



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

**Criminal Appeal 200 of 2008**

**PAUL MWITA ROBI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Kisii (Musinga & Karanja, JJ) dated 31<sup>st</sup> July, 2008*

**In**

**H. C. Cr. A. No. 281 of 2006)**  
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**JUDGMENT OF THE COURT**

The complainant in this second and final appeal, **Julius Maroa Mwera** (PW1) left Ntimaru in Kuria District at 7.30 p.m. going to his home. He had his bicycle. On the way, he was attacked and cut on the head and back by thugs. He fell down as he screamed for help. He was also hit on the right hand and his wrist watch was cut. Members of the public came to his aid and he told them the attackers had just taken his bicycle as well as other things he was carrying on that bicycle. They started tracing the bicycle using the tyre marks of the bicycle to guide them. In the meantime, Marwa Musabi Mwera (PW2) whose home was nearby, was at home. He heard screams of Maroa saying he had been robbed of bicycle and he went out to the same foot path. He heard somebody approaching him. That person had a bicycle. He met that person who was the appellant in this appeal. The appellant had a bicycle. Musabi forced the appellant to accompany him (Musabi) back to the complainant. When they reached the complainant, the complainant identified the bicycle as his. The appellant was beaten and then taken to police station. Ibrahim Mwita (PW3) was also living near the scene. He also heard screams of the complainant saying he had been robbed of a bicycle. He too proceeded to where the screams were coming from and he found Maroa together with appellant who had a bicycle. He accompanied the complainant in taking the appellant to police station at Ntimaru. Both Musabi and Mwita identified the bicycle which complainant identified to be his as the same bicycle the appellant had immediately the complainant screamed that his bicycle had been stolen in a robbery. IP. Evans Omuga (PW4) who was the O.C.S. at Ntimaru Police Station rearrested the appellant who was taken to the Police Station by a large crowd. He noted that the complainant was at the time bleeding. He also recorded statements from the witnesses and after he completed investigating the case, the appellant was charged with the offence of Robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars were as follows:-

***“On the 22<sup>nd</sup> day of August, 2006, at Gongelo village Ntimaru sub-location in Kuria District within Nyanza Province jointly with others not before court robbed Julius Maroa Mwera of one bicycle make, Hero Jet valued at Kshs.5000/-, four packets of maize seeds valued at Kshs.960/-. Rail of plough valued at Kshs.150/-, all valued at Kshs.6,110/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Julius Maroa Mwera.”***

He pleaded not guilty to the charge and at his trial, his defence given in a sworn testimony was:-

***“I come from Ntitaru. On that date I was going home. I met people on the road at 7.30 p.m. the (sic) answered me harshly and refused me way, I was drunk and we exchanged words, they beat me up and stole my money Kshs.4,500/- then they took me to police and later I was charged with robbery under section 296 (2). I want court to assist me.”***

In cross-examination, he said he did not commit robbery and although he saw the complainant in court, he did not ask him about money and complained about having been beaten. He stated further that he was drunk and was just on foot. The people who crossed his way were 8 in number and he did not know who injured the complainant.

After full hearing the learned Principal Magistrate convicted the appellant of the offence as charged, and sentenced him to suffer death. In convicting the appellant, the learned Principal Magistrate (E. O. Awino) stated inter alia as follows:-

***“The offence took place at about 7.30 p.m. and the accused was stopped and arrested at about the same time moving away with the bicycle. This bicycle was shown and exhibited in court; it was the property of the complainant and not the accused. He was arrested red-handed and his defence is just a mere defence (sic).”***

The appellant was not satisfied with that conviction and sentence. He lodged an appeal in the superior court. The superior court (Musinga & Karanja, JJ), after hearing the appeal, analyzing the evidence and evaluating the same evidence afresh as is required of it by law – see **Okeno vs. R (1972) EA 32**, dismissed it saying in pertinent parts as follows:-

***“It is our finding that the prosecution evidence did credibly establish that the appellant was found in possession of the complainants stolen bicycle immediately after it had been stolen in a violent manner from the complainant. The evidence, though circumstantial, did establish the appellant is indeed one of those who attacked and robbed the complainant of his bicycle and other items.”***

The court then cited the holding in the case of **R. V. Kipkering Arap Koske & Another 16 EACA 138** and went on to state:-

***“The appellant herein made no attempt to explain his possession of the material bicycle. He implied that he was not in possession thereof. However, the prosecution did satisfy the legal requirement of circumstantial evidence to warrant and justify the conviction of the appellant by the trial court on basis of the evidence on record. The appeal is without merit and is hereby dismissed.”***

The appellant is still dissatisfied and hence this appeal before us premised on three grounds in the supplementary memorandum of appeal dated and filed on the 8<sup>th</sup> March 2010 which are that:-

- “1. The superior court failed to remind, re-evaluate and analyse the evidence on record in exercise of one of its duties as the first appellate court.***
- 2. The trial court failed to safeguard the rights of Accused/Appellant to ensure a fair trial.***
- 3. The superior court went beyond the evidence on record to find a basis on which to dismiss the appellant’s appeal.”***

In his submission before us, Mr. Oguso stated that the first appellate court did not analyse the evidence adduced in the trial court as is required by the law in that it did not treat the matter facing the appellant with the seriousness it deserved as for example, the superior court merely concluded that the appellant was found with a stolen bicycle without considering that there was no evidence as to how the appellant was in possession of the bicycle, such as whether he was riding it, or pushing it etc. so as to establish properly that he was in possession

of the bicycle. Secondly, he contended, and we think rightly, that the learned Judge accepted evidence that was not admissible and incorporating the same in its judgment. Miss Oundo opposed the appeal stating that the appellant was clearly found in possession of a bicycle that had just been stolen from the complainant and was by inference, the thief. She conceded that the learned Judges of the superior court erred in admitting the evidence of IP. Evans Omuga in cross-examination, which was to the effect that the appellant even gave to the police names of the other five suspects and in using it as an assurance in their judgment that the appellant committed the offence, but Miss Oundo maintained that even if that part of evidence was to be excluded as it was indeed inadmissible, still there was enough evidence on record to sustain conviction of the appellant.

In our view, the learned trial Magistrate was plainly right in his finding that this was indeed a case of appellant having been caught red-handed stealing a bicycle from the complainant by use of force. The evidence on record that immediately the complainant was cut at the back of his head he fell down and was hit again while on the ground and immediately his bicycle was stolen as he was screaming saying that his bicycle was stolen, coupled with the evidence of Musabi and Muita who in response to his distress screams went to the path and intercepted the appellant with the same bicycle, leaves no doubt that the appellant was in effect caught in the act, for he was caught while attempting to escape from the scene of the crime. It does not matter whether he was riding the bicycle, pushing it, or even carrying it. What matters is that as the complainant was still screaming on account of having just been robbed of the bicycle, the appellant was arrested with the same bicycle nearby even before he settled down to enjoy his loot and before complainant settled down to reflect on what had happened to him. Mr. Oguso submitted that part of the evidence of IP. Omuga, we have referred to herein above to the effect that the appellant is the one who gave them the names of some other five suspects should not have been relied on by the superior court. He cannot be faulted on that and Miss Oundo conceded the same as we have stated. We also agree that that part of the superior court's judgment is a misdirection as that part of evidence was clearly inadmissible even as regards the law as it was before the amendment was introduced, for in any case, there was no evidence that the appellant was warned as was required in law before he could make such a statement. Of course under the law as amended, the law bars taking such statement from suspect. However, we have fully considered the effect of that inadmissible evidence to the entire judgment of the superior court. In our view, we agree with Miss Oundo that even if that part of evidence was not considered, the material that remains was still overwhelming and could sustain conviction. In other words, even if the superior court had not made reference to that inadmissible evidence, it was still bound, on the material that was before it to dismiss the appeal as it did.

Lastly, Mr. Oguso submitted that the appellant had no requirement to explain his recent possession of a stolen bicycle and that the burden remained throughout on the prosecution. That, with respect, is not the law. Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is especially within the knowledge of the accused and pursuant to the provisions of **section 111(1)** of the Evidence Act **Chapter 80**, the accused has to discharge that burden. The provision states:-

***“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, 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.”***

Thus while the law is that generally in criminal trials, the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, however, in a case where one is found in possession of a recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation only needs to be a plausible one but he needs to put it forward for the court's consideration. This is what the superior court was alluding to in its judgment.

To conclude, having considered anxiously the evidence that was adduced in the trial court, the judgment of that court, the judgment

of the superior court, the submissions before us and the law, we find no reason to disturb the decisions of the two courts. This appeal has no merit. It is dismissed.

Dated and delivered at Kisumu this 19<sup>th</sup> day of March, 2010.

**R.S.C. OMOLO**

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

**J.W. ONYANGO OTIENO**

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

**J.G. NYAMU**

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

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

**DEPUTY REGISTRAR.**