IN THE COURT OF APPEAL
AT KISUMU
(CORAM: BOSIRE, WAKI & AGANYANYA JJ.A)
CRIMINAL APPEAL NO.182 OF 2010

BETWEEN

DANIEL ODHIAMBO KOYO……. APPELLANT
AND
REPUBLIC ……..…….…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja, Ali Aroni JJ.) dated 15th June, 2010

in
H.C.CR.A.NO. 195 OF 2007
****

JUDGMENT OF THE COURT

Daniel Odhiambo Koyo *alias* **Omoya**, is the appellant in this second and probably his last appeal. He was convicted after a trial by the Senior Resident Magistrate at Winam of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, and was thereafter sentenced to death. He was unsuccessful in his first appeal to the High Court.

In the appeal before us he has raised two main grounds, firstly, that his conviction was based on inadequate and unreliable evidence on his identification as the person who committed the offence. Secondly, that the High Court did not adequately re-evaluate the evidence which was adduced before the trial court, which if it had done it would have become clear that he did not commit the offence charged.

The particulars of the charge against the appellant were that:

"On the 10th day of March, 2007 at Serina Stage in Kisumu District within Nyanza Province, jointly with another not before the Court while armed with crude weapons namely – a panga and iron rod robbed Kennedy Ogot Omollo of his motor cycle make Focus Frame No. LPBCO 125860088062 125 cc valued at Kshs. 72,600/- and at or immediately before or immediately after the time of such robbery wounded the said KENNEDY OGOT OMOLLO".

The named complainant is **Kennedy Ogot Omollo**. There is however variance in names with the person who testified as the complainant. The latter gave his name as Kennedy Okoth Omollo. The name on the charge sheet is also the name on the Medical Examination report (P3) and we take it that the middle name in the proceedings was erroneously inscribed, and as no issue was raised on it we take it the person who testified is the person who was robbed.

The robbery complained of was committed at about midnight on 10th March 2007, along Kondele –

Mamboleo Road. The complainant, a motor vehicle and motor cycle driver was returning to Kondele from Mamboleo where he had dropped a pillion passenger, when he was attacked by two men. One of the two men was armed with a panga and the other a metal bar. The complainant testified that although it was night time there were security electric lights about 25 metres away which enabled him to observe and identify the two men. The two men attacked him and demanded his motor cycle which he was pushing because it had had a puncture and he could not therefore ride it. He was cut on his head and left hand. He struggled with the two men and eventually he managed to free himself and escape. It was his evidence that he managed to recognize the appellant as one of the men. He also recognized the appellant's companion as one Odhiambo. He knew them before and for that reason and the fact that the security lights were on and he was close to them at the time of the attack he was able to recognize them. Odhiambo was not arrested.

The complainant's motor cycle was recovered on 11th March 2007 from outside the house of Nancy Ochieng Ojwang (PW2). PW2 testified that at 9.30 p.m. on 10th March 2007, she saw the appellant pushing a motor cycle, red in colour, into his house. The appellant's house was close to hers and she was therefore able to see well the motor cycle and the person pushing it. It was her evidence that the appellant talked to her and called her by name to draw her attention. She recognized him by both his appearance and his voice. Their houses were about 10 metres apart. The motor cycle was recovered between the two houses by the police.

Monica Okoth (PW3), who lived in the same area with PW2 and the appellant also testified. She testified that on 10th March 2007, at about 9 p.m. she saw a red motor cycle outside P.W. 2's house, but she did not witness it being brought there. It was her evidence that her son, **Brian,** alerted her about the presence of the motor cycle in the area. At that stage of her evidence the prosecutor is recorded to have applied for the witness to be locked up for being refractory, and although there was objection from Mr. Aluoch who was then appearing for the appellant, the trial court obliged and treated PW3 as a refractory witness. The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case. In **Maghenda v. Republic** [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:

"The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court."

There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them.

Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify.

PW3 was locked up in custody for about 30 minutes to secure her co-operation. Thereafter, she apparently became co-operative and testified that her son, Brian had told her the appellant was the owner of the motor cycle which she saw outside PW2's house. She later saw the appellant playing with it outside PW2's house accompanied by the said Brian. It was further her evidence that the appellant requested PW2 to assist him push the motor cycle into his house but PW2 refused. Later, the same night the appellant was arrested by the police and the motor cycle was seized. Among the people who were arrested with the appellant was PW2's son whose name was given as **Mike**. He was, however, later released after PW2 intervened.

The appellant in his defence denied the robbery. His testimony was confined to circumstances of his arrest and no more.

The trial magistrate believed the complainant and held that the circumstances under which the robbery was committed were conducive to a correct identification of the appellant and on the basis of his evidence found as a fact that the appellant jointly with another person while armed robbed the complainant of his motor cycle. He was satisfied that a motor cycle which was produced in court was that of the complainant even though it did not bear any registration marks. He was satisfied the evidence of

PW2 and PW3 amply supported the complainant's testimony. He therefore found the appellant guilty as charged and proceeded to sentence him as herein first stated.

The High Court on first appeal, analysed the evidence, and after commenting on various aspects of the case concluded its judgment as follows:-

"The complainant indicated that not only did he recognize the appellant but also the appellant's accomplice called Odhiambo. The learned trial magistrate was satisfied with complainant's credibility and believed him. The findings of a trial court based on the credibility of witnesses may not be interfered with by a first appellate court (see Republic v. Oyier [1985] 2 KLR 353). We think that the existence of bright security lights at or near the scene of the offence provided favourable circumstances for the recognition of the appellant by the complainant. This was supported and given more weight by the evidence of PW2 and PW3 which showed that the appellant was in possession of motor cycle a few minutes or hours after its theft from the complainant. The evidence of PW2 and PW3 was circumstantial evidence based on the doctrine of recent possession. It linked the appellant to the offence and provided corroboration of the complainant's evidence of identification against the appellant. For all the foregoing reasons, we uphold the appellant's conviction by the learned trial magistrate with the result that this appeal is hereby dismissed."

The decisions of the two courts below were based largely on credibility of witnesses. The offence complained of was committed at night time when generally conditions favouring a correct identification are difficult. In the case before us evidence was adduced by the complainant that there were security lights near the *locus in quo*. These provided ample light which, according to the complainant enabled him to recognize the appellant, a person he knew well before. This Court has warned in many decisions that before a conviction can be based solely or largely on evidence of identification at night time, a trial court has to warn itself of the dangers inherent in such identification as there is the possibility of a mistaken identification.

The identification of the appellant by the complainant cannot be said to have been mistaken in view of other evidence on record which both courts below accepted and acted upon. The appellant was seen by PW2 pushing a motor bike which the complainant later identified as the one which was taken from him by two robbers. PW3 also testified that she too saw the appellant with the motor cycle a few hours after it was stolen from the complainant.

PW3 as stated earlier was treated by the court and the prosecution as a refractory witness and we stated earlier that evidence of such a witness needs to be treated with circumspection because of her conduct. In certain cases however, such evidence may be accepted as corroborative of other evidence if the court is satisfied that it cannot be but true and is consistent with other evidence adduced and which the court has accepted. Although PW3 was initially refractory she appears to us to have accepted to co-operate and her testimony was clearly consistent with what PW2 had testified on.

In view of what we have said about PW3, her evidence was properly accepted and acted upon as corroborative of PW2's testimony and the testimony of the complainant. The totality of that evidence clearly shows that the appellant was properly identified by PW1 as the person who robbed him of his motor cycle. The issue of perception of distance from where the robbery occurred and where the security lights were, raised by Mr. Aringo for the appellant does not arise here. The complainant's evidence was supported by the testimony of PW2 and PW3 and we have no doubt whatsoever that the appellant was one of two robbers who took his motor cycle.

Akin to the issue of identification is the issue of possession. The appellant was clearly seen by PW2 and PW3 in possession of the motor cycle. The two witnesses were his neighbours and they were able to clearly see the appellant, more so when it was said that the appellant was with children belonging to the two witnesses. The possession raised a rebuttable presumption that the appellant was the thief which presumption he did not rebut.

For the foregoing reasons, the appellant's appeal lacks any merit. We, accordingly dismiss it. It is so ordered.

Dated and delivered at Kisumu this 3rd day of November, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI
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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR