



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GBM KARIUKI, J. MOHAMMED & KANTAI, J.J.A.

CRIMINAL APPEAL NO. 311 OF 2012

BETWEEN

AUGUSTI ERASMI APPELLANT

AND

REPUBLIC RESPONDENT

**(An appeal from the judgment of the High Court of Kenya at Machakos (Kariuki & Kimaru, JJ)
dated 11th May, 2012 in HC CR.A. NO. 433 OF 2008)**

JUDGMENT OF THE COURT

Background

1. The appellant, **AUGUSTI ERASMI**, a Tanzanian national was charged with robbery with violence contrary to **section 296(2) of the Penal Code**. The particulars of the charge were that on the 23rd day of September, 2006 at Illasit Trading Centre in the then Kajiado District within the Rift Valley Province, the appellant together with others not before the court robbed **GEORGE KIMANI KARANJA** of a motor cycle make 'Lifan' valued at KShs.70,000/- and at or immediately after the time of such robbery struck the said George Kimani Karanja occasioning him actual bodily harm.

2. The prosecution called five [5] witnesses in support of its case. The complainant is a motorcycle transport [*boda boda*] operator, at Illasit market in Loitoktok district. He testified that on 23rd day of September, 2006, at around 9pm the appellant approached him with a request to ferry him to an agreed destination at an agreed price. After negotiations the complainant agreed to do the job for KShs.80/-. The appellant then boarded the motorcycle as a pillion passenger and they started the journey to the agreed destination. As they were heading to their destination through a bushy path, the appellant asked the complainant to slow down because that stretch was too dusty and he was apprehensive that he would fall. The complainant reassured the appellant that he was in full control of the motorcycle. The two men continued with their journey but soon thereafter the appellant shouted that he had been hurt and asked the complainant to stop. As he stopped, two people emerged from both sides of the path armed with a knife, a torch and a *panga*. The appellant then grabbed the complainant's chest and showed him something that appeared to be a gun. After a struggle with the attackers, the complainant managed to jump off the motorcycle and ran into a nearby farm. The complainant ran into the farm while shouting that his motorcycle had been stolen. He also called his friends who came with Administration Police Officers

from Illasit. By this time the thugs had disappeared with his motorcycle.

3. A search was mounted for the thugs and the motorcycle which search went on until 3am but it did not yield any positive results. A search team was that morning at about 10am gathered and detailed to cross into the Tanzanian side to look for the motor bike. As they were preparing to go into Tanzania, two people who were coming from Tanzania informed them that a motorcycle had been recovered in Tanzania and was stored at Tarakea Police Station. After receiving the information, the complainant went to Tarakea Police Station where he was advised to make a report at Loitoktok Police Station so that the Kenya Police would collect the motorcycle. He did as he had been instructed and Inspector of Police Joseph Mwinzi (PW4) and PC Michael Mwela (PW5) accompanied him to Tarakea Police Station where the complainant identified his lost motorcycle and it was handed over to PW4 and PW5. PW4 and PW5 were also handed the appellant who was in the cells at Tarakea Police Station and they escorted him with the motorcycle to Loitoktok Police Station.

4. Ali Juma (PW2) and Detective Senior Sergeant Benjamin Baitan (PW3) testified that the appellant had been arrested at Kibaoni in Tanzania as he and his colleague were pushing the motorcycle.

5. The appellant in his unsworn defence informed the court that on the material day, 23rd September, 2006, at about 5:45am, he was on his journey to Mawatetu to buy fruits when he met a man with a motorcycle. The motorcycle had a mechanical problem and the man therefore asked him to assist to push it to a garage which he agreed to. As they were pushing the motorcycle towards Kibaoni, this man ran away leaving the motorcycle with him. The appellant was then arrested by members of the public and taken to Tarakea Police Station.

6. The trial court disregarded the identification parade that was carried out as the complainant had seen the appellant at the police station two days before the identification parade was carried out. The trial court considered the evidence of PW2 and PW3, indicating that the appellant was arrested with the complainant's motor cycle at Kibaoni area in Tanzania on 24th September, 2006 at 4:40 am, around seven [7] hours after the robbery, as uncontroverted.

The trial court applied the doctrine of recent possession and held that the appellant was bound to explain how he obtained possession of the motorcycle. The appellant's explanation to the court regarding his possession of the motorcycle was found to be unconvincing. The court accordingly, convicted the appellant and sentenced him to suffer death.

7. On first appeal, the High Court considered and analysed the evidence adduced in the trial court. The court found that the trial court had properly applied the doctrine of recent possession. The court held that the defence proffered by the appellant did not dent the otherwise strong evidence adduced by the prosecution in support of its case on the charge with robbery with violence contrary to **section 296(2) of the Penal Code**. The court dismissed the appeal and upheld the appellant's conviction and sentence.

8. Aggrieved by the decision of the High Court, the appellant filed a second appeal to this Court raising several grounds of appeal which can be summarized as follows:

i. The evidence relied on was contradictory and inconsistent;

ii. The identification parade was conducted in violation of the laid down rules as per Chapter 46 of the Police Standing Orders;

iii. The appellant was detained in custody for more than the required time which was contrary to section 75 (3) (b) of the repealed Constitution;

iv. The charge sheet was defective as it violated the provisions of section 214 as read with section 134 of the Criminal Procedure Code;

v. The court did not give cogent reasons for rejecting the appellant's defence which violated

section 169 (1) of the Criminal Procedure Code.

The appellant prays that this Court allows his appeal and his conviction be quashed and sentence set aside.

Submissions by counsel

9. Mr Omari, learned counsel for the appellant, submitted that he would rely on ground No. 5, that is, that the charge was defective and abandoned all the other grounds of appeal. Counsel argued that in his judgment, the trial magistrate disregarded the identification parade; that the court convicted the appellant under the doctrine of recent possession; that the appellant should have been convicted of handling of stolen property rather than robbery with violence and the charge sheet was therefore defective. Counsel argued that the appellant was convicted of handling of stolen property which charge does not attract the death sentence.

10. Mr Kivihya, the Assistant Director of Public Prosecutions opposed the appeal. He submitted that there was no variance between the charge and the evidence; that the High Court looked at the evidence adduced in totality and arrived at the right decision; that the appellant was convicted on the basis of the doctrine of recent possession; that the appellant was found with the stolen motorcycle and had no credible explanation regarding how he came into possession of a stolen motorcycle. Counsel urged that the appeal lacked merit and should be dismissed.

Determination

11. This is a second appeal and the Court is constrained to consider only questions of law. **Section 361 of the Criminal Procedure Code** provides

that:

“A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section

(a) on a matter of fact, and severity of sentence is a matter of fact.”

12. This point was further emphasised in ***KARINGO V R, (1982) KLR 213*** where the court held that:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence.”

See ***CHEMAGONG V R, (1984) KLR 213*** and ***REUBEN KARARI S/o KARANJA V R, 17 EACA 146***.

13. **Section 296 of the Penal Code** provides as follows:

“(1)/ Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.” [Emphasis added]

14. The ingredients of the offence of robbery with violence were further elaborated on by this Court in the case of ***OLUOCH V R, [1985] KLR*** where it was held that robbery with violence is committed in any of the following circumstances:

“(a) The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person. [Emphasis supplied]

The three factors to be satisfied for an offence under that section are exclusive and the prosecution need only prove one factor for the offence to be held to have been committed.

15. The prosecution proved through evidence to the required standard that a robbery took place involving the complainant's motorcycle and during that robbery, the complainant was injured by the appellant and his accomplices who were armed with dangerous weapons.

16. The trial court disregarded the identification parade as the complainant had seen the appellant at the police cells before the identification parade was conducted. This was a proper holding in law because the complainant had seen the appellant at the Police Station two days before. The court proceeded to convict the appellant based on the doctrine of recent possession. The principles to be followed in the doctrine of recent possession were laid down by this Court in ***ARUM V R, CR NO. 85 OF 2005*** where it was held that the doctrine is applicable where the court is satisfied that the prosecution has proved the following:

a. that the property was found with the suspect;

b. that the property was positively identified by the complainant;

c. that the property was stolen from the complainant; and

d. that the property was recently stolen from the complainant.

17. On the question of recent possession, in the case of ***OGEMBO V R, [2003] EA*** it was held that:

“For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen.”

18. Further, in the case of ***MALINGI V R, [1989] 225*** this Court stated:

“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; that the item he had 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.”
[Emphasis added]

19. The doctrine of recent possession is a rebuttable presumption of fact. Accordingly, the appellant 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. As was aptly stated in the case of ***HASSAN V R, (2005) 2 KLR***

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“Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or the receiver”.

20. In the instant appeal, all the ingredients of recent possession were proved. The appellant was found with the motorcycle seven hours after the robbery and he did not give any reasonably credible explanation of how he came to be in possession of the motorcycle a few hours after the robbery.

Accordingly, we find that in the circumstances of this appeal, the doctrine of recent possession was applicable and was proved.

21. Regarding whether the charge sheet was defective, **Section 134 of the Criminal Procedure Code** provides in mandatory terms that every charge should be precise and abundantly clear to an accused person. It provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

22. What constitutes a defective charge sheet was spelt out in the case of ***SIGLIANI V R, (2004) 2 KLR 480***, where it was held that:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

23. From the evidence on record, the appellant knew from the onset that the charge facing him was robbery with violence. Its particulars were clearly spelt out, which included the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. This is confirmed by the fact that in the trial, the appellant extensively cross examined prosecution witnesses and defended himself. The appellant’s counsel’s contention is that the charge sheet was defective as the identification parade was disowned by the trial court and that the particulars of the offence disclose the offence of handling of stolen goods under **section 322 of the Penal Code**.

24. We find that this argument lacks merit as the conduct and subsequent disregard of the identification parade has absolutely nothing to do with the charge sheet as framed. Similarly, the particulars of the charge properly disclosed the offence which the appellant was charged with: robbery with violence. As the doctrine of recent possession applied, it means that the appellant was the thief who robbed the complainant. As the evidence of robbery with violence was proved and all the ingredients of the offence under **section 296(2) of the Penal Code** were also proved, the conviction was well founded. The charge sheet was not defective in any way at all.

25. In the premises, we find that the appellant was properly convicted of the offence of robbery with violence contrary to **section 296(2) of the Penal Code**.

Accordingly the appeal lacks merit and is dismissed in its entirety.

Dated and delivered at Nairobi this 29th day of July, 2016.

G. B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR