REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 229, 230, & 231 of 2011

1. RAPHAEL YULU MUTIA

2. WAMBUA SYUKI MUSAU

3. ERIC KALULU KIVERENGE …….APPELLANTS

VERSUS

REPUBLIC .....RESPONDENT

(*Being an appeal from original conviction and sentence in Kilungu Senior Resident Magistrate's Court Criminal Case No.7/2011 by Hon. H. Nyakweba, SRM 29/11/2011)*

JUDGMENT

The Appellants were charged before the Senior Resident Magistrate's Court at Kilungu with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 8th January, 2011 at Kilome slaughter house, Kilome market Mukaa District in Makueni County while armed with dangerous weapons namely knives and iron bar jointly with others not before court robbed **Joseph Mwongela Kalii** of a motor cycle registration number KMCK 365N make Kinrod valued at Kshs. 123,000/=, one mobile phone make nokia 2100 valued at Kshs. 3,500/= a black jacket valued at Kshs. 2,500/=, a pair of canvas shoes valued at Kshs. 1,000/= and cash Kshs. 500/= and immediately before the time of such robbery threatened to use actual violence to the said **Joseph Mwongela Kalii.** The appellants denied the charges and were soon thereafter put on trial.

The complainant, **Joseph Mwongela Kalii** was a motor cycle taxi operator with his base at Nunguni Market. He was the owner of motor cycle registration number KMCK 365N make Kinroad which he had purchased from one **Julius Mutua** on 2nd November, 2010. On 8th January, 2011 at around 8.00p.m., while at the Nunguni taxi stage he was approached by the 2nd appellant who wanted to be ferried to the Kilome slaughter house. The fare agreed was 100/=. The 2nd appellant was then taken to his destination by the complainant. On reaching the Kilome slaughter house, the 2nd appellant was joined by 1st appellant. The 2nd appellant asked the 1st appellant to pay for him the agreed fare of Kshs. 100/=. The 1st appellant removed a Kshs. 1000/= note to pay but the complainant said that he did not have the change for that kind of money. The 1st appellant then moved aside as if to make a call. It was then that the 3rd appellant emerged from the nearby bush armed with a club and a knife. He ordered the complainant off the motor cycle. The 1st and 3rd appellant then frog matched the complainant into the bush where they ransacked his pockets and took away cash Kshs. 500/= mobile phone make Nokia 2100 black leather jacket and a pair of his canvass shoes. They abandoned him there, went back to the road, jumped onto his

motor cycle and sped off towards the Mutiluni Market direction. The complainant picked himself up and walked upto the Kilome market and reported to his colleagues and police officers on patrol the theft of his motorcycle. Shortly, a motor cycle taxi operator arrived from the Mutiluni direction and confirmed having seen a motor cycle fitting the complainant's description being rode towards Mutiluni with two pillion passengers aboard. A police officer on patrol called an administration police officer at Mutiluni Administration Police Camp and requested him to intercept the said motor cycle. The complainant did not know any of the appellants.

There was another motor cycle operator, **Tom Kiio Kithome** (PW2) who was using this road at the time. At Kilome slaughter house, he encountered a stationary motor cycle with its rider and other three persons standing. He slowed down to enquire if there was any problem. One of the persons standing was brown, tall and with big lips, replied that there was none. He used the light from his motor cycle to identify this person. He then proceeded on. Later he learned that the owner of the said motor cycle had been robbed of the same. He assisted the complainant to Kilome Police Station to report. The following day, he heard that the motor cycle had been recovered and some suspects arrested and were being held at the Mutiluni A.P. Camp. He joined a convoy of taxi operators to the post, where the suspects were shown to them. He was able to recognize the 3rd appellant as the one whom he had talked to at the scene of crime.

Another motorcycle taxi operator (PW3) was on 8th January, 2011 waiting for a customer at Mutiluni market next to a butchery when he saw one person pushing a motor cycle as two others walked along with him. One of these two people was holding a jerrican. The person carrying a jerrican requested him to help them with fuel but he turned down the request. He used electricity light to identify all these persons although it was his first time to see them. The customer he was waiting for soon came and he took him to Malili. While at Malili he received a call from an administration police officer, **Stanley Maina** (PW4) with information that a motorcycle had been stolen and driven towards Mavivye market. He called him to Mutiluni to take them to Mavivye and he complied. At Mutiluni, he picked three officers and they drove towards Mavivye. These officers alighted at the Mavivye junction as he went to Mavivye. Shortly before Mavivye he encountered three people on a motor cycle riding towards the junction where he had dropped the police officers. Having confirmed that this was indeed the same motor cycle they had been tracking, he turned and followed it. At the junction, he put on his full lights and hazards and blew the horn while shouting "*this was the motorcycle"*. The three police officers swung into action. One of them hit the front wheel of this motor cycle throwing its driver off- balance and the motor cycle overturned. The three riders were then arrested and handed over to **Cpl Raphael Terer** who upon further investigations charged the appellants with the offence.

