



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 94 OF 2014

BETWEEN

BEUMAZI NDORO CHAILA.....APPELLANT

AND

REPUBLIC.....

RESPONDENT

(Being an appeal from the Judgment of the High of Court of Kenya at Mombasa (Odero & Muya, JJ.) dated 29th May, 2014 in H.C.CRA. No. 43 of 2011)

JUDGMENT OF THE COURT

This is a second appeal and by dint of **Section 361** of the Criminal Procedure Code, such an appeal lies only on questions of law. That being the case, this Court is, therefore, precluded from questioning the findings of fact of the trial court as confirmed by the 1st appellate court, provided that there was evidence to support those findings. We can interfere though, where we consider that there was no evidence to support the findings of fact, this being a question of law. See **Rex v Hassan Binsaid alias Kimani Somali, [1902] IX EACA 62.**

The background to this 2nd appeal is fairly simple and straightforward. **Bakari Mwareje Juma** “*the complainant*” was a livestock trader who plied his trade at Mwangulu and Kinango Trading Centres in Kwale County. In the early hours of 7th September, 2009 at 5.20 a.m. to be precise, he was on his way to Mwangulu Trading Centre riding his bicycle, make Phoenix. His mission was to buy livestock. On the way, he was waylaid by three men who were armed with pangas. They immediately set upon him and cut him on the head, shoulders and the back, all in a bid to wrestle the bicycle from him. Eventually, they overpowered him and he was forced to run into the nearby bush screaming as they pursued him.

The complainant managed to evade his assailants and ran into the home of **Chimboza Hassan**, having left behind the bicycle. He sought refuge in the home and whilst there he contacted his brother, **Stondo Juma Mwareje (PW2)** who came by and assisted him to Mwangulu Police Post. On the way, they went past the scene of crime and noted that the attackers had, in fact, made away with the bicycle. At Mwangulu Police Post, the complainant was received by **P.C. Joseph Mutiso (PW8)**. After noting down the complaint, he issued the complainant with the P3 Form and escorted him to Mwangulu Dispensary for treatment. The P3 Form was subsequently filled by **Tilus Kyalo, (PW9)**, a Clinical Officer then based at

Kinango District Hospital. He assessed the injuries inflicted on the complainant as harm.

In the meantime, **Juma Bemdudu** (PW3), who ran a pharmacy at Burani Shopping Centre in Mariakani Sub-County of Kilifi County on 13th September, 2009, was in dire need of transport to take some Makuti to his home. The appellant got wind of his predicaments and offered to sell him his bicycle for that purpose at Kshs.1,500/=. PW3 was not averse to the idea. He duly bought the bicycle and used it to transport the Makuti as aforesaid. Thereafter, he handed the bicycle to his brothers, **Hassan** and **Sheti** for purposes of business and running errands. A few days later, as Sheti was using the bicycle, he came by the information that the complainant had earlier on been attacked and robbed of his bicycle by unknown persons. Suspecting that the bicycle in his possession could be the one that was stolen, he alerted PW3 and together they approached the complainant. On seeing the bicycle, the complainant positively identified it as his. PW3 told him that he had bought the bicycle 6 days earlier by the appellant who was a shoe shiner at Burani Shopping Centre, a person very well known to him.

They took up the matter with the local chief who then dispatched **Juma Salim Shambo**, (PW4), and **Boto Juma Mwareje** (PW5), members of the local Community Policing to arrest the appellant. They also knew the appellant very well as he was a common figure at the Shopping Centre. On 21st September, 2009, they proceeded to the home of the appellant and though he attempted to escape, they managed to subdue and arrested him and thereafter, escorted him to Kinango Police Station where he was rearrested by **P.C. Stephen Shikuli** (PW 7). However, since the offence was committed within the jurisdiction of Lunga Lunga Police Station, he transferred the appellant to the said station whereupon he was after completion of investigations charged with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars as stated in the charge sheet were that the appellant, on 7th September, 2009 at about 5:10 a.m. at Mirihini Village, Mwereni Location of Msambweni District, within the then Coast Province, jointly with another not before court robbed the complainant of one bicycle, make Phoenix, and at or immediately before or after the robbery, wounded the complainant.

On 28th September, 2009, the appellant was arraigned before the Senior Resident Magistrate's Court at Kwale to answer to the charge. He entered a plea of not guilty and the case proceeded to trial. In his unsworn statement of defence, the appellant maintained that he neither committed the offence, nor sold any bicycle to PW 3.

