



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 79 OF 2016

BETWEEN

WYCLIFFE IMBUGA ONYANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO 80 OF 2016

BETWEEN

MAXWEL LIBUYA ESESE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO. 81 OF 2016

BETWEEN

WYCLIFFEE LUDENYO AIKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(ALL APPEALS CONSOLIDATED UNDER CRA NO. 79 OF 2016)

(Being an appeal against both conviction and sentence in Vihiga SPMC Cr. Case No. 1006 of 2013 delivered on 24.10.2014 by Hon. S.M. Mwangi Ag SRM)

J U D G M E N T

Introduction

1. The three appellants were arraigned before the Principal Magistrate's court at Vihiga on one count of robbery with violence contrary to Section 296(2) of the Penal Code, the particulars being that on the 20th September, 2013 at about 9.30 pm, at Chamasilihi village Mbale Sub-Location Izava North Location in Vihiga County, jointly with others not before court, while armed with offensive weapons, namely pangas and rungun robbed off (sic) Lucy Nyaleso Mole six handbags, one mobile phone make Nokia 1280 and cash kshs.2000/= all valued a kshs. 11,000/= the property of Lucy Nyaleso Mole and at the time of such robbery threatened to use actual violence to the said Lucy Nyaleso Mole.
2. The appellants were also charged in the alternative with handling stolen property contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The particulars being that on the 30th day of September, 2013 at 9.30pm at Chamasilihi Village, Mbale Sub-location Izava North Location in Vihiga County otherwise than in the course of stealing, dishonestly retained six handbags knowing or having reason to believe them to be stolen goods.
3. All the appellants pleaded not guilty to the charges and the case went to full trial during which the prosecution called 8 witnesses to testify in the case.

The Prosecution Case

4. PW1 was Josephat Kinavode (Josephat) and he told the trial court that on 30th September, 2013 at about 9.30 pm, he was in his house together with his wife Lucy Nyaleso Mole (Lucy) who testified as PW2. He decided to go out to answer a call of nature. He went out of the house and while he was at the latrine he heard the sound of footsteps. When he came out of the latrine some 4 people surrounded him and asked him who he was. He also asked them who they were. All the 4 people were armed with pangas. Some got hold of his neck from behind and at once started behaving as if they wanted to cut him up. They made an attempt to cut his head but he shielded his head with his hands and they cut him on the right palm. The trial court was shown the scar. He was also hit on the legs from behind and he fell down. He was then cut on his left knee. Sensing that he would die if he did nothing, Josephat got up, and jumped over the live Kayaba fence and escaped towards his landlady's house.
5. At the landlady's house, he asked for help and the land lady allowed Vincent Aromba Shivaji(Vincent), PW3 and another man called David to accompany Josephat and assist him. The three men gave chase as they had noticed some lights around the nearby sugar cane plantation. The three of them were screaming as they gave chase. At the sugarcane plantation two men emerged. Josephat, Vincent and David gave chase and managed to arrest Wycliffe Ludenyo Aika the 3rd appellant herein who was 1st accused in the court below. The screams by the trio attracted many other people to the scene.
6. In the meantime, Josephat's landlady contacted the police Number 9402851 Sgt Isaiah Kipkemoi of Vihiga South Commander's Office (PW4) was one of the office who were detailed by SP Joseph Kigen to rush to the scene. On arrival at the scene near the sugarcane plantation, Sgt kipkemoi found the 3rd appellant surrounded by a mob. He urged the mob not to lynch him. A panga was found near where the 3rd appellant was lying down. PW5, number 94021161 AP Sgt Gerbon Onyango also joined Sgt Kipkemoi at the scene after he received instructions from SP Kigen to rush to the scene.
7. While they were at the scene, PW4 and PW5 spotted the 1st and 2nd appellants some 20 meters away, standing. The 1st and 2nd appellants were arrested and together with the 3rd appellant, they were taken to Mbale Police Station. Before they left the scene, the lights of an oncoming vehicle shone on a part of the sugar cane plantation where Lucy's six handbags had been hidden. The six handbags were retrieved by Sgt Kipkemoi. The six handbags were all produced in court and identified by both Josephat and Lucy as belonging to Lucy.
8. On 2nd October, 2013 at the request of Cpl Johnson Mumali of Kilingili Police station (PW7) three identification parades were conducted by number 50500 Ag Ip Nichodemus Musyoki of Mbale Police

Station Ag IP Musyoki testified as PW6. He testified that he conducted two parades. On the first identification parade, the 2nd appellant, Maxwell Lubunya Esese was identified by Lucy who touched him on the shoulder, while the first appellant was identified by Lucy on the second parade

9. During cross examination, Ag IP Musyoka testified that he used the same group of people although he stated that the people were of the same height and complexion. In her testimony, Lucy testified that the people who comprised the parades were of different heights and different complexion. CPI Mumali was the Investigating officer in this case. He testified as PW7.

10. PW8 was Obadiah Ndege (Obadiah) Clinical Officer at Vihiga District Hospital. On 01.10.2013 he examined Josephat who had arrived at the hospital at around midnight on 30.09.2013. Obadiah testified that Josephat had a deep cut wound on the left joint with fresh bleeding on his right hand around the tibia and fibula. Obadiah produced the treatment notes and the P3 form as PExhibits 2 and 3 respectively.

Defence Case

11. At the close of the prosecution case, all the 3 appellants were found to have a case to answer and were accordingly put on their defence. They each gave sworn evidence. None of them called any witness.

12. The third appellant as first accused denied committing the offence and instead stated that at around 9.00pm on the evening of 30.9.2013, he was in his house when he heard people screaming outside. He went out to see the matter was. He found a crowd of people who turned on him alleging that he was a thief. The mob started assaulting him but he was saved by one of the people who advised the mob not to kill him. Later police officers came to the scene, arrested him and took him to Mbale District Hospital and later to the police station at Mbale. He was later taken to court where he denied committing the offence.

13. The first appellant as second accused also denied committing the offence and testified that he was arrested when he went out of their house to see who was screaming on the road. He also testified that when he went out onto the road he found the third appellant being assaulted by members of the public.

14. The first appellant who was the third accused also denied committing the offence and stated that while he was in his house in the evening on 30.09.2013, he heard people screaming on the road. When he rushed out to see what was happening he fell into the hands of police who arrested him and took him to the police station. He also confirmed that on his arrival at the scene where the screams were coming from, he found the third appellant being assaulted. He denied a suggestion by the prosecution that he knew the third appellant and that the third appellant was his neighbour.

Judgment of the learned trial court

15. After carefully analyzing the evidence on record, as well as the submissions and the law, the learned trial court was satisfied that the prosecution had proved its case beyond any reasonable doubt against each of the three appellants on the charge of robbery with violence and convicted each one accordingly. They were each sentenced to suffer death as by law prescribed.

The Appeal

16. Each of the appellants was aggrieved by the entire judgment of the learned trial court hence these appeals. The first appellant put forward 4 homemade substantive grounds of appeal;-

- 1) THAT the learned trial magistrate erred in both law and facts when she convicted me without bearing in mind that chapter 4 of the police standing orders was violated.
- 2) THAT your lordship, the learned trial magistrate erred in both law and facts by convicting me without considering the fact that the charge sheet was defective hence is the foundation of the charge making it null(sic).

3) THAT your lordship, the learned trial magistrate erred in both law and fact to convict me without observing that no crucial evidence was adduced to link me direct to the present case.

4) THAT your lordship, the learned trial magistrate erred in both law and fact when she convicted me on contradictory case which was not proved beyond reasonable doubt as law prescribed.

17. The grounds of appeal for the second appellant as well as the third appellant were exactly the same as those raised by the first appellant. Each of the appellants prays that the appeals be allowed, convictions quashed and sentence set aside so that they are set free.

Duty of the court

18. As the first appellate court, this court is required to give a fresh scrutiny to the entire prosecution evidence adduced against the appellant during the trial evaluate it afresh and come to its own conclusions in the matter. The purpose of this fresh scrutiny and evaluation is for this court to ensure that the findings of the learned trial magistrate are anchored on facts and the law and where it becomes apparent to this court that the facts and the law do not support the lower court findings, then such findings ought not be allowed to stand. Generally see **Okeno – vs – Republic [1972] EA 32, and Mark Oiruri Mose – vs – Republic [2013]e KLR.** In the latter case, the court stated inter alia, that the first appellate court “is under a duty to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter, but always bearing in mind [the fact] that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.” The earlier case of **Pandya – vs – R [1957]EA 336 and Mwangi – vs – Republic [2006] KLR 28** highlighted the same point.

Submissions

19. Each of the 3 appellants filed their respective written submissions which are on record. I have carefully read through the same. They were also each given an opportunity to highlight their submissions during the hearing of the appeal. They all urged this court to make a finding that the evidence on record does not support the charge against any of them and to set them free forthwith,

20. The State made oral submissions in opposing the appeals. Mr. Juma prosecution counsel submitted that all the ingredients of the offence of robbery contrary to section 296 (2) of the Penal Code were proved. In addition, he submitted that all the 3 appellants’ were properly and positively identified during the robbery, and that even during the identification parade, proper identification of the appellants was made. Counsel urged this court to dismiss all the three appeals for want of merit.

