



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CRIMINAL APPEAL NO. 347 OF 2011

BETWEEN

JOHN OUMA KARANI APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisumu (Abida-Aroni, J.) dated 28th February, 2012

in

H.C.CR.A. NO. 46 OF 2011)

JUDGMENT OF THE COURT

1. This is a second appeal by **John Ouma Karani** against his conviction and sentence on the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. His first appeal was dismissed by Ali-Aroni and Chemitei, JJ in their judgment dated 28th February 2012 which provoked this one.
2. In his memorandum of appeal, the appellant complains that had the learned Judges of the High Court properly re-evaluated the evidence on record, they would have realized that his purported identification was flawed and his conviction was based on insufficient and contradictory evidence.
3. The brief facts of the case were that a blue Boxer motor cycle whose registration number is stated in the charge sheet as KMCG 862R was owned by one Daniel Owino (Owino). Owino gave it to Robert Omondi Omondi, PW1, to do “*boda boda*” business on his behalf.
4. On 3rd January 2010 at about 10.00 am when PW1 was at Ukwala Market, Anthony Onyango Oduor, PW2, went to him with 2 people who PW2 claimed he was supposed to take to Nzoia but he could not as his motor-cycle had had a puncture. PW2 therefore asked PW1 to ferry those people to Nzoia which PW1 agreed to do.
5. On the way PW1's motor-cycle got stuck in mud. Those people jumped off the motor-cycle and one of

them managed to ride it away as PW1 struggled with the other. That other person hit PW1 with a claw hammer and also managed to escape.

6. PW1 reported the matter to police who asked him to get PW2 as they suspected he was a confederate of the 2 robbers. PW2 claimed that when he went to Ukwala Police Station as directed, he was thrown into cells. He was released after two days after his parents had undertaken to compensate Owino of the stolen motor-cycle if PW2 and PW1 could not produce the two robbers.

7. 7. Having been released on that condition, PW2 went out looking for the robbers. He claimed that after several days he went to Busia to repair a puncture to his motor-cycle where he saw one of the robbers board a matatu at a bus stage near Matayo's Hotel. He caused him to be arrested and taken to police.

8. In court, PW1 and PW2 as well as another boda boda operator by the name Paul Ouma Odala, PW3, testified that they knew the appellant only by appearance. Although PW5 claimed that a parade was held for the identification of the appellant, the trial court, quite correctly in our view, found that no such parade was ever held. That left the testimony of PW1, PW2 and PW3 as the only evidence of identification of the appellant as one of the two people who robbed PW1 of a motor-cycle.

9. As we have stated, PW1, PW2 and PW3 claimed they knew the appellant by appearance, having seen him doing hawking business at Aboke trading centre. In cross-examination, however, PW2, the architect of the appellant's arrest conceded that his claim that he had known the appellant before was not in his statement to police. In cross-examination, PW1 who had also claimed he had known the appellant before and that he (PW1) had taken the appellant's sister to their home in Ukiya area conceded that he did not take police to the appellant's home as he "*didn't know him well.*" Later, while still under cross-examination, PW1 stated: "*I did not know the suspect [the appellant] clearly, (sic) I could only know (sic) upon seeing him clearly.*" He added that the person he knew well was the appellant's brother.

10. On his part, PW3 contradicted himself on the identification of the appellant. At one stage he claimed that he had, for about six months previously, seen the appellant at Aboke in cross-examination, however, he said he had not seen him do any business at Aboke.

11. In the absence of any identification parade, we find that the identification of the appellant by PW1 and PW3 is clearly dock identification, which has been held to be worthless. See **Martin Oduor Lango & Others v. Republic-Criminal Appeal No. 282 of 2012**. Bearing in mind that PW2 was desperate to get someone to "*hang*" for the theft of the motor-cycle to escape liability, a point that the High Court never addressed at all, and given the doubt elicited by cross-examination of PW1 and PW2, we find that PW2's identification of the appellant could easily have been mistaken. In the circumstances we agree with counsel for the appellant that had the High Court properly re-evaluated the evidence on record, it would have found that the identification of the appellant by PW1, PW2 and PW3 was doubtful and given the appellant the benefit of that doubt.

12. Beside the flawed identification of the appellant, there is another ground upon which we must allow this appeal. As we have stated, the registration of the stolen motor-cycle is stated on the charge sheet as KMCG 862R. There is no evidence that such motor-cycle exists and if so that it is indeed the one that was stolen in this case. This is because PW5, one of the police officers to whom the crime in this case was reported said he was told the motor-cycle belonged to a female. PW1 said the motor-cycle belonged to a male, one Daniel Owino. Owino was never called to testify. Even the motor-cycle's log book, which was said to have been with the police, was never produced in evidence. In the circumstances, we find that the theft of the motor-cycle having not been proved, the robbery charge against the appellant was not established.

13. For these reasons, we find that the appellant's conviction cannot be allowed to stand. We therefore allow this appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Kisumu this 21st day of May, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR