



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 189 OF 2013**

**PADDY NDIRANGU NJOROGE ..... APPELLANT**

**VERSUS**

**REPUBLIC .....STATE**

***(Appeal from the Ruling of the Chief Magistrate's Court at Nakuru Hon. J Mwaniki –Principal Magistrate delivered on the 5<sup>th</sup> September, 2013 in CMCR Case No. 3488 of 2010)***

**JUDGMENT**

The appellant **PADDY NDIRANGU NJOROGE** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at the Nakuru Law Courts. The appellant together with two other accused persons had been arraigned before the trial court on 30/6/2010 facing three counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. After a full hearing the appellant's co accuseds were both acquitted for lack of evidence. The appellant was however convicted on the first Count of Robbery with Violence and was sentenced to serve twenty five (25) years imprisonment. Being aggrieved the appellant filed this appeal.

The particulars of Count No. 1 were given as follows

***“On the 25<sup>th</sup> June, 2010 at Engashura Estate in Nakuru District within Rift Valley Province jointly and while armed with dangerous weapons namely pangas and knives robbed JUDITH ANDEKA ASUNDA of cash Ksh 300/=, a sub woofer make Ampex valued at Ksh 3,500/=, a DVD machine make LG valued at Ksh 4,500/=and Torch valued at Ksh 200/= all valued at Ksh 8,500/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said JUDITH ANDEKA ASUNDA”***

The record indicates that the appellant also pleaded 'Not Guilty' to an alternative charge (more on this later)

The charges arose from a robbery incident which occurred on the night of 25<sup>th</sup> June 2010 at an estate known as Harani Investment. **PW1 JUDITH ANDEKA** told the court that on 25/6/2010 at 8.00pm she was in her kitchen with a cousin called 'Joseline' when a group of men entered her house. The men were all armed and had all had covered their faces with marvins (knitted caps). The robbers ordered **PW1** to sit down and blind-folded her. Other neighbours from within the estate were also herded into the house of **PW1** after being robbed. The thugs placed a panga on the neck of **PW1** and warned her that if she resisted they would kill her child. **PW1** stated that she was robbed of a DVD machine, a sub woofer,

electronic torch and a bag. After stealing from **PW1** the robbers left. A report was made to the police.

On 28/6/2010 **PW1** was called by a neighbor and informed that certain items had been recovered. **PW1** went to check the recovered items and found that her sub-woofer was amongst them. She identified the sub-woofer on account of one of its speakers which was dysfunctional.

**PW2 DAVID MUCHIRI** was one of the neighbours who was robbed. This witness identified the appellant as one of the men who robbed his house on the material night. **PW3 MESHACK MWANGI** was the care taker of the plot. He too was robbed by armed men on the night in question. Both **PW2** and **PW3** told the court that a few days after the robbery incident certain items including a sub-woofer were recovered from the house of the appellant.

**PW4 PC HAMISI JIBISHA** was the investigating officer. He confirms that a report of the incident was made to the police. **PW4** further confirms that certain items were later recovered including 7 marvins, a panga and a sub-woofer. All these recovered items were produced as exhibits in court.

Upon conclusion of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave a sworn defence in which he denied any and all involvement in the robbery.

On 5/9/2013 the learned trial magistrate delivered his judgment in which he convicted the appellant on the 2<sup>nd</sup> Count of Robbery with Violence and thereafter sentenced him to serve twenty five (25) years imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

**MR. MARAGIA** learned counsel argued the appeal on behalf of the appellant. **MR. CHIRCHIR** learned State Counsel conceded the appeal. This being a first appeal this court has a duty to re-examine and re-evaluate the prosecution case and to draw its own conclusions on the same. In **MWANGI Vs REPUBLIC [2004] 2 KLR 28**, the Court of Appeal held that

*“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court’s own decision on the evidence.*

*2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.*

*3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts 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 had the advantage of hearing and seeing the witness”.*

The first issue this court must determine is whether the incident in question amounted to a Robbery with Violence. **PW1**, **PW2** and **PW3** all told the court that a group of about 5 men came to their individual houses. The men were armed with pangas and threatened their victims **PW1** stated that a panga was placed against her neck and she was warned that failure to co-operate would lead to the death of her child. This was a well co-ordinated attack on the houses in that plot. The occupants of the various house were all robbed and were then herded into the house of **PW1**. The thugs then proceeded to rob **PW1** of various items before they took off. In the case of **HASSAN MOHAMMED NAMWIBA Vs REPUBLIC [2014]eKLR**, the Court of Appeal sitting in Kisumu held that

*“There are three ingredients of forming the Offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. These are*

*i) That the offender is armed with a dangerous or offensive weapon or instrument or*

*ii) That the offender is in the company of one or more persons; or*

*iii) at the time of Robbery he or they visit violence of any person*

*There is no duty on the part of the prosecution to prove beyond reasonable doubt all the three ingredients as the offence is proved to the required standards if one of those ingredients of the offence of Robbery with Violence is proved”*

In this case the theft was carried out by more than one person. The perpetrators were armed with knives and pangas and the victims were threatened in furtherance of the crime. I am satisfied that this incident amounted to a Robbery with Violence as envisaged by Section 296(2) of the Penal Code.

Having determined the nature of the incident the next question is that of identification. Does there exist sufficient evidence to identify the appellant as one of the perpetrators of this robbery?

**PW1** in her evidence stated that she was not able to identify any of the robbers. This was because when they came to her house all the men had covered their faces with marvins. Further **PW1** told the court that when the men entered her house they blindfolded her.

However **PW2** whose house was also robbed on the same night told the court that he positively identified the appellant as one of the men who robbed him. I am mindful of the fact that the trial court acquitted the appellant on Count No. 2 of the charge which related to the robbery incident where **PW2** was the complainant. The State did not appeal this acquittal. Indeed the learned State Counsel conceded this appeal. However it is the duty of the first appellate court to review the evidence and draw its own conclusions. This court is not bound by the concession made by the State Counsel.

**PW2** gave a clear and concise account of the events of that day. Although his evidence had some gaps, due to torn pages of the record, the same was clearly decipherable and could easily be followed. **PW2** stated the robbers entered his house and ordered both he and his wife to lie down. The robbers stayed in his house for 20 minutes allowing him ample time and opportunity to see them well. Apparently whilst in

the house of PW2 the robbers had not covered their faces. Under cross-examination by counsel PW2 states

***“..... It is accused 2 who got into my house. It was 7.30pm the lights were on. They had put on marvins and I did manage to identify accused 2.....”***

After robbing PW2 the thugs led him to the house of the care taker PW3. Obviously the robbers could not have walked with PW2 to the house of PW3 with their faces covered. This afforded PW2 even a greater opportunity to see the robbers. In his evidence PW2 states

***“We were taken to the care takers house and it has some light. They were at my house for about 20 minutes. I did identify accused 2 when he came to my place....”***

PW2 went on to explain that the appellant was not a stranger to him. PW2 told the court that he knew the appellant well as they had grown up together. Therefore aside from visual identification there was clear evidence of recognition.

In his judgment the learned trial magistrate held as follows

***“It was only PW2 who said he did recognize the second accused whom he said he knew since his school days. This kind of identification cannot be said to be sound....”***

I find that the trial magistrate erred in this finding. Obviously if one had known another since school days he would be in the best position to render positive identification. Such identification can in no way be termed as unsound.

The trial magistrate went on to hold that

***“It is evident that attacks were immediate and violent. I doubt the complainant’s would have the courage to maintain composure and make un-impeded observation of the abductors. The conditions were not conducive for proper identification”***

Here again I fault the reasoning of the trial magistrate. PW2 gave a clear account of the events that occurred in his house. This proved that he was able to see well. He clearly stated the role which the appellant played. There lights were on and the witness spent more than 30 minutes with the robbers. Further they walked together to the house of the care taker. Finally given that the appellant was a man whom had known all his life he was in a better position to positively identify him. On my part I am satisfied that PW2 positively identified the appellant as one of the robbers.

In his evidence PW2 states

***“When I went to the police station, I told the police that I had identified accused 2. I was taken by another boy to accused 2’s house and before we reached, I saw accused 2 and I told the persons I was with that accused 2 was the one....”***

Therefore PW2 from the very beginning identified the appellant and even informed the police about the identity of the appellant. At no time did PW2 waver in this regard. This was clearly not an afterthought nor a fabrication.

The value of this identification by PW2 may not serve to affect the appellant acquittal on Count No. 2 of the charge, it does however serve to place the appellant at the scene of the robberies on the night in question.

All three robberies occurred on the same day ie 25/6/2010 and all occurred within the same time span ie 7.30pm to 8.00pm. They were not three independent and unrelated incidences of robbery in the same plot. As I stated earlier this was one continuous transaction. The robbers moved from house to house robbing

the occupants. In all three incidences the perpetrators were the same people. Indeed **PW1** confirms that the robbers who invaded her home herded her neighbours into her house. Therefore notwithstanding the failure by **PW1** to identify the robbers the evidence of **PW2** places the appellant at the scene of the robbery and in my view positively identifies him as one of the men who robbed **PW1**. This evidence of identification at the scene coupled with the evidence of recovery in my view sufficiently implicates the appellant in the incident.

**PW1** told the court that during the robbery she lost a sub-woofer. This sub-woofer was recovered just two days later in the house of the appellant. The said sub-woofer was produced as an exhibit in court **P. exb 9**. **PW1** was able to positively identify it as he property.

Counsel for the appellant challenged the veracity of **PW1's** claim that she was robbed of a sub-woofer. Counsel relied on the OB Reports regarding the robbery. There were two reports made vide OB No. 5 of 25<sup>th</sup> June, 2010 in which **PW3** (the care taker) reported the robbery in his rental house and listed the items stolen from him. The 2<sup>nd</sup> report was OB No. 11 of 25<sup>th</sup> day of June, 2010 in which **PW2** reported the robbery incident and listed the items stolen from him. It appears that **PW1** made no report to police regarding the robbery in her house and therefore did not furnish the police with a list of the items stolen from here. Does this failure by **PW1** to report the incident negate the fact that she was in fact robbed? I think not.

**PW1** told the court that she herself was not able to identify the robbers. She may have decided not to make a report on this basis. Many citizens in this county having been victims of a crime do not bother to make a formal report to the police as they hold out little hope that their stolen items will ever be recovered. **PW1** testified that it was only after **PW2** informed her that some stolen items had been recovered that she went and identified her sub-woofer. The fact that **PW1** did not formally report the theft does not mean that she was never robbed of a sub-woofer. **PW1** availed herself in court as a witness. She gave her evidence on oath and subjected herself to cross-examination by defence counsel. **PW1** had nothing to gain by claiming to have been robbed if no such incident had actually occurred. **PW1** did not have any motive to come to court and give evidence on oath regarding a non-existent event. I find that the failure of **PW1** to report the incident to the police does not prove that she was never robbed of a sub-woofer. **PW2** and **PW3** who were victims of the same robbery transaction and were therefore complainants did make reports and it was on the basis of their reports that police commenced investigations. I therefore dismiss this ground of the appeal.

The trial magistrate convicted the appellant on the basis of the '**Doctrine of recent possession**'. This doctrine was defined by the Court of Appeal in the case of **ERICK OTIENO ARUM Vs REPUBLIC [2006]eKLR** in the following terms

***"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, 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 another".***

As discussed earlier this court accepts the sworn testimony of **PW1** that she was robbed on the night of 24/6/2010 and that in the course of that incident her sub-woofer was stolen.

Evidence on recovery of this sub-woofer is tendered by **PW2**. Based on the identification of the appellant by **PW2** the house of the appellant was searched and a sub-woofer was recovered therein. This recovery occurred on 28/6/2010 barely two days after the robbery. In the case of a sub-woofer an electronic item which may take a couple of days to dispose off I find that this amounts to recent recovery.

It is pertinent that the appellant does not deny this fact of recovery. The appellant readily accepts that the sub-woofer was in fact found in his possession inside his house. However the appellant maintains that that

sub-woofer does not belong to **PW1** but his legitimately his. Therefore the big question to be resolved before the doctrine of recent possession can be applied is whether this recovered sub-woofer was the property of **PW1** or belonged to the appellant as he claims.

**PW1** stated that she was able to identify the sub-woofer on account of the fact ‘**one of its speakers was not working**’. Although **PW1** had misplaced the original receipt for her sub-woofer the police did manage to trace the person who sold it to her.

**PW5 PETR MUCHAI KAMAU** told the court that he was the proprietor of **Samkan Electronics**. He confirms that he did sell a sub-woofer make Ampex to **PW1** on 4/11/2009 for Ksh 3,500/=. **PW5** produces a proof of that sale a cash sale receipt S/No. 8083 and confirms that it was he who wrote out the receipt in his own hand. The witness produces as an exhibit the duplicate copy of the receipt which remained in his possession, **P. exb 10**. The receipt indicates that the sub-woofer sold to **PW1** was model Ax5075MS Serial No 2010020102207. **PW5** confirmed and identified the sub-woofer produced in court **P. exb 9** as the very one which he sold to **PW1**. He is able to identify it by the model number as well as the serial number, **PW5** also confirms that the receipt which he issued to **PW1**, **P exb 10** bore his VAT number and PIN number making it a genuine receipt.

I have myself carefully perused the carbon copy of the receipt issued by **PW5**. I note that the receipt does not bear the serial number of the sub-woofer which he sold to **PW1**. All it has is the model number. There can be several similar models of that sub-woofer. The exclusive mark to identify the sub-woofer would be the serial number which does not feature on the receipt.

In his defence the appellant claimed that he purchased the sub-woofer from a neighbor. The appellant claims that he exchanged the same for a bicycle. He produced during the trial a receipt for the sub-woofer **P exb 1**. The trial court dismissed the receipt produced by the appellant as a forgery and went on to find him guilty on the basis of the doctrine of recent possession.

During the appeal counsel applied and was allowed to adduce additional evidence. He called as an additional witness one **ANTHONY KIMANI KAMAU** who claimed that he was the neighbor who sold this sub-woofer to the appellant. This witness confirmed having issued the appellant with the receipt dated 23/5/2010 **P. exb 1**. This receipt gives the price as 2,900/= and gives both model and Serial number of the item sold. I am mindful of the fact that the trial court did not have the benefit of hearing from this witness who claimed that he had relocated to Turkana and as such the appellant was not able to trace him at the time of the trial.

The whole scenario appears too convenient, too contrived, a receipt bearing the serial number of the disputed sub-woofer, a seller who conveniently turns up during the appeal – I accept this evidence with much skepticism. However the net effect is that sufficient doubt is cast over the ownership of the sub-woofer. This doubt weakens the prosecution case. In the circumstances the claim by **PW1** to ownership of the sub-woofer cannot be said to have been established beyond reasonable doubt. The court must grant the appellant the benefit of that doubt. For this reason alone this appeal must succeed. I therefore quash the appellant’s conviction on this charge of Robbery with Violence and set aside the 25 year term of imprisonment imposed on him. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Nakuru this 24<sup>th</sup> day of April, 2017.**

Mr. Maragia for Accused

Mr. Motende for DPP

**Maureen A. Odera**

**Judge**