



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NO. 77 OF 2018

PETER KIOKO MONICAH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in

Mwingi Senior Principal Magistrate's Court Criminal Case No. 301 of 2016

JUDGEMENT

1. **Peter Kioko Monicah** the appellant herein and his co-accused Mbuvi Peter were charged with the offence of robbery with violence **Contrary to Section 296 (2) of Penal Code** vide **Mwingi Senior Principal Magistrate's Court Criminal Case No. 301 of 2016**. The particulars as per the charge sheet are that on **29th September 2016** at Ndolongwe village, Nuu Division, Mwingi East within Kitui County being armed with dangerous or offensive weapons namely rungu, two plies and hacksaw jointly robbed Musya Kyongo Kshs. 900, a torch and at the same time stole from Ndolongwe Borehole a solar panel valued at Kshs. 80,000 and cash Kshs. 1,905 and at the time of such robbery used actual violence thereby injuring **Musya Kyongo**.

2. The appellant and his co-accused pleaded not guilty and the case proceeded to full trial where a total of 8 witnesses testified.

3. The prosecution was partly based on positive identification by one of the witnesses who was also a victim of the robbery and mainly on the doctrine of recent possession.

4. The record from the trial court shows that the following evidence was material to the findings of the trial court which finding is now the subject of this appeal.

5. The 1st prosecution witness, **Daniel Muasya Kyongo (PW1)** testified that he was a victim of the robbery which took place on 29th September 2016 (hereinafter to be referred to as the material date). He testified that he was employed as a watchman at Ndolongwe borehole situated at Ndolongwe and narrated how the robbers struck at the borehole on the material date in the wee hours of the night at around 3am. He testified that he was hit with a rungu on the cheek and had his hands tied up before the two robbers embarked on stealing solar panel from solar installation. He also stated that the robbers broke into the water kiosk and stole Kshs. 1,000 and that because the solar panel was heavy it fell down and broke into two. He then saw the robbers take a woman who had come to collect water from the borehole and went away with her.

6. He testified that he later sought help and that the robbers were tracked by villagers including his sons and that the 2 robbers were traced and caught at Tuvaani Area. He stated that he was able to recover his torch and catapult which he positively identified as his and which were robbed during the robbery.

7. The evidence of PW1 was corroborated by the evidence of **Rose Mwikali (PW2)** who was at the said borehole at the material time trying to draw water. She testified that the robbers tied her up and later forced her to walk into a bush with them where they began raping her in turns. She was able to identify the appellant and his co-accused as the appellant's co-accused lit a cigarette and was able to see them. When the robbers were later tracked down and arrested by villagers the witness (PW2) was able to identify them.

8. The other prosecution's witnesses, **Jonathan Dunda Mwasya (PW3)** a son to PW1 and **Bahati Nzomo (PW4)** testified and narrated on how they were able to track the robbers following their tracks along a river bank and eventually caught up with them as they slept by the river bank. They stated they caught them with a catapult and when they escorted them to their houses they recovered more items stolen from PW1. The items were later identified by the complainant (PW1) and were tendered by **Investigating Officer Irene Mathu (PW8)** as

follows: -

i. A torch P Ex1

ii. Catapult –P Ex2

The other items recovered and later tendered as exhibits were:-

iii. Brown Padlock – P Ex4

iv. A pair of pliers –P Ex5

v. Solar Panel- P Ex 8

vi. A military jungle shorts –P Ex9

vii. Coins totaling Ksh. 61- P Ex7

9. When placed on his defence, the Appellant herein **Peter Kioko Monicah (DW1)** gave a sworn statement and informed the court that he was a bee keeper. That he was at his farm when was arrested by members of the public after PW3 told them to arrest him because PW3 owed the Appellant Kshs 10,000. He denied being involved in the robbery and further stated that he was assaulted by police because he refused to record a statement and forced to sign the statement that was produced in court. He also raised issue PW6 stating that she was not the investigating officer as she had never investigated the matter.

10. The trial court evaluated the evidence and found that the evidence tendered by the prosecution was sufficient and credible enough to found a conviction. The trial court found strong evidence linking the appellant and his co accused from the evidence tendered by the prosecution witnesses who had woken up early in the morning following the reported robbery incident and keenly tracked the appellant and his co-accused eventually getting them from their hideout in a river bank. The trial court also found that the doctrine of recent possession applied in favour of prosecution's case because the items stolen during robbery incident were recovered a few hours after the incident. The trial court found that the prosecution's case had been proved beyond reasonable doubt and convicted the appellant sentencing them to death as provided by the law.

