



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)**

**CRIMINAL APPEAL NO. 204 OF 2011**

**BETWEEN**

**STEPHEN SIFUNA KWATA .....1<sup>ST</sup> APPELLANT**

**GODFREY JUMA MUKARA .....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from a Judgment of the High Court of Kenya at Bungoma,*

*(Onyancha, J.) dated 20<sup>th</sup> July, 2011*

**in**

**H.C.C.R.A. NO. 121 OF 2010)**

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**JUDGMENT OF THE COURT**

**1. STEPHEN SIFUNA KWATA** (the 1<sup>st</sup> appellant) and **GODFREY JUMA MUKARA** (the 2<sup>nd</sup> appellant) were, upon trial on a charge of robbery with violence contrary to Section 296(2) of the Penal Code, convicted and sentenced to death.

2. The particulars of the charge were that during the night of 11<sup>th</sup> June 2009 at Mwanda Village of Bungoma South District (now Bungoma County) jointly while armed with a dangerous weapon namely an axe, the appellants robbed Isaac Wekesa Mbwonya of one TVS STAR motor cycle engine No. OF5K81470472 valued at Kshs.90,000/= and at or immediately before or immediately after that robbery they applied actual violence to the said Isaac Wekesa Mbwonya (the complainant).

3. The prosecution case was that the complainant used to operate a motorcycle transport business popularly known as “bodaboda” in Bungoma Town. On the material date at about 8.00 pm, while the complainant was at Lady Irene area in Bungoma Town, the appellants approached and requested him to transport them to Muande to pick chang’aa for sale at Bungoma. The appellant obliged. When they arrived at Muande, the appellants cut him with an axe, beat him up and robbed him of the said motorcycle which had not been registered. As the complainant knew Stephen Sifuna Kwata, the 1<sup>st</sup> appellant, he gave

his name to his (appellant's) sister who in turn gave it to PW2. The latter with other bodaboda operators arrested him and handed him to the police. The 1<sup>st</sup> appellant later led the police to the home of the second appellant whom they arrested and later the two were charged with robbery. After hearing before the Principal Magistrate at Bungoma, the two appellants were convicted and sentenced to death.

4. The appellants' appeals to the High Court having been dismissed, they have come to this Court on a second appeal alleging, in their nine ground memorandum of appeal, that they were not positively identified as the people who robbed the complainant and that had the learned Judges of the High Court properly re-evaluated the evidence on record, as they were obliged to, they would have realized that their conviction was based on suspicion and insufficient, contradictory and hearsay evidence as well as on the doctrine of recent possession that was neither proved nor applicable.

5. On identification, Mr. Bichanga, learned counsel for the appellant, submitted that the conditions at the scene of crime at the material time were not suitable for a positive identification. He argued that the motorcycle headlights which the complainant claimed enabled him to see the appellants were not trained on the appellants. Moreover, the complainant did not give the 2<sup>nd</sup> appellant's description to the police before he purported to identify him at the police identification parade.

6. On the second cluster of grounds, Mr. Bichanga argued that the complainant having conceded that he was using the stolen motorbike for the first time on the fateful night, that contradicted his evidence that the 1<sup>st</sup> appellant was his regular customer for whom he had previously transported chang'aa from Manda for sale in Bungoma Town. Counsel further submitted that the complainant said he was not present when the 1<sup>st</sup> appellant was arrested and that it was his father who informed him of the arrest. In the circumstances, counsel wondered who gave the 1<sup>st</sup> appellant's name to the police. He dismissed as hearsay the claim that it is the complainant's sister who gave the 1<sup>st</sup> appellant's name to the police as she was not called to testify.

7. Mr. Bichanga further submitted that the 2<sup>nd</sup> appellant, as PW2 conceded, was arrested on mere suspicion. The complainant said he did not know him and having not given his description to the police, his purported identification cannot be relied on. And the stolen motorcycle having not been found in his possession, the 2<sup>nd</sup> appellant said the doctrine of recent possession was neither proved nor applicable to him. In faulting the 2<sup>nd</sup> appellant for not explaining how he came to know where the stolen motorcycle was, counsel said the trial court shifted the burden of proof to the 2<sup>nd</sup> appellant. On those submissions, Counsel urged us to allow this appeal.

8. Mr. Omwega, learned Assistant Director of Public Prosecutions, strongly opposed this appeal. He submitted that there were security lights at the spot where the appellants and the complainant negotiated the fare they were to pay. Later at the scene of crime, the complainant was also able to see them well with the aid of the motorbike headlights.

9. He said the 1<sup>st</sup> appellant had previously been one of his regular customers. So he knew him well and he is the one who gave the 1<sup>st</sup> appellant's name to the police. After his arrest, the 1<sup>st</sup> appellant led to the arrest of the 2<sup>nd</sup> appellant. The latter in turn led the police to the recovery of the stolen motorbike. In the circumstances, he urged us to dismiss this appeal.

10. We have carefully read the record of appeal and considered these rival submissions. On the issue of identification, the complainant testified that on 11.6.2009 at about 8.00 pm when he was at Lady Irene area in Bungoma Town, the appellants accosted him and requested him to transport them to Manda to bring alcohol from there to Bungoma town. He knew the 1<sup>st</sup> appellant very well as he (the 1<sup>st</sup> appellant) had previously also regularly hired him to transport for him alcohol from Manda to Bungoma town. He, however, knew the 2<sup>nd</sup> appellant only by appearance. The complainant said there were streetlights at Lady Irene area which enabled him to see them well as they negotiated the fare to Manda.

11. The complainant took the appellants to Manda but they gave him only Sh. 60/= out of the agreed fare

of Kshs.150/=. The 1<sup>st</sup> appellant tried to give him a fake note of Sh.1000/= which he rejected. A disagreement therefore arose over the fare and the complainant decided to return to Bungoma. As he turned his motorbike, the headlights beamed the appellants' faces and he was, once again, able to see them well.

12. Before the complainant could ride away, the 1<sup>st</sup> appellant hit him with a stick and the 2<sup>nd</sup> appellant held him. They thereafter seriously assaulted him and robbed him of the motorbike. The complainant went to a nearby home where he was assisted to ring the area Assistant Chief and the police. The latter went to where he was and took him to Bungoma Hospital where he was admitted for 3 days. He was categorical that he is the one who gave the 1<sup>st</sup> appellant's name to the area Assistant Chief and the Police. PC Vincent Ngereza, PW4, confirmed that.

13. On hearing that the complainant had been taken to Bungoma District Hospital after being assaulted and robbed of the motorbike, the following day, PW2, who had given the stolen motorbike to the complainant, went there to see him. The complainant was, however, unable to speak to him at that time. The complainant's sister who was there informed PW2 that the complainant had been assaulted by one Stephen Sifuna for whom the complainant had previously regularly transported chang'aa from Manda to Bungoma Town and another person who the complainant only knew by appearance. PW2 knew Stephen Sifuna. He thereafter went with other bodaboda operators to his home and arrested him.

14. The 1<sup>st</sup> appellant named the 2<sup>nd</sup> appellant as his accomplice. PW2 and other bodaboda operators traced the 2<sup>nd</sup> appellant to Kanduyi Video Show premises and arrested him. The 2<sup>nd</sup> appellant in turn led them to the home of one Mandefu at Kimilili where they recovered the stolen motorbike. The people who were in that house ran away on seeing that search team.

15. From this account, which the two courts below carefully re-evaluated, we are satisfied that the complainant was able to identify the appellants. As we have said, there were electric streetlights at Lady Irene area in Bungoma town where the appellants approached the complainant and asked him to transport them to Manda to fetch alcohol for sale in Bungoma town. At Manda, as the complainant turned his motorbike to ride back to Bungoma after quarreling with the appellants on their failure to pay him the balance of the agreed fare, the motorbike headlight beamed the appellants' faces and he was able to again see them well.

16. As we have stated the complainant knew the 1<sup>st</sup> appellant very well. So his (the 1<sup>st</sup> appellant's) was a case of recognition. It is now an established principle on the issue of identification/recognition that recognition is more reassuring than mere identification of a stranger. See **Anjononi v. Republic, [1980] KLR 59.**

17. As regards the 2<sup>nd</sup> appellant, besides his identification by the complainant who previously knew him by appearance, he led PW2 and other bodaboda operators to Mandefu's home at Kimilili where the motorbike, which the complainant had been robbed of, was found. In the circumstances, we are in no doubt about the identification of the appellants as the people who robbed the complainant. Ground one of this appeal must therefore fail.

18. The second cluster of grounds is that the two courts below relied on suspicion and contradictory, insufficient and hearsay evidence to convict and sustain the appellants' conviction. The 2<sup>nd</sup> appellant also claimed that the trial court shifted to him the burden of proof. These grounds are also for dismissal.

19. The fact that the complainant was in hospital and was told of the 1<sup>st</sup> appellant's arrest by his father does not in any way assist the 1<sup>st</sup> appellant. And that the complainant's sister, Metrine, who gave the 2<sup>nd</sup> appellant's name to PW2 did not testify and that PW2's evidence in that regard was hearsay is also neither here nor there. The fact is that on the night of robbery before he was taken to Bungoma District Hospital, the complainant had given the 1<sup>st</sup> appellant's name and description to the Assistant Chief and the police who later re-arrested him after PW2 and his fellow bodaboda operators had arrested him. As

stated, the 1<sup>st</sup> appellant then named the 2<sup>nd</sup> appellant as his accomplice and the 2<sup>nd</sup> appellant led the police to Kimilili where the stolen motorbike was recovered.

20. We are also satisfied that the trial court did not in any way shift the burden of proof to the appellants. That court simply observed that the 2<sup>nd</sup> appellant's denial of involvement in the robbery could not be reconciled by his act of leading the police from Bungoma to Kimilili where the stolen motorbike was recovered.

21. On our part, after a careful re-evaluation of the evidence on record, we are satisfied that the appellants' conviction was founded on ample and credible evidence. Consequently, we find no merit in this appeal and we accordingly dismiss it in its entirety.

**DATED and delivered at Eldoret this 25<sup>th</sup> day of June, 2015.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**