



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NOS. 180 & 307 OF 2012

NAHASHON ALWEMBA MUKHWANA 1ST APPELLANT

PAUL MUIYA WASHIBABI 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence arising from the judgment of [G. A. MMASI, P.M.] in the Principal Magistrate's Court at Vihiga in Criminal Case No. 823 of 2008)

J U D G M E N T

The appellants were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that the appellants *on the 26.3.2008 at Chambiti sub-location, Wamuluma location in Vihiga District within Western Province, jointly while armed with offensive weapons namely knives robbed Wycliffe Lisamadi Kegode a motor cycle make FC 125 Frame No. LLCLPP2087E018007, Engine Number LC57FMIFE 188213 valued at KShs.67,600/= and a mobile phone make Nokia 6070 S/NO 351031010758909 valued at KShs.6,650/= the property of Austine Mukhebi Shikuku and immediately before or immediately after the time of such robbery they used actual violence to the said Wycliffe Lisamadi Kegode.*

The 1st appellant was also charged with an alternative count of handling the stolen property under count I. The particulars being that on the 2.4.2008 at Sigalagala sub-location of Kakamega district the appellant handled the stolen motorcycle. The appellants were convicted and sentenced to death. The grounds of appeal for the 1st appellant are that the conditions prevailing at the incident were not conducive for positive identification, the identification parade was not proper, no description of the assailants was given to the police, PW1's evidence was not corroborated, the prosecution evidence was based on hearsay, his defence was not considered and the case was not proved beyond reasonable doubt. During the hearing of the appeal the appellant submitted that **section 200(3)** was not complied with as he was not asked whether he wished to recall the witnesses. He contends that the language of the court was not indicated and the identifying witness alleged that he identified the appellant because he has a gap in his teeth yet he explained that he got the gap while in custody and produced medical report to show that.

Mr. Ateya, appeared for the 2nd appellant. Counsel relied on the grounds of appeal which are that the prosecution did not prove its case beyond reasonable doubt, the defence was not considered and that the sentence is harsh. Counsel submitted that the witnesses gave conflicting frame and engine numbers of the stolen motorcycle which was not registered. It is further submitted that none of the witnesses identified the 2nd appellant and the evidence against the 2nd appellant was not sufficient.

Mr. Orinda, State Counsel, opposed the appeal. Counsel submitted that there was sufficient evidence against the 1st appellant as he was found with recently stolen item and could not give convincing reasons how he got it. With regard to the 2nd appellant counsel submitted that the evidence is not strong but he was identified. Counsel contends that the circumstances were conducive for positive identification.

The record of the trial court shows that ten witnesses testified. **PW1 WYLCIFFE LISAMADI** testified that he used to operate a motorcycle as a boda boda cyclist. The cycle was owned by PW4. On the 26.3.2008 at about 9.30 p.m. he was approached by two customers who wanted to be taken to stage Maziwa near Mbale in Vihiga County. While on the way the two customers assaulted him and took the motorcycle. He was also robbed of his Nokia mobile phone and his KShs.70/=. PW1 was seriously injured and became unconscious. He was taken to Mbale hospital but later referred to Kakamega Hospital where he was hospitalized for over one month. The motorcycle was later recovered and on the 10.7.2008 he attended an identification parade where he was able to identify the 1st appellant but could not identify the 2nd appellant. It is his evidence that he identified the 1st appellant due to the gap in his teeth. He told the police that the appellant had a gap in the teeth.

PW2 APC FRELYNE CHOGO was based at the Ikolomani AP camp. On the 2.4.2008 at about 7.30 a.m. the 1st appellant was taken to the camp by security men from Sigalagala Technical Institute. It was indicated that he was being assaulted by some people and he had a motorcycle which had no number plate. He was asked for the registration documents for the cycle and he left the motorcycle promising to take the documents to the camp. The 1st appellant disappeared and never returned. On the 5.4.2008 the owner of the motorcycle **AUGUSTINE MUKHEBI SIKUKU (PW4)** went to the camp in the company of police officers from Kilingili police station and the motorcycle was released to him. Three months later PW2 recorded a statement and identified the appellant as the person who had left the motorcycle after he had been arrested.

PW3 was **ELLY KEGODE**. His evidence is that on the 26.3.2008 at about 3.00 p.m. he got information that his son, PW1, had been injured. He went to see PW1 and saw that he had been badly injured on the chest and stomach. He assisted in taking PW1 to hospital. He later went to Ikolomani AP camp and were informed that the motorcycle had been recovered. **PW4 AUGUSTINE MUKHEBI SIKUKU** testified that he is a teacher at Misanga Secondary School in Bungoma. He was the proprietor of the stolen motorcycle. On the 27.3.2008 he got information that one of his motorcycles had been stolen from PW1. He was later told that the motorcycle had been recovered. He went to Kilingili police station and went with police officer to Ikolomani AP camp where the motorcycle had been detained. He had the documents for the motorcycle which had not been registered and he identified it using the frame number. He had other motorcycles that were operating as boda boda.

PW5 DRAKE AMBUNDO MAKONJIO testified that on the 27.4.2008 he was at home when he told the 1st appellant to pick him from Mumias. He knew the 1st appellant as his friend who used to split timber for him. The appellant picked him and they went to Sabatia in Butere. While there somebody who works at the Law Courts told them that there was a motorcycle that had been stolen and it resembled the one the 1st appellant was riding. The person who works at the Law Courts took his phone number and he kept on calling him and he told him that he was only a passenger. The 1st appellant then disappeared. Sometimes later he went to Ikolomani AP camp and found the motorcycle there. He identified the motorcycle as the one that used to be operated by the 1st appellant. **EVANS OKELLO OYOKO** was **PW6**. He was a business man at Kilingili and Esibuye. On the 29.3.2008 at about 10.00 p.m. he received a phone call that the 1st appellant had been found with a stolen motorcycle. The call came from one Oyoko and he told Oyoko that the motorcycle ought to be detained. He went to Ikolomani AP camp and identified the motorcycle. He knew about the story of the stolen motorcycle from his brother PW5.

PW7 was **PC GEOFFREY KIARIE**. He was based at the Kilingili police station. On the 5.4.2008 at about 1.00 p.m. he stopped a motorcyclist who had no driving license. The cyclist told them that he was going to look for a stolen motorbike. He went with the cyclist and met the owner of the stolen

motorcycle PW4. They later went to Ikolomani AP camp where they found the stolen motorcycle and the owner identified it using the frame number.

PW8 PC ELLY OUMA investigated the case and was based at the Vihiga police station. On the 26.3.2008 he got information about the robbery. He visited PW1 at Vihiga District hospital and his condition became worse. He was transferred to Kakamega Provincial General Hospital. He got information that the 1st appellant was arrested and taken to Ikolomani AP camp with the stolen motorcycle but had disappeared. The 1st appellant was arrested on the 29.6.2008 by officers from Kakamega on suspicion of having committed a similar offence. He went to Kakamega police station and explained about the incident that took place on the 26.3.2008 in Vihiga. An identification parade was conducted and the appellant was identified. The owner of the motorcycle identified it. According to PW8 the 2nd appellant was arrested on the 1.7.2008 at Magada and an identification parade was conducted and he was identified. **PW9 DR. COLLINS MASIKA** produced the P3 form which gave details of the injuries sustained by PW1. **PW10 CI LAPTON BENGI** produced the photographs of the stolen motorcycle that were taken at Mbale police station.

The appellants were put on their defence. The 1st appellant in his sworn defence testified that he splits timber as his business. He differed with his colleagues and was taken to Kakamega police station. He was charged in court and jailed. While undergoing the court case an officer from Vihiga police station went to Kakamega police station and took him. He was taken to Vihiga police station where an identification parade was conducted. One complainant identified him as the person who had robbed him and he was charged with the current offence. It is his evidence that the complainant identified him because of a gap in his lower teeth and he told him that he lost the teeth while in prison. He produced medical documents from Kisumu District Hospital which showed that two of his teeth were extracted at the hospital. One was extracted on the 8.6.2009 while the second one was extracted in October 2010. He denied committing the offence.

The 2nd appellant also gave sworn evidence. It is his evidence that he was arrested on the 6.7.2008 while operating a boda boda bicycle taxi. He was arrested by the area assistant chief and an AP from Elukongo AP camp who went to his house and arrested him. He was taken to Magada police post where he slept for one day before he was taken to Vihiga police station. He was taken to court on the 10.7.2008 and charged with the current offence. He testified that he was not identified in an identification parade. His further evidence is that the investigating officer had earlier arrested him on a different issue relating to a different matter and there was a report at the Vihiga police station under OB number 22.4.2008. He denied that he was arrested on 1.7.2008.

The main issue for determination is whether the appellants committed the offence of robbery with violence as charged. The prosecution evidence does prove that PW1 was robbed of the motorcycle on the 26.3.2008. According to the prosecution the 1st appellant was found using the stolen motorcycle having left it at Ikolomani AP camp. The evidence against the 1st appellant is that he was identified at an identification parade conducted on the 10.7.2008. The parade officer did not testify and the parade forms were not produced as evidence. The only evidence remaining against the 1st appellant is that of PW2 and PW3. According to PW2 the appellant was taken to Ikolomani AP camp on the 2.4.2008 by security officers from Sigalagala Technical Institute. According to PW2 the appellant had no Identity Card. It is not clear how the police officers could let the 1st appellant go home yet they suspected that the motorcycle he was having had been stolen. It is clear that the police did not record any particulars of the 1st appellant. PW2 stayed for over three months until when the appellant was arrested when she recalled that he was the one who had taken the motorcycle to the AP camp. According to PW3 he was carried on the motorcycle by the 1st appellant and he identified the motorcycle at the Ikolomani AP camp.

The only evidence against the 2nd appellant is that he was picked at an identification parade by PW1. According to PW1 he did not identify the appellant. The parade officer did not testify and therefore the court could not conclude that there was an identification parade. None of the witnesses mentioned the 2nd appellant. Since there was no identification parade and nobody talked of the 2nd

appellant we do find that his conviction was not proper.

We have also gone through the record of the trial court and noted that the prosecution applied to amend the charge sheet after 8 witnesses had testified. The amendment related to the frame number of the stolen motorcycle. The application was granted and a ruling was delivered on the 25.11.2011. The amended charge sheet was read to the appellants on the 25.12.2011 and the appellants pleaded not guilty. The record does not show that after the provisions of section 214 of the Criminal Procedure Code were explained to the appellants they opted not to have the witnesses recalled. The record only indicates that the appellants were informed of their rights under section 214 of Cap 75. The record does not indicate that they opted not to recall the witnesses.

Similarly we note that the matter was heard by two magistrates. Mr. L.O. Onyina heard 9 witnesses. The matter was placed before Mrs. G. Mmasi on the 14.3.2012 and another witness **IP SHAVIYA MAMETI** testified. The witness was stood down as he was not gazetted and a scene of crime officer. On the 28.3.2012 PW10 CI LAPTON BENGI testified before madam G. Mmasi PM and the prosecution later closed its case after it was denied an adjournment to call the parade officer. When the second magistrate took over the matter she did not explain to the appellants their right to recall the witnesses as provided by section 200(3) of the Criminal Procedure Code. The magistrate simply proceeded with the case without even referring to the provisions of section 200. There are several authorities in relation to this anomaly such as **KANYI V REPUBLIC [1991] KLR 175** and that of **NJENGA V REPUBLIC [1984] KLR 605**. We do find that the case was based on the frame number of the motorcycle as the motorcycle was not registered. The amendment of the charge sheet altered the case and the court ought to have recorded whether the appellants opted not to have the witnesses not recalled. Similarly the change of magistrate automatically led to the operation of section 200 of the Criminal Procedure Code and the second magistrate failed to explain that section to the appellants.

Apart from the above two anomalies we do find that the case against the 2nd appellant was not strong enough to warrant a conviction. The 1st appellant was arrested in the year 2008 and has been in custody since then. No parade officer testified and to order a retrial would be tantamount to giving the prosecution an opportunity to fill in the gaps in their case. In the case of **OPICHO V REPUBLIC [2009] KLR 369** the Court of Appeal held that a retrial should not be ordered where it will enable the prosecution to fill in gaps in their case. Similarly in that case the court held that where the conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not follow that a retrial should be ordered. We find that the case against the 1st appellant is quite weak. PW3 did not check the frame and engine number of the motorcycle which allegedly was used by the 1st appellant to carry him. PW4 had several motorcycles and there is conflicting evidence in the record as to the exact frame number of the stolen motorcycle.

In the end we do find that ordering a retrial against the 1st appellant will not serve any justice. The case against the 2nd appellant was not proved. The State Counsel conceded that there was no evidence against the 2nd appellant. There was no identification against both appellants. We find the appeals merited and the same are allowed. The appellants shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 15th day of May 2014

SAID J. CHITEMBWE

GEORGE DULU

J U D G E

J U D G E