



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT MALINDI

CRIMINAL APPEAL 319 OF 2009

HAMISI MBELA DAVIS.....1<sup>ST</sup> APPELLANT

DAVID ANYILA KISOLO.....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Mombasa (Serگون & Azangalala, JJ.)  
dated 21<sup>st</sup> October, 2008*

In

*H.C.C.R.A. NO. 210 OF 2005)*

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JUDGMENT OF THE COURT

1. This is a second appeal arising from the original judgment of the acting Senior Resident Magistrate's court at Taveta. **Hamisi Mbela Davis** and **David Anyila Kisolo** (hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively), were the 1<sup>st</sup> and 2<sup>nd</sup> accused in the subordinate court. They were jointly tried and were each convicted and sentenced to death, for the offence of robbery with violence contrary to section 296(2) of the **Penal Code**.

2. The evidence upon which the appellants were convicted was in a nutshell as follows: On the 18<sup>th</sup> July, 2005 at 5.30 p.m. **Michael Mutie Wambua**, (the complainant) (PW2) and **Msafiri Kitogho (Msafiri)** (PW3), who is his neighbour were on their way to a place called **Bura Ndogo**. The complainant had a bicycle which he was pushing because there was something wrong with the tyre. At **Riata area** within Taveta sisal estate, the 1<sup>st</sup> appellant, who was known to the two, joined them. The 1<sup>st</sup> appellant struck a conversation asking the two where they were going. He also requested for a matchbox. The 1<sup>st</sup> appellant then remained behind as if he wanted to urinate by the roadside. The 1<sup>st</sup> appellant produced a panga which he had hidden in his clothing and suddenly attacked the complainant cutting him on the left shoulder. The complainant fell down and the 1<sup>st</sup> appellant demanded that he releases the bicycle which the complainant was still hanging on to. **Msafiri** confronted the 1<sup>st</sup> appellant but ran away when the 1<sup>st</sup>

appellant hit him with a panga on his left arm. As **Msafiri** was running away, the 2<sup>nd</sup> appellant appeared also holding a panga. The 2<sup>nd</sup> appellant tried to cut the complainant on the head, but the complainant blocked the panga with his left hand and was cut on the left hand. The 2<sup>nd</sup> appellant demanded that the complainant surrenders all the money in his possession. The complainant surrendered Kshs. 1,500/- and ran away screaming.

3. **Angelina Baraza**, (PW4) who was collecting firewood within the sisal estate, heard the screams. Upon checking she saw the complainant who was bleeding, screaming and writhing in pain. **Angelina** assisted the complainant by taking him to his home at **Bura Ndogo**. The matter was reported at Taveta police station to **PC David Mabonga** (PW5) who recorded the complainant's statement. On 31<sup>st</sup> July, 2005 the complainant went back to the station and reported that he had seen his bicycle within the compound of the 2<sup>nd</sup> appellant's mother. **PC David Mabonga** accompanied the complainant to the homestead of the 2<sup>nd</sup> appellant's mother where the bicycle was recovered. The complainant noted that the frame of the bicycle had been changed. Both the houses of the two appellants were searched, but the original frame of the complainant's bicycle was not recovered. The two appellants were arrested and later charged.

4. In their defence each of the appellants denied having attacked or robbed the complainant. Both claimed to have been in their homes. The 2<sup>nd</sup> appellant's father **Boaz Kisoro** (DW1) and his brother **Petro Kisoro Boaz** (DW2) testified as defence witnesses. They explained that the bicycle recovered from the home of the 2<sup>nd</sup> appellant's mother, was left in the home by one **Menei Major**, as security for a loan lent to **Menei Major** by the 2<sup>nd</sup> appellant's elder brother one Onyango. **Menei Major** did not redeem the bicycle.

5. Each appellant appealed to the High Court against their conviction and sentence. The two appeals were consolidated and heard together. In their judgment the High Court judges (**Sergon & Azangalala, JJ.**) found that the appellants' conviction was based on the appellants' identification through recognition by the complainant and **Msafiri**, both of whom knew the appellants well before the commission of the offence. The High Court therefore dismissed the appeals in their entirety.

6. In this second appeal, each of the appellants filed a petition of appeal raising five grounds which are basically similar. Following leave granted by this court, a supplementary memorandum of appeal was filed on 3<sup>rd</sup> August 2011, by **J.S Kaburu & Co. Advocates**, wherein seven grounds of appeal were raised. At the hearing of the appeal counsel for the appellants relied on this supplementary memorandum of appeal and argued the seven grounds which he compressed into three i.e. that the trial magistrate and the superior court erred in convicting the appellants as the charge preferred against the appellants was fatally defective; that none of the appellants was properly identified; and that the doctrine of recent possession was wrongly applied.

7. The learned Senior Principal Prosecuting counsel opposed the appeal, arguing that the particulars of the charge were proper and that any omission in the particulars of the charge could be cured under **section 382** of the **Criminal Procedure Code**. Prosecuting counsel maintained that the appellants were properly identified through recognition, and that the doctrine of recent possession was properly applied as the complainant's bicycle which was stolen during the robbery, was recovered from the home of the 2<sup>nd</sup> appellant's mother. He further submitted that each of the appellants' defence was properly rejected after being considered.

8. This being a second appeal, this court is mandated under **section 361(1)** of the **Criminal Procedure Code** to consider only issues of law. As was held in **M'Riungu vs. Republic [1983] KLR 445**:

***“Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings).”***

9. Section 296(2) of the Penal Code under which the appellants were charged provides that:

***“(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”***

10. The above section shows that there are several circumstances any of which if present in a robbery, may form the necessary ingredient graduating the offence from simple robbery under section 296(1) of the Penal Code, to one of robbery with violence under section 296(2) of the Penal Code. In this case, the particulars of the charge against the appellants stated that the two appellants *“jointly robbed Michael Mutie Wambua, one bicycle valued at Kshs. 2,500/- and cash Kshs. 1,500/- all valued at Kshs. 4,000 and at, immediately before and immediately after the time of such robbery wounded the said Michael Mutie Wambua.”*

11. Thus, the two appellants were alleged in the particulars of the charge to have jointly robbed the complainant wounding him in the process. Although the particulars of the charge did not state that the appellants were armed with any dangerous or offensive weapon, the particulars given, i.e. that the appellants were two persons acting jointly, and that the appellants wounded the complainant during the robbery, inferred the application of personal violence on the complainant by two persons. This was sufficient to constitute the necessary ingredients for the offence of robbery with violence contrary to section 296(2) of the Penal Code. We are satisfied that the charge as framed was proper.

12. Both the complainant and *Msafiri* maintained that they identified the two appellants who were known to them as the persons who robbed the complainant. This was therefore identification by recognition. In *M’Riungu vs. Republic* (supra) it was held:

***“Where, as in this case the accused were persons known by their victim before the crime, it was a case of whether the victim had recognized them and not whether he had identified them.***

***The question whether the victim of the robbery had recognized the 1<sup>st</sup> appellant was one of fact. .... Moreover the Court of Appeal would not upset the concurrent findings of fact of the two lower courts on the issue.”***

13. Both the complainant and *Msafiri* stated that it was 5.30 p.m. when the robbery occurred. Therefore, the incident occurred when it was still daylight. Secondly, the complainant and *Msafiri* had a conversation with the 1<sup>st</sup> assailant before he attacked the complainant. The complainant and *Msafiri* therefore, had ample opportunity to see and recognize the person who attacked them. Both the subordinate court and the superior court made concurrent findings that the complainant and *Msafiri* recognized the persons who attacked and robbed them as the 1<sup>st</sup> and 2<sup>nd</sup> appellants. These were concurrent findings of fact which we have no reason to interfere with, as we are satisfied that the findings were supported by the evidence on record. As was stated in *Anjoni & Others vs. R [1980] KLR 59*:

***“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”***

14. The recovery of the complainant’s bicycle in the home of the 2<sup>nd</sup> appellant’s mother was not disputed. Both the High Court and the lower court accepted that the bicycle was properly identified as the complainant’s bicycle, which was stolen during the robbery, about two weeks before it was recovered from the 2<sup>nd</sup> appellant’s mother’s house. This is a concurrent finding of fact which this Court has no reason to question. The issue is whether the explanation given by the 2<sup>nd</sup> appellant for the possession of the bicycle was satisfactory.

15. On our part, we find that the defence witnesses did not explain to the court when the bicycle was brought to the 2<sup>nd</sup> appellant’s mother’s house, nor was any explanation given as to why the 2<sup>nd</sup>

appellant's brother, **Onyango** to whom the bicycle was allegedly pledged as security, was not called as a witness. In the absence of a reasonable explanation, and given the identification of the 2<sup>nd</sup> appellant by the complainant and **Msafiri**, as one of the two persons who robbed the complainant, the recovery of the bicycle in the 2<sup>nd</sup> appellant's mother's house constituted constructive possession of the bicycle by the 2<sup>nd</sup> appellant. This provided corroboration of the complainant's evidence. In the circumstances, we can neither fault the trial magistrate, nor the High Court for rejecting the appellants' defences.

**16.** We come to the conclusion that the appellants' convictions were proper and sentences imposed lawful. Accordingly we find no substance in these appeals and reject the appeals in their entirety. Orders accordingly.

*Dated and delivered at Mombasa on this 16<sup>th</sup> day of March 2012.*

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

**H. M. OKWENGU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**