



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 19 OF 2016

ERICK OMONDI OPIYO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal arising from conviction and sentence in Nyeri Chief Magistrate's Court Criminal Case No. 528 of 2013 delivered by J. Onyiego Chief Magistrate on 14th March 2016)

JUDGMENT

1 The Appellant herein Erick Omondi Opiyo alias Nyake was the 2nd accused at the Chief Magistrates Court in Nyeri in Criminal Case No.528 of 2013. He was jointly charged with five (5) others with Robbery with Violence Contrary to Section 296(2) of the Penal Code. The offence is said to have been committed between the 13th and 14th day of July 2013 at Ithenguri village within Nyeri county, where while armed with dangerous weapons namely axes and pangas robbed Dorcas Wanjiru Nderitu of cash Kshs 15,000, one CPU, thermos flask, home theatre, DVD machine, 6 pairs of shoes, one legged shoe and one electric iron box all valued at Kshs. 118,000/= and immediately before or immediately after such robbery used actual violence to the said Dorcas Wanjiru Nderitu and killed one Daniel Njora Nderitu.

2 The Appellant also faced an alternative account of handling stolen property contrary to section 322(1) of the Penal Code. The offence is said to have been committed on the 14th day of July 2013 at Majengo estate within Nyeri County in the Republic of Kenya where otherwise than in the cause of stealing dishonestly undertook the retention of one CPU, thermos, hometheatre, DVD machine, 6 pats of shoes, one right leg shoe and one electric iron box knowingly or having reason to believe that they were stolen items.

3 After a full trial the Appellant was convicted on the principal count and sentenced to death while all his co-accused were acquitted. He filed this Appeal citing the following grounds.

(i) That the learned trial magistrate erred in both law and fact while convicting him on weak circumstantial evidence when PW8's evidence is duly noted and considered.

(ii) That the learned trial magistrate erred in both law and fact while convicting further on reliance to the inventory evidence which wasn't conclusive enough to link him to the required possession of the items alleged in light of no independent supportive evidence.

(iii) That the learned trial magistrate erred in both law and fact while convicting in reliance to the doubtful and inconsistent evidence of the prosecution witnesses.

(iv) That the learned trial magistrate erred in both law and fact while convicting him on charges that weren't proved to the required standard to justify the death sentence imposed against him.

(v) THAT the trial court magistrate erred in both law and fact while rejecting his sworn defence that wasn't challenged by the prosecution side as per law required in section 212 of the CPC Cap 75 LOK.

4 The case before the trial court was as follows: PW1, **Dorcas Wanjiru Nderitu** (complainant) told the court that on the night of 13th July, 2013 at 9:00am, she was in her house in the company of her brother **Daniel Njora**(deceased) and her 2 1/2 year old daughter when about twenty(20) people came to her house. The door to her house had been left a jar for good air circulation following its being painted.

5 Immediately the attackers entered her house, they ordered them to lie down and they complied. Her child started crying and she was ordered to sit on the chair. Thereafter, the attackers who were armed with axes, pangas and rungus tied the deceased's hands and legs using pieces of cloth and blind folded his eyes using her curtain nets. They then started carrying away electronic items and other house hold goods inter alia TV, DVD, thermos flask, computer, clothes, shoes and water pipe. In addition to this, they made away with some 150 chicken from

the chicken pen, potatoes, flour, charcoal and cooking fat.

6 Thereafter, they slaughtered chicken, cooked it and ate. They noticed that the deceased's blind fold had fallen off and he had seen their faces as the lights had been on the whole time. One of them claimed that deceased had removed the blind fold with the sole intention of identifying them. One of the robbers who had an axe hit him on the head as others urged him not to kill him. After being hit on the head, he shouted mentioning the names of Gakuo, Kanyora and Wanga pleading with them not kill him because they knew each other.

7 PW1 was ordered to go to the bedroom where one of the robbers searched her and made away with Kshs. 15,000 she had withdrawn earlier during the day for the purposes of paying workers who were painting her house. Her mobile phone was taken after the sim card had been removed.

8 After about ten minutes, she looked around and realized that they had left with the deceased. She then rushed to her neighbour's house(**PW6**) from where she managed to contact her mother and brother(**PW3**) who reported to the police and together they went to her house.

9 However, on their way back to her house in the company of **PW6**, and his wife, they came across some of her items that were stolen thrown on the road. They recovered a water pump, clothes, bedsheets, flour, blanket, sufuria and three chicken in a bag. As they went round the compound with police officers, they found the deceased's body hidden outside the kitchen.

10 She accompanied police officers to the station and recorded her statement. The following day, she was called to the police station and attended an identification parade. At the identification parade, she identified one of the acquitted suspects as one of her attackers on the material night due to the fact that he had a mark on the right side of his face and that he was also the one she had sat with as the rest of the attackers ransacked her house.

11 She identified some photographs of her house and some items recovered **EXB2-14(i)– (iv)**. DVD(PEXB.3), iron box (PEXB.4), thermos flask(PEXB.5), black green pairs of shoes(PEXB.6), black shoes(PEXB.7), 3 pairs of shoes(PEXB.8), one brown shoe(PEXB.9), red black suit case(PEXB.10),home theatre (PEXB.11) speaker (PEXB.)12, CPU(PEXB.13), axe (PEXB.14).

12 On the night of 14th July 2013 at 4 am and while asleep in the house of Wangui Angelina a Turkana lady PW2 **John Githinji Murefu** overheard a conversation from the next room. He went to that room and engaged the people there after hearing their conversation and argument about a person they had killed. They engaged him to get them a buyer for the stolen items. He accepted and left with Wangai, who told him about the items they wanted sold. They parted ways and he called his brother Paul and uncle Moses Kahiga who arrived at Majengo and pretended to be buyers of the stolen items. The deceased's brother (PW3) had also come and a report was made to the police.

13 Police came and managed to arrest the Appellant and another while the others ran away. He had learnt that the stolen items were in the Appellants' house and he alerted the Police. They proceeded to the house where the Appellant allegedly lived with the lady in charge of the rental houses. They searched the house but nothing was recovered from there. The lady testified as (PW8 and PW12). PW8's son led PW2 and others to a house where several items were recovered. The house was said to belong to the Appellant. The items recovered were EXB 3-13. PW8 alias PW1 and her son were arrested by the police and taken to the Police station.

14 PW4 **Paul Nderitu** a taxi operator testified that while at the Nyeri stage he received a call from an unknown person on 13/7/13 at 9:30 pm requesting for taxi services to Ithenguri. He proceeded to Ithenguri, found the caller who proceeded to open the car boot and loaded two sacks full of items therein. They went to Majengo area where his passenger alighted and took his goods. On 14/7/13, he was arrested by CID officers, and questioned over the taxi services he offered on the material night. At the station cells he identified the Appellant as the person he had carried that night.

15 PW8 who also testified as PW12 is Fatuma Wanjiku Muthee the alleged wife to the Appellant. She recalled that on 14/7/13, she left work in the evening at about 8:00p.m and was called out of her house by PW2 at about 8:30p.m. On getting out of her house she saw PW2 in the company of four police officers who asked her questions about a T.V but she told them that there was nothing in her house. They then searched her house but found nothing. They threatened her and arrested her and her son. Soon thereafter the three officers were led by PW2 to another house where apparently PW2 lived with one Wambui. She saw things being removed from therein by PW2. They were taken to the Police station where she was told to record a statement.

16 She told the court that she collected rent in the plot on behalf of some sisters. She also confirmed that the Appellant did not live in that plot. At this juncture, the prosecution made an oral application before the trial court urging the court to stand down Pw8 so as to give them time to establish why she had turned hostile. The trial court allowed the application by the prosecution.

17 Later when she returned and testified as PW12 she reiterated her earlier statement. The court declined the prosecution's bid to have her declared a hostile witness. In cross examination she said on 13th July 2013 night she was at her house and she never heard any commotion. Further that on 14th July 2013, she witnessed things being removed from PW2'S house. She confirmed that he was the one who lived in that house as he was the one paying rent to her. She denied signing any statement prompting the court to order for an investigation. The results remain unknown though she went to the station as directed.

18 PW10 **Corporal Richard Sambu Musyoki** told the court that on 14/7/2013, at 6:00p.m, he was on normal patrol in civilian clothes in the company of PC Erick Owour, PC Micah Githongori and PC Salat Boke. He received a phone call from an informer who later joined them and they proceeded towards Majengo where the informer pointed out the Appellant who was then arrested, after he tried to escape but stopped after P.C Erick fired in the air. The Appellant led them to his home which was searched for stolen items.

19 They found the Appellant's door not locked and they recovered (PEXB 1-13), Baige jacket PEXB.16, remote control (PEXB. 17). They then left with the Appellant to the police station. At the police station, they were informed of other suspects involved in the crime and

thereafter arrested 5 other suspects. He produced an inventory (PEXB.22) of things they recovered.

20 PW11 **PC Salat Boke** corroborated PW10's testimony that they arrested the Appellant who took them to his residence where they recovered a travelling bag, 6 pairs of shoes, DVD player, electric iron box, thermos, home theatre, 2 speakers, an axe and jacket. On cross examination, he said that the axe (PEXB.14) and CPU (PEXB.13) were found in the Appellant's house.

21 PW13 **PC Stephen Odhiambo** told the court that he received a complaint of robbery on the night of 13/7/2013 from PW3. That they rushed to the scene, entered the house, found PW1 in her house where everything had been turned upside down. They also found the deceased's body in the fire place. He contacted the police station and the scenes of crime officer took photos and the body was taken to mortuary and investigations commenced immediately.

22 He further testified that on 14/7 /13, at about 2:00p.m he received a call from PW3 who informed him that he had information which could lead to some recoveries. He gave this information to the OCS as he was away. Upon his return, he learned that some recoveries were made from the house of the Appellant and Pw1 came to the station and identified her items. The items were (MF1-8) which were produced as (PEXB.1-8). Furthermore, a blood stained jacket (PEXB.16) had also been recovered.

23 He took the jacket and sought authority to have the blood stains on the jacket tested against the blood of the Appellant and another.

Upon visiting the scene, they found an axe next to the body of the deceased. He prepared a memo (PEXB.18) and sent the samples of the jacket, axe and blood samples of the deceased to the Government chemist for analysis.

24 He produced a bank statement (PEXB.1) from Pw1 which showed she withdrew Kshs. 16,000 that day and she was robbed Ksh. 15,000. He also produced the scenes of crime report (PEXB.2).

25 PW14 **Elizabeth Waithera Oyengo** is a Government Chemist Analyst. She confirmed to the court that she did analysis of blood samples of the Appellant and another. She also did analysis and compared blood stains on the jacket (PEXB.16) and the axe (PEXB.14).

After conducting the DNA analysis, she confirmed that blood stains found on the axe belonged to the deceased and the blood stains found on the jacket (PEXB.16) referred to as Appellant's belonged to the deceased.

26 PW15 **PC Erick Owuor** confirmed that on 14/2/13 at about 6:00pm he was in the company of PW10 and PW11 when the Appellant led them to his house in Majengo, opened it as it was shut and they proceeded to search the house with the members of the public. That all the items recovered were identified by PW3 as PW10 wrote an inventory at the station where they took the items. He confirmed that the inventory was signed by PW3, PW8, PW10, PC Micah Gathogori, , PW11, himself and the Appellant.

PW16 **I.P Kennedy Otieno** conducted an identification parade in respect of one of the suspects who was acquitted.

27 The Appellant gave a sworn defence and denied the offence. He testified that on 14/7/13, he was from his place of work when police officers arrested him and took him to his house. He contended that nothing was recovered from there and he denied signing any inventory.

28 Furthermore, he stated that on 17/7/13 in the evening, he was requested to attend an identification parade which he did and was not identified. He contended that PW2 had a grudge against him. Despite having indicated he would call three (3) defence witnesses he did not call any.

29 When the Appeal came for hearing, Mr Kimunya who appeared for the

Appellant submitted on grounds 1 and 2 that the Appellant's conviction was based on circumstantial evidence based on possession. He referred to page 16 of the trial court's judgment where the court observed that there was no direct evidence against all the accused persons save for the Appellant.

30 Counsel further submitted that the trial court linked the Appellant to the recovery from his house while Pw8 who also testified as Pw12 said that nothing was recovered from the Appellant's house. Counsel contended that there was contradiction as to the owner of the house from which the items were recovered.

31 He urged the Court to consider the character of Pw2 with a pinch of salt as his character and truthfulness were challenged and submitted that the case was not proved to the required standard.

He further submitted that there was the recovery of a jacket which was said to belong to the Appellant because it was allegedly recovered from his house.

32 Counsel submitted that in as much as the blood stain on the jacket was found to belong to the deceased, the Analyst could not determine who the owner of the jacket was. In reference to the inventory (PEXB.22) of recovered items, Counsel submitted that the inventory was prepared at the police station and the Appellant was made to sign it from there. The Appellant had however denied ever signing the inventory.

33 In reference to ground 3, Counsel submitted that despite acknowledging in his judgment that there were inconsistencies and uncorroborated statements, the trial court failed to give the Appellant the benefit of doubt. Lastly, counsel submitted that the Appellant was convicted on suspicion evidence and that the prosecution produced nothing to confirm that the house where these items were recovered

belonged to the Appellant. He relied on the case of **John Mutua Munyoki v Republic Court of Appeal Nairobi Criminal Appeal No 11 of 2016** to buttress his case.

34 Mr. Njue for the Respondent opposed the Appeal and submitted that in as much as suspicion cannot support a conviction, the Appellant was convicted on being in possession of recently stolen items. He submitted that Pw4 a taxi driver was called by a customer who he identified as the Appellant. The customer loaded two sacks of items into the boot of the vehicle and asked him to take him to Nyeri.

35 He further submitted that the Appellant in his defence, conceded to signing the inventory though under duress. He also conceded to having been arrested on 14/7/13 and that he took the officers to his house. According to Counsel, the Appellant only disputes the recovery which he urged the court to look at as a mere denial.

36 Counsel conceded that there was no direct evidence to show that the jacket belonged to the Appellant but questioned how the jacket found it's way to the Appellant's house as the Appellant never disputed ownership of the house.

He also conceded that there were inconsistencies in the prosecution's evidence but they could not vitiate the evidence as three witnesses confirmed the recovery.

37 Mr, Kimunya in a rejoinder submitted that the trial court never relied on the evidence of PW4 who stated that he was called by a person he did not know. He reiterated that the recovery was not from the Appellant's house and urged the court to allow the Appeal.

38 This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own independent conclusion. See **Okeno v Republic E.A. 32, Pandya v Republic [1957] E.A 336 and Kariuki Karanja v Republic [1986] KLR 190**

39 I have considered the evidence on record, the grounds of appeal, the submissions by counsel and the cited authorities. The Appellant has raised a total of 5 grounds of appeal. Upon considering all I have stated above, I will narrow them to the following issues:

(i) *Whether PW4 identified the Appellant as the person he carried in his vehicle on the material night.*

(ii) *Whether the prosecution proved beyond reasonable doubt that the items stolen from PW1 were found in the Appellant's house.*

(iii) *Whether the blood stained jacket belonged to the Appellant.*

(iv) *Whether the Appellant signed the inventory form.*

Issue (i) On Whether PW4 identified the Appellant as the person he carried in his vehicle on the material night.

40 Mr. Njue for Respondent submitted that PW4 a taxi driver was called by a customer to ferry him to Nyeri and the customer was the Appellant who loaded two sacks into the boot of the vehicle.

41 Mr Kimunya for the Appellant on the other hand submitted that the trial court never relied on the evidence of PW4 as PW4 stated that he was called by a person he did not know.

In his evidence, Pw4 stated:-

“..... I received a call from unknown people on 13/7/13 at 9:30 pm while at the Nyeri stage. The caller then requested for taxi services to a place known as Ithenguri. I proceeded to Ithenguri, found the caller there and the caller proceeded to open the car boot and load two sacks full of items. I then proceeded to Majengo area where the passenger alighted and took his goods.

On 14/7/13, I was arrested by CID officers, I was questioned over the taxi services I offered on the material night. At the station, I identified Appellant as the person I had carried that night already in the cells.”

42 Is this kind of identification reliable?

The Court of Appeal in **Douglas Kinyua Njeru v Republic (2015) Eklr** held:-

“identification parades are meant to test the correctness of a witness's identification of a suspect.”

In the instant case, as Mr. Kimunya correctly submitted, PW4 never knew the person who loaded two sacks with items in his car boot and he ferried on the material night. It goes without saying that it's possible he may have taken a glimpse of the person he carried before he finally dropped him at Majengo.

43 In as much as PW4 contended that he identified the person he carried on the material night at the Police Station as the Appellant such evidence ought to have been tested through an identification parade. It's not even clear under what circumstances he identified the Appellant at the Police station. This identification clearly amounts to dock identification. The Court of Appeal in **Ajode v Republic [2014] eKLR** expressed itself on this saying:-

“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.”

44 Therefore, the purported identification by PW4 of the Appellant as the person who loaded two sacks of items in his boot is not admissible and the trial court was correct in not relying on such evidence.

Issue No (ii) On Whether the prosecution proved beyond reasonable doubt that the items stolen from Pw1 were found in the Appellant's house.

45 PW2 was the first witness who linked the Appellant to the Pw1's stolen items. In his evidence he stated :-

“ I left the house with Wangai leaving the others inside that house. Wangai told me the items they had. We walked as I went towards my place of work. Wangai said they had a TV,DVD, Changer, Speaker, Home theatre. He said the items were Ngatia's.”

‘I told the police the items were in Nyake's place. At 6:00pm we went to Nyake's place and the kiosk. He was staying with the plot landlady as she was his wife. We went to landlady's house to look for things, they were not there. The land lady was slapped but refused to own up on where the items were. The land lady's son Bilali was called and showed me Nyake's house. The lady opened Nyake's house and there were many things inside. The items were removed. Those items are here in court i.e DVD, suitcase, shoes and all the other things in court. It is only the axe I did not see.’

46 PW8 who also testified as PW12 refuted all that the prosecution tended to state against the Appellant and denied being his wife. She said the items recovered in this case were recovered from Githinji's (PW2) house adding that there is no Eric Omondi in the plot she manages.

47 The second witness to link the Appellant with stolen items was PW10 **Cpl David Sambu Musyoki**. He explained how they arrested the Appellant who had tried to run away. That the Appellant led them to his house where they recovered the items in court. His colleague PW11 **P.C. Salat** and PW15 **P.C Erick Owuor** also said the Appellant took them to his house and recoveries were made. PW 10 stated that they found the door to the Appellant's house open and so they just pushed it open.

48 PW11 did not tell the court how entry was gained but PW15 said the door to the Appellant's house was closed and he is the one who opened it for them. On the other hand from PW2's narrative the Appellant was not present when his house was opened by PW8 alias PW12 and items recovered. That the Appellant was arrested later. This witness never made mention of the Appellant leading the police officers to the Appellant's house. In fact he said it was PW8's son called Bilali who showed them the Appellants house, and PW8 alias PW12 opened the door.

49 Mr.Njue for the Appellant conceded that there were inconsistencies in the prosecution's evidence but they could not vitiate the evidence as three witnesses confirmed the recovery of the items from the Appellant's house. In contrast, Mr. Kimunya for the Appellant submitted that the recovery was not from the Appellant's house.

50 From the above evidence by the prosecution, Pw2 who I can say was the chief prosecution witness, told the trial court that it was Pw8's son who showed them the Appellant's house. PW8 on the other hand denied ever knowing the Appellant and contended that in fact the items were recovered from PW2's house. Then there is the evidence of Pw10 who stated that it was in fact the Appellant who led them to his house, the door was not locked and they just pushed it and recovered the items.

51 PW15 on the other hand contended that the Appellant led them to his

house, it was locked and he had to open it. The Appellant on his part in his defence admitted that he took police to his house but nothing was recovered from there and contended that Pw2 had a grudge against him. On cross examination, he maintained that nothing was recovered from his house and that he was forced by police to sign the inventory form while in hand cuffs.

52 From the above evidence, it is evident that the prosecution's evidence on who the owner of the house was and where PW1's items were recovered is doubtful. PW2 is the chief witness for the prosecution's account on how Pw1's items were recovered and his evidence differed sharply with the evidence of the police. In my humble view, at the time the prosecution closed it's case, the identity of the person who owned the house where PW1's items were recovered was not established.

53 In criminal cases the burden of proof is always on the prosecution and never shifts to the Accused. PW2's version of the recovery differed from that of PW10, PW11 and PW15. PW8 alias PW12 was also a prosecution witness and her evidence completely differed with that of PW2, PW10, PW11 and PW15. The Appellant was not identified at the scene and so the only evidence that seemed to connect him was that of the recovery. It had to be watertight. This contradictory evidence on the recovery and failure to adduce evidence establishing who the owner of that house was, in my view did a fatal blow to the prosecution case.

Issue no (ii) On whether the blood stained jacket belonged to the Appellant.

54 As this court has established above, the prosecution did not adduce evidence beyond reasonable doubt to show that the house from which PW1's items were recovered actually belonged to the Appellant. The blood stained jacket(PEXB.16) according to Pw14, matched the blood

of the deceased was also recovered in the said house. It goes without saying that since the ownership of the house was not established, the owner of the jacket also remained unknown.

55 With the shortfalls pointed out above it is clear that the prosecution did not prove its case beyond reasonable doubt. The Appellant will benefit from the doubt created in the court's mind. The result is that the Appeal succeeds and is hereby allowed.

56 The conviction is quashed and the sentence set aside. The Appellant to be released unless lawfully held under a separate warrant.

Orders accordingly.

Dated signed and delivered this 29th day of November 2018 in open court at Nyeri.

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HEDWIG I. ONG'UDI

JUDGE