



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 49 OF 2014

BETWEEN

PETER WESONGA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega, (Chitembwe & Thurania, JJ.)

dated 8th November, 2012 in H.C.CR.A. NO. 271 of 2010)

JUDGMENT OF THE COURT

1. Moses Ameya, (the complainant), who testified before the subordinate court as PW1, was a boda boda operator. He was at the material time employed by one George Musumba to operate a motorcycle which had not been registered. It was a TVS Motorbike valued at Kes.85,000/= and identified by its engine number OFSB91514287.
2. As he rode home from Ekeru Centre on 4th September 2009 at about 8.30 pm, he was stopped by the appellant, who was one of his regular customers, and asked to take him to Burudika Bar in that Centre. He obliged. The appellant alighted, went in that bar and returned with another person. Both of them asked the complainant to take them to Lurekho area. The appellant once again obliged. On the way, prior to arriving at the said destination, the appellant asked him to drop them which the complainant did. As the appellants pretended to get the fare from their pockets, another person emerged from a nearby sugar plantation with a stick. Thereafter the appellant and his confederates assaulted the complainant, left him lying down on the road and fled with his motorbike.
3. Musa Oduor Washika, a village elder who happened to be near the scene and witnessed the incident, rang police on patrol and informed them of the robbery. The police intercepted the motorbike and arrested the appellant with it. The appellant's confederates managed to escape.

4. The appellant was thereafter arraigned in court with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. After trial, he was convicted and sentenced to death. His appeal to the High Court against both that conviction and sentence having been dismissed, he has come to this Court on a second appeal.
5. In his two grounds of appeal, the appellant complained that had the High Court properly re-evaluated the evidence on record, as it was obliged to, it would have found that the appellant had not been properly identified and that he was convicted on contradictory evidence.
6. Prosecuting the appeal before us, Mr. Lore, learned counsel for the appellant, submitted that PW2 did not identify the three people he claimed he saw assault the complainant and ride off with his motorbike. The intensity of electric light and the moonlight which allegedly enabled the complainant to see and identify the appellant having not been given, counsel said the appellant's identification by the complainant was not positive and reliable. Counsel concluded that in addition, the ownership of the motorbike was not established and urged us to allow this appeal.
7. In response to those submissions, Mr. Ketoo, learned Prosecution Counsel, dismissed this appeal as lacking in merit. He submitted that the recovery of the motor cycle from the appellant sealed his fate.
8. Having considered these rival submissions and carefully read the record of appeal, we agree with Mr. Ketoo, learned Prosecution Counsel, that this appeal has no merit. Besides the moonlight, the complainant was, with the aid of his motorbike headlights, able to see the appellant at the spot where the appellant stopped him and requested to be taken back to Ekeru Centre. At Burudika Bar in that Centre which the appellant entered and shortly returned with another person, there was electric light which enabled the complainant to again see the appellant. In the circumstances, we are satisfied that the conditions were favourable for a positive identification and this being a case of recognition, we have no doubt that the appellant's identification was not mistaken.
9. As we have stated, upon information from PW2 who witnessed the robbery though he was himself unable to identify the robbers, police officers on patrol intercepted the appellant and arrested him with the stolen motorcycle a few minutes after its theft. In court, the complainant produced a receipt which proved that the motorbike belonged to his employer, George Musumba. So even if there was any error in the appellant's identification, we find that his conviction on the doctrine of recent possession cannot be faulted. In the circumstances, we find no merit in this appeal and we accordingly dismiss it.

DATED and delivered at Kisumu this 17th day of December, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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of the original.

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