



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 28 of 2009

WILSON OKETCH DACHI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence from Chief Magistrate's Court at Kisumu Criminal Case No. 94 of 2008]

Coram

Mwera, Karanja –JJ

Miss Oundo for state

Court clerk George /Laban

Appellants in person

JUDGMENT

Wilson Oketch Dachi (herein appellant) appeared before the Principal Magistrate at Kisumu charged with robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 16th September 2007 at Nyahera Oyugis town Rachuonyo District Nyanza Province, jointly with another not before court, while armed with offensive weapons namely pangas, robbed **George Ochola** of a motor cycle chassis number MAD 623FB3071C37291 make T.V's blue in colour valued at Kshs. 100,000/= the property of **James Ochieng Otieno** and at immediately before or immediately after the time of such robbery used actual violence to the said **George Ochola**.

There was a second count of stealing of a motor-cycle contrary to Section 278 (A) of the Penal Code, in that on 16th August 2007 at Milimani Estate Kisumu, the appellant stole one motor cycle chassis number MDE23FB35HA34056 make T.V's blue in colour valued at Kshs. 100,000/= the property of **John Otieno Miganda**.

The appellant pleaded not guilty to both counts and after trial was convicted and sentenced to death on count one. He was acquitted on count two for lack of evidence.

Being dissatisfied with the conviction and sentence the appellant filed the present appeal on the basis of the grounds contained in his petition of appeal dated 16th February 2009. He augmented and fortified the grounds by presenting written submissions during the hearing. He relied on the said submissions.

Basically, the appellant complains of the prosecution evidence of identification which he contends was insufficient and contradictory. He also complains of the misapplication of the doctrine of recent possession by the trial court and the violation of his constitutional rights under Section 77 (2) (b) (f) of the Constitution of Kenya.

The learned Senior State Counsel, **Miss Oundo**, appeared for the respondent and opposed the appeal.

The learned State Counsel summarized the prosecution case and contended that the case was proved beyond reasonable doubt against the appellant.

On the alleged violation of the appellant's constitutional rights, the learned State Counsel, contended that although the language used was not indicated at the time of plea, the appellant was duly represented by an advocate and in any event, the charge was later re-read in Dholuo language while the trial proceeded in Kiswahili, English and Dholuo.

The learned State Counsel said that there was nothing to show that the appellant did not follow the proceedings.

Our obligation as the first appellate court is to reconsider the evidence and make our own conclusions. We however bear in mind that the trial court had the advantage of seeing and hearing all the witnesses (See **Okeno vs Republic [1972] E. A. 32**).

The prosecution case was that on the 17th September 2007 at 8:30 p.m. **James Ochieng Otieno (PW1)** who operated a motor cycle taxi business at Sikri Centre near Oyugis town was informed by his employee **George Ochola (PW2)**, the actual complainant herein that his (PW1's) motor-cycle make Tusmax 100 blue in colour had been stolen in a robbery attack against the employee (PW2) who was at the time in the course of his employment. James (PW1) reported the incident at the Oyugis Police Station but found that his employee had already made a report. He (PW1) availed documents showing that the stolen motor cycle belonged to him. He said that the motor cycle had been purchased from Car and General Ltd on the 28th August 2007.

On 5th March 2008, James was called by a police officer attached to C. I. D. Kisumu and informed that his stolen motor cycle had been recovered. He proceeded to Awendo Police Station where he saw and identified the motor cycle. He was also shown the person who was suspected of having stolen the motor cycle. The said suspect was the appellant.

The complainant's employee **George Ochola Otieno (PW2)** said that he was riding the said motor cycle on the material 16th September 2007 while carrying a pillion passenger who was being taken to Nyahera junction from Oyugis stage. The passenger was a paying passenger and on arrival at the Nyahera junction he told George (PW2) to stop and immediately thereafter a person suddenly emerged from a nearby bush wielding a panga (machete) and ordered him (PW2) to leave the motor cycle or lose his life.

The pillion passenger who had already alighted from the motor cycle pushed George (PW2) away from the motor cycle and took it away.

Thereafter George (PW2) rushed to Oyugis Police Station and made a report. Police officers accompanied him back to the scene but the suspects were nowhere to be seen.

George (PW2) said that the pillion passenger was not previously known to him but he managed to identify him when they passed through a petrol station within Oyugis town where there was bright electric light from florescent tubes. He (PW2) said that the passenger wore jeans trousers, jacket and a cap. He (PW2) identified the said passenger as the appellant.

On 7th March 2008 George (PW2) learnt that the stolen motor cycle had been recovered. He came to Kisumu and identified the motor cycle. He saw the appellant in police cells in a group of about eight (8) other people.

P. C. Kipngetich Ruto (PW3) of the C. I. D. Flying Squad Kisumu produced the recovered motor cycle in court after the appellant had already been charged.

A teacher at Wikodongo Primary School cum-member of the Pefa Church in Rongo District by name **Joshua Aduwi Were (PW4)** testified that on or about 4th September 2007, he was at a school called Liwuro Primary School when he received visitors who arrived in a motor cycle. The visitors numbered two and included **Wilson Oketch**, the appellant herein.

Joshua (PW4) said that the appellant introduced himself as a promoter of products from Car and General Motors Limited Kisumu and said that he was a salesman for the company.

Being a pastor, Joshua became interested in the purchase of a motor-cycle and since the appellant was known to a fellow teacher called Charles Otieno his (PW4's) confidence in the appellant was enhanced.

On 27th September 2007 the appellant went to see Joshua (PW4) while in possession of a motor-cycle and a letter head from his "**company**". The two made an agreement for the purchase of a motor –cycle by Joshua (PW4). The agreement was witnessed by the teacher Charles Otieno and others.

Thereafter, the appellant received the purchase price and left the motor –cycle with Joshua. He (appellant) was to bring the motor – cycle's log-book and registration plates at a later stage.

While awaiting for the logbook, Joshua (PW4) was approached by police officers on the 5th March 2008. The police officers were accompanied by the teacher Charles Otieno. He (PW4) was asked about the motor-cycle and he said that it was operating as a taxi at a place called Ranen.

The motor –cycle was indeed found at Ranen. It was then confiscated by the police and taken to Awendo Police Station. At that time, the appellant had already been arrested.

The agreement entered between the appellant and Joshua (PW4) respecting the motor – cycle was tendered in evidence before the trial court.

On 25th February 2008, **Luyai Majwoli (PW5)** a businessman at Migori was introduced to the appellant by the same teacher Charles Otieno. He (PW5) was told that the appellant was a salesman for the Car and General Ltd. He (PW5) expressed an interest in the purchase of a motor –cycle and it was agreed that the appellant would fetch for him one from Kisumu.

Luyai (PW5) paid a deposit of Kshs. 40,000/= of the agreed purchase price of Kshs. 85,000/= . The

appellant promised him that the agreement would properly be made upon delivery of the motor-cycle on the following day.

No such delivery was made and on the 3rd March 2008 Luyai (PW5) traced the appellant with whom they came to Kisumu on the 4th March 2008.

On arrival in Kisumu, the appellant took Luyai (PW5) to a hotel where they were both arrested by police officers and taken to Migori.

Luyai (PW5) said that at Migori, the appellant led the police into recovering three motor-cycles. Two of the motor –cycles were recovered in Ranen while the third was found with a teacher called **Charles Oguda**.

The recovered motor-cycles were taken to Sony Police Station while Luyai (PW5) was released even though the money he had paid the appellant was not refunded to him.

Cpl. Andrew Rana (PW6) of the C. I. D. Kisumu attached to the Flying Squad unit was on duty on 4th March 2008 when he received a tip-off that a theft suspect was at Whirlspring Hotel in Milimani Estate. He (PW6) and colleagues proceeded to the hotel and found the appellant and Luyai (PW5). Both were arrested and on the 5th March 2008 they were taken by the police to Migori. At Migori and with the help of the appellant the motor –cycles “**sold**” to the teachers **Charles Otieno** and **Joshua (PW4)** were recovered. Cpl Rana (PW6) said that the motor – cycle found with Joshua (PW4) was the one which was robbed from the complainant (PW2) in Oyugis. The appellant was then charged accordingly.

Ag I. P. Evans Mwangi (PW7) conducted an identification parade in which the appellant was pointed out by the complainant (PW2).

In his defence, the appellant in an unsworn statement said that he was a taxi driver in Migori town and had travelled to Kisumu from Migori on the 3rd March 2008 to purchase shop goods. However, on reaching near the Kisumu Museum the vehicle he was travelling in had a tyre burst and was parked at a petrol station (Oil Libya). It was late in the evening. The appellant went to a nearby hotel for an evening meal. Thereafter on his way to Nyalenda to look for a lodge a vehicle stopped next to him and its occupants forced him into the vehicle. He was searched and his money Kshs. 33,300/=, including his identification documents and driving licence was taken away. He was taken to the Kisumu Central Police Station where he was beaten and questioned about the money. He was placed in the cells where another person was brought. He (appellant) was asked whether he knew the person and he answered in the negative. The person was taken away.

On 7th March 2008, he (appellant) was taken to the Flying Squad office where he was pointed out to two people who later identified him in an identification parade. He was later taken to court where the person he had seen in the cells and one of those who attended the identification parade testified against him.

All the foregoing evidence by the prosecution and the defence was considered by the learned trial magistrate who concluded that the prosecution had proved beyond reasonable doubt that the appellant had committed the offence of robbery with violence against the complainant.

On our part and having carefully reviewed the evidence, we are satisfied that the offence was committed against the complainant (PW2) by a group of two people one of whom was armed with a

panga. The person with the panga had emerged from a nearby bush at the Nyahera junction where a passenger on the complainant's motor cycle had asked to be taken. We do not think it was a coincidence that the complainant was confronted and robbed of his motor-cycle at the place where he had dropped the passenger. It was quite apparent that the passenger and the person who emerged from a bush and confronted the complainant in a threatening manner were acting in concert to carry out a common purpose. This was confirmed by the fact that the passenger and the panga wielding person from the bush rode off on the motor –cycle after the complainant was forced to surrender it.

The actions of the passenger and his colleague constituted the offence of robbery with violence contrary to Section 296 (2) of the Penal Code (**See Johana Ndugu =vs= republic Criminal Appeal No. 116 of 1995).**

With regard to the identification of the two offenders it was notable that the offence occurred in the hours of darkness thereby rendering difficult circumstances for identification. The only identification witness was the complainant (PW2). He said that he saw and identified the appellant as the person who was the passenger on the motor cycle and who asked to be dropped at Nyahera junction. The complainant said that he was able to see and identify the appellant when they entered a petrol station which was well lit by means of electric light.

The complainant also said that the appellant at the time wore jeans trousers and jeans jacket and a cap.

In the identification parade conducted by **Ag. I. P. Mwangi (PW7)** the appellant was again allegedly identified by the complainant.

There was no other identifying witness. The trial court had only the evidence of the complainant to hold that the appellant was positively identified as having been one of the two robbers.

In our view, that evidence of identification at or near the scene of the offence was rather shaky and insufficient to be accorded absolute reliability. The evidence did not overrule the possibility of error or mistaken identification. We say so because, firstly the complainant (PW2) did not say how he was able to identify the appellant at a petrol station where there was light given that the pillion passenger was at his rear while he (complainant) was facing the front. There was no mention that the passenger alighted from the motor –cycle at the petrol station and stood by facing the complainant or that the complainant alighted from the motor cycle and stood by facing the passenger.

Secondly, the complainant clearly said that the passenger wore a cap. It is common knowledge that a cap may conceal a person's face such that identification becomes inhibited. There was no mention that the cap was removed by the passenger at the petrol station.

A petrol station is usually a place where there could be a number of people including the attendants, yet the prosecution did not deem it fit to summon one of the petrol station attendants to testify and corroborate the complainant's evidence of identification against the appellant.

We think that it was highly likely that the complainant did not enter any petrol station as alleged and even if he did, he was not in a position to clearly see and visually identify the passenger who had hired him. More likely than not he only identified the clothes more that the passenger was wearing and nothing more. If the complainant could not identify the suspected passenger at the scene of the offence then his purported identification of the appellant at the identification parade was erroneous if not stage managed.

We therefore disagree with the learned trial magistrate that the appellant was positively identified by the complainant.

The complainant's evidence of identification was unreliable and unsafe to rely on and more so in the absence of corroboration.

However, there was sufficient and reliable evidence linking the appellant with the offence. This was essentially circumstantial and based on his recent possession of the motor - cycle which had been stolen from the complainant. His defence was a mere denial of having been involved in the offence and a suggestion that he was arrested for nothing and implicated with the offence. He never made any attempt to explain his possession of the stolen motor - cycle a few days after its theft from the complainant. The evidence by Joshua (PW4) showed that the motor - cycle was sold to him by the appellant on or about the 27th September 2007. The theft occurred on 16th September 2007. The police recovered the motor - cycle on the 5th March 2008 at Ranen where it had been put into use by Joshua (PW4) as a motor cycle taxi.

Joshua (PW4) said that when selling the motor - cycle to him appellant had represented himself as an agent of Car and General Co Ltd Kisumu.

James Ochieng Otieno (PW1) produced the necessary documents showing that he was the actual owner of the stolen motor - cycle and that he had purchased it on 20th August 2007 from Car and General Ltd. He was informed of the recovery of the motor - cycle on the 5th March 2008 and proceeded to Awendo Police Station where he saw and identified it as his property which had been stolen from his employee the complainant (PW2).

Luyai (PW5) almost fell victim to the appellant's unlawful activities. He confirmed that the stolen motor-cycle was recovered along with two others in his presence. He had been arrested together with the appellant when they were found by the police at a Kisumu hotel. He (PW5) said that he had paid the appellant a deposit of Kshs. 40,000/= for the purchase of a motor - cycle but when the motor - cycle was not delivered, he traced the appellant and forced him to take him (PW5) to Car and General Ltd Kisumu. They arrived in Kisumu on 4th March 2008 and the appellant took him to the hotel where they were arrested. He (PW5) was only released after the recovery of the material motor - cycle even though he lost his money to the appellant.

Cpl. Rana (PW6) confirmed that the material motor - cycle was recovered with the help of the appellant. He (appellant) led them (police) to Migori where the stolen motor- cycle and others were recovered.

The evidence by the foregoing witnesses was more consistent to the appellant's guilt rather than innocence. It was in-capable of explanation on any other reasonable hypothesis except the hypothesis that the appellant was guilty of the charge (**See, Rex =vs= Kipkering Arap Koske & Another [1919] EACA 135, Mwita =vs= Republic [2004] 2 KLR 60 and Mwangi =vs= Republic [2004] 2 KLR 28).**

The evidence clearly established the vital ingredients for the application of the doctrine of recent possession. It established that the appellant was in possession of the stolen motor - cycle a few days after its theft and that the motor - cycle was positively identified as belonging to James Ochieng Otieno (PW1) but was at the time of the offence in the possession of his employee (PW3) (**See, Isaac Wanga Kahiga alias peter Nganga Kahiga =vs= Republic Criminal Appeal No. 272 of 2005).**

Other than the evidence adduced against him, the appellant also complained herein of the violation of

his constitutional rights under the provisions of Section 77 (2) (b) (f) of the Constitution of Kenya.

On perusal of the lower court record we are satisfied that there was no such violation of the Constitutional rights during the trial which was conducted in a language understood by the appellant with necessary interpretation being provided by a court clerk. Besides, the appellant was in the trial represented by an advocate, **Mr. Onsongo**.

For all the reasons hereinabove we see nothing to compel us to interfere with the appellant's conviction by the trial court.

In the end result, this appeal is dismissed.

Dated, signed and delivered at Kisumu this 8th day of December 2009.

J. W. MWERA

J. R. KARANJA

JUDGE

JUDGE

JRK/aao



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