



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**Criminal Appeal 21 of 2005**

**DAVID WACHIRA KINYUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu, JJ) dated  
14<sup>th</sup> October, 2004**

**in**

**H.C. Cr. Appeal Nos. 447 & 467 of 2002 (Consolidated))**

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**JUDGMENT OF THE COURT**

In this second appeal, **David Wachira Kinyua** (the appellant), attacks his conviction and sentence for the offence of robbery with violence contrary to **section 296(2)** of the Penal code, whose particulars allege that: “On the 11<sup>th</sup> day of September, 2000 at Karaini Village in Kirinyaga District within Central Province jointly with another not before court and while being armed with torches, rungas and pangas, robbed Mary Wagatwe Maina of one television set, one sewing machine head, one radio cassette, one bicycle and cash money 1,000/= total valued at Kshs.29,500/= and at immediately before or immediately after the time of such robbery harmed the said Mary Wagatwe Maina.” (the complainant).

The appellant was convicted by a Senior Resident Magistrate, at Kerugoya, after trial. He was jointly charged, tried and convicted with Edward Wachira, who was however acquitted by the superior court on first appeal, of the robbery count, second count of rape contrary to **section 140** of the Penal Code and also a third count of being in possession of cannabis sativa contrary to **section 3(1), (2a)** of the **Nacotic Drugs And Psychotropic Substances Act No. 4 of 1994**. The appellant, like his co-accused, had faced a second count of rape, and on first appeal, his conviction thereof was quashed.

The appellant’s conviction on the robbery with violence charge was based on his alleged possession of the complainant’s bicycle two days after it had been reported stolen from her, and the complainant’s visual identification of him at night time with the help of a gas lighter. The superior court, on first appeal, held that the circumstances under which the complainant said she identified the appellant and his co-accused were difficult and hence that identification could not possibly have been reliable. That court upheld the appellant’s conviction on the basis of being found with recently stolen property and his failure

to offer a reasonable explanation or any explanation as to how he came to be in possession of that property. In this appeal, the appellant challenges the concurrent finding of fact that the appellant was found in possession of the complainant's bicycle.

Mr. Mahinda, for the appellant before us, submitted that the bicycle in question was recovered about eight months after it was stolen, and in his view therefore, the doctrine of recent possession did not apply. As we think the learned counsel was mistaken on this, we will first outline the background facts before we deal with his submission.

The complainant was surprised in her bedroom on the night of 11<sup>th</sup> September, 2000, by two men who demanded to have sexual intercourse with her and threatened to injure her if she did not oblige. They were armed with pangas and "rungus". She complied and was raped in turns by the two men who she said she recognized, when they lit a gas lighter, as the appellant and his co-accused, one Edward Wachira Gikunju. The men escaped with several items including a bicycle. On the basis of information supplied by her, the appellant and his co-accused were arrested. The appellant volunteered to and led the police to Simon Muriithi Mathenge (Simon) to whom he had sold a bicycle which the complainant positively identified as one of the items which were stolen from her house on the night she was attacked by two men. Simon testified that the appellant sold a bicycle to him on 13<sup>th</sup> September, 2000, which sale was witnessed by the appellant's aunt, Jane Wanjiru Nderitu (Jane), and the appellant and herself signed a document evidencing the sale. Simon produced the document as an exhibit. The appellant did not challenge the authenticity of the document, and besides, Jane confirmed that she signed the documents as a witness to the sale.

The police recovered the bicycle from Simon on 4<sup>th</sup> April, 2001. It is this date which Mr. Mahinda regarded as the date the appellant was found in possession of the bicycle. With due respect to the learned counsel, the correct date on which the appellant had possession of the bicycle after it was stolen was 13<sup>th</sup> September, 2000. It was then that he sold the bicycle to Simon. Both Simon and Jane testified to that effect. Consequently, the doctrine of recent possession applied. Two days were short enough for an item such as a bicycle to be regarded as recent enough for the doctrine to apply.

As Mr. Orinda, State Counsel, rightly submitted, since the appellant was not claiming to be the owner of the bicycle, the burden was upon him to explain how he came to be in possession of it. It is a duty cast upon him by **section 111(1) of the Evidence Act Cap 80 Laws of Kenya**. In his defence, the appellant merely denied the offence and put forward an *alibi*. He was not obliged to prove his *alibi*. However, his duty to explain his possession of the bicycle is not displaced by the *alibi*. To the contrary, his possession of the bicycle and his failure to offer a reasonable explanation as to how he came by it dislodges his *alibi*. Besides, the fact that he was found with the bicycle, does clearly confirm the complainant's identification of him as one of the two men who raped her and robbed her of her property. Entry into her house was forcible and violence was applied to her by the appellant and another person and thus all elements of the charge of robbery with violence were proved to the standard required.

In the result, we find no basis for interfering with the decision of the superior court and accordingly, we hereby dismiss the appellant's appeal in its entirety. It is so ordered.

**Dated and delivered at Nyeri this 4<sup>th</sup> day of August, 2006.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O BOSIRE**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**