IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 290 OF 2010

BETWEEN

TITUS OTIENO OWINO……..…… APPELLANT

AND

REPUBLIC ……RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisumu (Karanja & Aroni, JJ.) dated 13th July, 2010

in

H.C.CR.A. 132 OF 2009)

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JUDGMENT OF THE COURT

This is a second appeal, the first appeal in the High Court vide Criminal Appeal Number 132 of 2009 having been dismissed. The record before us, the genesis of this appeal shows that the facts that gave rise to the entire saga are straight forward.The complainant **John Onyango Onyango (PW1**) **(Onyango)** and **Michael Otieno Adhola (PW2) (Michael)** were both bicycle repairers and had a workshop near Octopus Bar, on Mosque Road. They both lived at Otonglo market on the outskirts of Kisumu Town. On 7th October, 2008, they worked till late. At about 9.00 pm, as Onyango was riding his bicycle on his way home, and just as he was about to reach home, he heard a bang on his head and he fell down. He had been hit on the head and he lost consciousness. When he came to about 20 minutes later, he found he had been injured on his head and mouth and his bicycle was gone. Some good Samaritans helped him to Port Florence Hospital nearby where he was treated. He also realised that apart from his bicycle, his NOKIA mobile phone and his cash Ksh 2000 had also been stolen. He was admitted at the hospital for one week. He did not identify his attacker(s) at the time of the attack. His wife got the information about his predicament; went and saw him and thereafter went to the complainant's place of work and reported to Michael with whom he had been working that day and with whom they were together that evening till they parted as each was going to his home. On Michael receiving the information from the complainant's wife of the theft of Onyango's bicycle and other items, he passed the information to other colleagues of theirs. On 8th October, 2008, one day later at about 10.00 am, Michael saw the appellant riding Onyango's bicycle. He recognised the bicycle as that of the complainant as he had repaired it and Onyango had also used to carry him on the bicycle. He therefore apprehended the appellant seeing him riding the bicycle. He asked the appellant where he got the bicycle from and the appellant told him the

owner was at Fanana Bar. By that time more people had joined the two, so they asked him to take them to the *"owner"* at Fanana bar, but as they got to Fanana bar,the appellant ran away into a Police Post nearby which was housed in a container alleging that Michael and others wanted to kill him. The police advised Michael to go and report the alleged theft to Central Police Station. He complied and thereafter the appellant was moved from the Police Post to Central Police Station. **PC Fredrick Ojwaya (PW3**) who was manning the Police Post, referred to by Michael as a container, confirmed having received the appellant from Michael and his colleagues. He also received the subject bicycle and was taken to Port Florence Hospital where the complainant had been admitted. He recorded a statement from the complainant and issued him with a P3 form. That form was presented to **Benard Omollo (PW4) (Benard)** a Clinical Officer at Kisumu Hospital by the complainant on 7th November, 2008. After examining Onyango, Benard formed the opinion that Onyango had been seriously injured as X ray examination revealed fracture on the left middle finger, and he was also cut on the head and had a cut on the left hand. He classified the injuries as grievous harm. He produced P3 form prepared by him as Exh.1.

The appellant was thereafter, charged with the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code, the particulars of which were that:

> "***On the 7th day of October, 2008 at about 9.30 pm at Kobil Otonglo in Kisumu East District within Nyanza Province, robbed John Onyango Onyango of one bicycle Hero Jet, Nokia mobile phone make 1110 and Kshs.2000/= all valued at Kshs.10,500/= and at or immediately before or immediately after the time of such robbery -used actual violence to the said John Onyango Onyango."***

He denied the offence but after hearing all the four prosecution's witnesses, the learned trial Magistrate found a prima facie case made out against him and put him to his defence. His defence, given vide unsworn statement was:

> ***"I come from Ugenya. I transport water in Kisumu.***
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> ***On 8/9/08 I was on way to work and on reaching Octopus, I sat on some stones to wait for my handcart. Then Michael Otieno Onyango whom I know came to me with others. He asked me if I could remember what I had done. I said I could remember keeping some speakers for him. Then he told me to keep his speakers. From that day, Michael had not been happy with me because his speakers got lost. He and others started beating me saying I had stolen a bicycle. I told them not to beat me but to take me to the Police Station.***
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> ***They took me to the Police Station and said I had robbed John Onyango of a bicycle. I denied. I don't know John Onyango and I never robbed him that is all."***

The above is the entire evidence that was before the trial court and upon which that court convicted the appellant and after considering mitigating factors, sentenced the appellant to death. The learned Chief Magistrate, having analysed that evidence and having evaluated it stated:

> ***"As stated earlier, the complainant and the other prosecution's witnesses were strangers to the accused and I did not observe anything in their demeanour to suggest that they had any reason to give false testimony against the accused. I am satisfied that they spoke the truth and I believe them. I cannot say the same of the accused whose defence I have considered, found un-meritious and reject."***
>
> ***From the evidence on record and accused's unexplained possession of the complainant's bicycle so soon after the robbery, I am satisfied that he must be the person who attacked the complainant on the night of 7.10.2008 injuring him on the head and robbing him of the bicycle and other items as per the charge sheet. The prosecution having established its case against him beyond doubt, I find him guilty of the offence of robbery with violence contrary to Section 296 (2) Penal Code and convict him accordingly."***

As we have stated, he appealed against that conviction and sentence vide Criminal Appeal No. 132 of 2009 at the High Court at Kisumu. That court revisited the evidence set out hereabove afresh and having done so dismissed the appeal saying in doing so as follows:

> ***"The appellant denied responsibility but not the fact that he was found in possession of the complainant's stolen bicycle one day after the offence. He made no attempt to explain his possession of the bicycle. Instead, he took Martin (sic - should be Michael) (PW2) and his group on a "wild goose chase" in search of the alleged "owner" of the bicycle. He implied that he was fabricated by Martin (sic) (PW2) due to a disagreement on some speakers yet he betrayed his "innocence" by running away into the safe hands of the police when it emerged that there was no owner of the bicycle to be found at Fanana Bar. The conduct and recent possession of the complainant's stolen bicycle provided sufficient and credible circumstantial evidence to connect him to the offence beyond peradventure.....***
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> ***In sum, this appeal has no merit and is dismissed accordingly."***

The above two concurrent findings by the trial court and the High Court are what triggered this appeal based on three grounds in the Memorandum of Appeal dated and filed on 7th May, 2014. These grounds, which were before us argued together by Mr. Indimuli, the learned counsel for the appellant were:

> ***"1. That the superior court erred in law in failing to appreciate that the evidence on record was riddled with material inconsistencies that rendered the verdict therein a nullity.***
>
> ***2. The superior court erred in law in failing to analyse the evidence as a whole in arriving at its conclusions and findings.***
>
> ***3. The superior court shifted the burden of proof:"***

In his submissions before us on the above three grounds, Mr. Indimuli, stated that as the entire conviction was based on the doctrine of recent possession in that the appellant was found in possession of the complainant's bicycle stolen only one day previously and as he did not explain that possession, he was the thief. However there was no proof of that as the court failed to consider that the main and only witness who gave evidence leading to that conviction was Michael who, according to the appellant, was nursing grudges against the appellant and thus, there was no nexus between the alleged bicycle and the appellant.

Mr. Abele, the learned Assistant Director of Public Prosecutions, on the other hand supported the conviction submitting that the two courts below accepted the facts which clearly demonstrated that the appellant was found in possession of the complainant's bicycle which had been stolen from the complainant in the course of the robbery only one day back. He never gave any explanation for that possession and so he had no escape route.

As we said at the commencement of this Judgment, this is a second appeal. Our jurisdiction, according to the provisions of ***Section 361 (1)(a)*** of the Criminal Procedure Code, is limited to matters of law only. We have no jurisdiction to consider matters of fact unless we are persuaded that the two courts below proceeded on misapprehension of facts and therefore their judgment result into a perversion of justice in which case we would still view it on the basis that it is a matter of law.

Again, as we have stated, the facts giving rise to the entire matter are straightforward. Complainant is attacked at night- about 9.30pm; his head was hit and he fell down unconscious for about 20 minutes. He woke up to find his bicycle, his Ksh.2000/= and mobile phone all stolen. He could not identify his attacker and was rushed to a hospital where he was admitted for one week. His wife informed Michael the next day. Michael and complainant had been working together repairing bicycles. Michael had repaired the stolen bicycle and had been given a ride on it, so he knew the bicycle only too well. At about 10.00 am, on 8th October, 2008, he sees the appellant with the same bicycle. He apprehends him and asks

him where he got the bicycle from. The appellant offers to show the *"owner"* who was allegedly at Fanana bar, but as they were almost to reach the bar, the appellant ran to a Police Post. He did not, having gained his security, offer to take the police to the owner of the bicycle and did not give any other explanation of his possession of the subject bicycle. Instead, in court, he alleged that Michael had grudges with him over some speakers but throughout Michael's evidence the appellant never in his cross examination raised any issues of grudges arising from his failing to account for Michael's alleged speakers.

The conviction proceeded on the application of the doctrine of recent possession to the entire case and both courts found that the complainant was indeed attacked, injured and robbed of his bicycle, money and mobile phone. The appellant was found in possession of the stolen bicycle the next day and he never offered any explanation for his possession of the same stolen property so soon after the theft. In the circumstances the two courts below held him to be the thief. The principles which guide the courts when considering a case based on the doctrine of recent possession are now well settled. In the case of **Mwachanje & 2 Others vs Republic, (2002) 2 KLR 341,** the High Court sitting in Mombasa held inter alia:

> **"2. Where an accused is found in recent possession of goods alleged to have been stolen, he is under an obligation to explain how he came into such possession and that such possession is innocent. Failure to do so leads to the inescapable conclusion that he is the thief or robber."**

That was a decision of the High Court. It is of persuasive authority, but if that is not enough, the decision of another High Court in the case of **Malingi v R. (1989) KLR 225** makes the legal position even clearer. The court stated in that case as follows:

> **"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 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 item."**

And lastly, in the case of **Hassan vs Republic (2005) 2 KLR 151** this Court stated that:

> **"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 receiver."**

In this case, the trial court accepted the evidence of Onyango, the complainant, that his bicycle was stolen during the attack on him on the night of 7th October, 2008. He identified the bicycle by its cushion which he installed on it. Other items - money and mobile phone were also stolen during the same attack. The appellant did not dispute that. First appellate court confirmed that fact. It was also accepted that the next day, Michael found the appellant with that same bicycle and the two courts accepted Michael's evidence on that aspect. The appellant never claimed the bicycle and all he said was that Michael had grudges with him, but again that was not put to Michael when he gave evidence. Further, and we agree with the High Court, the appellant's conduct of saying that the bicycle was owned by somebody while on being challenged on that he bolted to a police post, where he never offered to show the police that alleged owner, all demonstrate his guilt. In our view, on the evidence on record and on proper application of the doctrine of recent possession, the two courts below had no option but to find the appellant guilty. We can see no basis for interference with the same conviction. The sentence was lawful and was not challenged on appeal.

In short, this appeal lacks merit. It must fail. It is dismissed.

Dated and Delivered at Kisumu this 13th day of June, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR