



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 4 OF 2020

PAUL MWENDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. H. Ndungu CM

in Meru Cr. Case No.712 of 2017 on 14/01/2020)

JUDGMENT

1. **Paul Mwenda ('the appellant')** was jointly charged with others with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged that on 7/04/2017 at Gakoromone Area in Imenti North District within Meru County, being armed with pangas, he robbed Fatuso Mutuma cash Ksh.12,000, assorted pairs of ladies shoes, mobile phone make T-cell, all valued at Ksh.35,000, and his wallet which had his identity card, one cooperative bank ATM card, voters card and nhif card.

2. He faced a second count of robbery with violence contrary to section 296(2) of the penal code. It was alleged that on the material day and place, he robbed Morris Kaburu Mobile phone make ITEL, two computers hard disks, a small radio, all valued at Ksh.25,200, his wallet which had his wallet which had his identity card, two ATM cards for family and equity and voters card.

3. He denied the charges culminating into a full trial where the prosecution called six (6) witnesses in support of its case. On his part the appellant gave a brief sworn statement without calling any other witness. At the end of the trial, the court found the prosecution to have proved its case to the requisite standards, convicted the appellant on both counts and sentenced to death on each count. The sentence on the second count was left in abeyance.

4. Aggrieved and dissatisfied with the said conviction and sentence, the appellant lodged this appeal raising 10 grounds later compressed by the handwritten document filed in court on 18/02/2021 into 7 but I have condensed both into 3 as follows;

a. The trial court erred in law and fact in failing to note that the complainant, who did not produce receipts of the stolen property to prove he was the owner thereof, was unable to identify the appellant at the scene of crime.

b. The trial court erred in law and fact by failing to note that the appellant could be charged with the offence of handling stolen property because of the absence of medical evidence to support the charge of robbery with violence.

c. The trial court erred in law and fact in rejecting the appellant's defence of alibi which was not challenged by the prosecution's contradictory, unreliable, fabricated, insufficient and inconsistent evidence.

5. In order to appreciate the merits or lack thereof of the appellant's appeal, it is important to set out the evidence at the trial. **PW1 Fatuso Mutuma Mwititi**, a shoe vendor, recalled that on the material day at about 8.30 pm, after closing his shop, he carried 4 pairs of boots, 10 pairs of assorted ladies high heels in a jungle green bag and headed home. He was in the company of Morris Kaburu (PW3) and Edwin Muteithia (PW2) but along Gakoromone area near the sewage, they met about 7 men. One hit him on the face an umbrella. The others were armed with pangas and machetes. They robbed him of the bag containing the 4 pairs of boots and the 10 pairs of ladies high heels. They also took his wallet which had his NHIF Card, Cooperative bank card, Ksh.12,000, Mobile T-cell and his county government receipts. He did not know what happened to his colleagues but as he went home, he met Edwin who told him that he was not robbed as he had managed to escape. He reported the incident at Meru police station the following day. On 12/04/2017, he and Edwin met the appellant who wanted to sell a brown boot, black boot and red high heeled shoes and orange high heeled shoes at Makadara area. After which he reported at Meru police station and he was given a police officer. They found the appellant seated on a sack and upon checking its contents, they found sawdust together with the same shoes mentioned hereinabove and took him to Meru police station. He stated that he did not identify anyone during the night of

the robbery and that the appellant was not known to him except for the fact that he had found him selling the shoes. During cross examination, he confirmed that he did not identify any of his assailants when he was attacked as it was dark hence he could not see them. He maintained that he had been robbed and that he had found the appellant with the stolen shoes. He contended that he was in shock after having been threatened with pangas and that is why he did not report on the same day. He stated that he had been robbed on his way home and that he had receipts in his wallet which the appellant had taken. He stated that there were other people who bought shoes where he bought and that the appellant had been found with 2 pairs of boots as well as 2 pairs of ladies shoes. He concluded that he did not know the appellant prior to the robbery and that he did not resist being robbed because he was outnumbered.

6. **PW2 Edwin Muteithya**, a hawker who sells shoes, told the court that, on the material day at about 7.00 pm, he closed down his business and headed home with his colleagues PW1 and one Morris. When they reached Gakoromone market, about 7 men who were carrying pangas and machetes confronted them. He managed to escape while they held PW1 who was carrying a bag. After about 5 minutes, PW1 caught up with him and told him that he had been robbed of the bag he was carrying together with his wallet that had money. They went home and confirmed that Morris had also been robbed of money and 2 flash disks. They reported the matter to Meru police station the following day and on 12/04/2017, while they were at Makadara Street with PW1, they found the appellant putting the stolen shoes on display for sale. It was then that PW1 went to call the police who arrested the appellant. During cross examination, he stated that although there were street lights, he did not identify anyone during the attack but they later recovered the shoes from the appellant. He stated that 10 pairs of high heeled shoes and boots were stolen but they only managed to recover 3 pairs of boots and other heels from the appellant. He denied that the appellant had a shoe selling business in Meru because when they found him selling the shoes, he was unable to produce any other stock that he had.

7. **PW3 Moris Kaburu**, a shoes hawker, recalled that on the material day he was walking home with his colleagues PW1 and PW2. On arrival at Gakoromone market at about 7.00 pm, they were attacked by 7 people who were armed with pangas and metal bars. He was robbed of Itel phone, 2 hard disks, Ksh.1,200 and a small radio. After about 20 minutes, PW1 and PW2 came to his home to tell him that they had also been robbed. PW1 was robbed of an Itel phone, Ksh.12,000 cash as well as a green bag which contained 10 pairs of ladies shoes and 4 pairs of ladies boots. The following day, they reported to the police then later on PW1 told him that he had spotted someone selling shoes in town. He and PW1 went to Meru police station and made a report. They came with police officers who arrested the appellant in possession of the 4 pairs of ladies high heels and 2 pairs of boots, who was at pains to explain how he had gotten the shoes. He stated that he was unable to identify any of the robbers as it was dark. During cross examination, he stated that he did not have a license to show that he sold shoes but that they paid to the council on daily basis. He stated that he did not have receipts as the shoes were second hand and denied seeing the appellant on that day. He stated that two people held him on each hand and he was hit on the legs with an umbrella metal.

8. **PW4 P.C Dennis Ouma** of Kienderu police station, recalled being on patrol within town with P.C Ngatia on 12/04/2017 when they met two complainants PW1 and PW3 who reiterated to them how they had been robbed of Ksh.12,000, Identity cards and ATM cards by 7 people who were armed with pangas at Gakoromone sewage area. They proceeded to Marigiti, Gakoromone where the appellant had displayed 2 pairs of lady boots and 2 pairs of high heels and arrested him after he was unable to explain how he had gotten the shoes. During cross examination, he stated that the complainant gave them a receipt for a bundle of shoes because he sold many shoes.

9. **PW5 CPL Fredrick Otieno** of Meru police station testified on behalf of his colleague Senior Sergeant Mulwa, that 7/04/2017 at about 7.00 pm, two complainants came to report that they were carrying assorted ladies shoes and boots after closing down their businesses of selling shoes when they were accosted by 7 people among them the appellant who robbed PW1 and PW2 various items among them the shoes. During cross examination, he stated that the shoes which the complainants had been robbed were the same ones which had been recovered from the appellant.

10. In his defence, the appellant told the court that he was a business man selling shoes. He recalled on 12/04/2017, he was selling shoes when one lady told him to take to her shoes. He took 4 pairs of shoes for her to select. He was arrested before he could to sell the shoes. During cross examination, he maintained that he had sold shoes for years.

11. The court on 21/7/2020 directed the parties to file and exchange their written submissions but it appears only the appellant filed, which submissions I have prudently considered.

12. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** being that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570). It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings 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, see (Peters V Sunday Post 1978) E.A. 424.”

13. I have carefully considered the evidence on record and I totally agree with the trial court that there no identification of the appellant whatsoever by the eye witnesses that is PW1, PW2 and PW3. The only evidence therefore linking the appellant to the offence was purely circumstantial based on the fact that he was found in possession of the stolen shoes. When to rely on circumstantial evidence as a basis of conviction was established by the court of appeal in

14. In coming to its conclusion, the trial court drew an inference of guilt on the appellant who was found in possession of recently stolen property and he was unable to give a reasonable explanation how he came by the goods. The Court of Appeal summarized the essential elements of the doctrine of recent possession in Eric Otieno Arum v R (2006)eKLR, to be that “ **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.**”

15. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. In Paul Mwita Robi v R (2010) eKLR, the Court of Appeal observed that; “**Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.**”

16. In this appeal, that the appellant was found in possession is not in dispute because that is admitted by him the dispute being whether he did explain to the satisfaction of the trier of facts, and to the satisfaction of this court, how he came in possession, the first threshold is surmounted and the court needs only to ascertain from the record if the good were roved to belong to the complainant whereafter the evidentiary burden shifts for the appellant to justify his possession.

17. Before the trial court, while the complainants did identify the goods subject at the charge to have been theirs, the appellant equally asserted his right to the goods by stating that he was given the goods by a third party to sell but he could not identify that third party, just being content with taking the police officer to a shop that remained closed. I have weighed the brief statement of his defence against the evidence presented by the prosecution and I do find the prosecutions side was credible while that by the defence was not. I find and hold that the appellant was found in possession of two (2) pairs of boots and two pairs of high heels which P.W 1 identified as the same one he was robbed of and that the explanation given by the appellant on his possession was not satisfactory but obviously suspect.

18. Does it matter that only items charged in count 1 and none for count 2 were recovered and proved to belong to the complainant. I find that it matters not because the act of robbery was one of both counts committed at the same time hence recovery even of a single item connect the convict with the entire transaction of robbery.

19. In the end, I find the entire appeal to lack merits and it is thus dismissed.

DATED, SIGNED AND DELIVERED AT MERU BY MS TEAMS THIS 26TH DAY OF MAY 2021.

PATRICK J O OTIENO

JUDGE