REPUBLIC OF KENYA

COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 372 OF 2009

WILSON OKETCH DACHI ……......……............................. APPELLANT

AND

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

(Appeal from the judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ) dated 8th December, 2009

in

H.C.CR.A.NO.28 OF 2009)
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JUDGMENT OF THE COURT

This is a second appeal. By dint of the provisions of ***section 361(a)*** of the Criminal Procedure Code, our jurisdiction is confined to matters of law only, unless it be demonstrated to us that the first appellate court considered matters it ought not to have considered or that it failed to consider matters it ought to have considered or that looking at the entire decision on such matters that court was plainly, wrong in which case our considering such matters amounts to considering matters of law as in such cases, it would beaccepted that the first appellate court failed to revisit the evidence that was before it afresh, analyse it and evaluate it as is required of it in law – see the case of ***OKENO V R (1972) EA 32.***

The appellant ***WILLIAM OKETCH DACHI***, was arraigned before the Chief Magistrate's Court at Kisumu on two counts. The first count was that of robbery with violence contrary to ***Section 296(2)*** of the Penal Code. The particulars of that charge were that:-

"On the 16th day of September, 2007 at Nyahera area in Oyugis town, Rachuonyo District within the Nyanza Province jointly with another not before court, while armed with offensive weapons namely pangas, robbed George Ochola of a motor cycle chassis number MD 623FB3071C3729 make TV's blue in colour valued at Kshs.100,000/- property of James Ochieng Otieno and at or immediately before or after the time of such robbery used actual violence to the said George Ochola."

The second count was that of stealing a motor cycle contrary to ***Section 278 (A)*** of the Penal Code but as he was acquitted of that charge, we need not set it out in this judgment. The appellant denied the charge of robbery reproduced herein above, but after full hearing, in which the prosecution called seven witnesses and the appellant gave unsworn statement in his defence, the learned Principal Magistrate (*A.C.*

Onginjo) in a judgment delivered on 13th February 2009, found him guilty, convicted him of the offence and after hearing mitigating circumstances, sentenced him to death. A we have stated, he was acquitted in respect of the second count for lack of evidence as indeed even the complainant in that charge did not testify.

The appellant felt dissatisfied with that conviction and sentence and hence this appeal premised on four (4) grounds of appeal filed by the appellant in person on 12th September, 2011 and five (5) grounds contained in supplementary Memorandum of Appeal dated 15th June 2012 and filed on his behalf by his firm of advocates, *S.O. Madialo & Co.* As in addressing us at the time of hearing the appeal, the learned counsel for the appellant *Mr Madialo* relied fully on supplementary grounds of appeal and abandoned the home-made grounds filed by the appellant, we reproduce the same grounds in the supplementary Memorandum of Appeal. They were:-

"1. That the learned 1st Appellate Judges erred in law in failing to appreciate and find that the robbery with violence charged had not been proved in all its elements.

2. That the learned 1st Appellate Judges erred in law in failing to appreciate that having doubted and ruled that there was no proof of the appellant's presence at the scene of crime, the essential ingredient of the robbery with violence could not therefore in the movement of evidence be proven against him (the appellant).

3. That the learned 1st Appellate Judges were in error in their interpretation and application of the Doctrine of recent possession.

4. That the learned 1st Appellate Judges were in error in putting too much reliance on the fact of the Lower Court having seen, heard and observed the witnesses and therefore failed to give consideration to the appellant's evidence in comparison to that of the prosecution witnesses under the circumstances surrounding and attending the arrest of the appellant and the recovery of the alleged stolen motorcycle, with the result that a recovery that amounted to an illegal confession was allowed to stand and hold.

5. That the learned 1st Appellate Judges erred in failing to address their minds to the fact that the lower court had allowed its findings to be influenced by matters that was extraneous to the case and which veracity had not been probed either before the lower court or before the 1st appellate court."

Mr Madialo, the leaned counsel for the appellant addressed us at length on the above five grounds, contending that PW2 who to him, was the star witness in the entire case did not properly identify the passenger who allegedly hired him and who together with another man found at the scene of the crime took his motor-bike after threatening him with a panga. He submitted further that the man who allegedly joined his passenger and together robbed him of the motor-circle was not identified and was not taken to court. In his view, the failure to identify the appellant at the scene was fatal to the entire prosecution case. Further, he contended that there was in any event no evidence of bodily injury and no apprehension of any injury by the complainant. He also submitted that the charge as drafted was not complete and so could not be a basis for a conviction. He referred us to the evidence of the person who allegedly bought the motor-bike from the appellant having been introduced to the appellant by one *Charles Otieno*, but that *Charles Otieno* was not called as a witness to confirm the allegation. He ended his submission by saying that the case was not proved as the doctrine of recent possession could not be relied upon in the circumstances of this case and a vital witness namely somebody from **Car and General** was not called to give evidence as to whether the appellant was indeed their agent.

Mr Meroka the learned State Counsel in response, supported the conviction and sentence on grounds that the prosecution proved before the trial court that on the date of the robbery, the appellant or whoever perpetrated the offence was with another person and that the complainant was threatened. These are ingredients of robbery with violence under the provisions of ***Section 296(2)*** of the Penal Code. Only one ingredient needed to be satisfied for a conviction under ***Section 296(2).*** The same motor-cycle the

subject matter of the offence was sold to another person who identified the appellant as the one who sold it to him and that was within a span of only ten (10) days from the date of the offence. In the scenario, *Mr. Meroka* maintained, the doctrine of recent possession was properly applied and he referred us to the case of ***ODHIAMBO VS REPUBLIC (2002) 1 KLR 241*** for that proposition. He submitted that failure of the appellant to explain his possession of the stolen motor-cycle within less than two weeks of its theft leaves no doubt that he was one of the robbers. On failure to call other witnesses, *Mr. Meroka's* take was that under the provisions of ***section 143*** of the Evidence Act, superfluity of witnesses is not a requirement and the witnesses called proved the case within the standards set for proof of such a case.

We will hereafter consider the grounds set out in the Supplementary Memorandum of appeal reproduced above together with the record and the submissions set out above and of course, the entire record and the law, but first the brief facts.

As on 16th September, 2007, ***James Ochieng Otieno (PW1) (James)*** was the owner of a motor-cycle make Tusmax 100 blue in colour chassis No. MD 623 FB 307 IC 37291. He bought it from **Car and General Motors** on 20th August 2007 and had all the relevant documents proving his ownership of the motor-cycle. He hired a rider, ***George Ochola Otieno (PW2) (George)*** who was using the motor-cycle for hire purposes within Oyugis Township and its surroundings. On 16th September 2007. George was at Oyugis stage with the Motor-cycle. A person approached him and hired him to transport him (the person) to Nyahera along Oyugis-Kisii highway. George obliged and the passenger together with George started off to Nyahera area, but on their way they called at a petrol station within Oyugis where there was bright electrical light. At Nyahera junction, that person (whom he later identified as the appellant) asked him to stop. He stopped but suddenly someone emerged from the bush nearby with a panga. That other person ordered George to either let go the motorcycle or lose his life. He made the wise choice in the circumstances then prevailing and that is that he surrendered the motor-cycle without much ado even as the passenger also pushed him as they took it. The two, namely the person who was his passenger and the person from the bush with a panga, both went away with the motor-cycle which was James' property but was at the relevant time in possession of George. George rushed to Oyugis police station and reported the incident. The police officers accompanied him back to the scene in search of the thieves but they had disappeared. George said he identified the appellant while they were at petrol station where there was bright electric light. He admitted in his evidence in chief that he did not describe the appellant's physical features to the police alleging he was certain the appellant was the man who lured him up to Nyahera junction and is the man who when he was being threatened with a panga by the man from the bush pushed him away from the motor-cycle.

Meanwhile, earlier on, on 4th September 2007, some twelve days prior to the incident, the appellant together with another person visited Liwuro Primary school and approached ***Joshua Aduwi Were (PW4)*** a teacher at that school. They introduced themselves to Joshua and the appellant introduced himself as promoter of **Car and General Motors Kisumu** and informed him and other teachers extensively about the company, saying that they were salesmen for the company. Joshua, who was a pastor, got interested in buying a motor-cycle. As the appellant was known to one of the teachers at the school, namely Charles Otieno, Joshua saw nothing wrong in negotiating to buy a bicycle from the appellant. The appellant and his colleague left. After about two weeks, the appellant took a motorcycle to Joshua. He also had documents which he told Joshua, were from **Car and General Motors, Kisumu**. They made agreement for sale which was witnessed by Charles Otieno. Joshua then paid the purchase price. However, the number plate and logbook were still missing. The appellant said those would be available in three to four months time.

On 4th March 2008***, Cpl Andrew Rana (PW6)*** attached to CID Kisumu and to the Flying Squad Kisumu, acting on information, went together with three other police officers to Whirl Spring Hotel in Milimani Estate Kisumu. They found the appellant there together with ***Luyai Majwoli (PW5***) who had given the appellant a deposit of Kshs.40,000/- being part payment for a motorcycle which the appellant never delivered and was with the appellant for purposes of verifying the existence of such a motorcycle. The police officers arrested them and booked the two in police cells. The next day 5th March 2008, the appellant led the police officers to Joshua who was still waiting for the log book and number

plate for the motorcycle sold to him. When they reached Liwuro Primary school, the appellant was left in the police vehicle as Joshua's colleague *Charles Otieno,* and the police approached Joshua. Joshua later saw the appellant in the police vehicle. At that time, Joshua's rider had gone with the motorcycle to Ranen area. Joshua told the police and led them to Ranen where the motorcycle was recovered from the rider. Joshua identified the motorcycle sold to him as the one which was in court and was the same as the motorcycle identified by George as the motorcycle stolen from him by violence on 16th September, 2007. The appellant was taken to Kisumu police station. On 10th March 2008, *Ag IP Evans Mwangi* conducted identification parade at which George allegedly identified the appellant as the person who hired him and who joined the other person from the bush and together robbed him of the subject motorcycle. The appellant was thereafter taken to court and charged as stated above. When put to his defence, the appellant stated in his unsworn statement that on 3rd March 2008, as he was reaching Kisumu from Migori, where he was going to buy shop goods, they had a tyre burst and they alighted from the *matatu* in which they were travelling. It was late in the evening so he went to a hotel in *Kilimani* where he had supper. After supper, as he was proceeding to seek a lodging at Nyalenda, police officers accosted him, arrested him and put him into their vehicle. They searched him and took his Kshs.33,000/-. He was taken to Central Police Station where he was beaten to reveal where he got that money. He insisted it was his money. At about 5.00 a.m. the police brought another person into the cell whom he did not know. After that he did not know where the police took him to. On 7th March 2008, he was taken to Flying Squad office where he found two people seated. Those people were asked if they knew him but they denied knowing him. He however heard *CPl Rana* tell them he was the one. On 10th March 2008 the same two people were brought to identify him at an identification parade. The parade was held in the cells. When he complained about the parade and inquired about his money, he was told to complain in court. On 11th March 2008 he was taken to court and when he asked about his money he was not allowed to talk. Later at his trial, the man who was brought into the cell on the day he was arrested and one of the people who purportedly identified him at the parade gave evidence.

The above were the facts that were before the trial court and which were revisited afresh, analysed and evaluated by the first appellate court. As we have stated, the learned Principal Magistrate, after considering that evidence, acquitted the appellant on the second count of stealing a motor cycle contrary to ***section 278(A)*** of the Penal Code, but convicted him on the first count of robbery with violence contrary to ***section 296(2)*** of the Penal code. Two issues were for consideration in this matter. First was visual identification of the appellant and second was whether the doctrine of recent possession of the stolen item applied. In finding the appellant guilty as charged in that count and convicting him of the offence, the learned Principal Magistrate appears not to have put much weight on the identification of the appellant at the scene of the incident and indeed, she did not make any specific findings in that aspect preferring to consider it merely as strengthening the evidence on the doctrine of recent possession of the stolen motor-cycle. We form this view from the following part of her judgment.

"whether evidence of identification of accused person by PW2 can be relied upon to find that accused person committed robbery on 16th September 2007 independently, PW2 said that he did identify accused at an identification parade conducted by Ag IP Mwangi – PW7 who produced ID parade forms with details of the members of parade. The accused raised the issue of him having came (sic) with contract (sic) with PW1 said he is the only one who went to identify motorcycle in Awendo and that he was not with PW2. PW2 also said the only time that he saw accused was when they were in parade of about 8 people. PW2 was not questioned as to whether he had seen accused person after arrest and prior to parade so as to prejudice the process. However coupled with the fact that he sold motorcycle less than 2 weeks after it had been robbed from PW2 the only inference that any reasonable man can draw is that he participated in the robbery."

The first appellate court was more assertive on the issue of visual identification. It rejected the evidence of PW2 on that aspect, stating as follows:-

"In our view, that evidence of identification at or near the scene of the offence was rather shaky and insufficient to be accorded absolute reliability. The evidence did not overrule the possibility of error or mistaken identification. We say so because, firstly the complainant (PW2) did not say how he was able

to identify the appellant at a petrol station where there was light given that the pillion passenger was at his rear while he (complainant) was facing front …"

We agree. The law is now well settled on the standard of care that the court needs to exercise before relying on and convicting an accused person on the evidence of visual identification or even of recognition even though identification by recognition is more assuring than identification of a stranger particularly under difficult circumstances like at night and by a single witness. Of course this is not to say that conviction cannot issue in such circumstances but there is need for extra care and absolute assurance that the witness is reliable. In the case of ***WAMUNGA V REPUBLIC (1989) KLR 424***, this Court differently constituted had this to say:-

"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

In this case, as we have stated, the incident took place at night. The passenger was a stranger and was a pillion passenger sitting behind George. As the first appellate court rightly observed, there was no evidence that at the Petrol Station where there was electric light, he alighted and faced George at any time to enable George identify him visually. Where the incident of robbery occurred, it was dark and George was clearly scared and so could not identify his attackers properly. Even worse, in cross examination George stated:-

"I didn't describe physical features of the robbers. I also didn't tell police how robbers were dressed. I did not say in my statement that there was any source of light. I didn't record in my statement that I went to petrol station. I didn't say in my statement I could identify the robber. My statement does not indicate I saw the accused elsewhere after robbery."

In that scenario, one wonders how the police came to arrange for an identification parade. The police can only organize successful identification parade after a complainant informs them that he can identify the suspect if he sees him again and after proper description of the suspect as to his physical features etc. It is only then that the police can assemble members of the parade that resemble the suspect for without that information how would they comply with some requirements of Police Forces Standing Order No.46. We agree that even though the learned magistrate felt that the evidence of identification could be coupled with the evidence on recent possession and that having been done, a properly proved case emerged, we agree with the learned Judges of the High Court that the evidence on identification was a non starter and thus could not either on itself or by coupling it with another be enough for conviction in a criminal case.

However, that is not the end of the road. The case against the appellant did not depend solely on the issue of visual identification. The other aspect, as we have stated above was on the doctrine of recent possession. The subject motorcycle stolen from George on 16th September 2007 was recovered from Joshua on 27th September, 2007. Appellant is said to have led Police to Joshua as one of the people who had one of the motorcycles he had allegedly stolen. *Mr. Madialo* argues that that was in violation of the law as ***Section 31*** of the Evidence Act had been repealed and so evidence of recovery as a result of the appellant leading the police to the recovery was no longer admissible as at the time the recovery took place. We agree with the legal proposition. The effect of that repeal was however to stop admission of the evidence that relates solely to the discovery as a result of the accused leading the police to that discovery. In this case, even if the court were to refuse evidence on recovery as a result of the appellant leading the police to it, nonetheless there was still credible independent evidence to prove that the appellant was in possession of the motorcycle only about ten days after George was robbed of it. Joshua gave evidence graphically on how the appellant first approached him at his School on 4th September, 2007 and was introduced to him. The appellant told him that he was a salesman with Car and General Motors, selling motorcycles. Joshua, having been convinced of the deal as his colleague *Charles Otieno* also knew the appellant, placed an order for a motorcycle. The appellant duly delivered the motorcycle on

27th September, 2007 and that motorcycle was the one stolen from George on 16th September, 2007. Joshua said he entered into an agreement with the appellant and was left with documents together with the motorcycle. Only the logbook and the number plate remained to be delivered later after three or four months. On this evidence which the two courts believed and we have no reason to fault them on that, it did not matter whether the appellant led the police to Joshua or not. It could stand on its own and was enough for a conviction unless the appellant offered a reasonable explanation of how he came to be in possession of the motorcycle on 27th September, 2007 the day he delivered it to Joshua. Whether the motorcycle was stolen or not as at that date and from whoever he got it, were all matters within his own knowledge. The provisions of ***Section 111*** of the Evidence Act is clear. It says:-

"111. (1) When a person is accused ofany offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall :-

(a) ***prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or***

(b) ***impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or***

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity."

In our view, in so far as the appellant never gave any explanation of how he came by the subject motorcycle which he sold to Joshua on 27th September, 2007 and which was stolen on 16th September, 2007, he was the thief. We note that through his counsel, *Mr. Onsongo*, the appellant told the court that he had no claim over the same motorcycle, yet there was uncontroverted evidence that it was the motorcycle stolen from *George* and that he sold it to Joshua within about ten days of its theft by way of robbery with violence.

The sum total of all the above is that, we too are of the view, like the first appellate court that this appeal has no merit. It is dismissed.

DATED and DELIVERED at KISUMU this 11th day of October, 2012.

J.W. ONYANGO OTIENO
………………………………………
JUDGE OF APPEAL

W. KARANJA
……………………………………
JUDGE OF APPEAL

K.H. RAWAL

………………………………..
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR