



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 161 OF 2013**  
**HUDSON LUKUYANI ..... APPELLANT**  
**V E R S U S**  
**REPUBLIC ..... RESPONDENT**

*(Appeal against conviction and sentence from the judgment of [M.I.G. MORANGA, P.M.] delivered on 16.10.13 in Kakamega Chief Magistrate's Court in Criminal Case No. 2268 of 2012)*

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

The appellant was charged and convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that the appellant and two others *on the 3.11.2012 of Murhanda Location, Lirhanda sub-location in Kakamega East District within Western Province, jointly while armed with dangerous weapons namely slashers robbed GEOFFREY KALAKA LIHAVI of his motorcycle registration No. KMCM 716 B make KAKA Eagle valued 86,000 KShs. and immediately before the time of the said robbery threatened to use actual violence to the said Geoffrey Kalaka Lihavi.*

The appellant was sentenced to suffer death. His two co-accused were acquitted for lack evidence. The appellant's grounds of appeal are that he pleaded not guilty, the charge sheet was defective, the prosecution evidence was not corroborated, the burden of proof was shifted, no first report was availed, the conviction is based on a single witness, an essential witness was not called to testify and that the case was not proved beyond reasonable doubt.

The appellant filed written submissions. He contends that the prosecution evidence was not corroborated. PW1 gave the date of the robbery as 3.11.2012 while the investigating officer referred to an unknown date. The charge sheet was defective as it refers to a slasher while the evidence refers to a panga. The date of arrest is also not clear. The appellant further contends that the conviction is based on recognition but the intensity of the light was not clear. The witness referred to a lady at a house but she was not called to testify. The complainant told PW2 that he had been robbed of a phone yet evidence relates to a motorcycle. The proceedings were not properly recorded as he cross examined PW3 but it was not recorded. Some of the exhibits were not produced.

The State opposed the appeal. Miss Omondi, learned State Counsel, submitted that PW1 identified the appellant. The evidence of PW1 is corroborated by that of PW2. The stolen motorcycle was found in possession of the appellant and the case was proved beyond reasonable doubt.

As the first appellate court we shall evaluate the evidence before the trial court. PW1 Geoffrey Khalaka Lukhabi was the complainant. His evidence was that on 3.11.2012 at around 8.00 p.m. he had stopped to clean mud from a motorcycle which he was using to distribute cakes and mandazi when he was attacked

by three people. PW1 was alone. The robbers aimed a panga at him but it hit the motorcycle and cut off the side mirror. The indicators were on and he was able to identify the appellant who had rastars. PW1 ran away and called PW2 on phone. He reported the matter to the police. They went back to the scene with an Administration police officer and followed the tyre marks as it had rained.

According to PW1, the following day they went to a house where they met a lady. The lady referred them to the accused's house. The accused opened his door and upon a search being conducted the stolen motorcycle was found covered by several coats. PW1 identified the appellant as one of the robbers. The panga and the broken side mirrors were also found in the appellant's house. The stolen motorcycle was registration number KMCB 716 B.

**PW2 NELSON ATSENGA** is a brother to PW1. He was called by PW1 that evening at about 8.45 p.m. He went out and met PW1. They conducted a search in the company of a police officer who was in civilian clothes. They went to the house of one lady who refused to open. The following day they went to the appellant's house and the motorcycle was recovered in the bedroom.

**PW3 WICLIFF OCHIENG SIKOLI** was the owner of the motorcycle. He runs a bakery and PW1 is his employee who distributes cakes and mandazi for him. He produced the ownership documents for the motorcycle. He had authorised PW1 to use the motorcycle. PW4 PC Abdidek Shanj Mohamed was based at the Kakamega police station. The appellant was taken to the station on 4.11.2012 at 10.30 a.m. by two APs together with a motorcycle number KMCM 716 B. He investigated the matter and went to the appellant's home. According to PW4 there were tyre marks in the appellant's house.

**PW5 APC VICTOR KOECH** was based at the Murhanda AP post. The incident was reported at the post on 3.11.2012 at about 10.00 p.m. He went to the scene that night with PW2 and PW2. They followed tyre marks up to a certain house. He was not in uniform and advised the complainant that they were to investigate the issue the next day. It is the evidence of PW5 that they went to the same home the following day. They found the appellant who had dreadlocks. He searched his house and recovered the stolen motorcycle, a panga and a broken side mirror. He was in the company of PW1, PW2 and his colleague, AP Jackson Kwendo. They arrested the appellant and took him to Kakamega police station.

The appellant was put on his defence. In his sworn testimony he stated that he is a boda boda cyclist at Shinyalu. On 4.11.2012 he was at his home when two AP officers went to arrest him. He was later taken to Kakamega police station where he was shown a motorcycle which he didn't know. He was later charged with the offence which he denied.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. It is the evidence of PW1 that he was robbed of a motorcycle on 3.11.2012 at about 8.00 p.m. PW2 was informed about that incident. The prosecution evidence does prove that indeed PW1 was robbed of a motorcycle.

According to PW1, PW2 and PW3 they went to the appellant's home on 4.11.2012 in the morning and upon searching the appellant's house recovered the stolen motorcycle. The appellant contends that he was shown the motorcycle at the Kakamega police station. He was only arrested by two Administration police officers and taken to the Kakamega police station where he was shown the motorcycle.

From the evidence on record, we do find that the appellant was found in possession of the stolen motorcycle the following morning after it had been robbed from APW1 the previous day at about 8.00 p.m. It is the evidence of PW1 that he identified the appellant from the lights of the motorcycle indicators. The appellant had dreadlocks during the robbery according to PW1. That evidence is corroborated by PW2 and PW5 who testified that when they went to the appellant's home he opened the door and the appellant had dreadlocks.

The appellant's ground of appeal that the conviction is based on recognition is not true. The trial court convicted the appellant on the weight of the evidence. We do find that the prosecution did prove its case. The lady who was the appellant's neighbour did not have to testify. Similarly, there is no defect of the

charge sheet. The ingredients of robbery with violence were proved. Even if the charge sheet indicated that the appellant was armed with a slasher yet the evidence shows that it was a pnga, that does not disprove the prosecution contention that the appellant was armed.

In the end, we do find that the appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of October 2014

**SAID J. CHITEMBWE**

**GEORGE DULU**

**J U D G E**

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