



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 55 OF 2006

WILFRED KIURA MARIA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (J.M. Khamoni & H.M. Okwengu JJ) dated 14th November 2005

in

H.C.CR. APPEAL NO.201 OF 2004)

JUDGMENT OF THE COURT

The appellant, **Wilfred Kiura Maria**, was tried and convicted by a Senior Principal Magistrate at Kerugoya of robbery with violence contrary to **Section 296(2)** of the Penal Code and sentenced to death. The charge preferred against him alleged that on the 24th April, 2004 at Kandongu trading centre in Kirinyaga District, jointly with others not before the court while armed with dangerous weapons namely pangas robbed **Bernard Mugo Mutero** of his bicycle and cash shs.380/= all valued at shs.2,880/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Bernard Mugo Mutero (the complainant).

The appellant lodged an appeal to the High Court of Kenya at Nyeri (Khamoni and Okwengu JJ.) but by its judgment delivered on 14th November, 2005 the appeal was dismissed. This is the appellant’s second and final appeal.

This, therefore, being a second appeal only matters of law fall for consideration pursuant to **Section 361** of the Criminal Procedure Code. The first issue raised by Mr. Muchiri wa Gathoni counsel for the appellant is that the first appellate court did not subject the evidence to exhaustive examination and that had it done so, it would have found that the bicycle, the subject matter of the charge, had not been properly identified as belonging to the complainant.

We reiterate that it is, indeed, the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld – see **Okeno v. R.**[1972] E.A 32

We pose; can it be justifiably argued that in the instant appeal the first appellate court failed in its duty?

With great respect we would think so.

The robbery took place at about 9.00 p.m. along Kagio – Kandongu road. The complainant was accosted by three people armed with pangas. Two of them had bicycles. They snatched the complainant’s bicycle and rode away fast. The complainant stopped a passing lorry and informed the driver of the robbery. They gave chase and at about a kilometre away along Embu – Nairobi road they saw three cyclists. The lorry blocked the road and the cyclists fled in different directions leaving behind three bicycles. One person was spotted, targetted, chased and arrested. He was the appellant. The complainant identified one of the bicycles as belonging to him.

The appellant in his defence testified that he was riding home in the evening. It was dark. Suddenly a lorry came from behind and swept him off the road. He fell into a trench. He was arrested and beaten by people who took him to the police station. He denied being found with the complainant’s bicycle.

In this case none of the witnesses identified the robbers. However, the conviction of the appellant was wholly dependent on the recent possession of the stolen bicycle. In upholding the conviction the first appellate court said:-

“Although the complainant was not able to identify the Appellant as one of the persons who robbed him, as was decided in the case of Andrea Obonyo v/s Republic [1962]EA 542, the appellant’s possession of the bicycle shortly after the robbery, and his failure to satisfactorily account for his possession of the bicycle gave rise to the doctrine of recent possession, and a presumption of fact that he was one of the robbers.”

This finding cannot possibly stand a critical analysis of the evidence as to whether the appellant was in actual possession of the complainant’s bicycle. Firstly, three bicycles were found at the scene. Whose bicycles were the other two? It is possible that one of them belonged to the appellant as there was no evidence to disprove of his testimony. Secondly, it was not proved beyond doubt that the appellant was in possession of the complainant’s bicycle. Moreover, he gave a satisfactory account of why he was at the place at which he was arrested. As the bicycle, the subject matter of the case, had not been positively proved to belong to the complainant the doctrine of recent possession cannot be invoked.

We think that the conviction of the appellant is unsafe and we do not uphold it.

The appeal is allowed. The conviction is quashed and the sentence of death is set aside. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 27TH day of October 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR