



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 27,43 & 193 of 2010

LINUS MURUNGA ..... 1<sup>ST</sup> APPELLANT

CAROLYNE WILAKA MACHINA ..... 2<sup>ND</sup> APPELLANT

PATRICK MUTSAMI AMUKOCHI ..... 3<sup>RD</sup> APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

J U D G M E N T

The three appellants were charged with one count of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The 2<sup>nd</sup> appellant was charged with the offence of handling stolen goods contrary to **Section 322** of the **Penal Code**. The particulars of the offence for each count were as follows:-

*“On the night of 17<sup>th</sup> March 2009 at 10.30 p.m. at Nyao Tea Zone, Lurambi, along Lurambi-Shinyalu road in Kakamega Municipality Location, Central Kakamega District within Western Province, jointly with others not before, while armed with offensive weapons namely panga, robbed **KENNEDY ODONDI KISANYA** of his motorcycle make SUZUKI AX 100 CC blue in colour, registration number KAZ 831 D, mobile phone make Nokia 1200 and cash KShs.2,600/= all to the total of KShs.99,600/= and after the time of such robbery, used violence against the said **KENNEDY ODONDI KISANYA**.”*

ALTERNATIVE CHARGE

*“On the 21<sup>st</sup> day of March 2009 at Mukumu village in Shitoto sub-location, West Isukha Location in Central Kakamega District within Western Province, otherwise then in the cause of stealing, knowing or having reason to believe to be stolen goods, dishonestly undertook retention of a dismantled Suzuki Motorcycle blue in color AX 100 CC for the benefit of **LINUS MURUNGA ABUNG’ANA**”*

The appellants were convicted of the first count and sentenced to suffer death. The consolidated grounds of appeal for the appellants are that the prosecution did not prove its case beyond reasonable doubt, the trial court allowed the production of photographs by a non gazetted officer, the prosecution evidence was full of contradictions, crucial witnesses were not called, the standard of prove in criminal cases was lowered, there was dock identification and the identification parade was not fair. The 3<sup>rd</sup> appellant further contends in his grounds of appeal that the recovered items were never produced in court as exhibits and his alibi defence was wrongly dismissed.

Mr. Momanyi, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> appellants expounded on the grounds of appeal and submitted that the recovered motorcycle was never produced. DW4 produced photographs which did not show that they were taken from the stolen motorcycle registration number KAZ 831 B. PW5 and the investigating officer PW8 gave contradictory evidence as to how the motorcycle parts were recovered. Court misunderstood the doctrine of recent possession. Mr. Shifwoka, counsel for the 3<sup>rd</sup> appellant submitted that the robbery occurred at night and it was not possible to identify anyone. PW1 testified that he identified the 3<sup>rd</sup> appellant but his defence is not corroborated by that of PW6 who was with him. The purported identification was under difficult circumstances. No description of the appellant was given to the police and an attempt was made to give the description after an identification parade had been done. There was no evidence linking the appellant to the crime.

Mr. Orinda, State Counsel, opposed the appeals. Counsel submitted that the 3<sup>rd</sup> appellant was identified. The 1<sup>st</sup> and 2<sup>nd</sup> appellants were found with recently stolen items. The stolen item was a motorcycle owned by PW1. PW5 was a mechanic who knew the motorcycle and it was given to him to repaint. PW5 informed the police. The 2<sup>nd</sup> appellant is the one who opened the house where the motorcycle was kept. Counsel further submitted that the prosecution evidence did not establish that there was a lady during the robbery and therefore the 2<sup>nd</sup> appellant ought to have been convicted of handling stolen property as she was not at the scene of the robbery.

The prosecution case is that PW1, was robbed of his motorcycle on the 17.3.2009 at about 10 p.m. He was riding the motorcycle in the company of PW6. Within the same month of March 2009 the 1<sup>st</sup> appellant gave some parts of the motorcycle to PW5 for repainting. PW5 notified the police and the 1<sup>st</sup> and 2<sup>nd</sup> appellants were arrested. The 3<sup>rd</sup> appellant was identified by PW1 at an identification parade and he was also charged with the offence.

According to **PW1, KENNEDY ODODI KISANYA**, on the 17.3.2009 at about 10 p.m. he was heading towards Nyao Zone area together with PW6 when they were stopped by 6 people and ordered to sit down. The people had pangas and rungas and chased them away. He was able to identify the 3<sup>rd</sup> appellant using the light from the head lamp of the motorcycle. He was robbed of the motorcycle, ATM Card and KShs.2,600/=. He was cut with a panga and ran away. After sometime he went back to the scene and saw PW6 who had not been injured. They reported the matter to the police. After 3 days CID officers

informed him that the motorcycle had been recovered. He went to the police station and found that it had been dismantled and some parts were missing. He was informed that one person had been arrested. He attended one parade but could not identify anyone. He later attended a second parade and he identified the 3<sup>rd</sup> appellant. He further testified that he informed the police that he could identify one of the attackers. He gave the description of a short and stout man. PW2 SP NEHEMIA BITOK conducted an identification parade on the 7.11.2009. His evidence is that the 3<sup>rd</sup> appellant was identified by PW1.

**PW3, ETIANA FRANCIS** was a clinical officer based at Kakamega Provincial General Hospital. He produced a P3 form indicating the injuries sustained by PW1. According to the P3 form the injuries comprised of cut wounds on the back and left shoulder joint. PW4, PC DAVID OTIENO OUMA, was a scene of crime officer. He testified that on the 30.3.2009 he took photographs of a dismantled motorcycle and he produced the photographs in court. The items were photographed at the Kakamega DCIO's office.

**PW5, BENAYA SAKWA**, testified that on the 23.3.2009 at about 10 a.m. he was in his motorcycle garage at Khayega. The 1<sup>st</sup> appellant invited him to his house and he found a complete motorcycle blue in colour. The 1<sup>st</sup> appellant wanted the motorcycle to be sprayed with a different colour. He dismantled the tank and side covers and took the parts to Kakamega at a garage belonging to Mr. Kawango along Maziwa road. Mr. Kawango sent him to a police officer because the motorcycle belonged to PW1. He informed the police and on the same day at about 5 p.m. the police went to Khayega and arrested the 1<sup>st</sup> appellant as well as PW5. The 1<sup>st</sup> appellant took police officers to his home but nothing was recovered. He then took the officers to his house where they found a motorcycle which had a frame, engine, shackles and wheels. They then went to Maziwa road and collected the tank and side covers. PW5 further testified that he knew the owner of the motorcycle as he used to repair it. The 1<sup>st</sup> appellant also used to have a motorcycle which he also used to repair. PW5 did not know the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. According to PW5 the motorcycle was recovered in a rented room. He had never seen the 2<sup>nd</sup> and 3<sup>rd</sup> appellant and was present when the motorcycle was recovered.

**PW6, JOASH SHIKANGA SHIHEHE**, was with PW1 on the 17.3.2009 at 10 p.m. He was a pillion passenger when they were intercepted by a gang of more than 5 people who were armed with pangas and rungs. It was raining and muddy but there was moonlight. He could not identify any of the attackers. He was made to sit down and they removed his clothes and left him naked. The robbers ran away with the motorcycle. PW6 was not injured. **PW7, APC GEOFFREY NANDASABA** was stationed at the DC's office Kakamega East – Shinyalu. On the 3.5.2009 he got a report that some people had broken into the garage of one Mary and stolen some goods. They arrested the 3<sup>rd</sup> appellant who had been mentioned by Mary as a suspect.

**PW8, PC FESTO WAMWAYI**, was the investigating officer. He got information about the robbery from PW5 on 21.3.2009. He went to Khayega market with other officers and stopped the 1<sup>st</sup> appellant who was riding a motorcycle. They requested him to take them to where the motorcycle was hidden. They went to his home area in Shigodi village but nothing was recovered. Later he took them to Mukumu village and the 2<sup>nd</sup> appellant opened a house where a dismantled motorcycle was recovered. PW1 identified the motorcycle as his. The 2<sup>nd</sup> appellant informed him that the 1<sup>st</sup> appellant had taken the motorcycle there for safe custody. A parade was conducted but PW1 could not identify the 1<sup>st</sup> appellant. When the recoveries were made PW5 was present. When they arrested the 1<sup>st</sup> appellant he was being towed by PW5 as his motorcycle had broken down. PW8 arrested both the 1<sup>st</sup> appellant and

PW5. When the complainant reported the matter he did not give the description of the attackers. The complainant made his first statement to the police on the 25.3.2009 while a second statement was made on the 7.5.2009.

The appellants were put on their defence. The 3<sup>rd</sup> appellant was the first one to testify and gave sworn evidence. His evidence was that he does not know the 1<sup>st</sup> and 2<sup>nd</sup> appellant. On the 4.5.2009 at about 1.30 a.m. he was arrested by AP officers from Murhanda AP camp on suspicion of burglary at the home of one **DORICAS MADEGWA**. Nothing was recovered from his house. He was taken to Kakamega Police station and he was charged in court on the 8.5.2009. He further testified that he had never seen the motorcycle in question.

The 1<sup>st</sup> appellant gave sworn evidence. He testified that on the 17.3.2009 he went to sleep at his home at 10.30 p.m. On the 21.3.2009 he went to his usual motorcycle boda boda business and while waiting for customers PW5 Benaya Sakwa informed him that his motorcycle had broken down three kilometers from Khayega and he wanted to be towed. He went to his rescue and pulled him. On the way they were stopped by somebody whom he thought was a customer. The person turned out to be the arresting officer. Together with PW5 they were handcuffed and taken to Mululu village where a search was conducted but nothing was recovered from his house. PW5 led them to some rental house at Mukumu near the hospital. PW5 opened one of the rooms where a motorcycle was recovered and taken by the police officers. The 2<sup>nd</sup> appellant went to the police vehicle when he saw the 1<sup>st</sup> appellant with the police and on enquiry she was also arrested. The 1<sup>st</sup> appellant knew the 2<sup>nd</sup> appellant as a fish monger and a customer.

The 2<sup>nd</sup> appellant testified that she is a fish monger. On the 21.3.2009 she called a taxi operator to collect her and when she reached her home she saw the 1<sup>st</sup> appellant who is her customer handcuffed. She asked him what was happening but police officers slapped her and put her in the vehicle. She saw a motorcycle in the police vehicle. According to her where she lives is a house with 20 rental rooms and the motorcycle was not recovered from her room.

The evidence of the prosecution in relation to the 1<sup>st</sup> appellant is that he was found in possession of recently stolen items and therefore was one of the robbers. According to the complainant PW1 he did not identify the appellant. Similarly PW6 who was with PW1 could not identify the 1<sup>st</sup> appellant. The robbery occurred on the 17.3.2009 and the 1<sup>st</sup> appellant was arrested on the 21.3.2009. An identification parade was conducted but PW1 could not identify the appellant. The State counsel submitted that the evidence connecting the appellant to the crime is the recovery of the motorcycle. Counsel for the appellant submitted that PW5 was also a suspect and he was also arrested. According to the evidence of PW5 he was given the motorcycle by the 1<sup>st</sup> appellant on the 21.3.2009 in the morning. He took some parts for repainting to somebody by the name Kawango. He knew the motorcycle and notified PW8 who later went to arrest the appellant. It is his evidence that when the recovery was being made the 2<sup>nd</sup> appellant was not present and that he had never seen her before. According to the appellant it is PW5 who took them to a rental house at Mukumu and he opened a room where the motorcycle was recovered. What is on record is the word of the appellant against that of PW5. The garage owner by the name Kawango was not called to testify as to whether indeed PW5 took the motorcycle to him for repainting. It is not clear why PW5 did not see the 2<sup>nd</sup> appellant at Mukumu where the motorcycle was recovered yet the evidence of PW8 is that he was with PW5 when the motorcycle was recovered in a room belonging to the 2<sup>nd</sup> appellant. Since the complainant did not identify the appellant as one of the robbers and the evidence on mode of recovery of

the motorcycle is quite doubtful, we do find that the prosecution did not prove its case beyond reasonable doubt against the 1<sup>st</sup> appellant.

