



REPUBLIC OF KENYA

Court of Appeal, at Kisumu

Criminal Appeal No 66 of 1985

Yahuma

versus

Republic

(Appeal from the High Court at Kakamega, Gicheru J)

December 4, 1985, Hancox, Nyarangi JJA & Gachuhi Ag, JA delivered the following

Judgment.

The circumstances giving rise to this appeal took place on the January 30, 1982, on what was said to be a lonely road near the Alure Leprosy Centre, at which the appellant said he was employed for some ten years as head clerk.

The case as presented by the prosecution was that the complainant, Paulo Oremo Kechore, a patient at the Centre, was returning there with his bicycle at about 5.00 pm when he was met by the appellant who demanded the payment of a debt. Before he could give any satisfactory answer the appellant seized him, and tried to take the bicycle. In the ensuing struggle the appellant tore the pocket of the shirt which the complainant was wearing and removed Kshs 175.00 from it. The complainant's screams attracted the attention of another patient at the center, Julius Makhanu, PW 3 who saw them fighting and separated them. The complainant said he had been robbed of Kshs 175.00 and he, the witness, said he saw the complainant strike the bicycle, presumably with the jembe which he had with him.

After telling the appellant to report to the police rather than damaging the complainant's bicycle, Julius left and later told the police at Adongosi Police Station what had happened. The appellant was seen carrying the damaged bicycle at 5.30 pm going towards Uganda by Pastiano Esibal (PW 2). It was eventually found hidden in the bush near the Uganda border at 4.00 pm on the next day by a herdsman Christopher Emonyang, PW 5, still in its damaged condition. It was then taken to Adongosi Police Station.

The appellant in his unsworn defence gave an entirely different version. He said he was visited in his home by the complainant and three police officers at 7.30 pm, the same evening and asked if he had taken the bicycle and the Kshs 175.00 an accusation which he denied. He said the complaint was the result of a grudge because he, the appellant, had prevented the complainant from running Army boots goat hides and other contraband across the border. The police added that if the appellant paid them Kshs 1,200 the matter would not go to court, with the result that he (the appellant) could keep his job. The magistrate evaluated the evidence, and for those which seem to us entirely inadequate reasons, accepted the prosecution's version, convicted the appellant and sentenced him to one year's imprisonment, two strokes corporal punishment and to five years supervision for the offence of robbery contrary to section 296 (1) of the

Penal Code, which the appellant was charged in Criminal Case 2467 of 1982. He had previously been charged with stealing the money and maliciously damaging the bicycle in R M Busia Criminal Case 484 of 1982, but that charge was withdrawn on June 28, 1982, and the present one instituted the next day.

The learned Judge, Gicheru J summarily rejected the first appeal on the April 4, 1983, but, as a result of this court's order of the June 22 1984, the first appeal was re-instated for hearing and was dismissed by the same judge in a reasoned judgment, on November 16, 1984 and this despite the lack of support of his conviction by learned State Counsel at Kakamega, a matter for which we have sought explanation in view of the Republic's present attitude. It is from that second High Court decision that this appeal is now brought.

Almost the only thing that is clear from the facts as seen and testified to is that there was a fight between the parties, and that the appellant struck the complainant's bicycle with his jembe. The damaged bicycle was later recovered, but this did not give any indication that the complainant was robbed of it, as he said, any more than that it was damaged in anger by the appellant after a quarrel. Indeed the facts are consistent with the latter sequence of events, even though it was not one put forward by the appellant.

The next unsatisfactory matter is that the torn shirt and pocket, to which the appellant rightly drew our attention was never exhibited. This was a vital piece of evidence and its absence is, we think, fatal to an acceptance of the prosecution's case. A third factor is that obviously the police originally thought that the bicycle was the subject of a malicious damage charge, rather than one of robbery, for why else would they have charged him two different offences? This fact indicates that it was never part of original case that the complainant was robbed of his bicycle.

The true explanation, we think is that there was a meeting between the two, that an argument ensued, and the appellant either took that which he thought was his just due, or out of malice for what he thought had happened to him, hit the bicycle, damaging the frame and buckling the rear wheel. This would equally be consistent with an argument over money, or with the appellant's stated refusal to allow the complainant to move goods illegally across the border. Either way the facts do not, we think, indicate a robbery.

We appreciate that there were concurrent findings of fact by both lower courts, but the reason for rejection of the defence case were that it showed a consistency with the damage being done to the bicycle by the appellant, for the magistrate said,

“Again, Makhanu saw it being struck with a jembe by the accused. He supports the complainant in this. Emonyong also found it hidden, but in a damaged condition. It is already exhibited in Court in the same state.”

Surely anyone intent on robbing another of his bicycle, particularly one who could easily identify him, would not wish to damage an item which he wished to keep for himself. Again the magistrate said that Makhanu heard the appellant boasting to the complainant that he could do what he liked about the alleged robbery of the Kshs 175.00

That is more consistent with a dispute over the money, and indeed raises a possible claim of fight, than with robbery. In his second judgment Gicheru J said that the evidence as to the damaged bicycle provided corroboration of the complainant's evidence as against the appellant. This was just what it was not, being more consistent with the appellant's actions being in anger and with the charge sheet as originally presented.

We therefore, with reluctance, for it is a matter which this court hesitates to do on second appeal, disagree with the findings of fact of the lower courts. We consider the facts are inconsistent with a robbery by the appellant committed on the complainant.

For these reasons we allow the appeal, quash the appellant's conviction and set aside the sentence imposed on him.

Appeal allowed.

Delivered on the **December 4, 1985**

Hancox, Nyarangi JJA & Gachuhi Ag, JA