11. The appellant felt aggrieved and filed this appeal raising the following grounds in his initial petition of appeal namely;

a) *The trial magistrate erred both in law and facts by convicting me relying on the doctrine of recent possession without considering that none of the prosecution witnesses had placed a clear evidence on whether I (accused) was found in possession of the stolen or robbed items*

b) *The trial magistrate erred in both law and facts by convicting me without considering my alibi defence which was strong enough to beat all contradictive evidence of the prosecution and was collaborating by my written submissions.*

c) *The learned trial magistrate erred both in law and facts by convicting me relying on the collaborating evidence of who presented an investigation report never visited the place (Tuvaani) where the witnesses claimed to have arrested me and none of Tuuvani residents had recorded any statement or came before the court to confirm the same*

d) *The trial court erred both in law and facts by misdirecting itself to convict me without considering that I was not either seen at the scene of robbery neither no prove the possession of the stolen or robbed properties*

e) *The trial court erred both in law and facts my misdirecting itself to convict me considering prosecution witnesses reports that they followed footprints without bearing in mind that there was no type of shoes that was placed before the trial pundit magistrate to prove their allegations*

f) *The trial magistrate erred both in law and facts by convicting me without considering that the police officer one PC Sarah Alphas was termed to be the investigating officer at the beginning of this case who denied the facts and other police one Major Irene Matu stood before the trial court to give hearsays and reports which she never investigated.*

12. The appellant added the following ground in his amended petition without leave of this court namely: -

i. *That his conviction was manifestly unsafe as the trial court proceeded as a defective charge sheet and that **Section 214** was not complied with.*

ii. *That the trial court erred by reaching a conclusion that the prosecution's case had been proved beyond reasonable doubt when the evidence tendered did not support the finding.*

iii. *That his arrest was not satisfactory.*

iv. *That his defence was not considered.*

As I have observed above the amended or additional grounds were added without leave of this court under **Section 350 (2) of Criminal Procedure Rules** the same will not be considered as such.

13. In his written submissions, in his submissions the Appellant takes issue with the charge sheet and states that the same is defective due to what he refers as a variance of evidence in relation to the items robbed from the complainant. He contends that the charge sheet indicated that a solar panel was stolen while the complainant indicated that the robbers were unable to steal the solar panel as it broke into two.

14. He relied on the case of **Ramathan Ahmed v Republic E.A.C.A (1995)** which was to the effect that in a criminal appeal, it is upon the appellant to show that the findings of the court of the first instance was unreasonable and could not be supported having regards to the evidence.

15. The Appellant also contends that the doctrine of recent possession was not applicable in this case. He has placed reliance on the case of **Raymond Hermes Odhiambo v Republic [2002] eKLR** where the Court of Appeal dismissed an appeal where the Appellant had been charged with Robbery with violence. On the doctrine of recent possession, the court found that the Appellant had been found with the vehicle hours after it was stolen. The court also held that evidence of recent possession is circumstantial which depending on the facts of each case may support any charge.

16. He has also placed reliance on the case of **Boniface Mutinda Mwema & Charles N. Kimeu Vs Republic [2003] eKLR**. Similarly, the Appellant in this matter was robbery with violence the charge was however reduced by the court after it made a finding the charge of robbery with violence had not be established by the prosecution

17. The Appellant also takes issue with the evidence of PW3 who stated that they followed foot prints from the crime scene while it was not established that the Appellant was wearing sleepers. He also contends that the complainant did not indicate that he was assaulted by a person who was wearing sleepers.

18. In his rejoinder submissions filed on 18th October 2021, the Appellant contends that failure to call witnesses from Tuvaani area was fatal to the prosecution's case. He also contends that although he raised his defence of alibi at the close of the prosecution case, the prosecution had the opportunity to pause stop the matter and conduct further investigations. He asks that the appeal be allowed and the conviction and sentence set aside.

19. The prosecution opposes the appeal and urge the court to dismiss the same. The state submits that the prosecution proved its case beyond reasonable doubt and proved the elements of robbery with violence. That the Appellant was armed with a dangerous and offensive weapon, that the complainant was attacked by one or more people with one being the Appellant and finally that actual violence was used against the complainant.

20. The State/Respondent further submits that it proved its case beyond reasonable doubt and proved the elements of robbery with violence which were that the Appellant was armed with a dangerous and offensive weapon, that the complainant was attacked by one or more people with one being the Appellant and finally that actual violence was used against the complainant.

21. The prosecution further submits that the failure to call residents of Tuvaani residents as witnesses was of no consequence to their case as the robbery happened at Ndolongwe village.

22. In regard to the doctrine of recent possession, the prosecution submits that stolen items were recovered in the Appellant's house which linked him to the offence. The prosecution has relied on the case of **David Mugo Kimunge vs R [2015] eKLR where the Court of Appeal** held that the essential elements necessary to establish the doctrine of recent possession are proof that the property was found with the suspect, that the items were the complainant's property, that they were recently stolen from the complainant.

23. The prosecution submits that the items were indeed found with the Appellant and his co-accused and that PW1 identified the catapult and torch as his.

24. On the Appellant's alibi, the prosecution submits that the same was far-fetched and untenable.

25. On the sentence, the prosecution submits that the same was commensurate to the seriousness of the offence.

26. This court has considered this appeal and the response made. This is a first appeal and the duty of this court is re-evaluate and re-assess the evidence tendered at the trial court and made own conclusion.

This principle was well captured by a Court of Appeal decision in **Kiilu & Another versus Republic [2005]eKLR174** where the court held;

“An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding should be supported. In doing so it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

27. The issues that have cropped up in this appeal are as follows: -

- i. Whether the prosecution's case was proved to the required standard in law.
- ii. Whether the appellant was positively identified.
- iii. Whether the defence was considered.
- iv. Whether the sentence meted out was harsh.

28. (i) **Whether the prosecution's case was proved to the required standard.** The appellant contends that the prosecution did not prove its case beyond reasonable doubt, the contention is contested in equal measure by the respondent. The provisions of **Section 296 (2) of Penal Code** upon which the appellant was charged and convicted reveals the following ingredients which must be established and proved for the charge under that section to be sustained;

- a) **the offender must be armed with any dangerous or offensive weapon or instrument; or**
- b) **the offender must be in the company of one or more other person or persons or;**
- c) **at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**

29. The court of Appeal in the case of **Oluoch versus Republic (1985) eKLR549** reiterated that the same ingredients when its inter alia held;

“Under section 296(2) of the Penal Code, robbery with violence is committed in any of the following circumstances;

- a) **The offender is armed with any dangerous or offensive weapon or instrument.**
- b) **The offender is in company with 1 or more person or persons, or,**
- c) **At or immediately before or immediately after the time of the robbery, the offender wounds, beat strikes or uses other personal violence to any person”**

30. Looking at the evidence tendered at the trial, the above ingredients of the offence were clearly revealed by the evidence of PW1 & PW2.

The complainant (PW1) was at his place of work guarding Ndolongwe Water borehole on the material date when at around 3am the robbers struck. He says he was struck with a rungu before being tied up with a rope. The evidence of injuries suffered as a result of being struck was tendered through medical evidence of P Ex 6-Medical treatment and P3 form P Ex 8. The medical evidence was tendered by a **medical officer (PW 7)**. The element of use of violence in the process of robbery was clearly proved beyond doubt.

31. The appellant and his co-accused were armed with a rungu and a hacksaw which can be termed as dangerous weapons depending on how it was used and there was evidence that the rungu was used to subdue PW1 and intimidate PW2 into submission. It is unfortunate that due to trauma and the fear the appellant and the co-accused had subjected PW2 into, she was not able to make a formal report about the rape incident. The evidence tendered shows the kind of ordeal she underwent under the hands of the appellant and the co-accused. The police for unknown reasons unfortunately did not pursue the allegations of rape which should have been pursued independently as a second count but that was not to be and this court will leave it at that.

Having said that, this court is satisfied upon re-evaluation of the evidence tendered that the trial court was correct to conclude that all ingredients of robbery with violence had been proved.

32. The appellant was with his co-accused when they committed the robbery and so the three ingredients for robbery with violence as per **Section 296(2) of the Penal Code** were proved beyond doubt.

33. (ii) **Whether the appellant was positively identified.**

It is true that the robbery was committed in the wee hours of night and as PW1 stated it was dark and though the appellant and the co-accused were people who lived not far from his village he could not identify them as it was dark. But the evidence of PW2, the lady who was raped in the process in my view nailed them particularly when her evidence is considered alongside the evidence of PW3 and PW4 who testified that they were among the villagers who tracked the robbers after following their footsteps which led them to their hideout near a river where they were found asleep with the items they had robbed a few hours earlier. The trial court evaluated the evidence well. The trial court correctly found that under **Section 119 of Evidence Act**, a reputable presumption and inference of guilt can be made against a suspect if he is found in possession of some recently stolen items. The appellant and his co-accused did not offer any explanation on how the catapult and torch belonging to the complainant (PW1) was found with them. In my considered opinion, even if PW2 had not positively identified them when they were arrested as the people who had raped her in turns earlier after the robbery, I would still have found that the appellant was positively identified by application of doctrine of recent possession.

