violence Contrary to **Section 296(2) of the Penal Code**. The charges and the particulars of the offence are as follows, **Count 1: Robbery with violence contrary to Section 296 (2) of the Penal Code**, the particulars are that on the night of 29<sup>th</sup> and 30<sup>th</sup> day of January, 2015 in Lake Victoria at Sifu area, Mageta Location in Bondo District within Siaya County, jointly with others not before Court, being armed with dangerous weapons name panga and wiper robbed Ibrahim Otieno Okello of one Motorboat engine make Yamaha E15DMHL Serial No. 6B4 KL 1127483 valued at KSh.198,124/= the property of Francis Namugerwa Odembo and at/or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Ibrahim Otieno Okello. The appellant faced an **alternative charge of Handling Stolen Goods, contrary to Section 322 (2) of the Penal Code**, the particulars of the charge are that on the night of 18<sup>th</sup> day of February 2015, at Nyamonye Trading Centre, in Bondo District within Siaya County, jointly with another not before Court, otherwise than in the course of stealing dishonestly retained one dismantled out boat engine S/No.6B4KL1127483 make Yamaha knowing or having reasons to believe it to be stolen good or unlawfully obtained. **Count II, Robbery with Violence contrary to Section 296 (2) of the Penal Code**. The particulars of the charge are that on the night of 29<sup>th</sup> and 30<sup>th</sup> day of January 2015, in Lake Victoria at Uloma area, West Yimbo Location in Bondo District within Siaya County, jointly with others not before Court, being armed with dangerous weapons namely panga and wiper, robbed Kevin Owino Odhiambo of his mobile phone make LG valued at KShs.2,500/= and a motorboat engine make Marina MRMK 15 ML Serial No. 0N060933 valued at KShs.135,000/=, the property of Ezekiel Owino Obabi, and at or immediately before or immediately after the time of such Robbery threatened to use actual Violence to the said Kevin Owino Odhiambo. **Count III, Robbery with Violence contrary to Section 296 (2) of the Penal Code**. The particulars of the offence are as follows that on the night of 29<sup>th</sup> and 30<sup>th</sup> day of January 2015, in Lake Victoria at Uloma area, West Yimbo Location in Bondo District within Siaya County, jointly with others not before Court, being armed with dangerous weapons namely Panga and wiper, robbed Kevin Owino Odhiambo of his radio make Sonitec valued at KShs.800/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Kevin Odhiambo.

2. After full trial the Appellant was found guilty of Count 1, convicted and sentenced to suffer death.
3. Aggrieved by the conviction and sentence the Appellant preferred this appeal setting out five (5) grounds of appeal thus:-

***(a) That there was no corroboration of PW1's evidence that the appellant participated in the commission of the offence.***

***(b) That the Learned trial Magistrate erred in law in dwelling on the uncorroborated evidence of all the prosecution witnesses.***

***(c) That the Learned trial Magistrate erred in law in his ruling by not stating to what extent and as to which point the prosecution had proved its case beyond any reasonable doubt.***

***(d) That the Learned trial Magistrate erred in law in overlooking the cross-examination of the defence, was biased and in favour of the prosecution.***

***(e) That the findings of the trial learned magistrate were against the weight of the evidence adduced at trial.***

4. At the hearing the appellant appeared in person whereas the State was represented by M/s. Odumba Learned State Counsel.

5. The Appellant in support of the appeal relied on his written submissions in which he urged that the trial Court erred in basing his judgment on the doctrine of recent possession and on contradictory evidence, convicting the appellant when the case had not been proved beyond reasonable doubt, and failing to consider the Appellant's defence.

6. M/s. Maurine Odumba, Learned State Counsel started by opposing the appeal however, towards the end she conceded the appeal on the grounds that exhibit P4 did not support the issue of ownership and further that there was no sufficient evidence to prove the charge of robbery with violence.

7. The facts in support of the prosecution case from facts of the record of the appeal and I need not reproduce the same, however I shall very briefly summarize the prosecutions case and the defence.

8. The prosecutions case is as follows:- that PW1 Ibrahim Otieno on 30.1.2015 at about 1.00 a.m. he went to the lake with Peter for fishing using a motor boat. That they also had a fuel tank and nets between Imbo and Sakwa. That the Motor Boat had two lights, one light for the people who were fishing Omena. That at about 1.00 a.m. another motor boat came close to PW1's boat, the occupants flashed two spotlights to PW1's and his companions faces. PW1 asked them what was happening and one of the occupants of the other boat told PW1 "Wewe." That boat had three people and one of them jumped into PW1's boat, took one of them and put him into the polythene bag and pushed PW1 into the place of the engine at the back of the boat flashing light on PW1's face and such that he could not identify him. PW1 was then tied with a rope, and ordered to remove the engine from his boat. The engine was Yamaha by make. PW1 removed the engine and one of the person in the other boat took it, they also took the fuel tank and forced PW1 to enter into the Polythene bag. The attackers were speaking in Kiswahili. PW1 was told to go and tell the owner of the boat to buy similar engine to the one they had taken. The attackers stole a phone from Peter and left towards Usigu Beach. PW1 continued fishing upto 8.00 a.m. using wind which pushed them to Mageta Beach. That at Mageta they were assisted by another boat at 10.00 a.m. PW1 then went to the office of Mahanga and later reported at the police station. They later learned that some items had been recovered in the month of February 2015, being the engine and the fuel tank. PW1 identified the fuel tank by a mark he had put using a nail and engine by its black colour make Yamaha.

9. The Appellant denied the offence and gave a defence of Alibi that during the night of 29<sup>th</sup> and 30<sup>th</sup> January 2016, he was at Nairobi and that he reached Nyamonye at 5.00 a.m. on 30.1.2015. That he was

arrested on 18.2.2015 outside Dallas Club at Usenge at 7.00 p.m. following an argument between a motor rider and the two vehicles after the motor rider who DW1 had hired disappeared leaving him behind. That the owner of the vehicle who was a police officer asked DW1 to pay KShs.20,000/= to the owner of the vehicle. DW1 stated he did not have money and he was put in the cell. That on 20.1.2016 the Appellant was charged with this offence. He denied knowledge of the offence.

10. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:

***“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”***

***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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***

11. Whether the Appellant was identified as one of the assailants? The offence as per evidence of PW1 and PW2 took place during a dark night at 1.00 a.m. and it was swift. The attackers flashed spotlight on the faces of PW1 and PW2 and they could not see the attackers, one of the attackers jumped into PW1's and PW2's motor boat forcing PW3 into a polythene bag. PW2 was pushed to the place of engine and tied with a rope and later put in a polythene bag after the engine and fuel tank had been stolen by the attackers. PW2 testified he could not identify the attackers. PW2 gave similar evidence to that of PW1 as regards the occurrence of the events. PW1 did in his evidence testify that he could not identify the assailants. I therefore find that the conditions at the material night was not conducive to positive identification of the assailants and that PW1 and PW2 as the trial court rightly found were not able to identify any of the assailant's.

12. Whether the trial Magistrate erred both in the law and facts in convicting the appellant basing his findings on the doctrine of recent possession over the recovered motor boat engine? The trial court based the appellant's conviction on the doctrine of recent possession. The trial court in its judgment found that the appellant was arrested at Bondo while awaiting to be paid for boat engine he was selling, that it was found in possession of the Appellant and that PW3 identified the engine as his property which had been stolen from his workers PW1 and PW2. That the Appellant was unable to explain how he came into possession of the stolen item.

13. In the case of **Isaac Ngang'a Kahiga alias Peter Nga'ng'a Kahiga V R Criminal Appeal No. 2012 of 2005**. The Court of Appeal addressed itself thus:

***“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”***

14. What are the ingredients of doctrine of recent possession and whether, the basis of the conviction in this case was proved? First the possession must be proved. In the instant case, PW3 testified that on 17.2.2015 he received information that some boat engines were on sale and made arrangements to meet the sellers on 18.2.2015 who he met at 8.00 p.m. PW3 was not shown the engine but his mate Owino and

with whom they offered a purchase price. That PW3 proceeded to Bondo Kenya Commercial Bank to pay the seller. That the Appellant was arrested while PW3 and his mates had the engine in the Probox. PW4 testified at Nyamonye they were shown by the Appellant and another an engine which was in the sack and which had been dismantled and was in parts. The parts were removed and they negotiated a purchase price of KShs.80,000/=, they agreed to proceed to Bondo Town to withdraw money from the ATM and pay the sellers. I therefore find that the sellers were found in possession of dismantled engine parts.

15. Whether the engine parts were positively proved to be property of the complainant? PW3 in his evidence did see the engine parts which were shown to PW4 at Nyamonye while in the sack on 18<sup>th</sup> February 2013 but identified the engine as his the following day by marks which he claimed he had placed on the engine. He claimed he had tattooed his name and phone number, but it had been erased and sprayed. The serial number had been scratched and it was not visible that in the block he saw serial number which was similar to his number. It was 1127483, but the top of the seal had also been broken and rubbed. Sheet of the lower plug burnt. PW3 identified copy of receipt MFI – 3 and consignment note showing the engine numbers as MFI-4. PW5 testified that PW3 complained to him his engine make Yamaha serial number 6D4KLII27483 had been stolen. That the engine that PW5 recovery from Probox was dismantled and in sack but PW3 identified it as his engine. PW3 produced duplicate receipt as proof of ownership of the engine and consignment note. The engine was grey in colour. The consignment produced as exhibit 4 and photocopy of receipt. Produced as exhibit 3, motor engine exhibit 2, nylon sack as exhibit 5 and fuel tank exhibit 1. The burden of proving ownership of the engine that it was property of the complainant lied with the complainant. In this case the complainant relied on the marks which he had put on the engine. The recovered engine did not have the tattoos and number of the complainant. He complained they had been erased and sprayed and the serial number scratched.

16. The best way of proving ownership in cases of engines is to produce receipt of purchase and give the serial number of the engine. PW3 relied on a photocopy of the receipt exhibit 3, and consignment exhibit 4. I have perused the photocopy of receipt exhibit 3 and consignment exhibit 4. Photocopy exhibit 3 has serial receipt No. 6 B4122 1127483 Engine No. E15DMHL Yamaha- Outboard. The copy of the receipt bears the name of Francis Namugerwa as the owner of the engine. Exhibit 4 gives No. E.15DMH and 6 B4801-1800 and 6 B4K 1127483 but it is not easy to know what the numbers stand for as the document is in Japanese language and was not translated. The said document clearly reveal that engine number of the complainant is different from the numbers found in the dismantled engine which bore Nos.112483. The number is different from 6B4K 112483. PW3 gave the explanation of the difference of the numbers is that the numbers, had been interfered with, in that it was erased and sprayed. The prosecution did not call engine experts from the company to confirm that indeed the engine number had been erased and further presented that in spite of that, the engine was the same one that PW3 claimed to be his. I find in view of the discrepancies in the number in the recovered and dismantled engine and in absence of expert evidence to prove that the recovered engine had been tampered with and the number changed, it is possible it was not the stolen machine of the complainant. I accord the Appellant the benefit of doubt and find that the prosecution did not prove positively the engine was property of the complainant. I further find in view of the above the prosecution did not prove the property was stolen from the complainant nor did they prove it was recently stolen from the complainant.

17. It was incumbent upon the prosecution to prove that the dismantled engine which was found in the Appellant's possession belonged to the complainant. Engine are commonly found in various shops in this country and people do import engines for different purposes into this country. Such are readily available in open markets. That each engine has its own serial number for its identification. In view the above the prosecution did not prove that the engine found in the appellant's possession actually belonged to the complainant. Consequently I find the ingredients of doctrine of recent possession as set out hereinabove were not sufficiently proved to warrant conviction of the appellant basing conviction entirely on the doctrine of recent possession.

18. Whether the appellants defence of alibi was considered? The Appellant's defence is that he was not at the scene of robbery on 29<sup>th</sup> and 30<sup>th</sup> January 2015 but was away in Nairobi. I have considered the proceedings and trial Courts judgment, none of the prosecution witness placed the appellant at the scene

of the robbery. The trial Court in convicting the appellant based its judgment on the doctrine of recent possession and not that he was placed at the scene of the robbery. The Court found the appellant had been one of the people offering to sell the engine when he was arrested. The evidence of PW3, PW4 and PW5 placed him at the scene of people offering to sell the engine. His defence of not being one of the potential sellers was dislodged by PW3, PW4 and PW5 and his defence of not being one of the potential sellers but an innocent by stander at the time of his arrest was correctly rejected. The prosecution as I have already held did not prove that the engine that Appellant was found with positively was the property of the complainant, that it was stolen from the complainant and that it was recently stolen. I have given the benefit of doubt to the Appellant for those reasons.

**19. The upshot of the foregoing is that I find the appeal has merits and is hereby allowed. Accordingly I quash the conviction and set aside the sentence meted out against the appellant. I direct that the Appellant be hereby set at liberty forthwith unless otherwise lawfully held.**

**DATED AND SIGNED AT SIAYA THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2016.**

**J.A. MAKAU**

**JUDGE**

**Delivered in Open Court in the Presence of:**

**Appellant in person.**

**M/s. M. Odumba for State.**

**C.A.1. K. Odhiambo**

**2. L. Atika**

**J. A. MAKAU**

**JUDGE**