With regard to the 2<sup>nd</sup> appellant the State counsel conceded that the complainant testified that there was no woman amongst the robbers. According to the state counsel the 2<sup>nd</sup> appellant ought not to have been found guilty of the offence of robbery with violence but guilty of the offence of handling stolen property as per the alternative count. With regard to the count of handling stolen property the only evidence connecting the appellant to the offence is that of PW8 the investigating officer. According to PW8 the 1<sup>st</sup> appellant took them to a house at Mukumu where they recovered the motorcycle. The 2<sup>nd</sup> appellant opened the house where the motorcycle was being kept. PW8 was with PW5. However, PW5 testified that he did not know the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. During cross-examination by counsel for the 2<sup>nd</sup> appellant he testified that he had never seen the 2<sup>nd</sup> appellant. It is not clear why the two witnesses were at the same place and yet one saw the 2<sup>nd</sup> appellant opening a room while the other one did not see her. According to the 1<sup>st</sup> appellant the 2<sup>nd</sup> appellant was only arrested when she went to enquire about his arrest. Since the evidence on record shows that she was not one of the robbers and according to PW5 she was not present when the recovery was made, we do find that the prosecution evidence was not sufficient to have her convicted of the offence of robbery with violence. As indicated herein it is not clear whether she was present when the recoveries were being made. PW5 never saw the 2<sup>nd</sup> appellant and he was part of the prosecution evidence. We do find that the prosecution did not prove its case beyond reasonable doubt against the 2<sup>nd</sup> appellant.

According to PW1 he attended a parade and identified the 3<sup>rd</sup> appellant. The evidence of PW2 SP Nehemia Bitok is that he conducted the parade and the witness was PW1. The parade form that was produced indicates that the parade was conducted on the 7.5.2009. The record of the trial court shows that the 1<sup>st</sup> and 2<sup>nd</sup> appellants were charged in court on the 26.3.2009. The matter was mentioned several times until 20.8.2009 when the same was consolidated with the Criminal Case No. 948 of 2009. The consolidation brought in the 3<sup>rd</sup> appellant. According to PW7 AP GEOFFREY NANDASABA he arrested the 3<sup>rd</sup> appellant on the 3.5.2009 on suspicion that he had committed a burglary at the home of one MARY. In his defence the 3<sup>rd</sup> appellant testified that he was arrested on the 4.5.2009 at 1.30 a.m. in the morning by AP officers from Murhanda AP Camp. He was brought to court on 8.5.2009 when he was charged. It is clear that the 3<sup>rd</sup> appellant was not arrested for the current offence but was a suspect of a burglary. We have not seen the charge sheet for the criminal case number 948 of 2009 but we are satisfied that PW1 was not the complainant in that matter since the same police station could not have charged the appellant separately. From the record of the trial court it is clear that the appellant was arrested on the night of 3<sup>rd</sup> and 4<sup>th</sup> May 2009. An identification parade was conducted on the 7.5.2009 after the other two appellants had been charged in court. The arrest of the 3<sup>rd</sup> appellant was not because of the description of the physical appearance of the appellant given by the complainant. It was just a mere coincidence that the appellant was made to undergo an identification parade.

According to PW6 the robbery occurred at about 10.30 p.m. They were accosted by about 6 people. It was raining and muddy. It is the evidence of PW1 that he was chased away but he managed to identify the 3<sup>rd</sup> appellant and gave his description to the police as a short and stout man. PW6 did not run away and had the advantage of staying with the robbers for some time as he was stripped naked yet he could not identify the robbers. According to PW1 he used the light from the head lamp of the motorcycle to identify the robbers. We are not satisfied that the conditions were conducive for positive identification. There is no evidence that the robbers were seated so that the light from the motorcycle could have flashed on them. It is common knowledge that a motorcycle is of lower ground than an average adult. It was not

possible for the motorcycle to have flashed on the faces of 6 robbers while being cycled by the complainant. It was raining and the evidence on record shows that the incident occurred at a corner. The arrest of the 3<sup>rd</sup> appellant was not as a result of the description given by PW1. The 3<sup>rd</sup> appellant was arrested over 1 ½ months after the robbery had occurred. We do find that the identification is not full proof.

In the end, we do find the appeal is merited and the same is allowed. The appellants shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 9<sup>th</sup> day of May 2013

**SAID J. CHITEMBWE**

**B. THURANIRA JADEN**

**J U D G E**

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