REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 224 OF 2011

ANTONY KARIUKI NJIEMA ……...…APPELLANT

VERSUS

REPUBLIC ……...……RESPONDENT

(*From the original conviction and sentence in Criminal case No. 1603 of 2010 of the Chief Magistrate's court at Kiambu before Mrs. C. Olouch, Senior Resident Magistrate)*

JUDGMENT

The appellant Aaron Kariuki Njiema was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged in the particulars of the charge that on 19th October, 2010 at Githurai 44 within Nairobi jointly with another not before the court they robbed Charles Mukwana Mwabo of motor cycle registration No. KMCL 730X Make Captain, valued at Kshs. 76,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Charles Mukwana Mwabo. He denied the offence but after a full trial he was convicted and sentenced to death. Aggrieved by the said conviction he filed this appeal.

On the date of the alleged offence P.W. 1 who was the rider of the said motor cycle and an employee of P.W. 2 received a call from the appellant to go and pick him from Kahawa West stage. He went there and found the appellant with another person. He carried the two up to Githurai 44 and asked to be paid Kshs. 100/= which was the agreed charge. The appellant then told him he had no money but would call his cousin to send him some.

It is the evidence of P.W. 1 that the appellant and his colleague asked him to teach them how to ride the motor cycle but he refused. The appellant then removed some coins from his pocket some of which dropped and asked him (the appellant) to pick them. When he bent to pick the coins the appellant held both his hands while his colleague made away with the motor cycle.

He held onto the appellant with the help of members of public. He then called his employer who arrived and police on patrol came and arrested the appellant. He was taken to Kiamumbi police post and subsequently charged. He had known the appellant before and even had his telephone number.

P.W. 3 was one of the police officers on mobile patrol along Githurai 44 road when he saw a crowd of people making noise. He approached the scene and found the appellant having been pinned down. He was informed that the appellant's colleague had asked the motor cycle rider to teach him how to ride after

which he was taken for two rounds and then disappeared with the motor cycle. He arrested him and took him to the police station.

At the police station the appellant was received by P.W. 4 who recorded statements from witnesses and charged the appellant with the present offence. He was given the receipts and sale agreement relating to the motor cycle which he produced in evidence.

In his defence the appellant denied the offence and said that he was going home after working at a construction site when he met the complainant P.W. 1 who was his friend and lived in the same plot. He had lent him Kshs. 1000/= but when he asked him for the money the complainant said he would not pay. A scuffle ensued and police officers on patrol arrived, handcuffed and took them to Kiamumbi Police post where they were locked up for three days to settle the matter. When they failed to agree the complainant was released while the appellant was arraigned in court to answer this charge.

The learned trial magistrate believed the prosecution case and convicted the appellant. The appellant has raised several grounds in his petition of appeal which can be summarized as follows. The learned trial magistrate relied on the evidence of the complainant alone which was uncorroborated. A number of witnesses were taken to the police station but were not called to testify.

P.W. 2, P.W. 3 and P.W. 4 were not present at the scene and only relied on hearsay. There were several inconsistencies which were not considered by the learned trial magistrate. The complainant was not a credible witness because he denied teaching the appellant's colleague how to ride the motor cycle yet there was evidence he had taken him round twice. Two people had been placed in custody yet the complainant said he was never placed in custody. The offence was therefore not proved beyond any reasonable doubt.

The appeal is opposed by the Republic and it was submitted that the evidence was corroborated and the inconsistencies were immaterial. The ingredients of robbery were proved and therefore the charge was proved.

As the first appellate court, we have looked at the entire evidence adduced before the learned trial magistrate with a view to arriving at an independent conclusion. It is true that the conviction of the appellant was founded on the evidence of the complainant only. This is because although P.W. 3 said many people were taken to the police station no independent testimony was offered in court. There is also evidence that P.W. 4 recorded statements from witnesses but those witnesses were not called.

Assuming however that the complainant P.W. 1 was telling the court the truth there is no evidence that any violence was visited upon him. The motor cycle was taken by the appellant's colleague when he bent to pick the coins that had been dropped by the appellant. The learned trial magistrate was persuaded that because the appellant was with another person then the offence had been proved. The learned trial magistrate did not warn himself of the danger of relying on the evidence of a single witness. While we are persuaded that the complainant and the appellant knew one another, there are a few observations that put into question the credibility of the complainant.

Whereas he told the court that he refused to teach the appellant's colleague how to ride the motor cycle, P.W. 3 the police officer who arrived at the scene told the court that he took him for two rounds after which he took off with the motor cycle. That may as well be hearsay evidence but it puts into question the credibility of the complainant. He also denied that he was placed in custody but his employer P.W. 2 told the court that he was locked in for investigations. Further P.W. 4 admitted under cross-examination that in his statement which he recorded the complainant and the appellant herein were both placed in the cells. It is therefore more probable than not that what was contained in the statement of P.W. 4 reflected the truth because the statement was recorded soon after the alleged offence when his memory was still very fresh.

The fact that both were locked in the cells appears to lend some weight to the defence advanced by the appellant that there was a scuffle whereby both of them were handcuffed and taken to Kiamumbi police

station. That may enhance the credibility of the appellant as opposed to that of the complainant.

There were some inconsistencies with regard to the registration number of the motor cycle but these do not go to the root of the alleged offence. Our concern is that the evidence of the complainant remained alone without any corroboration and considering the seriousness of the offence, lack of corroboration makes the conviction unsafe.

There was a benefit of doubt which should have been accorded the appellant herein. We accordingly allow this appeal, quash conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in court this **5th** day of May **2014**.

A.MBOGHOLI MSAGHA **L.A. ACHODE**

JUDGE **JUDGE**