



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Criminal Appeal 352 of 2008

RICHARD ODUOR ADERA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (Sergon & Kariuki, JJ) dated 28th April, 2005

in

H.C.CR. Appeal No. 49 of 2003)

JUDGMENT OF THE COURT

The genesis of this appeal is Criminal Case No 160 of 2006 in the Senior Principal Magistrate's Court at Siaya in which the appellant Richard Oduor Adera, and seven others were jointly charged on four counts of robbery with violence contrary to **section 296(2)** of the Penal Code. In the trial magistrate's court the appellant was the 5th accused.

In count 1 the particulars of the offence were that on 18th December 2005 at Sega Sub-location Siaya, jointly with others not before court while armed with dangerous weapons namely pangas, rungas and torches they robbed Alfred Onyango Odhiambo of his bicycle (DOSHI) worth shs. 3,500/-. In the course of the robbery they killed the said Alfred Onyango Odhiambo.

In count 2 the particulars were that on the same day and place the same gang similarly armed robbed Colins Omondi of his bicycle and used violence on the said Collins Omondi.

In count 3 the particulars were that on the same day and place the same gang similarly armed robbed Bernard Otieno Akula of a bicycle worth Shs. 3,000 and used violence on the said Bernard Otieno

Akula.

And in count 4 the particulars were that on the same day and place the same gang similarly armed, robbed Vincent Oduor Owino of his bicycle and in the course of the robbery used violence against the said Vincent Oduor Owino.

In the alternative charge contrary to **section 322 (2)** of the Penal Code it was alleged that the appellant with others otherwise than in the course of stealing, dishonestly “received” or “retained” two mattresses, bed sheets, four bicycles makes and frame numbers not visible on 19th December 2005 at Sifuyo Village Siaya knowing or having reasons to believe them to be stolen goods.

The facts as accepted by the two courts below were that on 18th December 2005 at about 9.00 p.m. the four complainants namely, Alfred Onyango Odhiambo (deceased and complainant in count 1), Collins Omondi Omondi (PW1 and complainant in count 2), Bernard Otieno Akula (PW2 and complainant in count 3) and Vincent Oduor Owino (PW5 and complainant in count 4) were riding their bicycles from Sega “airport” towards their homes when they were confronted by a gang of about ten men which set on them (complainants) with pangas and rungas robbing them of their bicycles. The attack was so vicious that Alfred Onyango Odhiambo did not only lose his bicycle but his life too as he succumbed to the injuries inflicted during the robbery incident and died in hospital where he had been taken for treatment. Although the complainants did not identify any of the assailants there were further developments on the following day when the appellant herein was spotted riding a bicycle. It was Collins Omondi (complainant in count 2) who saw the appellant riding a bicycle which Omondi (PW1) recognized as his bicycle which had been stolen the previous evening during the robbery incident. This was reported to the Administration Police and as a result the appellant together with others were found in the home of one Mudimo. When the appellant saw the police party he ran away leaving the bicycle behind. Omondi (PW1) confirmed the bicycle to be his. From there the Administration police party proceeded to the home of the appellant where two more bicycles were recovered. Those two bicycles were identified as those stolen during the robbery. One bicycle belonged to the deceased Alfred Onyango Odhiambo (the complainant in count 1) and the other bicycle belonged to Vincent Oduor Owino (the complainant in count 4). The appellant was arrested and subsequently jointly charged with others who, however, were acquitted for lack of evidence.

The learned trial magistrate (G.K. Mwaura – Principal Magistrate) in his judgment delivered on 31st January 2007 stated inter alia:-

“Having regard to the duration the bicycle had been stolen and the conduct of the fifth accused, I find that he was in very recent possession of the stolen item has no explanation for the circumstances and is therefore one of the gang of robbers who waylaid the four complainants and robbed them four bicycles. In the course of the robbery they fatally wounded the late Alfred Odhiambo and also injured Collins Omondi PW1 with regard to the latter a P. 3 form was exhibited irregularly by a police officer. I would disregard the medical evidence. The four main counts provide that the accused persons committed the offence “JOINTLY” with others. This has been sufficiently proved in this case and satisfies one of the circumstances in S 296(2) of the Penal Code in which a robbery aggregate to robbery with violence. For these reasons I do not doubt the prosecution case against the fifth accused on the four main counts. I find him guilty as charged and proceed to convict him accordingly.”

The learned trial magistrate then sentenced the appellant to death on each count.

Being aggrieved by both convictions and sentences imposed on him the appellant filed an appeal in the superior court. The High Court at Kisumu (Mwera & Karanja JJ) considered the appellant’s pleas before it and in the course of their judgment delivered on 23rd September 2008 the learned Judges said:-

“In the appellant’s home the party recovered the deceased Onyango’s bicycle (Exh.2) which Omondi (PW1) said that he knew. He was with the search party. Also there was Vincent Oduor’s (PW5) bicycle. It was recovered in PW1’s presence (Exh.P3). Another bicycle Exh. P4 belonging to Benard Akula (PW 2) was found in the home of one Otieno Achachi whom the members of the public beat to death –not from the home of the appellant. Nobody testified that Achachi was one of the gang of the appellant which robbed the complainants so as to establish a common intention.

In sum the conclusion we came to is that the appellant was in the group of robbers who attacked and stole the bicycles of Alfred Onyango (Count 1), Collins Omondi (count 2, PW1) and Vincent Oduor (PW 5 Count 4). The bicycle of Benard Akula (PW2) was found in the home of Otieno Achachi. He died. Only the wife of the appellant told the search team that this Achachi brought the subject bicycles into her home. She did not testify in the lower court. And we cannot therefore assume that the appellant and Achachi were confederates in the robberies.

Accordingly we allow his appeal regarding this count 3. In the result that we uphold the conviction and sentences against the appellant as regards counts 1, 2 and 4 only. We direct that the appellant do serve the sentence for count 1 while the other two are held in abeyance.”

Still dissatisfied with the foregoing the appellant now comes to this Court by way of second and final appeal. That being so only matters of law may be considered – see **section 361** of the Criminal Procedure Code. Through his lawyer the appellant filed a memorandum of appeal comprising the following grounds.

- “1 That the learned Judges of the superior court erred in law by failing to consider evidence before him especially the appellant evidence and without assigning any reasons therefore.**
- 2 The learned Judge of the superior court erred in law in failing to find that the trial magistrate wrongly invoking the doctrine of recent possession so as to find conviction.**
- 3 That the learned judge erred in failing to find that the trial magistrate erred in law by shifting the burden of proof of alibi to the appellant contrary to section 296 (2) Penal Code.**
- 4 That the learned Judge erred in failing to find that trial magistrate erred in law in failing to appreciate that the charges against the appellant were bad for duplicity and hence prejudiced (sic) to appellant’s fundamental right”**

This is the appeal that came up for hearing on 1st December 2009 when Mr. P.J.O. Otieno appeared for the appellant and Mr. D.I. Musau (Senior Principal State Counsel) appeared for the State. Mr Otieno abandoned the fourth ground of appeal and proceeded with the first three grounds. In his submissions Mr. Otieno contended that PW 1 did not give sufficient description of the bicycle which he claimed to be his. Mr Otieno pointed out that the appellant too claimed the bicycle to be his. For these reasons, Mr Otieno was of the view that the conviction of the appellant was unsafe. These were the arguments on grounds 1 and 2 of the Memorandum of Appeal. As regards ground 3 Mr Otieno submitted that the court below had shifted the burden of proof to the appellant.

On his part Mr. Musau submitted that both courts below were in agreement that there was evidence of recent possession and that the bicycles were sufficiently identified by their owners. Mr Musau pointed out that the appellant was found in possession of the two bicycles only a day after the robbery.

We have considered what has been urged before us and it can safely be stated that the appellant’s convictions were based on the fact that he was found in recent possession of the bicycles that had been stolen during the robbery. The robbery took place on the evening of 18th December, 2005 and on the following day the appellant was seen riding one of the bicycles stolen during the robbery. When the police party went to the appellant’s house two more bicycles (also stolen during the said robbery) were recovered. The recovered bicycles were identified as those belonging to the complainants. The appellant did not offer any explanation as to how he came to be in possession of the stolen items.

On the doctrine of recent possession of goods this Court held in **ISSAC NANGA KAHIGA alias PETER KAHIGA V REPUBLIC – Criminal Appeal No. 272 of 2005 (unreported):-**

“It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses.”

Having considered the concurrent findings of the two courts below and taking into account the foregoing we are satisfied that the appellant’s convictions were based on very sound evidence of recent possession of stolen property. The appellant was not only found in recent possession of stolen property but his very conduct clearly demonstrated that he was a guilty person.

In view of the foregoing we find no merit in this appeal and we order that it be dismissed in its entirety. It is so ordered.

Dated and delivered at Kisumu this 5th day of February 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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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