



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 24 OF 2017

GODDRICK SIMIYU WANGA & 4 OTHERS.... APPELLANTS

VERSUS

REPUBLICRESPONDENT

Coram: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the state

JUDGMENT

The appellants were arraigned before the trial Court at Kilifi, tried, convicted and sentenced to the mandatory sentence of death, for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Their conviction was wholly based on identification and the doctrine on recent possession of stolen goods, which is the evidence of surrounding circumstances.

Being aggrieved with both conviction and sentence, each preferred an appeal to this Court based on the following grounds:

- 1. The Honourable Magistrate erred in both Law and fact in convicting the appellant to serve death sentence on evidence that was not collaborated as per the Law.**
- 2. The Honourable Magistrate erred in both Law and fact in convicting the appellant to serve death sentence on evidence that was not proved beyond reasonable doubt as required by the Law.**
- 3. The Honourable Magistrate erred in both Law and fact in failing to appreciate that there was material contradiction on the evidence adduced in Court.**
- 4. The Honourable Magistrate erred in both Law and fact in shifting the burden of proof to the appellant.**
- 5. That the appellant dealt with the accused person only on a business basis which all and sundry know was done by the said accused person.**
- 6. That the appellant applied for the recall of the complainant for further cross examination in vain.**
- 7. That the accused was at the site by as a right being employed by the complainant.**
- 8. That the accused was not found with any of the stolen item.**
- 9. That the accused was given to the police security officers for arrest by the complainant.**

In light of the above grounds, the appellants also filed brief written submissions in support of the appeal.

On the part of the respondent counsel, the entire appeal is opposed in view of the overwhelming evidence presented before the trial Court establishing the charge of robbery with violence beyond reasonable doubt.

Evidence at the trial

The prosecution case was underpinned on the witness testimonies of the following witnesses. **PW1 – Yul Wenger** a resident at Bofa in Kilifi county where he stays with his wife **Heike Wenger** testified that on the 4.12.2013, on or about 11.00 O'clock in the night, they were attacked by robbers. **(PW1)** told the Court that this attack happened as they made entry to the garage, only to be followed by the guard into the house. It was at that time the guard **Goddrick** had a conversation but suddenly thugs came through the gate and ambushed them, with simultaneous threats of actual violence.

Though armed with a firearm **(PW1)** stated that he was not able to retaliate as the thugs overwhelmed them and engaged in using violence to rob him of 15 rounds of ammunition, ipads, cash Kshs.760,000/=, his watches, wedding band, liquor, two guns and his wife's watch, diamond engagement ring, wedding band, earrings and a chain. According to **(PW1)**, they went through this ordeal but at one moment he was able to see **Goddrick**, their watchman standing by them as the other thugs executed the robbery. As the events of the night unfolded **(PW1)** gave evidence that he managed to positively identify **Goddrick** the 1st appellant and the third appellant **Juma Mutinda**. Further in **(PW1)** testimony, he recalled that the 3rd appellant was the one who opened the safe and carried away the watches and a ring.

In course of the investigations, **(PW1)** told the Court that a blue pouch, with money in it, watches, headphones E66- Nokia, Black bag, Black gun hoister, Magazine holder, House keys, short gun case berretta, HD - bag, black shirt, black jacket, Sudoku Book, white envelope, black spectacles, notebook, firearm certificates, alien certificates were all recovered and positively identified to be part of the items stolen on the night of the robbery.

Apart from **(PW1)** evidence, it was also the case for the prosecution by the testimony of **(PW2) – Pushar Savi Jayani** who told the Court that he operates Meggi Enterprises Ltd. He testified that on 9.12.2013 he sold one motorcycle to the third appellant – **Juma Mutinda** at Kshs.106,500/= model Bajaj Boxer DM150. Further **(PW2)** stated that on the same day, he sold another motorcycle chasis number **MD2A35A23DWD833356** to **Nixon Hamisi** the 9th appellant. In support of the purchase transactions **(PW2)** produced invoices as **exhibits 23 and 24** respectively.

(PW3) – Senior Sergeant Johnson Musyoki testified as a ballistic expert in connection with rounds of ammunition marked as **exhibit A1, A2, B1, B2 and B3** duly forwarded by **Cpl James Ochola (PW4)**. On examination, the exhibits **(PW3)** formed the opinion that they fall within the definition of ammunitions as defined in the Firearms Act. In **(PW4)** evidence on receipt of the crime report from **(PW1)** together with other police officers initiated an investigations on the matter. According to **(PW4)**, the investigations culminated in the arrest of the appellants and a charge of robbery with violence was preferred against each one of them being the key suspects. **(PW4)** further testified that through phone data analysis it emerged that one of the mobile phones **Nokia E66** with **IME No. 357976035722073** had been used by Ruth, the 4th accused. He also testified that the motorcycle purchased by the 5th appellant was from the proceeds of the robbery. That therefore, positively identified him as one of the perpetrators of the robbery on the fateful day at the home of **(PW1)**.

After further investigations, **(PW4)** faced with the information on the second purchase of a motorcycle from the same shop at Malindi by the 9th appellant he formed the opinion that such circumstances were closely connected with the robbery.

As regards the 8th appellant **(PW4)**, gave evidence that a search was conducted in his house in which recovery of the following items were made: Khaki jungle shirt, single belt, a whistle with black strip, jungle hat, 1 phone box, headphone, a bunch of keys, 5 rounds of ammunition, 2.9mm caliber. In the case at hand **(PW4)** told the Court that **(PW1)** positively identified the bunch of keys and locks, ammunition holster, blue pouch, carrier of short gun, medicine for the complainant, short gun case for Berretta, sunglasses, notebook to be part of the properties stolen on the night of the robbery.

(PW5) Rehema Maitha gave evidence to corroborate the features on the recovery of the stolen properties which were dumped at her farm. During the trial **(PW6) – Richard Mwika Mutuli** a motorcycle rider stated that in December 2013, he was employed by the third appellant to operate motorcycle registration number KMCD. However, in the course of his duties when he went to check on him at Habib Bank the police also arrested him in connection with the said motorcycle. From the foregoing evidence, **(PW6)** identified the motorcycle allegedly bought by the third appellant from the proceeds of the robbery.

(PW7) Inspector Kemboi stated that he had led an operation aimed at arresting the 1st appellant who was on the run at Gongoni in Magarini. **(PW7)** gave evidence that their concerted efforts the 1st appellant was arrested while entering Komptalkine Salt Ltd where he had gone to ask for work.

(PW8) IP Suleiman Hashim in his evidence testified as data analyst and cyber crime expert. **(PW8)** stated that on commencement of the analysis, he obtained 1st phone numbers of the 2nd, 3rd, 4th, 6th and 9th appellant. At the time of analysis, the 1st appellant mobile number **0707-626-212** data showed frequent calls to **0735-417-999** registered in the name of the 3rd appellant. It was also the evidence of **(PW8)** the **IME No. 357976035722070** identified with the mobile number to the wife of **(PW1)** was traced being used by the 4th appellant what was the span of the time of the robbery through the **mobile No. 0738-506-895** of the 6th appellant and **phone number 0726-408-821** of the 5th appellant and **mobile number of 0789-029-471** of the 9th appellant all placed them at the scene of the crime. He produced the analysis report as **exhibit 45** inventory in the name of 5th appellant exhibit 47, inventory in the name of the 4th appellant as exhibit 48, the safaricom print out **MFI -49** and Airtel print out **MFI – 50**.

At the conclusion of the prosecution case each appellant was placed on his or her defence.

Appellant 1 denied the charge save that while on duty as security guard at the home of the complainant **(PW1)** thugs set in executed an attack coupled with a robbery over the properties belonging to **(PW1)** and his wife. In his explanation during the robbery, he was unable to press the alarm button for fear of being injured by the robbers.

(DW3), **Juma Mutinda** stated in his defence that on 15.12.2013 he was arrested and later charged with an offence he had not committed. (DW6) **Ibrahim Yaa Mangi** stated that he is in the dark why the state charged him with the offence of robbery under Section 296 (2) of the Penal Code.

(DW7) **Philip Ngala** gave evidence that he came to know of the robbery during the arrest when his kiosk was broken into. Thereafter, he was shown some electronics and mobile phones allegedly which formed part of the exhibits in the state case against them for the offence of robbery. He also denied the charge as framed in the indictment.

Finally, (DW8) – **Maurice Kiogora** in his defence alleged that on 2.3.2014 police officers bounced on him while playing pool waiting for miraa vehicle. He was later to be taken to a house and police retrieved a black paper bag as an exhibit to support their false allegation that he committed the offence.

In this appeal, the appellants challenge the findings of the trial Court on both identification and recent possession of stolen property as a basis of their conviction and subsequent sentence to suffer death.

Analysis

For an appreciation of the matters raised, it is necessary to remind myself of the principles in **Okeno v R {1972} EA 32** which lays down the principles that

“a first appellate Court is obliged to analyze and re-evaluate the evidence adduced before the trial Court, independently draw its own conclusions, overlooking or disregarding the findings of the trial Court, and bear in mind that unlike the trial Court, it did not have the opportunity of hearing and seeing witnesses testify.”

In my view this appeal raises the following key issues.

- (1). **First, is the relation to the sufficiency of the evidence on record and whether that evidence was capable of supporting the conviction of the appellants.**
- (2). **Secondly, whether the element of identification was proved.**
- (3). **By the prosecution beyond reasonable doubt.**
- (4). **Finally, the importance of and correlation of the doctrine of recent possession and call data to uphold the conviction of each appellant to this appeal.**

Issue number 1

The offence of robbery with violence is provided for under Section 295 as read with Section 296 (2) of the Penal Code. For purposes of these Sections, **“any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen, or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery.”**

It follows therefore, for the offence under Section 296 (2) of the Penal Code to be proven, **“the prosecution must establish that the appellants were armed with any dangerous or offensive weapon or instrument or they were in company with one or more other person or persons, or if at or immediately or immediately after the time of the robbery any one of them wounded, beat, struck, or used personal violence to the complainants.”** (See **Oluoch v R {1985} KLR 549**).

All that the prosecution is required to establish and prove is any one of the three elements of the offence as defined in Section 295 read in conjunction with Section 296(2) of the Penal Code which suffices to sustain a conviction of the appellants for the offence. (See **Daniel Muthimi v R {2013} eKLR**).

Applying the above principles there was ample evidence which in my view the Learned trial Magistrate accepted which showed that the appellants at the time of the robbery prosecuted the unlawful act of robbing the complainant (**PW1**) and his wife while armed with offensive weapons namely pistol and other dangerous instruments.

There is evidence on record from the recoveries made of the properties stolen of the complainant, each was positively identified as articles capable of being stolen. The appellants on the material night of 4th December 2013, made entry to the residence of the complainants while armed with deadly weapons which were used against the PW1 and his wife without any retaliation in the course of the commission of the theft.

As a result of the robbery, (**PW1**) confirmed to the trial Court that his wife is still traumatized given the nature of threats of actual violence meted out by the appellants. The prosecution therefore, brought their indictment within the scope of Section 296 (2) of the Penal Code. In the circumstances, in my Judgment the evidence sufficiently displaces any denials presented by the appellants contending that they had no knowledge of the offence.

Once that evidence of (PW1) – (PW3) was accepted, the conviction of the appellants was inevitable in terms of the provisions of Section 107 (1) and 108 of the Evidence act.

One of the factors relied upon by the Learned trial Magistrate to convict the 1st and 3rd appellant and which they fault was reliance on identification. There are a series of authorities which sets out the principles to be applied on the evidence of identification. **Kariuki Njiru & 7 others v R CR Appeal No. 6 of 2001, Wamunga v R {1989} KLR 424, Simiyu v R {2005} 1KLR 192, R v Turnbull & others {1976} 3 ALL ER 549.**

In light of the principles enunciated therein (**PW1**) the complainant demonstrated that he had adequate time and opportunity to acquaint himself with the 1st and 3rd appellant. He explained clearly particular surrounding circumstances which he relied upon to positively identify the two appellants. All those statements by the two appellants failed to controvert the cogent and credible testimony of the complainant. There is nothing to suggest that the complainants evidence on identification was in error or mistaken to say the very least.

Finally, the evidence on record as set out under the doctrine of recent possession obtained from the complainant in regard to identifying the property stolen on the night of the robbery. For the prosecution to reliably sustain a conviction based on the doctrine of recent possession the following elements as stated in **Gideon Meiteken v R {2013} eKLR** ought to be proved beyond reasonable doubt:

1. **That the property was found with the suspect.**
2. **That the property was positively identified by the complainant.**
3. **That the property was recently stolen from the complainant (See also Isaac Nganga Kaluga alias Peter Nganga Kaluga v R CR Appeal No. 272 of 2005)**

In this case at the trial (**PW4**) **PC Kamiti and Cpl Ochola** on the investigations and recoveries of goods made at various points were positively identified by the complainant (**PW1**). I note that **Cpl Ochola** confirmed having searched a house allegedly occupied by the 1st appellant in which they recovered two mobile phones, stolen during the time of the robbery.

Further, **Cpl Ochola** testified that the 3rd appellant was in possession of Nokia Phone E66 belonging to the wife of (**PW1**) which he sold to one Francis Mwangangi. It was also in the testimony of **Cpl Ochola**, that a carrier of shotgun, medicine for (**PW1**) one round of ammunition which the complainant identified, short gun case, leather bag, sunglasses, were also recovered from the third appellant. Apart from the recovery from the third appellant a note of the complainant was recovered from the 1st appellant on that basis, the inference from recent possession of stolen property and in review of the circumstances it was proper for the trial Court to draw such a correct inference that the appellants had been present and had taken part in the robbery with a common intention as defined in Section 21 of the Penal Code. Although, the appellants had put forth a case of denial, it was unreliable and failed the test under Section 111 of the Evidence Act Cap 80 of the Laws of Kenya.

Taking into account all these pieces of evidence coupled with circumstantial evidence on Safaricom call data as illustrated in the testimony of **IP Hashim** indeed the appellants were placed at the scene of the robbery.

As was said in **R v Taylor, Weaver and Donovan {1928} 21 CR App R. 20:**

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. (See also R v Kipkering Arap Koskei & Another 16 EACA 135, Abanga alias Onyango v R CRA No. 32 of 1990 UR.)

I have anxiously considered the issue of Safaricom call data particularly, the chain of communication between the appellants and its velocity to place the appellants at the scene. I have come to the conclusion that there was no error of Law or principle committed by the trial Court in his finding that the appellants committed the robbery.

In the result, I dismiss the appeal against convictions recorded against the appellants herein namely the 1st, 3rd, 6th, 7th and 8th appellant.

In this appeal such as this and to share the concerns expressed in **Francis K. Muruatetu v R {2017} eKLR**. I set aside the sentence of death imposed on the charge of robbery with violence contrary to Section 296 (2) of the Penal Code and substitute it with a custodial sentence of 30 years imprisonment with effect from 23.12.2013.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF MARCH , 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Sombo for the state

2. Appellants in person