



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

CRIMINAL APPEAL NO. 12 OF 2014

BETWEEN

ERICK OMONDI OKELLO APPELLANT

AND

REPUBLIC RESPONDENT

Appeal from the Judgment of the High Court of Kenya at Kisumu (Chemitei & Muchelule, JJ.) dated 10th December, 2013

in

HCCRA. NO. 22 OF 2012)

JUDGMENT OF THE COURT

1. The appellant was convicted of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the charge were that on the 22nd day of November, 2010 at Umala Sub- Location in Ugenya District, being armed with dangerous weapons, namely, a panga and a rungu, the appellant and his accomplice robbed **Wilson Omondi Oloo**, the complainant, of his motor cycle make TVS Star, registration number KMCM 387 F and a mobile phone make Nokia 1200 and at or immediately after the time of such robbery used actual violence to the said complainant.
2. The appellant was sentenced to death as by law prescribed. His appeal to the High Court was dismissed, hence this second appeal.
3. The complainant used to operate a motor cycle for hire. On the material day he carried a passenger and upon reaching a place known as Asego, the passenger alighted but refused to pay the agreed fare. The passenger ran off and shortly thereafter two people emerged from behind. It was about 7.00p.m. The complainant alleged that it was not very dark and was able to see the faces of the two people.
4. The two assailants were armed with a panga and a rungu. The complainant was hit and he took off, leaving behind the motor cycle. Shortly thereafter the complainant reported the incident to the police. He also notified his cousin who was living in Kisumu. After two days he received a call from his cousin, who informed him that some people who were in possession of his stolen motor cycle had been arrested at Kisumu.

5. The complainant travelled to Kisumu and positively identified the motor cycle. He also identified the two people who had been found in possession of the motor cycle. He alleged that they were the ones who had attacked and robbed him of the same.

6. Regarding the arrest of the two (*the appellant and his co-accused who escaped custody*), **P. C. Paul Magut, PW 2**, and **APC Jacob Ekenye, PW 3**, testified that on 24th November, 2010 they were informed by a member of the public that there were two people selling a motor cycle that was suspected to have been stolen. Posing as potential buyers, they approached the sellers and negotiated to buy it at a price of Kshs.50,000/=. They arrested the two and escorted them to Central Police Station. The complainant, armed with its purchase documents, went to the station and positively identified the motor cycle that he had been robbed of two days earlier.

7. In his defence, the appellant stated that on 24th November, 2010 as he was walking to a food kiosk for lunch he was stopped by PW 2 and PW 3. The two police officers interrogated him briefly then took him together with the stolen motor cycle to Central Police Station. Later on he was put in a police vehicle together with the complainant and two police officers and taken to Ugunja Police Station. On 27th November, 2010 he was transferred to Ukwala Police Station where an identification parade was conducted. The complainant easily picked him out since he had already seen him, having travelled together in the same vehicle from Kisumu. The appellant denied having committed the said robbery.

8. **Mr. Omay**, learned counsel for the appellant, argued that the High Court, as the first appellate court, failed to re-evaluate and critically examine the evidence tendered before the trial court, erred in failing to find that the identification parade was a sham, failed to find that the appellant was not in actual possession of the stolen motor cycle, and also erred in shifting the burden of proof to the appellant.

9. **Mr. Ketoo**, learned prosecution counsel, opposed the appeal. He submitted that the High Court rightly re-evaluated the evidence and came to its own independent conclusion. He further submitted that the appellant's conviction rested on his possession of the stolen motor cycle, just two days after the robbery. As he was unable to explain how he came by it, the trial court was entitled to conclude that he was involved in the robbery.

10. Regarding the evidence of identification, Mr. Ketoo submitted that the complainant testified that during the robbery he was able to identify the appellant and so it was not difficult to pick him out during the identification parade.

11. We have carefully considered the record of appeal as well as the submissions by counsel. This being a second appeal, by dint of **section 361** of the **Criminal Procedure Code**, the Court is restricted to consider matters of law only. In **KARINGO V REPUBLIC [1982] KLR 213**, this Court held:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did”.

12. Regarding the evidence of identification of the appellant, the complainant testified that the robbery occurred at around 7.00p.m. He said that there was no darkness. He did not state that there was any source of light at the scene of the robbery. In the circumstances, it is doubtful whether he could properly have seen the faces of his assailants. When the complainant reported the robbery to the police, he said that he was robbed by people who were unknown to him. He did not even give their description.

13. Turning to the identification parade, the complainant saw the appellant at the Central Police Station, Kisumu, when he went to identify the recovered motor cycle. Thereafter they travelled together in a police vehicle from Kisumu to Ugunja Police Station. The identification parade that was conducted at Ukwala Police Station was therefore of no value at all since the person sought to be identified was already known to the complainant. We would agree with the appellant's counsel that the evidence of identification of the appellant was too weak to sustain a conviction.

14. But that is not all. The trial court also relied on the doctrine of recent possession to convict the appellant. The appellant and his accomplice were found in possession of the stolen motor cycle, two days after the robbery. They were selling it at a throw away price of Kshs.50,000/=. According to **P. Exhibit 3 (b)**, (*the purchase receipt*), the motor cycle had been bought on 16th September, 2010 at a price of Kshs.160,000/=.

15. The complainant produced documents that showed that he was the special owner of the motor cycle, although it had not yet been registered in his name. In law, a special owner is a person who has a special interest in a property. Such a person possesses a qualified ownership in that property.

16. The appellant and his run away accomplice had no documents pertaining to the said motor cycle. They did not explain how they had acquired possession of the same. The appellant admitted having been arrested on 24th November, 2010 and having been escorted to Central Police Station together with the motor cycle.

17. Both the trial court as well as the High Court rightly applied the principles to be followed in proving the doctrine of recent possession as laid down by this Court in **Isaac Ngugi Kalinga Alias Peter Ngugi Kalinga V Republic, [2004] eKLR.**

18. We find no merit in this appeal and consequently dismiss it in its entirety.

DATED and delivered at Kisumu this 12th day of February, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR