**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)**

**CRIMINAL APPEAL NO.32 OF 2014**

**BETWEEN**

**ERICK MACHARIA MUGO.....1ST APPELLANT**

**DAVID MUYA NJUGUNA.....2ND APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nyeri*

*(Ougo & Abuodha, JJ.) delivered on 28th October, 2013*

*in*

***H.C.CR.A No.117 & 119 of 2010)***

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**JUDGMENT OF THE COURT**

1. The appellants Erick Macharia Mugo and David Muya Njuguna were charged with one count of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***, ***Cap 63 of the Laws of Kenya*** and a second count of handling stolen goods contrary to ***Section 322 (2)*** of the ***Penal Code.*** They were convicted of both counts and sentenced to death for robbery with violence. The sentence on handling stolen goods was held in abeyance.

2. The particulars in the charge for robbery with violence is that on the 1st day of March, 2009, at Biriri village in Nyeri North District within the then Central Province, jointly with others not before court, robbed Simon Macharia Kanyi motor cycle registration No. KBF 235Z make MTR 1350 valued at Ksh. 80,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Simon Macharia Kanyi.

3. The appellants in their defence denied committing the offence more particularly denied stealing the motor cycle. The prosecution evidence as given by PW2 Simon Macharia Kanyi was geared to prove theft

of the motor cycle and use of violence during the offence. The two courts below relied on the doctrine of recent possession to convict the appellants. There are two set of opposing facts and circumstances leading to the alleged offence. The first set of opposing facts is given by the prosecution and the second is by the defence. To appreciate the context of the present appeal, both set of facts are outlined hereunder.

4. The set of facts and circumstances underpinning the prosecution case was given by PW2 Simon Macharia Kanyi the complainant. He testified as follows:

> ***"I am a motor cyclist taxi driver. I cycle motor cycle Reg. No. KBF 235Z. I was employed by one John Muiru Maina. On 1st March 2009 at 7.00 pm I was at Kimahuri Centre. The 1st accused (Erick Macharia) met me where I usually do the taxi work using the motor cycle. He requested me to carry him to a place called Kwa Suleiman near Tagwa Forest. We bargained for the fare and he agreed to Ksh. 150/=. I ferried him to the place and on arrival when I demanded for money, he removed a half full bottle of fanta and hit me on the forehead using the said bottle. I released the motor cycle wanting to protect myself. The other one emerged and axed me on the knee using an axe. I fell down and the 1st accused called for the sword saying that they should kill me. I woke up and ran away. They picked the motor cycle and drove away. The person who hit me I could not recognize him. I saw the two driving away the motor cycle. I ran to another homestead. I explained to them and they gave me a phone I called my brother. He came driving a motor vehicle and took me to Kiamariga Police Station. I was given a note to attend to Karatina General Hospital. As I was being treated I received a call that the motor cycle was recovered at Kiama Chibi road block. There was an identification parade that was conducted at Kiganjo police station. I identified the 1st accused person because he is the one I talked to as my customer and I had recognized him. I also saw the motor cycle at Kiganjo Police Station. I know the 1st accused person and the other whom I could not recognize at the scene. I was told that the motor cycle had been intercepted at the road block while two people were on board. I had not known the 1st accused before. I do not know why the particulars on the charge sheet do not include the dangerous weapons i.e knife, axe and a soda bottle".***

5. The second set of opposing facts is the testimony of the 1st appellant as DW1 Erick Macharia. He testified as follows:

> ***"I do the business of cooking and selling cakes. On 1st March, 2009, at about 3.00 pm, I was called by PW2 Simon Macharia Kanyi that we meet at Chaka so we collect money we had sold cakes. At 5.00 pm we returned back to Chaka at stage bar. While we were there, one customer came and bought us beer. At 6.30 pm, I told PW2 to take me home. He took me on his bicycle and he said he will not carry me since he was drunk. He called the 2nd accused who came with another person. He was given the keys and took me home.... While going, we were stopped by police officers at a road block. They told us the motor cycle was stolen and we were arrested. At the police station PW2 touched me during the identification parade. PW2 came to prison and asked me for my property. I refused to give him. That is when he told me I will see him. On 5th March 2009, PW2 came to prison to request for the apparatus that we were cooking cakes with. He has been coming to prison severally. I knew PW2 because we were cooking cakes and selling them at Chaka. I stay at Karatina. We were calculating the money we had collected at stage bar with PW2 from 5.00 pm to 6.00 pm. We had Ksh. 7,000/=. We had not quarrelled with PW2".***

6. The 2nd appellant David Muya Njuguna testified that he is a taxi motor cyclist. That on 1st March, 2009, at about 8.30 pm he was called by Michael Waruita (DW3) to go to stage bar to pick a customer. That he went to stage bar and met the 1st appellant and his friend. That he was told to take the first appellant to Karatina; that the 1st appellant boarded the motor bike and on their way they were stopped by policemen at a road block. That PW2 has been visiting them in prison and came to apologize. That he did not know PW2 prior to this incident; that PW2 did not give him keys of the motor cycle as he has his own bike.

7. DW 3 Michael Warutia testified that he called the 2nd appellant to go to stage bar to pick a customer who is the 1st appellant. That the 1st appellant was to be ferried to Karatina and he was shocked to hear that they had been arrested.

8. Police Corporal PW5 Kahindi Marsden testified as follows:

> ***"On 1st March, 2009, at around 6.00 pm I was sent to man the road block at Giaathiga junction along Karatina Nyeri road. I was with three (3) junior officers. At around 10.00 pm on the same day we heard information from police control room in Nyeri that there was a motor cycle Reg. No.KBF 235Z MTR that had been hijacked from somebody from Akorino Church between Kiamariga and Kiganjo area. I was informed that we should be on alert. At 11.11 pm, a motor cycle on board two people passed by the road block and we stopped it. We saw the number plate KBF hidden by smearing mud on it but one could vaguely read it. We had been given the registration number and we found it was the same. We arrested the two persons on board and retained the motor cycle. The two people I arrested that day in possession of the said motor cycle are the ones before court today".***

9. The trial court having heard the prosecution case and the defence testimony convicted the appellants for the offence of robbery with violence. The court expressed itself as follows in regards to the defence evidence:

> ***"DW3 happened to have another criminal case where he is charged with robbery with violence contrary to Section 296 (2) of the Penal Code and where he is described as a salesman and not a taxi man doing boda boda business. I will dismiss his evidence in support of the accused person together with the accused person's defence which do not have merit at all. From the evidence of the prosecution witnesses and specifically PW2, PW3, 4 and 5, their evidence is overwhelming and substantial. It points to the accused persons as the ones who committed the said offence. DW1 and DW2 were found in possession of the motor bike which PW2 claimed to have been robbed. Recent possession of the property having been stolen from PW2 directly points to the two accused persons as having been involved in the said robbery. I find the evidence by the prosecution witnesses overwhelming and directly points at the two accused persons having committed the offence of robbery with violence contrary to Section 296 (2) of the Penal Code as charged".***

10. The learned judges of the High Court in re-evaluating the evidence on record agreed with the trial court and found that the learned magistrate did consider the defence and brought out the contradictions. The trial magistrate in her judgment stated that:

> ***"From his defence (1st appellant's) I wonder why PW2 would implicate the accused who was his partner and had not had any misunderstanding out of the business he claims to have been running together at Chaka. This has a lot of questions that it leaves to the court as in truthfulness of his defence...DW2 stated that he had his own bike why he did not prefer to use his own bike to drop DW1 at Karatina leaves this court with a lot of questions unanswered".***

The High Court while agreeing with the above statement of the trial magistrate stated as follows:

> ***"We too have noted the contradictions, if indeed PW2 and the 1st appellant knew each other what would have made him allege an offence of robbery with violence against the 1st appellant yet they had not quarrelled that night. The 1st appellant's defence that PW2 told him in person he would see because he refused to return his things is an afterthought, with the contradictions stated, we reject the appellants' defences".***

11. The appellants' aggrieved by the judgment of the High Court have lodged this second appeal raising the following grounds:

***i. That the first appellate court erred in law in declining to note that the charge sheet was defective in the premises that it was not in tandem with the evidence tendered by PW2 the complainant.***

***ii. That the first appellate court erred in law in failing to note the complainant was not truthful and his allegations were untrustworthy.***

***iii. That the first appellate court erred in law in finding that there was nexus between the appellants and the recovered motor cycle.***

***iv. That the first appellate court erred in law in declining to evaluate the defence case.***

12. At the hearing of this appeal, the 1st appellant was represented by learned counsel Messrs Paul Ngarua while the 2nd appellant was represented by learned counsel Messrs A.M. Nganga. The State was represented by the Assistant Director of Public Prosecution J.Kaigai.

13. Counsel for the appellant elaborated the grounds of appeal and submitted the key witnesses in the prosecution case was PW2 who in his statement to the police indicated that he was assaulted by persons known to him and during trial he indicated he did not know the 2nd appellant. That it was odd for PW2 to visit the appellants in custody yet he stated he did not know them; that in his evidence in court PW2 denied knowing the 1st appellant and wondered how a complainant can be visiting the accused persons in custody if he did not know them; counsel submitted that the Prison visitors book was availed in court and it clearly showed that PW2 visited the a appellant's while in custody awaiting trial. Counsel submitted that through his conduct, the credibility of PW2 was questionable and the two courts below erred in failing to evaluate the credibility issues raised in the conduct of PW2. It was further submitted that the trial magistrate in her judgment stated that a lot of questions remained unanswered; that if this were so, doubt had been raised and the benefit of doubt ought to have been given to the appellants. That the learned judges of the High Court erred in law in fell into the same error as the trial court in failing to deal with the credibility of PW2 and failing to appreciate that doubt had been raised in the prosecution case. That the two courts erred in failing to properly evaluate the defence case which was premised on the contention that there was no theft of the motor cycle; that it was PW2 who gave the motor cycle to the 2nd appellant to ferry the 1st appellant to Karatina. That the evidence on record as given by the 2nd appellant is to the effect that PW2 was drunk and the injuries sustained by PW2 are consistent with a drunk person falling. Counsel emphasized that since PW2 is the one who gave the 2nd appellant the motor bike, the doctrine of recent possession was inapplicable and had the two courts below considered the defence testimony, the learned judges should have come to the conclusion that there was no motor cycle stolen and the doctrine of recent possession was inapplicable. That the motor cycle came into possession of the appellants through the consent of PW2 who was a business partner to the 2nd appellant.

14. Counsel for the 2nd appellant in his submission emphasized that the charge sheet was defective and the defect was incurable. It was submitted that the charge sheet does not mention the weapons used in the alleged robbery and does not indicate whether the weapons were dangerous; that it is not clear whether the weapon used was an axe, sword, knife or a bottle of soda; that the charge sheet was fatally defective and this was prejudicial to the appellant. Counsel further submitted that the High Court erred in not properly re-evaluating the defence testimony and the learned judges simply reproduced the judgment of the trial magistrate and there is no proof of re-evaluation of the evidence. It was also submitted that the learned judges erred in law in failing to find that the trial court violated the rules of natural justice in summarily dismissing the testimony of DW 3 on the basis that he had a pending criminal case. Counsel submitted that the 2nd appellant having given a reasonable explanation as to how he came to be in possession of the motor cycle this explanation should not have been casually dismissed by the two courts below.

15. We have considered the rival submissions by counsel. We have examined the record of appeal and the judgement of the High Court. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not interfere with concurrent

findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in ***Chemagong vs. Republic*** ***(1984) KLR 213*** at page 219 where this Court held***:***

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 17 EACA146)"***

16. Our evaluation of the evidence on record shows that the critical evidence linking the appellants to the crime is the testimony of PW 2 and PW5. It is our duty to determine whether the High Court properly evaluated the testimony of PW2 in light of the defence testimony. The 1st appellant in his defence stated he was a fare paying pillion passenger in the motor cycle driven by the 2nd appellant. The 2nd appellant in his defence stated that he was a business partner of PW 2 and that PW 2 is the one who gave him the motor cycle to ferry the 1st appellant. In support of the 2nd appellant's defence, DW3 testified that he was the one who advised the 2nd appellant to go to stage bar and get a customer.

17. Our analysis of the evidence on record shows that the trial magistrate in analyzing the evidence dismissed the testimony of DW 3 stating that DW 3 was not a credible witness as he had a pending criminal case. Counsel for the 2nd appellant submitted that it cannot be the law that any person with a pending criminal case is not a credible witness; that there are persons in society from all walks of life high and low ranking who have pending criminal cases and it cannot be gainsaid that they are not credible witnesses. Counsel submitted that the presumption of innocence ought to have been upheld by the trial court in this case and the testimony of DW 3 should have been evaluated. That the learned judges erred in law in failing to detect this error of law on the part of the trial court. On our part, we concur with submissions by counsel and state that there is no general rule or principle of law that any person with a pending criminal case is not a credible witness; we go further and state there is no general principle of law that a convicted person is not a credible witness. It is our considered view that the High Court erred in law in upholding the trial court's rejection of the testimony of DW3 on the basis that he had a pending criminal charge. It was incumbent upon the High Court to re-evaluate and analyze the defence testimony and weigh it against the prosecution evidence.

18. Counsel for the second appellant submitted that the charge sheet was fatally defective in that it did not disclose the weapon(s) allegedly used by the appellants. We have examined the charged sheet and reproduced the essence of the charge in the form of particulars given. We note that the appellants face a charge of robbery with violence and the charge sheet neither indicates the weapon used nor describes any weapon(s) used as dangerous. In the case of ***George Omondi – v- R, Criminal Appeal No. 5 of 2005***, this Court sitting in Mombasa and citing the case of ***Juma –v – R, (2003) 2EA*** 471 stated as follows:

> ***"Where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was a dangerous or offensive one. The reason for this is that a knife, for example, is not an inherently dangerous or offensive item. A knife can and is often used under very many circumstances entirely for peaceful purposes. So that if it is being alleged that the knife was being used for dangerous or offensive purpose, it must be so stated in the particulars of the charge under Section 296 (2) to distinguish such a charge from one under Section 295 punishable by Section 296. It is the use to which the weapon or instrument is put that makes it dangerous or offensive. .... The charge of robbery brought against the appellants was, with respect, defective as it failed to allege a vital ingredient thereof namely that the knife was a dangerous or offensive weapon. The conviction recorded against each of the appellants must, accordingly be quashed. We do so and set aside the sentence of death imposed thereon as respects each appellant".***

19. Guided by the dicta in the cases of ***George Omondi – v- R, Criminal Appeal No. 5 of 2005*** and ***Juma –v – R, (2003) 2 EA 471,*** it is our considered view that the charge sheet as drafted in the present case is fatally defective and we are obliged to quash the conviction recorded against each of the appellants and

set aside the death sentence imposed thereon as respects each appellant.

20. On the whole, we find that the charge sheet against the appellants was fatally defective. We also find that the two courts below erred in dismissing the testimony of DW3; we further find that the High Court erred in law in failing to find that the trial magistrate had made a finding that there were unanswered questions as per the evidence on record and this raised doubts as to the guilt of the appellants and the benefit of doubt ought to have been given to the appellants. We remind ourselves of the dicta by this Court in ***Suleiman Juma alias Tom – v- R, Criminal Appeal No. 181 of 2002 (Msa)*** that where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight. The defective charge sheet taken together with the evidence of PW 2 and weighed against the defence testimony that PW2 gave the 2nd appellant the motor cycle shows that the prosecution case was not watertight. We hereby quash the conviction of the appellants in respect of the charge of robbery with violence and the alternative charge of handling stolen property and we set aside the death sentence that was meted out to the appellants. We hereby order and direct that Erick Macharia Mugo and David Muya Njuguna be and are hereby set forth at liberty unless otherwise lawfully held.

***Dated and delivered at Nyeri this 30th day of July, 2014.***

***ALNASHIR VISRAM***

**.....**

***JUDGE OF APPEAL***

***MARTHA KOOME***

**.....**

***JUDGE OF APPEAL***

***OTIENO-ODEK***

**.....**

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**