Analysis and Determination

21. After a careful analysis of the evidence on record, the grounds of appeal, the rival submissions made by the appellants and the respondent, the Judgment of the learned trial court, the following issues arise for determination.

- a) Whether the appellants were positively identified,
- b) Whether the doctrine of recent possession is applicable in this case
- c) Whether the prosecution proved the charge against each of the appellants beyond reasonable doubt.

22. On the issue of identification, courts have stated over and over against that where the prosecution case rests on the evidence of identification, and where such identification is alleged to have been made under difficult circumstances, then the court dealing with the issue has to be extremely cautious before basing the conviction of an accused on such evidence. This is because mistakes in identification can be made even by close relatives and friends. In the case of **Turnbull and others – vs – R [1973] 3 ALL ER 549,**

the court established the parameters to be considered in case of visual identification, especially by a single witness. This is what the court said;-

“-----the judge should direct the jury to examine closely the circumstances in which the identification of each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way.....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ----- Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

23. The above stated principles have been applied in our own courts. A case in point is **Wamunga – vs – Republic [1989] KLR 426** where the Court of Appeal stated, inter alia that:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

24. I now return to the evidence on record in this case. From the evidence given by Josephat, the alleged robbery took place at around 9.30pm when he was confronted by a group of 4 people who asked him who he was and soon after he asked them who they were, they surrounded him and some of them held him by the neck from behind. Though Josephat said he had a torch, there is no evidence from his testimony that he used that torch in any manner whatsoever to see who the attackers were. They first threatened to cut him and indeed they cut him on his right hand as he tried to shield his head from being cut. Before long, one of the intruders knocked him on the legs from behind and he fell down. He was again cut on the left knee. Spurred by imminent danger to his life if he stayed on the ground, slowly got up and escaped to the landlady’s compound. So from Josephat’s testimony, he did not visually recognize any of his attackers before he escaped.

25. However, Josephat stated that when he eventually returned to his house, he found his wife Lucy, who informed him that the robbers had broken into the house and stolen Ksh.2,000/= a Nokia 2810 mobile phone and her 6 handbags. Josephat, Vincent and David gave chase and at the nearby sugar cane plantation, Wycliffe Ludenyo Aika was arrested as he tried to escape from the sugarcane plantation. One other person who was with him escaped. Josephat did not see Maxwell Lubuya E sese and Wycliffe Imbuga Onyango.

26. Lucy said she was in the home when the wooden door to the house was broken down and 2 men entered demanding money and mobile phones. The 2 men were strangers to her, but she testified that there was enough light both inside the house and in the verandah to enable her identify Maxwell Lubuya E sese and Wycliff ee Imbuga Onyango. She further testified that while Maxwell Lubuya E sese kept guard at the door, Wycliffe Imbuga entered the house and took the mobile phone from her and also went to her bedroom and came out with the 6 handbags. That the two appellants both carried pangas and torches.

27. It was Lucy’s further testimony that she was able to identify both Maxwell Lubusa and Wycliffe Imbuga at the identification parades carried out by the police, but during cross examination, she stated that the members on the identification parades were of different heights and different complexion and that the same people were used on all the parades. Lucy also testified that though she gave a description of her attackers, the police did not include it in her statement. It is also not clear from Lucy’s testimony, how long her attackers stayed in the house before they left with the money, the phone and the 6 handbags.

28. From the above evidence, this court has reached the conclusion that the identification of Maxwell and Wycliffe Imbuga by Lucy was doubtful. I shall start with the evidence of the identification parade. In my

considered view, that identification was a Sham. Lucy's evidence was to the effect that the same persons were used in all the three parades she attended. Secondly, that the members of the parade were of different heights, and complexions, thereby making the identification parade defective and contrary to the rules. A proper identification parade should have at least 8 members who should as nearly as possible be of the same height and the same complexion. Further, each suspect ought to be given a chance to say whether or not they want a relative or a friend or an advocate to be present during the parade. Thirdly, no two parades conducted for the same witness should have the same members Ag IP Musyoka who conducted the identification parade clearly flouted the rules.

29. Regarding the identification of Wycliffe Ludenyo Aika the evidence is that he was arrested as he tried to flee from the sugar cane plantation near the scene. He fell into a ditch and Josephat, Vincent and David caught him. Josephat and his team had followed torch light coming from the spot in the sugarcane where Wycliffe Ludenyo Aika was hiding with another who is still at large. According to Vincent, Wycliffe Ludenyo Aika was arrested just 4 meters from where the torch light had been seen. The suspect was armed with a panga and also had on his person 2 national identity cards belonging to other people. Shortly thereafter, the suspect was handed over to the police. Vincent also stated that the suspect was found carrying 6 handbags which were later identified by Lucy to have been stolen from her by Maxwell and Wycliffe Imbuga. During cross examination, Vincent admitted that his statement did not contain any information to the effect that Ludenyo had been found carrying 6 handbags when he was arrested nor did the statement contain any information to the effect that Lucy gave them details of what had been stolen from her.

30. It seems clear to me therefore that the visual identification of the appellants including that of Ludenyo remains in doubt. The question that now follows for determination is whether there is any other evidence, be it circumstantial or otherwise that would establish a nexus between the appellants and the violent robbery visited upon Josephat and Lucy on the material night. Sgt Kipkemoi testified that on 30.9.2013 at about 9.30 pm, he was told by SP Joseph Kigen the county commander, about the robbery incident. He stated that as he and his team made way to where Ludenyo had been arrested, he saw Maxwell and Imbuga "hiding on the other side of the fence and nappier grass" He testified that he also saw Ludenyo on the ground surrounded by a crowd of people. He also testified that when Maxwell and Imbuga could not explain what they were doing at the fence, he arrested them and took them to where Ludenyo was. Some 6 handbags were recovered from near the scene where Ludenyo had been arrested. According to Sgt Kipkemoi Maxwell and Imbuga were found hiding some 6 metres away from where Ludenyo had been captured.

31. What the above evidence leads to is the question as to whether the doctrine of recent possession is applicable to the circumstances of this case. It is now well settled that the doctrine is applicable to any case, regardless of the gravity of the crime once the following perquisites are established:-

- a) *The property in question must have been found with the suspect.*
- b) *The property must be positively identified as the property of the complainant and*
- c) *The property must be proved to have been recently stolen from the complainant*

32. The above perquisites were enunciated in the following notable cases:- **Isaac Ng'ang'a Kahiga alias Peter Nganga Kahiga – Vs – Republic CRA NO. 272 of 2005 (UR)** unreported where the court held, inter alias, that;-

".....it is trite that before a court can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive identification of the property as that of the complainant. Thirdly that the property was stolen from the complainant and lastly that the proof as for time as has been stated over and over again, will depend on the easiness with which the stolen property can move from person to the other."

33. In the instant case, Ludenyo was apprehended as he tried to flee from the sugar cane plantation when he fell into a ditch. According to Josephat and Vincent, two other people escaped, but soon after Ludenyo's arrest, Maxwell and Imbuga were arrested some 6 metres away hiding near the fence. Upon arrest, they could not explain why they were in that place at the material time. Some 6 metres away from the scene, the police recovered 6 handbags, which handbags were positively identified by both Josephat and Lucy as the bags that had been stolen from their house that same night at around 9.00pm. The 6 handbags were produced as PExhibit 4. It is noteworthy that the arrests took place within a very short time after the robbery.

34. In summary, I am satisfied that the doctrine of recent possession is applicable in this case. The handbags were found in the very same place where Ludenyo was arrested, and just a short distance away from where Maxwell and Imbuga were found hiding. Though the handbags were not found in the hand of any of the three appellants, the fact that the handbags were found within the vicinity of the area where the three appellants were arrested confirmed the evidence that there had in fact been three people at the scene before two of them ran ahead of Ludenyo. This is a confirmation that the three appellants were in possession of the 6 handbags

35. The appellants stated separately that they had simply rushed out in response to the screams they heard, but in my considered view that story was made up by each one of them as they awaited trial. The truth of the matter is that they were all out there in that place as they were trying to evade arrest after committing the robbery.

Conclusion

36. In conclusion and for the reasons above stated, I find no merit in the appellant's appeals. The same be and are hereby dismissed on both conviction and sentence. Right of appeal within 14 days.

It is so ordered

Judgment delivered dated and signed in open court here at Kakamega this 18th day of October 2017

RUTH N. SITATI

JUDGE

In the presence of :-

.....Present in person.....1st Appellant

..... Present in person2nd Appellant

..... Present in person3rd Appellant

.....Mr. Juma (present).....Respondent

.....Polycap Mukabwa.....Court Assistant