IN THE COURT OF APPEAL

AT KISUMU

CORAM: (P. KIHARA KARIUKI, PCA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 52 OF 2013

BETWEEN

NYONGESA MAKOKHA SIRENGO …….…. APPELLANT

AND

REPUBLIC .....……..……..……..….....……. RESPONDENT

(An Appeal from a conviction and a Judgment of the High Court of Kenya at Bungoma (Hon. Kimaru & Muchelule, JJ.) dated 19th July, 2012

in

HCCR.A NO. 1 OF 2012)

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JUDMENT OF THE COURT

1. On 23rd December 2011 the Chief Magistrate's Court at Busia convicted the appellant, **Nyongesa Makokha Sirengo (alias Stephen)** for two offences. The first conviction was for the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The second was for the offence of theft of a motorcycle contrary to Section 278(A) of the Penal Code. He was sentenced to death for the offence of robbery with violence and to five years imprisonment for the offence of theft. The latter sentence was to remain in abeyance in view of the death sentence on the first count.

2. The essence of the prosecution case as regards the offence of robbery with violence was that the complainant, Silvanus Odour Okwara (PW1), a motorcycle boda boda operator at Nambale was hired by the appellant on 3rd October 2010 to take him to Funyula. Along the way, the appellant asked the complainant to stop the motorcycle, drew a knife and took off with the motorcycle. That was not the first time PW1 had hired the appellant. Immediately after the incident, PW1 telephoned Silvanus Barasa (PW2), another motorcycle boda boda operator at Nambale who had seen the appellant hire PW1, and narrated to him what had transpired. PW 2 joined PW 1 at the scene and together they mounted a hunt for the appellant and reported the incident to various police stations. PW1's motorcycle was ultimately recovered in the appellant's house with the second accused.

3. As regards the second charge, the prosecution case was that the appellant sold a motorcycle to Ernest

Owino Adero, (PW3) who then entrusted it to George Pedo, (PW4) to operate boda boda business on his behalf. Subsequently PW4 asserted that the appellant hired the same motorcycle from him. The appellant then allegedly reported to the police that the ownership documents in respect of that motorcycle were lost and obtained a police abstract to that effect. He thereafter purported to sell the same motorcycle to one George Onyapida from whom it was subsequently recovered.

4. Satisfied that the prosecution had proved its case, the trial court convicted the appellant on both counts. The appellant appealed to the High Court. Kimaru, J and Muchelule, J heard the appeal and dismissed it in a judgment delivered on 19th July, 2012.

The appeal

5. In this second appeal to this Court, the appellant has two main complaints, which were argued before us by learned counsel for the appellant, Mr. Onyango Jamsumbah. The first complaint is that the two courts below failed to consider that the appellant's right to a fair trial and that under Article 50 of the Constitution of Kenya, 2010 was breached for two reasons. In that regard, he asserts that he was denied legal representation and that he was not supplied with a witness statement of one of the witnesses, namely PW 9, beforehand.

6. The second complaint is that the courts below did not properly evaluate the evidence. If they had done so,counsel argued, they would have established that the charges were not proved to the required standard; the evidence was fraught with contradictions and inconsistencies; and the appellant was not properly identified.

7. Mr. Evans Ketoo learned prosecution counsel on behalf of the office of Director of Public Prosecutions for the respondent opposed the appeal. He submitted that the appellant was accorded a fair trial; that he (the appellant) had an opportunity to engage an advocate and did not require the trial court to advice him to do so; that he should in any event have raised the complaint at the earliest opportunity and cannot do so belatedly on appeal. As regards PW9's witness statement, counsel argued that the trial court properly guided itself as PW 9 had no witness statement but was called to merely produce a report.

8. On identification, Mr. Ketoo submitted that the robbery took place in broad light when conditions for positive identification were favourable; that the complainant knew the appellant and gave a detailed description of him when he reported to the police; that PW 2 also knew the appellant; and that in the circumstances an identification parade would not have served any useful purpose. According to counsel both offences were proved and the guilt of the appellant established to the required standard.

The Legal standard and issues for determination

9. Section 361(1) of Criminal Procedure Code restricts second appeals to matters of law. [See **M'Riungu v R [1983] KLR 455**]. Furthermore, we cannot, on a second appeal, interfere with the concurrent findings of fact by the lower courts unless such findings are not based on evidence, or are based on a misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. In **Karingo vs. Republic [1982] KLR 213**] the Court stated:

> ***"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. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari s/o Karanja vs. Republic* (1950) 17 EACA 146*)"***

10. Guided by those principles, the issues that require our consideration are three. The first is whether the appellant's constitutional right to a fair trial under Article 50 of the Constitution was violated. That in turn depends on whether he was denied his right to legal representation, and whether the trial judge correctly permitted PW 9 to testify despite the appellant not having been provided with his witness statement in

advance. The second issue is whether the lower courts correctly handled the issue of identification; whether in the absence of an identification parade, the evidence of identification was sufficient and whether the appellant was indeed positively identified. The third issue is whether the offence of theft under count two was proved. We will consider each issue in turn against the evidence that was placed before the trial court.

Analysis and Determination

11. On the issue whether the appellant's constitutional right to a fair trial under Article 50 of the Constitution was violated, there are, as already mentioned two aspects to this. The first is whether he was denied legal representation. The second is whether the testimony of PW 9 should have been excluded because the appellant did not have his witness statement in advance.

12. The record shows that when proceedings commenced before the trial court with the taking of plea on 16th March 2010, an advocate did not represent the appellant. When the evidence of PW 1 to PW 6 was taken between 15th September 2010 and 4th January 2011, the appellant conducted his own defence and cross-examined those witnesses himself.

13. Throughout that period the record does not show that the court informed the appellant of his right to choose, and be represented by an advocate. Neither does the record show that the appellant requested for an advocate to be assigned to him by the state or at state expense. Learned counsel Mr. Onyango Jamsumbah advocate appeared for the appellant (as well as for the appellant's co-accused) before the trial court for the first time on 1st April 2011. After the coming into effect of the Constitution of Kenya, 2010 on 29th August 2010, therefore, a considerable part of the trial proceedings took place without the appellant having the benefit of legal representation.

14. There is no doubt that the right to legal representation enshrined in Article 50 of the Constitution is an important component of a fair trial. In the case of **David Njoroge Macharia vs. Republic [2011] eKLR** this Court held that persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense if substantial injustice would otherwise result. The Court in **Douglas Kinyua Njeru vs. Republic [2015] eKLR** expressed the same view.

15. In the more recent case of **Isaiah Moroo vs. Republic [2015] eKLR** the Court stated:

> "**The importance of legal representation cannot be gainsaid and in a criminal trial where the life, liberty and property of an accused person is at stake, it is a critical cog in the wheel of justice and a signal step towards attaining equality of arms. Thus, the constitutional thought behind these provisions must be that an advocate is essential to criminal proceedings and so the trial court has a duty to inform an accused person, and promptly so, of his right to hire one and, if he be unable to, of the right to be provided with one at State expense. The Constitution itself limits the right to legal representation at State expense to only those cases in which "*substantial injustice would otherwise result*" a phrase the precise contours of which are yet to be delineated whether by statute or by judicial pronouncement**". [**emphasis added**].

16. The Court also addressed the issue at length in **Karisa Chengo & Others vs. Republic, Criminal Appeal Nos. 44, 45 and 76 of 2014 [2015] eKLR**. The Court urged parliament to fast track enactment of legislation envisaged under Article 261 of the Constitution to provide a comprehensive framework regarding the realization of the right to legal representation at state expense. The Court expressed the view that substantial injustice would arise:

> "***Where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another***…"

17. As to whether a breach of the right to legal representation should result in the acquittal of an accused person, the Court in **Karisa Chengo & Others vs. Republic** (supra) stated:

> "***As regards the denial of that representation in the instant case, we do not think that an acquittal is the remedy available to the appellants as they submitted. It cannot have been the intention of the framers of the Constitution, to halt all criminal prosecutions of persons charged with capital offences until the implementation of a scheme to provide legal representation to all persons charged with such offences. Sadly, again an acquittal is not the remedy available to the appellants even if their right was violated in the trial court."***

The Court went on to say:

> ***"This Court in Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008 has held that an acquittal is not an appropriate remedy where the alleged violation of fundamental rights of the accused has been proved. Nor did the appellant point out that the substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation***."

18. We think similar considerations arise in the circumstance of this case where the appellant was not informed of his right. Without condoning the omission by the trial court to discharge its duty under Article 50 of the Constitution to inform the appellant of his right to legal representation, we do not discern that the appellant was handicapped from conducting his defence. Up to the point that his advocate first appeared, he effectively cross-examined the prosecution witnesses. When his advocate appeared for the first time in the course of the trial, there was no mention that the appellant had not been informed of his right to legal representation or that he had been prejudiced by conducting his own defence. Neither was a request made, at that point for recalling of the witnesses who had testified in the absence of the advocate. The complaint was not raised before the High Court during the first appeal. It was raised for the first time before us. Although we accept that there is no evidence that the trial court discharged its duty under Article 50(2)(g) of the Constitution to inform the appellant of his right to choose, and be represented by an advocate, we do not think, in the circumstances, that the conviction should be quashed on that ground.

19. We turn to the complaint that the testimony of PW 9 should have been excluded because his witness statement was not provided to the appellant beforehand. At the outset of the trial, the court ordered that witness statements be supplied to the appellant. PW 9 was police constable Mulongo Talia of the Scene of Crime Section of the CID Office, Bungoma. He examined PW1's motorcycle that was allegedly stolen at 'knife point' by the appellant and prepared a report in which he concluded that the engine number of that motorcycle had been tampered with.

20. The prosecution asserted that beyond that report, the witness did not prepare a witness statement that would have been supplied to the appellant alongside other witness statements as had been ordered by the trial court. Technically, that might be the case. However, that report was prepared as early as February 2010 contained the substance of the evidence that PW 9 was to give. It should have been supplied to the appellant alongside the other witness statements, even though the order by the trial court for the prosecution to supply the appellant with witness statement did not specifically mention reports. As the Court stated in **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, the prosecution is required to provide an accused person in advance of the trial, "***all relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items***." The report produced by PW9 was such relevant material.

21. It was not satisfactory for the prosecution to say PW 9's report was not a witness statement. The report should have been made available to the appellant in advance alongside the witness statements. That said, however, the advocate for the appellant cross- examined PW 9 effectively and at length. We do not think that, that violation, for reasons given earlier in the context of the issue of legal representation, should result in an acquittal.

22. We advert now to the question whether the lower courts correctly handled the issue of identification. What then was the evidence in that regard?

23. On 3rd October 2010 at 9.00 am, PW 1, Silvanus Oduor Okwara, a motorcyclist taxi operator was at Nambale Market waiting for passengers. The appellant approached him and asked him to transport him to a place known as Funyula. They agreed on a charge of Kshs. 400.00. The charge would go up to Kshs. 600.00 for a return trip. He boarded PW1's motorcycle registration number KMCG 569M and they got on the way. Before reaching the destination, the appellant asked PW1 to stop the motorcycle at a place called Lakite. The appellant claimed he wanted to see somebody there. They entered a path where the appellant asked PW1 to stop the motorcycle. The appellant removed a knife, and PW 1 disembarked from the motorcycle. The appellant then took off with the motorcycle. PW 1 then telephoned Silvanus Barasa, PW 2, a colleague in the motorcycle taxi business who he had left at Nambale and sought his assistance after narrating to him what had happened.

24. PW 2 joined PW1 at Lakite and together they embarked on searching for the appellant. PW 2 had earlier that morning witnessed the appellant riding with PW 1 on his motorcycle at Nambale. They called at a home in Funyula where apparently PW 1 had dropped off the appellant on a previous occasion. They found a lady in that home who referred to the appellant as Steve. They proceeded to the appellant's father's home where they met his father who said the appellant's real name was Stephen Nyongesa Sirengo. They reported the incident at Bumala patrol base, Busia Police Station and Funyula Police Station.

25. Police constable Joseph Alukwa (PW7) received information from an informer who had been approached to look for a buyer for a motorcycle. Together with Police Constable Munyo, they met the informer who led them to the house of the appellant's co accused where they recovered the motorcycle and arrested the appellant's co accused Victorine Atieno and took him to Bungoma. The motorcycle did not have a number plate but PW7 gave its frame number as SWG 054555 and engine number BSF 31509. They then contacted the police from Busia who came and took Victorine Atieno together with the motorcycle to Busia.

26. Police Constable Peter Kamau (PW 6) from Busia Police Station was at the police station when PW 1 reported the incident of having been robbed of his motorcycle registration number KMCG 569M. Upon its recovery in Bungoma he accompanied Police Constable Otieno to Bungoma where they found the appellant's wife had been arrested and the motorcycle recovered at her house. They took her and the motorcycle to Busia and PW 1 identified it as his by its chassis number. He produced the ownership documents evidencing the purchase and registration.

27. Police constable Mulongo Talia(PW9) examined the motorcycle and concluded that the engine number had been interfered with and produced a report to that effect. The appellant was subsequently arrested by IP Haron Kipsang (PW 8) and charged alongside his wife after Police Constable Mark Otieno (PW 10) completed investigations. Based on his investigations, PW 10 established that the lady, (Victorine Atieno) in whose possession the motorcycle was recovered was married to the appellant.

28. According to PW1, he identified the appellant by appearance when he reported the incident to the police. He stated that he was with the appellant long enough to be able to recognize his appearance. He said that on the way from Nambale they had to disembark from the motorcycle to cross a river on foot and as they waded through the water and washed their feet, he had further opportunity to clearly see the appellant. The testimony of the prosecution witnesses was not shaken on cross- examination.

29. In his defence the appellant stated that he is a businessman in Bungoma where he sells second hand

clothes; that he was asleep at his house on 7th March 2010 when police woke him up. He was arrested and later taken to Busia Police Station before being charged with an offence on 16th March 2010. The charges were later "consolidated with some woman who used to be wife" but with whom they had disagreed three months earlier. He went on to say they had separated with his co accused by the time she was allegedly found with the motorcycle.

30. Based on that evidence, the trial court was satisfied that the appellant was positively identified as the incident occurred during the daytime. As to how the appellant was identified in connection with the charge of robbery with violence, the trial court stated:

> ***"PW 1 and PW2 clearly in their testimony stated on how they got to know the accused. They stated that they knew him by appearance and got the names from the home where he had been previously dropped. They followed him upto Busia and finally at Bungoma where he was arrested. It is*** [sic] ***therefore can't be said that they didn't know the person they were looking for. The complainant had definitely known of the accused and they are the ones*** [sic] ***which resulted in his arrest and subsequent charge before the court."***

31. b The trial magistrate was fortified in that conclusion by the fact that the motorcycle was recovered from a house where the appellant and 'his wife' the co accused who was acquitted, resided.

32. The High Court on its part after reviewing and re- evaluating the evidence concluded:

> ***" It was clear to this court that the appellant was properly identified by the complainant as the person who first posed as a passenger, before threatening the complainant with a knife and then robbing him of the motorcycle. The complainant was later to establish the identity of the appellant. The motorcycle was traced to the house of the appellant at Bungoma. Although the appellant denied owning the house that the motorcycle was found, the prosecution was able to adduce evidence which connected the appellant to the house. The woman living in the house, it was established, was the wife of the appellant. There was no substance in the claim by the appellant that he had separated with the woman by the name victoria Atieno. Infact, the woman was charged in the same case in the subordinate court as an accomplice of the appellant."***

33. In our view, the evidence supported those concurrent findings by the two courts below. Given the evidence of identification and the recovery of the motorcycle in possession of the appellant's wife a few days later, we are satisfied that the conclusions reached by both lower courts were well supported by the evidence. We are unable, as a matter of law, to find fault with both judgments regarding the approach taken and the conclusions reached as pertains to the identification of the appellant.

34. As this Court stated in **Adan Muraguri Mungara vs. R [2010] eKLR**, we must:

> "**Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere**."

35. The attempt by the appellant to disassociate and distance himself from his co accused and to disown her as his wife and also to distance himself from the house where the motorcycle was recovered is surprising. Surprising because when he attempted to do so in his defence, he must have forgotten that when his advocate was opposing an application by the prosecution for adjournment before the trial court on 1st April 2011 he (the advocate) was categorical that ***"A1 and A2 are husband and wife. They are both helpless. They have 4 issues the youngest is in custody with A2. The other issues who are out are truly suffering. They are looking at the court to offer a speed trial of this matter."*** The appellant's

subsequent attempt to distance himself from the house where the motorcycle was recovered and to disown his wife was 'convenient' and could not therefore be taken seriously.

36. For the foregoing reasons, we have no basis for interfering with the concurrent findings of the lower courts and uphold the conviction and sentence on the charge of robbery with violence.

37. As regards the conviction for the offence theft, we have entertained doubt that the charge was proved to the required standard. The prosecution case was that the appellant sold a motorcycle to Ernest Owino Adero, (PW 3) who then entrusted it to George Pedo, (PW4) to operate boda boda business on his behalf. Subsequently PW 4 asserted that the appellant hired the same motorcycle from him. The appellant then allegedly reported to the police that the ownership documents in respect of that motorcycle were lost and obtained a police abstract to that effect. He thereafter sold the same motorcycle to one George Onyapida from whom it was subsequently recovered.

38. The evidence of PW 3 was that it was PW 4 who in the first place introduced the appellant to him. After concluding the sale transaction, PW 3 then engaged PW 4 to operate the motorcycle. According to PW 4, the appellant then hired the motorcycle and did not return it. It is puzzling that after the appellant allegedly went off with the motorcycle and did not return it for sometime, PW 4 did not inform PW 3 about it until after PW 3 got worried and enquired about the motorcycle four days later. That creates the impression that PW4 may have been complicit in the disappearance of the motorcycle. Indeed the police treated PW 4 as a suspect and placed him in the cells before later releasing him. The person to whom the appellant allegedly sold the stolen motorcycle, one George Onyapidi, was not called to testify by the prosecution. In our view, his testimony would have shed light on the matter. That would probably explain the omission by the High Court to address itself to count two in the course of dealing with the first appeal. We are therefore not satisfied that the charge of theft was proved to the required standard.

39. The result of the foregoing is that the appellant's appeal partially succeeds. We hereby quash the conviction for the offence of theft of motorcycle under count II of the charge and set aside the sentence of five years imprisonment held in abeyance. We, however, uphold the conviction and sentence for the offence of robbery with violence.

Orders accordingly.

DATED and delivered at Kisumu This 17th day of December, 2015.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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