34. The appellant takes issue with the witnesses who testified in court claiming that they were all related to the complainant. Further that PW3 stated that he together with other members of the public followed some sleepers' footprints while the complainant did not make an allegation that he was robbed by someone who was wearing sleepers. However, as observed above, the Appellant has not given an explanation as to how the items that were stolen were recovered from him and others from his house. I am not persuaded that they were

framed as no such evidence was tendered.

35. Evidence from PW3 and PW5 indicate that members of the public apprehended the Appellant and his co-accused sleeping at the banks River Enziu. Items recovered from the Appellant and his co-accused included pliers, catapult, torch and a padlock. The catapult and torch belonged to PW1 while the padlock belonged to PW4. The items were recovered hours after the robbery incident.

36. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarized the essential elements of the doctrine of recent possession in *Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR*, where the court stated as follows:

“In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

37. As I have observed above, in addition to the doctrine of recent possession, PW2 stated that the appellant and co-accused raped her in turns and that one of them lit a cigarette and she was able to see the faces of the two. The witness was later to recognize the appellant and his co-accused when the villagers including PW3 & PW4 successfully pursued them tracking them to their hideout and arrested them.

38. This court finds that contrary to the contention by the appellant, his conviction was safe because he was positively identified notwithstanding that the offence was committed when it was dark. As a matter of fact, most robberies are committed in the cover of darkness but the investigators like in this instance are at times able to piece together credible evidence that can help in bringing the culprits to book.

The appellant contends that the prosecution should have called witnesses from Tuvaani Area contending that failure to do so was fatal to prosecution’s case but as submitted by the respondent, the offence was committed at Ndolongwe area. The members of the public including PW3 AND PW4 followed the footsteps of the culprits along a river bank and the footsteps led them to Tuvaani area where they found the appellant and the accused in their hideout still with some of the stolen items The

provisions of *Section 143 of the Evidence Act* provides as follows;

“No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.”

39. The prosecution in the light of the above provisions was not obligated to call all the villagers or someone from Tuvaani area to prove that the appellant and co-accused were caught sleeping by the river bank of River Enziu and that the suspects led them to their houses where the other items were recovered and later positively identified by PW1 and PW5. The witnesses called by the prosecution in my view were able to prove the fact of recent possession and the fact that the footsteps from the scene of crime led them to the suspect’s hideout in a river bank. In the case of *Keter versus Republic [2007] EA 135* the court held as follows;

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses sufficient to establish the charge beyond any reasonable doubt.”

respondent, the offence was committed at Ndolongwe area. The members of the public including PW3 AND PW4 followed the footsteps of the culprits along a river bank and the footsteps led them to Tuvaani area where they found the appellant and the accused in their hideout still with some of the stolen items The provisions of *Section 143 of the Evidence Act* provides as follows;

“No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact.”

40. (ii) Whether the defence was considered.

The appellant claims that his defence was not considered but I have looked at his sworn statement and the decision from the trial court and find that his contention is unfounded. The trial court considered his defence. He stated he as at his farm when he saw a crowd of about ten people approach and that all of them were strangers save for PW3 and that PW3 had a grudge against him over a debt and that it is him who incited the people to arrest him. The appellant however did not tender any evidence to establish his claims or impeach the credibility of PW3. If anything this court upon re-evaluation, finds that the evidence of PW4 corroborated the evidence of PW3.

The defence of alibi was considered by the trial court and found to be constitute were denials which did not discredit or dislodge the prosecution’s case. Upon reassessment of evidence I have reached the same conclusion.

In the end this court finds that the prosecution’s case was proved to the required standard. The evidence tendered fully supported the charge upon which the appellant was charged and the charge sheet clearly revealed the offence of robbery with violence. This court due to the foregoing finds no merit in this appeal. The same is **disallowed**. The conviction is **upheld**.

The sentence provided under *Section 296 (2) of the Penal Code* is death penalty. The sentence meted out was proper in the circumstances. The same is **upheld** by this court.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF FEBRUARY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE