IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ONYANGO OTIENO, KARANJA & KOOME, JJ.A.)

CRIMINAL APPEAL NO.180 OF 2010

BETWEEN

EDWARD MARUTI SIMIYU.....APPELLANT

AND

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

(Appeal from a judgment of the High Court of Kenya at Bungoma (Onyancha & Muchemi, JJ.) dated 15th June, 2010

in

H.C.CR.A NO.2 OF 2007)

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JUDGMENT OF THE COURT

Edward Maruti Simiyu (appellant) was charged and tried before the Senior Resident Magistrate's Court at Bungoma with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

The appellant was found guilty of the offence, convicted and sentenced to death. Being aggrieved with the conviction and sentence he appealed before the High Court. The grounds relied upon in challenging the conviction before the High Court were basically fourfold namely: failure by the learned trial magistrate to indicate the language used by the Court; insufficient evidence; improper reliance on the doctrine of recent possession and failure to consider that crucial witnesses were not called to give evidence.

Those issues were addressed before the High Court and in a detailed Judgment, Onyancha and Muchemi, JJ. dismissed the appeal thereby provoking this second appeal.

By dint of the provisions of Sections 361 of the Criminal Procedure Code (CPC) only issues of law fall for our consideration. The appellant filed his homemade memorandum of appeal that raised eleven grounds of appeal. However, Mr. Mwinamo learned counsel for the appellant adopted the memorandum

of appeal, but chose to pursue only two grounds; recent possession of stolen property and failure by the prosecution to call crucial witnesses. He submitted that there was no positive identification of the bicycle that was found tied in a Nissan Matatu which was transporting many people. The booklet manual that the complaint used to identify the bicycle was not reliable as there was no serial number and no ownership receipt.

In any event the manual was not even in the name of the complaint but in the name of Solomon Masinde. The make, mode, color or frame number which was on the manual booklet could not be linked to the bicycle.

The second point argued on behalf of the appellant was that the prosecution failed to call crucial witnesses such as the turn boy or the driver of the Matatu. These are the witnesses who could have confirmed whether the appellant was traveling in the Matatu and was found in possession of the bicycle. Failure to call those two witnesses, the prosecution failed to prove the bicycle was found in possession of the appellant thus the appellant's defence that he was merely implicated by PW3 when he was found waiting at a Matatu stage was credible.

On the other hand Mr. Chirchir, learned Senior Prosecution counsel opposed the appeal. He defended the judgment by the two Courts below who were concurrent in their findings that the case against the appellant was proved based on the doctrine of recent possession. The bicycle was positively identified by PW1 and PW3. The bicycle was sent to PW1 by his brother as a present and that explains why the name of the complainant was not the one on the manual. On the second argument, it was not necessary to call the driver or the turn boy of the Matatu whose evidence would have been the same as that of PW3. Lastly, the appellant failed to explain how he came to be in possession of a bicycle which was stolen three weeks prior to his arrest.

Before we analyze these grounds which were proffered for and against this appeal, we wish to first set out the essential background of this matter. On 10th October, 2008 at about mid-night a gang of robbers descended upon the homestead of Professor Henry Mutero. They terrorized Henry Nyongesa Masinde PW1 and James Okwiri PW2 who were working there as watchmen. The robbers broke into the room that was occupied by PW1; they assaulted PW1 until he lost consciousness. They stole from his room a Television set and a bicycle make Appolo all valued at Kshs.22,000/=. Both PW1 and PW2 did not identify the robbers. The matter was reported at Bugoma police station and the items robbed were recorded, PW1 was also treated for the injuries he sustained during the robbery.

On 3rd November, 2003, Solomon Masinde PW3 a brother of PW1 was at Kiminini Market. He saw a Nissan Matatu at the Bungoma stage. On the grill, there was a bicycle make Appolo which he recognized as the one that belonged to PW1 and was stolen about three weeks earlier. PW3 conferred with the driver of the Matatu about the stolen bicycle, the driver pretended to change the matatu route to Kitale and therefore asked the passengers to take out their properties. When the bicycle was untied, the appellant said it was his, he said he had bought it for Kshs.1,500/= and he had an agreement to that effect. The appellant was escorted to the Administration Camp at Kiminini by PW3; both were given an opportunity to produce the documents of ownership.

PW1 produced a manual; he claimed the bicycle was sent to him as a present by his brother. PW1 had also reported the robbery of his bicycle at Bungoma Police Station and all the details of the bicycle were recorded before the recovery. APC Philip Kiap arrested the appellant and escorted him to Bungoma Police Station. PC Michael Chepto interrogated the appellant; he maintained that he had bought the bicycle from somebody while PW1 had a booklet manual which he claimed he had received from his brother together with the bicycle. Moreover, PW1 had reported the robbery that had taken place on the night of 10th October, 2003 and it was recorded a bicycle Appolo make was stolen.

It is on that basis the appellant was charged with the offence of robbery with violence. Based on this evidence the learned trial Magistrate was satisfied the prosecution had proved the appellant was found in possession of a stolen bicycle that was robbed from PW1 on the 10th October, 2003. The learned Judges of the High Court after carefully re-evaluating the matter arrived at a similar conclusion in their judgment.

"In the above circumstances the trial magistrate held and we independently also hold, that the appellant was found in possession of the bicycle because he was one of the robbers who on 10 – 11th night attacked the complainant and robbed him of the Appolo bicycle and other named items..."

We now turn to the two grounds of appeal; was the appellant found in recent possession of a stolen bicycle that was robbed from PW1? The evidence was by PW1, PW3, PW4 and PW5, that is the complainant, his brother who spotted and recognized the bicycle and the two police officers. The evidence by PW3 that when the passengers were told to take their luggage from the Matatu, the appellant claimed the bicycle as his, was accepted by the two Courts below as credible.

This evidence was further reinforced by PW4 and PW5 when the matter was reported at first at the AP Camp and at Bungoma Police Station; the appellant was claiming he had bought the bicycle from somewhere. However, the appellant in his defence denied any connection with the bicycle and claimed PW3 tricked him that he was required at the AP Camp. PW3 picked a bicycle from the stage, and while at the Camp PW3 said he and found the appellant with the bicycle while aboard a matatu. The appellant's defence was found lacking in credibility in the face of what was considered as credible evidence by PW3, PW4 and PW5. Regarding prove of ownership of the bicycle, this was not challenged as the appellant in his defence did not claim its ownership, the two Courts below were satisfied that PW1 had made and recorded a report of a stolen Appolo Bicycle on 10th October, 2003 and produced a manual for an Appolo bicycle which proved ownership. The appellant had nothing to say about the ownership of the bicycle, he denied ownership in is defence. Mr. Mwinamo submitted that the defence evidence should have carried the day as opposed to the evidence of PW3, PW4 and PW5. We do not think so as we find no misdirection by the two Courts below.

The evidence on record that the appellant was found with a bicycle that was recently stolen and he failed to offer any explanation of how he came to be in its possession is credible. In a similar case this Court in the Case of ***Hassan v Republic (2005) 2 KLR*** while dealing with the issue of recently stolen goods delivered itself thus: -

"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 either he is the thief or a reliever."

As regards the challenge touching on the prosecution's failure to call the Matatu driver or turn boy to give evidence there are no gaps left by the evidence of PW3 and PW4 regarding the arrest of the appellant with the bicycle. In the Uganda case of ***Bukenya and others v Uganda [1972] 9 of 549 at page 550*** the Court of Appeal for East Africa stated thus:

"It is well established that the director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty, on the character to call or make available all witnesses necessary to establish the truth, even their evidence may be …..... Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case... If he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called the Court is entitled under the general Law of evidence, to draw an inference that the evidence of those witnesses if called would have tended to be adverse to the prosecution case."

In this case, PW3's evidence is clear on how he spotted the bicycle on a matatu at a stage and the appellant claimed its ownership, the matter was referred to the police. At the police station, the appellant still claimed ownership of the bicycle, there was a report filed by the complainant earlier regarding the robbery of an Apolo bicycle that was supported with the complainant's manual of the same bicycles. Based on this evidence the police charged the appellant with the offence.

In respect of the number of witnesses to call, that was within the prosecution's discretion as long as no gaps were left in their evidence. We cannot fault the evidence on record. In the result we are satisfied this appeal lacks merit and it is accordingly dismissed. The conviction and sentence are upheld.

Dated at Eldoret this 30th day of January,2013.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR