



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 147 OF 2011

KELVIN NJOROGE GATHURIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 1418 of 2010 of the Chief Magistrate's Court at Kiambu – Mrs. C. Oluoch (SRM) on 31st May 2011)

JUDGMENT

1. The appellant filed an appeal following his conviction by Mrs. C. Oluoch Senior Resident Magistrate, for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in **Kiambu CM Cr. Case No. 1418 of 2010**. The particulars of the offence were that on the 27th day of August 2010 at Nduata village in Kiambu, jointly with others not before the court while armed with offensive weapons namely, metal bars and stones they robbed George Nderitu Ciuri of a motor cycle registration No. KMCE 986 E make Honda 200 cc, one helmet and a pair of protective gloves all valued at Kshs.275,000/= and at, immediately before or immediately after the time of such robbery they wounded the said victim.
2. He also faced an alternative charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. It was alleged that on 28th August 2010 at the same place, other than in the course of stealing dishonestly retained one helmet valued at Kshs.3500/= knowing or having reasons to believe it to be stolen property or unlawfully obtained.
3. A recap of the prosecution's case is that **PW1**, a supervisor with G4S Security Services was riding a motorcycle registration No. KMCB 986 E along Riara Ridge road to Black Petal's Flower Company, between the hours of 10 and 11.30 p.m. when he was hit with a stone on the shoulder. He lost control of the motor cycle and fell down. Two young men emerged and got hold of him. One of the men went for his helmet while the other wielded a metal bar and tried to hit him with it. He blocked the blow and in the ensuing struggle he managed to escape leaving behind the motorcycle and helmet. He had however managed to identify his attackers since it was not very dark.
4. **PW1** called the G4S control room and one of their response teams came to the scene. Together with the team **PW1** searched the area and came upon two young men with a motorcycle. They arrested one of them and he led them to the appellant who was arrested and charged.

5. When placed on his defence the appellant denied the offence in a sworn testimony. He told the court that on 27th August 2010 at about 7.00 p.m. he finished his work at a hotel at Nduata junction and went home. At about 10.00 p.m. he retired to bed with his cousin Douglas Ng'ang'a Kamau who later left the house at 4.00 a.m. He was awakened by the light of torches being flashed at his house. A number of police officers came into his house accompanied by G4S Security officers and ordered him to get up. The officers took a hammer and a sign board which he had stored for a company that was repairing the road. They also removed a helmet from under the bed, an ID card and a diary. He was taken to Karuri police station together with a village mate and later charged.
6. The trial ended in his conviction and sentence to suffer death in accordance with the law. Being aggrieved by the conviction and sentence the appellant filed an appeal on grounds that he was convicted on the doubtful contradictory evidence of a single witness and on the evidence of a helmet which was not recovered in his possession.
7. Learned state counsel Miss Njuguna opposed the appeal on behalf of the State. She asserted that **Section 214** of the **Criminal Procedure Code** was complied with and any discrepancies arising from the registration No. of the motorcycle in the charge sheet being different from that tendered in evidence, was curable under **Section 382** of the **Criminal Procedure Code**.
8. We are aware that not every discrepancy that appears in the charge sheet and the evidence is fatal to the prosecution case. Of importance is whether the description of the motorcycle as KMCE 986E in the charge sheet and KMCB 986E in the evidence caused a miscarriage of justice. **Section 382** of the **Criminal Procedure Code** is intended to cure those discrepancies that do not go to the core of the case. The motorcycle in question was recovered and there was no dispute about its ownership. No demonstrable miscarriage of justice was occasioned to the appellant because of that defect in the circumstances of this case.
9. The appellant advanced another ground that the evidence of **PW4** should not have been relied on since he had been earlier arrested as a co accused. He admitted that **PW4** was his relative and that he did lead the police to his house, but stated that this may only have been to buy **PW4**'s own freedom. Further that he may have planted the helmet in the appellant's house. Miss Njuguna submitted that the court had exercised caution while relying on the evidence of **PW4** and that he gave sworn evidence which in the opinion of the trial magistrate met the highest standard of credibility.
10. Two issues arise out of this submission. The first is that **PW4** should have been treated as an accomplice and the second is whether the doctrine of recent possession applies with regard to the recovery of the helmet.
11. On the issue of accomplice evidence, we had recourse to the decision of the Court in the case of **Watete v Uganda [2000] EA pg. 559**, which described an accomplice as a person who has participated in the commission of an offence as a principal or an accessory. The Court added that the clearest case of an accomplice is where a person confesses to the participation in the offence, or has been convicted of the offence, either on his own plea of guilty or on the court finding him guilty after the trial. The Court may also find a person to be an accomplice from the evidence recorded in Court.
12. From the evidence, **PW4** was arrested in the act of pushing the motorcycle which **PW1** was robbed of. He however said that he was assisting the appellant and his cousin whom he had found pushing it and who had fled when the police arrived, leaving him to be arrested. **PW4** did lead the police to the appellant's house where a helmet with G4S initials was recovered within hours of the theft. We considered the explanation of **PW4** on how he came to be pushing the motorcycle and found it plausible as did the trial court.
13. We noted that the trial court treated the evidence of **PW4** with the caution it deserved. We therefore scrutinised the rest of the evidence to establish whether there was any other independent evidence besides his testimony. The recovery of the helmet hours after **PW1** was robbed of it led us to examine whether the doctrine of recent possession is applicable to this case.
14. Issues that must be considered before a court can rely on the doctrine of recent possession as a basis for conviction in a criminal case were set out by the Court of Appeal in the case of **Arum vs**

Republic 85 of 2005 KLR [2006] Vol. I Pg 233. Before a court can rely on the doctrine of recent possession it must be established that:

- a. *The property was found with the suspect;*
- b. *The property was positively the property of the complainant;*
- c. *The property was stolen from the complainant;*
- d. *The property was recently stolen from the complainant.*

2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

3. In order to prove possession there must be acceptable evidence as search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot suffice, no matter from how many witnesses.”

15. The appellant admitted that the helmet was recovered from his house in the circumstances described by the prosecution witnesses. It is our conclusion that there is no cousin who spent the night in his house and left in the morning as he stated since the police arrived there at about 3 a.m. and found him alone in the house. We find that the doctrine of recent possession is applicable in the circumstances of this case, and that the evidence of the recovery of the helmet in the appellant's house a few hours after **PW1** was robbed of it, constitutes independent corroborative evidence.
16. The appellant also raised a ground that his right to fair hearing was contravened since the proceedings were conducted in a language he did not understand. At the outset we make mention of the decision of the Court of Appeal in the case of **JOHN KAMAU GITHUKU AND ANOR VS. REPUBLIC CRIMINAL APPEAL NO. 229 OF 2008**, in which their lordships held that since the appellant participated in the proceedings after the plea was taken, there was no prejudice suffered on his part. We note that in the instant case the record shows that at the time of taking plea, English, Kiswahili and Kikuyu interpretation was employed. The appellant did not raise any issue then. He also had representation and as the proceedings progressed he cross examined the prosecution witnesses quite well through his counsel. He defended himself in Kiswahili and at the end he offered mitigation. We find that this ground cannot therefore avail him now.
17. On the ground that his defence was not considered, the judgment shows that it was considered by the court which found that his account was not probable and had not shaken the credibility of the prosecution evidence.
18. Before the appeal was heard the appellant brought to the attention of the court that part of the testimony of **PW6** was missing and yet it would have been of assistance to his appeal. For that reason therefore, he prayed for an order for re-trial. Miss Njuguna responded that the evidence of **PW6**, **PW2** and **PW3** corroborated each other and that the appellant would therefore suffer no prejudice. In her opinion there was no need to order for a re-trial.
19. We perused the original record in its entirety and noted that the evidence of **PW6** was indeed incomplete since a piece of one of the pages was torn off. From the evidence, **PW6** was one of the response officers from the G4S Company and what remains of his evidence seems to corroborate that of **PW2** and **PW3** who were also officers from G4S and who participated in the appellant's arrest together with **PW6**. On that basis we agree with Miss Njuguna that an order for retrial will not serve the interests of justice since whatever **PW6** said was also stated by **PW2** and **PW3**. From the handwritten manuscript only a small portion of the record was torn off.
20. In sum the evidence on record was cogent and left doubt in our mind that the appellant was properly convicted. The appeal is therefore lacking in merit and is dismissed. Both the conviction and sentence herein are upheld.

SIGNED DATED and DELIVERED in open court this **8th** day of **October 2014**.

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A.MBOGHOLI MSAGHA

JUDGE

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L. A. ACHODE

JUDGE