In their defence, each of the appellants made an unsworn statement and called no witness. The 2nd appellant who was the 1st accused stated that on 8th January, 2011; he left Nunguni for Mutiluni escorting a lady. At Mutiluni the lady asked him to wait for her. As he waited he entered a bar to have drinks. When this lady did not show up at 8.00pm, he enquired if the bar offered accommodation. He was arrested by the person from whom he had made the inquiry. He was thrown into the cells because of being drunk. He did not know why he was arrested until he was arraigned in court. He denied committing this offence.

The third appellant who was the 2nd accused during the trial stated that on 8th January, 2011, he was walking home from Malili. At around Mutiluni market he met with a lady whom he engaged in a conversation. Shortly, they came across three men, one of whom grabbed his hand and asked him to identify himself. These men then accused him of having affairs with other people's wives. They led him to the rear of a shop where they detained him. At around 8.00pm another person was thrown into the cells and a third one at 9.30pm. They all remained in the cells until 12.30pm when they were taken to the Kilome Police Station and later charged. He also denied committing this offence.

The 1st appellant who was prosecuted as the 3rd accused testified that on 8th January, 2011 when walking home at Mutiluni market from Salama market was stopped by three A.P. officers in uniform. They asked him to identify himself which he did. However since he did not have his identity card, they arrested him and escorted him to their cells where he found one inmate. Later in the night,

another person was thrown into the same cells. They all remained here until morning. Later in the day, they were transferred to Kilome Police Station. The following day, he was arraigned in court and charged with an offence he knew nothing about.

The learned magistrate having carefully considered and evaluated evidence tendered by both the prosecution and the defence was satisfied that the prosecution had proved its case beyond reasonable doubts as against the appellants, convicted them and sentenced them to death as required by law.

The appellants were each aggrieved by the conviction and sentence. Accordingly, they individually and separately lodged appeals to this court. The grounds of appeal were similar in nature. They all revolved around their dock identification, gross violation of section 85(2) of the Criminal Procedure Code, the doctrine of recent possession was wrongly invoked, prosecution evidence was full of inconsistencies and contradictions and finally, their plausible and formidable defences were wrongly rejected.

When the appeal came up for plenary hearing before us on 10th July, 2012, 2012, **Mrs Gakobo,** learned Principal State Counsel applied that the 3 appeals be consolidated since they arose from the same trial in the subordinate court and for ease of hearing. The appellants not objecting the request by the State was duly granted.

In urging their respective appeals the appellants with our permission filed written submissions. We have carefully read and considered them alongside cited authorities.

The State opposed the appeals. In doing so, **Mrs Gakobo** submitted that the prosecution had proved that the complainant had been accosted by the appellants who proceeded to rob him of his motor cycle and other personal effects. The appellants were soon thereafter arrested in possession of the motorcycle. This was hardly 2 hours after the robbery. The learned magistrate therefore appropriately invoked the doctrine of recent possession to find the conviction. The conviction of the appellant was therefore founded on credible evidence.

As a first appellate court, it is our duty to re-evaluate the evidence and reach our own independent decision. As we do so however, we must remind ourselves to make allowance for the fact that we neither saw nor heard witnesses who testified. See **Okeno vs Republic [1972] E.A. 32**. We have done so. We are nonetheless persuaded that the evidence adduced at the trial in support of the doctrine of recent possession was sufficient to support the verdict reached by the trial magistrate and that the conviction was safe.

The learned magistrate was alive to the inherent dangers of convicting the appellants on the evidence of identification. He observed and rightly so in our view, that the complainant had conceded that it was the first time he was encountering the appellants during the robbery. In his evidence before the trial court, he did not tell how he was able to identify them. He merely thundered that he was able to identify the appellants without saying how. But when it came to cross-examination, he muddled himself up. He even went to the extent of admitting that infact he had not identified any of the appellants. In a bid to bolster its case against the appellants with regard to identification, the prosecution brought in PW2. However, his evidence was no better than that of the complainant. Despite saying that he was able to identify the 3rd appellant using the lights from his motorcycle, he did not indicate how long was such lights focused on the said appellant as to enable him to be able to positively identify him. Such focus if at all there was any must have been a matter of seconds, which was not sufficient to enable him identify the said appellant. Worse, when challenged in cross-examination on that aspect of the matter, they owned up that they had not said in their 1st reports to the police that they could identify the appellants or any one of them.

Again it conceded that the offence was committed at night, at 8pm to be precise. It was dark. The appellants were strangers to both PW1 and 2. If indeed these witnesses had identified the appellants, they should have given a description of them to the police who would later arrange and carry out a proper police identification parade. This did not happen. Accordingly, the alleged identification of the appellants

can only pass for dock identification which is of little evidential value.

Considering all the above factors, the learned magistrate was clearly right in not basing his conviction of the appellants on the element of identification. Accordingly, the appellants' grounds of appeal touching on the issue of identification cannot come under serious consideration.

Instead the learned magistrate chose to rely on the doctrine of recent possession to convict the appellants. In doing so, he believed the prosecution case that the appellants were arrested shortly after the robbery as they rode on the stolen motor cycle. Once evidence of possession of recently stolen goods is tendered, the trial court is entitled to draw an inference that the possessor is guilty of stealing or dealing in stolen property. That is unless the possessor comes up with plausible explanation for the possession. See **Malinga vs Republic [1989] KLR 225** where the Court of Appeal remarked

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession.; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver."

The learned magistrate, who saw and heard all the witnesses, also disbelieved the appellants' defences of being framed up with the case. He did not see any or any valid reason why the complainant, PW3 and PW4 would want to frame the appellants with the offence. They stood to gain nothing from such an undertaking. The prosecution evidence in our view with regard to the appellants' possession of the motor cycle far outweighed the appellants' denials.

The learned magistrate found as a fact that the appellants were arrested as they rode on the motor cycle belonging to the complainant and therefore they were in possession thereof. There is no doubt at all that the said motor cycle was the same one which had just been stolen, hardly 2 hours there before from the complainant. There is equally no question that it belonged to the complainant and was positively identified as such. A motor cycle is not the kind of item that can easily change hands. Having been found in possession of a stolen motor cycle, duty was cast upon the appellant to show or explain how they had come by the possession. They offered no such explanation. They only attempted to poke holes in the prosecution evidence on recovery by claiming that no inventory of the recovery was tendered in evidence to prove that they were found in possession of the motorcycle. This submission should be read together with their basic defence at the trial that they did not commit the crime and that they were simply framed. We respond to this by pointing out that there is no legal requirement that an "*inventory form*" be tendered in evidence to conclusively prove that a person was found in possession of stolen property. All that the law requires is proof that a person was found in exclusive possession of stolen property. Evidence of such exclusive possession can take several forms – including *viva voce* evidence of witnesses as happened in this case. Here, two witnesses positively testified that the appellants were arrested whilst in possession of the stolen motor cycle.

Like the trial court we find the doctrine of recent possession applicable here. We find, on the evidence, that the appellants were, indeed, found in possession of the stolen motorcycle and find no doubt that it belonged to the complainant. We also find that the appellants failed to explain their possession satisfactory leading to the ineluctable conclusion that they are guilty of the robbery offence charged.

The appellants have raised the issue that they were prosecuted by a person who was least qualified to prosecute them. That they were prosecuted by a police constable by the name **Muasya.** That was illegal since under section 85(2) of the Criminal Procedure Code, only a police officer of the stature of an inspector of police and above was entitled to prosecute. They drew their solace in the case of **Elirema vs Republic [2003] 1 KLR 537** in which the Court of Appeal observed that where such an incompetent

officer prosecutes a criminal case such a trial is a nullity. However, arising from this decision the Attorney General moved with alacrity amended the section. That was by act No. 7 of 2007. That amendment did away with the requirement that a police prosecutor must be of the rank of police inspector and above. All that the Attorney General was required to do was to appoint any advocate of the High Court or person employed in the public service to be a public prosecutor for the purposes of any case. The appellants were first arraigned in court on 10th January, 2011. They were prosecuted after this amendment had come into force. The appellants have not demonstrated that **PC Muasya** was not so appointed and or that he was a person not employed in the public service.

The end result is that, we have no hesitation whatsoever in confirming the conviction and sentences handed out by the trial court after our own independent re-evaluation of the evidence presented. We therefore dismiss the 3 appeals in their entirety.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **5TH** dayof **OCTOBER 2012.**

ASIKE MAKHANDIA **GEORGE DULU**

JUDGE **JUDGE**