



**REPUBLIC OF KENYA**

**HIGH COURT OF NAIROBI (MILIMANI LAW COURTS)**

**misc appl 497 of 98**

**JOSHUA ATUA**

**OJWANG.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT:**

The appellant JOSHUA ATUA OJWANG' was found guilty of robbery contrary to section 296(1) of the Penal Code. He originally had been charged under section 296(2) with robbery with violence. The trial magistrate did not convict the appellant, but proceeded to sentence him to four years imprisonment with four strokes of the cane. The High Court (Wambilyangah, J.) dismissed OJWANG's appeal without correcting the omission by the trial court and entering a conviction.

The robbery with which the appellant was charged jointly with others who were not before the court took place at night on 25th February, 1997. The complainant FLORENCE ODINDO ANDALA estimated the time to have been 8 p.m. when she heard one of her children call out and cry. She looked and saw a group of people already in the dining room of her house. One of them greeted her and demanded money. He hit her on the thigh, and she fell on the bed, raised her hands in surrender and promised to give them the money. She gave them altogether KShs. 26,000/-, but although they complained that that was not enough they left. FLORENCE's assailants wore hoods so she was unable to identify anyone of them. When the attackers left FLORENCE screamed. The villagers responded physically by turning up and the chase of the attackers ensued but none was apprehended. This is what FLORENCE said in the trial court: "They were collected and brought to my house and then later reported the matter. One of the bicycles was later identified to belong to the accused. I had not seen it before. After reporting to police I recorded my statement."

In cross-examination she added - "I do not know the bicycles. Police officers knew them." In brief the complainant did not even know where the bicycles came from.

FLORENCE's co-wife CONSOLATA ODINDO (P.W.2) was one of the people who came to her (FLORENCE's) rescue. The robbers were nowhere to be seen. They had vanished in the night, and although someone who flashed a torch light at CONSOLATA ordered her to go back and she obeyed, she did not give the identity of the person. CONSOLATA was joined by ADDA and the two ran out to the road shouting and informed the villagers who came out about the attack. When they all went to FLORENCE's house they found she had been locked in from the outside and they opened for her. She told them that she had not been injured. CONSOLATA said: "On checking outside we found 6 bicycles. We took them to the police station and also made a report."

Like her co-wife CONSOLATA did not identify anyone but she testified that she identified one of the bicycles which belonged to ATUA (the appellant OJWANG') which she said she used to see at Bondo. When OJWANG' cross-examined her CONSOLATA said that she used to see him riding the same bicycle and it did not have a mark. She also said that she did not know the frame number but she knew it. How she knew it must have been her (CONSOLATA's) jealously guarded secret. What CONSOLATA did not also say was how far from FLORENCE'S house was the venue where the six bicycles were found and whether they all were in the same place or different spots. Who specifically found the bicycles?

The bicycles were delivered to Bondo Police Station the same night on 25th February, 1997, and were received by Corporal EMILIO MBOGO (P.W.3) who was on duty. This witness identified one of the bicycles as belonging to the appellant. He said the appellant had before gone with it to the police station and had lent it to him. The police witness had a memorable experience with that particular bicycle when his pair of trousers was caught between the torn part of the saddle when he was riding it (the bicycle). He remembered that the bicycle of OJWANG' had a red seat and its frame had no number. CPL MBOGOH when cross-examined admitted that he had arrested many bicycles without frame numbers and the marks he had talked of being on the alleged OJWANG's bicycle were common on other bicycles. Above all the witness could not know whether the bicycle (assuming it belonged to the appellant) could have been used by someone else in the commission of the robbery. Another police witness P.C. CHARLES KARIUKI said that he had seen the same bicycle severally and could establish that the seat was torn on its right side. It will be remembered that CPL MBOGOH who claimed to have seen the bicycle and even used it did not give the specifics of the torn side of the saddle. PC CHARLES KARIUKI learned while at the police station (undoubtedly from CPL MBOGOH) that the particular bicycle had no frame number. PC KARIUKI too admitted that there were many bicycles with red saddles.

The appellant gave sworn testimony and denied on oath ownership of the said bicycle. When asked to identify any of the six bicycles he was shown by the Bondo OCS the appellant did not identify any. The appellant said that the Chief of the location was the only person who said that he (chief) could identify the bicycle. The appellant denied committing the robbery or being present and that his bicycle was among the six found in the bush. He said that he was arrested with his bicycle which was released on 11th March, 1997. He challenged the prosecution to prove that the alleged bicycle belonged to him. His sworn evidence was not seriously challenged.

What we have detailed in this brief judgment is the total sum of the circumstantial evidence upon which the appellant was found guilty of robbery contrary to section 296(1) of the Penal Code. In a case wholly dependent on circumstantial evidence it is necessary before drawing the inference of the accused's guilt from such evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference - see *TEPER V. THE QUEEN* [1952] AC 480 at p. 489. In this case there are co-existing circumstances which destroy or weaken the inference of the appellant's guilt. For example lack of evidence as to the exact venue where the six bicycles were found; absence of any evidence connecting one of the bicycles with the appellant as belonging to him; lack of any peculiar marks of identification or features on the bicycle alleged to belong to the appellant; lack of proof that the appellant was or must have been in possession of one of the six bicycles at the material time at the scene of crime.

Although the evidence before the trial court might have raised a strong suspicion that the appellant might have been one of the robbers, who attacked and robbed the complainant on the night of 25th February, 1997, a proposition to which we do not contribute, the accused could not in law be convicted on a mere suspicion however strong that suspicion might be. The guilt of the accused must be proved beyond a reasonable doubt, that is, a doubt to which one can give a reason as opposed to a mere fanciful sort of speculation - see *MSA Criminal Appeal No. 80 of 1997 PATRICK NABISWA V. REPUBLIC - UR*. The Principal State Counsel for the Republic did not support the conviction. With respect we agree with him. For the reasons we have given we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held. We accordingly so order.

**Dated and delivered at Kisumu this 16th day of June,**

**1998.**

**Z.R. CHESONI .....**

**CHIEF JUSTICE**

**J.E. GICHERU .....**

**JUDGE OF APPEAL**

**A.M. AKIWUMI .....**

**JUDGE OF APPEAL**