Having considered carefully the evidence adduced by the Prosecution as well as the defence, the trial court was ***"...satisfied that the accused sold the complainant's bicycle to the said witness. It is further on record that the bicycle was sold on 13th September, 2009. The robbery occurred on 7th September, 2009 about 6 days before the recovery. Because of the short duration between the time of robbery and that of recovery, the court will rely on the doctrine of recent possession and find that accused's defence does not offer any explanation as to how he came into possession of the same and that he (sic) must be presumed to be part of the gang that attacked and robbed the complainant"***.

With that, the trial court convicted the appellant and sentenced him to death. Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court at Mombasa on grounds that no evidence of his identification was tendered, nothing incriminating was found on him upon arrest, a crucial witness, that is, the Investigating Officer, was not called to testify, his defence was not given due consideration and lastly, that the sentence meted on him was unjust.

The appeal was heard by **Odero** and **Muya, JJ.**, who in a judgment dated 29th May, 2014, dismissed the same thereby precipitating this second and perhaps last appeal on the grounds that; the charge was defective for want of specifics with regard to the bicycle, the doctrine of recent possession was wrongly invoked, the appellant may well have been a mere handler, there was no corroborative evidence and finally, the two courts below fell into error by dismissing the appellant's defence and by so doing, shifted the burden of proof from the prosecution to the appellant which resulted in a miscarriage of justice.

Supporting the appeal, **Mr. Nabwana**, learned counsel for the appellant submitted that the doctrine of recent possession was applied erroneously as no witness pointed at the accused as being the person who

stole the bicycle. At best and in the circumstances of this case, the appellant could only have been guilty of handling stolen goods. The appellant having denied stealing the bicycle or selling it to PW3, that denial alone rebutted the application of the doctrine of recent possession.

Counsel further submitted that there were several contradictions in the prosecution case which ought to but were not resolved in favour of the appellant and that failure by the prosecution to call the Investigating Officer in the case was fatal since the Investigating Officer would have helped in resolving the contradictions. For this submission, counsel relied on the case of **Ahmed Salim & Another v Republic, Cr. App. No. 38 of 1997 (UR)**.

Opposing the appeal, **Mr. Wamotsa**, learned Senior Prosecution Counsel submitted that under **Section 143** of the Evidence Act, it is not the number of witnesses called that determine the weight of evidence and that failure to call the Investigating Officer was not fatal as there was no allegation that his evidence, if adduced, would have been adverse to the prosecution case. In any event, counsel submitted, if the defence felt that his evidence was crucial, nothing stopped them from summoning him. As far as counsel was concerned, the evidence tendered established the offence charged.

Counsel further submitted that contrary to the assertions by the appellant, the evidence before the court was consistent, corroborative and overwhelming. There were no contradictions at all in the prosecution's case. On the application of the doctrine of recent possession, counsel submitted that the two courts below concurrently invoked the doctrine based on the evidence on record. The conviction of the appellant on the basis of the doctrine cannot, therefore, be faulted. Further, such evidence did not constitute the offence of handling stolen goods. The recovery of the bicycle was so soon after or recent such that the appellant could only be deemed to have been the robber.

From the submissions of respective counsel, the issues of law that arise are basically two namely, the application of the doctrine of recent possession and the failure by the prosecution to call a crucial witness i.e. the Investigating Officer.

The essence of the doctrine of recent possession is that when a person is found in possession of recently stolen property, and cannot provide a reasonable explanation for that fact, the court may infer that he or she either stole the property or received it knowing that it was stolen. Though referred to as "*doctrine*" this is simply a matter of a court drawing an inference from common piece of circumstantial evidence that the accused possessed recently stolen property. The inference is drawn from possession of recently stolen property rather than recently taking possession of stolen property.

However, before the court can draw the inference from the accused's possession of recently stolen property, it must be satisfied of five matters:

- i. That the accused was in possession of the property;**
- ii. That the property was positively identified by the complainant;**
- iii. That the property was recently stolen;**
- iv. 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;**
- v. That there are no co-existing circumstances, which point to any other person as having been in possession and;**

The doctrine being a rebuttal presumption of facts is rebuttable with an accused being called upon to offer an explanation, which if he fails to do an inference is drawn that he either stole or is guilty receiver. See also **Section 119** of the Evidence Act.

In proving possession, the prosecution must establish that the accused had possession of the property in

question, i.e. had custody of or control over that property and intended to have custody or exercise control over it. The fact that a third party has physical possession of the property does not mean it could not have been possessed by the accused. In this regard, the prosecution does not need to prove that the accused was actually caught with the property in his or her possession. It is sufficient to prove that the accused possessed the property at the relevant time.

Again, the term “*recent*” depends, as already stated, on the nature of the property. Frequently circulated property such as bank notes remain “*recently stolen*” for a shorter period than less frequently traded objects like cars, books, clothes, electronic appliances etc. For all the above propositions, see generally:

- **Andrea Obonyo & Others v R, [1962] E A 542.**
- **Republic v Kowky R, [1988] SC R 59.**
- **Malingi v Republic, [1989] KLR 225.**
- **Peter Kariuki Kibue v Republic, [2001] eKLR and David Mugo Kimunge v Republic [2015] eKLR.**

Applying the above cases to the appeal before us, we surmise that the inference arising from the unexplained possession of stolen goods is one of fact. The trial court was best placed to appreciate and hear witnesses who testified before it. As always, the first and second appellant courts must of necessity give allowance for this advantage and be slow in interfering. Nothing has been demonstrated to us as to invite our intervention. Again, both courts below were of the concurrent finding that the property was the possession of the appellant. These concurrent findings must be respected by us unless it is demonstrated that there was no legal or factual basis for such findings. None has been demonstrated.

Before us, the appellant submitted that to the extent that the stolen bicycle was found in possession of PW 3 who claimed to have bought the same from the appellant, the appellant was thereby not in possession. As we have already demonstrated possession may be direct, physical or even constructive. In this case, there was evidence that 6 days after the bicycle was stolen from PW1 the appellant offered to sell it and did sell to PW 3. The evidence of the aforesaid transaction was not controverted at all by the appellant. The time that the appellant was deemed to be in possession was the time when he offered to sell the bicycle and not when it was found in possession of PW3 who was an innocent purchaser. In this case, the prosecution no doubt proved that the appellant possessed the bicycle at the relevant time.

On the basis of the foregoing, the appellant’s defence that he was not found in physical possession of the bicycle falls flat on its face. The bicycle was positively identified by PW1. The appellant did not claim ownership of the bicycle. Instead, before us, he denied positive identification of the bicycle on the basis that the charge sheet referred to Phoenix as the make of the bicycle whereas, the evidence suggested Avon as the make. Whether the make is Phoenix or Avon is a matter of fact. In any event, given his defence, this is a non-issue. Finally, on this, we would say that on the evidence, the bicycle had some parts belonging to Phoenix and others belonging to Avon bicycle models.

No doubt the bicycle was stolen from PW1 during a violent robbery. The time taken, the nature of the item and the time taken to investigate the case does not in our view negate the application of the doctrine of recent possession in this case. The findings by the two courts below on all material elements were factual and there was credible evidential material upon which the findings could reasonably be made.

We are thus satisfied on the basis of the applicable law, that the two courts below were entitled to arrive at the conclusions they did and we have no reason to disturb them.

The appellant took issue with the fact that the Investigating Officer was not called as a witness by the Prosecution. In **Bukenya & Others v Uganda [1972] E.A. 549**, the former East Africa Court of Appeal held that the Prosecution has a duty to call all witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had a duty to call any witness whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case. This proposition which we agree with entirely was, however, espoused

in the context where the evidence was barely adequate. This propositions must also be seen in light of **Section 143** of the Evidence Act which provides that, in the absence of any requirement by provision of the law, no particular number of witnesses shall be required for the proof of any fact. In this case, there was no paucity of evidence. If anything, the evidence was simply overwhelming against the appellant. There were no loose ends in the prosecution case that the said, Investigating Officer would have helped by his evidence to tie them up. In any event, the conviction of the appellant turned on the application of the doctrine of recent possession. In the circumstances, we are unable to appreciate what value the evidence of the Investigating Officer would have added to the other evidence already on record.

In the end, we are satisfied that the High Court dismissed the appeal rightly as the appellant was properly convicted of the offence of robbery with violence as charged and accordingly we dismiss this appeal.

Dated and delivered at Mombasa this 26th day of February, 2016.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR