



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: GITHINJI, AGANYANYA & NYAMU, J.J.A.)

CRIMINAL APPEAL NO. 153 OF 2009

BETWEEN

JAMES MACHARIA MWANGIAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Njagi & Omondi, JJ.) dated 20th July, 2009

in

H.C.Cr.A. No. 11 of 2007)

JUDGMENT OF THE COURT

James Macharia Mwangi, the appellant, was charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. He, denied the charge before the Chief Magistrate's Court at Malindi and was tried, found guilty and convicted by the Senior Resident Magistrate (*D.O. Ogembo*). Upon such conviction the appellant was sentenced to death. The appellant was aggrieved by the conviction and sentence and he appealed to the superior court which appeal was dismissed, hence this present appeal before us.

The brief facts of the complaint were that on 25th September 2003 **Davison Menza Chome** (PW1) was riding his bicycle from Kibokoni to Kisumu Ndogo in Malindi town at 6.45 p.m. when he found two men on the way who attempted to trap him using a rope but when he dodged and passed by the two men chased him as they whistled. Then PW1 saw another man ahead who aimed to hit him with a stick but it missed him and instead hit the bicycle handle bars causing him to fall off the bicycle and run away into the bush. As he was going to report the matter to Malindi Police Station near Galana Hospital, he saw the appellant riding his bicycle and he was carrying his colleague thereon. They passed PW1 towards Kisumu Ndogo without recognizing him though he saw them very well. However, PW1 proceeded to Malindi Police Station where he reported the matter to **IP. Charles Mwanyalo** (PW4) who visited the scene of the incident and commenced investigations into the matter.

On the same day at around 9.00 p.m. **Pc. Athman Jillo** (PW2) and **Pc. Robert Ngugi** (PW3) were on patrol duties at Majengo Mapya with a dog handler called Riba when they met two men one of whom

was pushing a bicycle. When asked to stop the appellant who was pushing the bicycle dropped it and took to his heels as well as his companion. They were however pursued by PW2 and PW3. The appellant tried to climb over an anthill but he fell down and was held by PW3. His companion disappeared. The appellant was then taken to Malindi Police Station together with the recovered bicycle where PW2 and PW3 found a report of a stolen bicycle. PW1 was contacted next morning and when he went to the police station he saw the recovered bicycle and identified it as the one he had been robbed of the previous day. He confirmed it to be his bicycle by showing his identification marks thereon and the receipt he had been issued with when he bought it. The appellant was then charged with the offence as hereinbefore stated.

He denied the offence in his sworn evidence and said that on the day in question he had gone to visit a friend at Kisumu Ndogo when, on his way home, he met two policemen who started asking him questions and searched his pockets. When one of the policemen asked the appellant to give them Ksh.300/= and he refused they collected a bicycle which was beside the road and took it together with him to Malindi Police Station. He was then charged with the offence of robbery with violence which he denied.

In his judgment delivered on 23rd January, 2007, the learned trial Magistrate stated in part:

“I am convinced that the prosecution witnesses were truthful in this matter. None of them knew the accused. And none had any grudge against him. And the prosecution’s case left no doubt that accused was seen together with another with the complainant’s bicycle only a few minutes after the robbery and again about 2 hours later with the same bicycle.

So does the doctrine of recent possession apply in this case? I think so when accused was first seen with the bicycle, it was just a few minutes after the attack. He was again been (sic) with the same bicycle about 2 hours later. This was too short for the bicycle to have changed hands as suggested by the defence.”

Then the learned Magistrate continued:

“And again accused behaviour of dropping the bicycle and starting to run away also betrays him. Why did he run away at the more (sic) sight of a flashlight by people who did not talk to him in (sic) a bright (sic) evening? I also do not believe that police officers on patrol would just pounce on an innocent passerby coming from as far as about 200 m. away and plant on him an item dropped by a fleeing man. Rather than plant it on someone the police would have picked up the bicycle and taken it to the police station to await appearance of its owner or for purpose of investigations.”

On the defence case the learned Magistrate stated:

“I have also considered the evidence of the accused. With respect, I do not believe the same. I do not believe the police would have planted his bicycle on the accused while he innocently walked. It would be too remote to believe that the police waited for accused who approached 200m away and planted this bicycle on him after the alleged cyclist ran away. He also alleges there were other passersby at the scene. This means police had options on who to pick from. So why is it that they picked on the accused whom they did not know? And through the prosecution case accused did not raise the issue of alleged money demanded from him by the arresting officers. The defence raised is surely an afterthought.”

The learned Magistrate considered the absence of an identification parade and a discrepancy in the statement of PW3 as to whether he recorded that the appellant was riding or pushing the bicycle when he was arrested but felt that these irregularities were not fatal to the prosecution case.

On appeal to the superior court, the learned Judge’s (Njagi & Omondi, JJ) had this to say:-

“We are persuaded that the appellant had the complainant’s bicycle which had been forcefully taken away from him by men who were operating in interspersed groups along the path way in Mtangani

village. Was the group armed and did they use force? Appellant stated that another man who was ahead of the first group, aimed a stick at him, but missed and instead hit the bicycle handle basis (sic) would this qualify to be considered (sic) being armed and using or thus claiming to use force envisaged under section 296(2) CPC.

When the intended purpose of use is demonstrated by the person having possession of the stick, then yes, a stick becomes an offensive weapon and indeed it was used to threaten and intimidate the complainant. There was violence and threat of violence as demonstrated in evidence by the stick which was aimed at the appellant, he missed and it hit the bicycle handle bar.

The upshot of our finding is that the learned trial Magistrate took into consideration the evidence rendered, evaluated it properly, analysed, reasoned and came to a safe conclusion. We thus uphold the conviction and confirm the sentence herein.”

The appeal before this Court was based on homemade “grounds of appeal” filed herein on 29th November 2010. It had 5 grounds of appeal. They concerned failure by the trial court to note the inconsistencies in the frame number of the bicycle, failure to explain the options open to the appellant under **section 211** of the Criminal Procedure Code and failure to consider the defence case.

There was also a supplementary memorandum of appeal filed herein by *Messrs Obara & Obara, Advocates* for the appellant on 29th January 2011. It had 5 grounds of appeal which related to the difficult conditions under which the appellant was identified, lack of adequate description of the appellant and the improper application of the doctrine of recent possession.

During the hearing of the appeal before us on 19th July, 2011, **Mr. Obara** learned counsel for the appellant submitted that the incident occurred at 6.45 p.m. when it was dark thus making proper identification of the appellant difficult. On the doctrine of recent possession, Mr. Obara contented that since the appellant denied being in possession of the bicycle, he could not be expected to explain how he came into possession of it. On **section 211** of the criminal procedure code, counsel submitted that if it had been complied with, the appellant could have opted to remain silent.

Mr. Ondari, Assistant Deputy Public Prosecutor, for the State, opposed the appeal and submitted that the facts of the case were straight forward; three people had robbed the complainant of his bicycle and a report of the incident made to Malindi Police Station. The two police officers (PW2 and PW3) saw two people on the same night who dropped the bicycle and ran away. One was pursued and arrested by the officers who took him to the police station with the bicycle. He was the appellant. And at the police station, PW2 and PW3 found a report of a robbery case involving a bicycle. And when PW1 was contacted later, he went to the police station and confirmed and identified the recovered bicycle to be the one he had been robbed of. According to Mr. Ondari, PW1 had identified the appellant as one of the robbers who was soon after found in possession of his (PW1’s) bicycle. This was sufficient evidence for the appellant to be convicted.

On **section 211** of the Criminal Procedure Code, counsel stated that the learned magistrate complied with it and this is why the appellant opted to testify on oath and gave a three page detailed defence.

We have on our part perused through the record of appeal and also heard submissions of learned counsel for the appellant and the assistant Deputy Public Prosecutor for the Republic. It would appear to us that the issue of identification depended on the credibility of the witnesses who testified. The decision on this lay with the learned trial magistrate who saw and heard the witnesses testify and who was in a better position to assess their credibility. He believed the evidence of PW1 on this and rejected that of the appellant.

It was the same with the doctrine of recent possession. In particular the trial magistrate did not understand how PW2 and PW3 would pick on the appellant whom they did not know to plant on him a stolen bicycle when there were many passersby they had met during their patrol duties, as the appellant

himself had attested to. The magistrate did not also find any reason why the appellant, if innocent, could drop a bicycle on seeing police officers on patrol and run away. This necessitated a chase by the said police officers leading to his arrest. The evidence of PW2 and PW3 on this aspect was believed unlike that of the appellant which was rejected. There were thus concurrent findings of fact by the two courts below on the two issues, which gives this Court no room for interference, see ***Buru vs. Republic [2005] KLR 533***. The appellant was found with the stolen bicycle two hours after PW1 had been robbed of it and it was held that this falls within the doctrine of recent possession. We say the same here. We dismiss this appeal and it is so ordered.

Delivered and dated at Mombasa this 6th day of October, 2011.

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR