



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NOS.566 & 567 OF 2006

(An Appeal arising out of the conviction and sentence of Hon. Muchira (Mrs.)- SRM

delivered on 26th September 2006 in Kibera CMC. CR. Case No.9245 of 2004)

STEPHEN WANYONYI SIMIYU.....1ST APPELLANT

BERNARD ARHAME KULOBA.....2ND APPELLANT

JUDGMENT

The 1st Appellant, Stephen Wanyoni Simiyu and the 2nd Appellant, Bernard Arhame Kuloba were charged with two others with several offences under the **Penal Code**. The relevant charge for the purpose of this appeal is the 1st Count in which the Appellants were charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 13th November 2004 at Ongata Rongai Township in Kajiado County, the Appellants, jointly with others not before court, while armed with dangerous weapons namely axes and rungun robbed Yusuf Omar Iddi of one television set (make JVC 14 inch), one radio cassette make Sonny, one hand bag full of personal clothing, cash Kshs.4,600/- and other personal items all valued at Kshs.40,600/- and at or immediately before the time of such robbery used actual violence to the said Yusuf Omar Iddi (hereinafter referred to as the complainant). When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged. They were sentenced to death. The Appellants were aggrieved by their conviction and sentence. They have appealed to this court.

In their respective petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of the evidence of identification that did not stand up to legal scrutiny. They took issue with the fact that the trial court had relied on the evidence of identification which was made in circumstances that were not conducive to a positive identification to convict them. They faulted the trial magistrate for relying on the doctrine of recent possession to convict them yet the evidence adduced by the prosecution witnesses did not establish to the required standard of proof that the said stolen items were found exclusively in their possession. They were aggrieved that the trial court did not take into account the circumstance of their arrest which in their view raised reasonable doubt that they had indeed participated in the robbery in question. They took issue with the fact that the trial court had relied on contradictory, inconsistent, uncorroborated and incredible evidence to convict them. They were aggrieved that the trial court did not take into account their defence before arriving at the decision to convict them. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside the death sentence that was imposed on them.

During the hearing of the appeal, the 1st Appellant handed to the court written submission in support of

his appeal. In the submission, the 1st Appellant urged the court to carefully consider his grounds of appeal which essentially touched on the evidence of identification and the application of the doctrine of recent possession by the trial court and reach a finding that the said evidence did not establish his guilt. He urged the court to acquit him. On his part, the 2nd Appellant made oral submission before court. Just like the 1st Appellant, he submitted that he was not properly identified by the victim of the robbery. He challenged the evidence of identification that was adduced by the prosecution witnesses. He further complained that a crucial witness who was arrested while in possession of the stolen items was not called to testify in the case. He was emphatic that the robbed goods that were recovered were not in his possession. He therefore urged the court to allow the appeal.

Ms. Nyauncho for the State opposed the appeals. She submitted that the prosecution was able to establish to the required standard of proof that the Appellants robbed the complainant and in the course of the robbery injured him. Property stolen from the complainant was recovered in the Appellants' possession a day after the robbery. The property was positively identified by the complainant when he was summoned to the police soon after the said recovery. She further submitted that the complainant positively identified the Appellants during the robbery. He described the clothes that the Appellants wore at the time of the robbery. He explained the role each Appellant played during the robbery. The trial court properly applied the doctrine of recent possession to find the Appellants guilty of the offence that they were charged with. The complainant produced a P3 form filled by a doctor which confirmed the injuries that he had sustained during the robbery. She submitted that the essential ingredients to establish the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** were proved to the required standard of proof beyond any reasonable doubt. She urged the court to dismiss the respective appeals lodged by the Appellants.

Before giving reasons for this court's decision, it is imperative that the facts of this case be set out, albeit briefly. PW1, the complainant in this case testified that he was a resident of Ongata Rongai. On 13th November 2004 at about 3.00 a.m. while he was asleep at his house, he was woken up by a bang on his door. He switched on the electric light. Shortly thereafter, he realized that the intruders had broken into his house. The complainant lived in a one-roomed house. They were already in the house. None of the intruders wore any disguises. They were armed with a metal bar, a Chisel and a rungu. They kicked and hit him on the head with the rungu. He fell on his back. They then took away his JVC television set, Sonny radio, his clothes and bed sheets. They also took his wallet which had Kshs.4,600/-. The complainant explained that during the robbery he was able to identify the Appellants as the persons who robbed him. He described the roles that each Appellant played in the robbery. He testified that the 1st Appellant hit him with the chisel and demanded that he surrenders his mobile phone. He further threatened to harm him if he screamed to alert his neighbours.

The 2nd Appellant is the one who took away his television set. The complainant testified that even though he raised alarm, due to the fact that it was raining heavily, none of his neighbours came to his aid. Immediately after the robbery, he went and made a report to Ongata Rongai Police Station. He was advised to seek medical attention. He was treated at a nearby hospital referred to as Sinai before he was discharged. The P3 form in respect of the injuries that he had sustained was filled and produced in court by PW6, Dr. Z. Kamau. The doctor noted that the complainant had sustained a cut injury on the mid forehead. The injury was caused by a sharp object. The degree of injury was assessed as harm.

Meanwhile, on the same 13th November 2004 in the morning hours, PW3 PC Joshua Kampen while at Shauri Moyo Police Station, he received information from a member of the public that there were certain people who were carrying what was suspected to be stolen property. These persons were seen at Majengo area. PW3 accompanied by other police officers was escorted by the member of public to a pub where busaa (traditional liquor) was being sold. Outside the house was a television set and clothes. PW3 entered the pub and arrested the four men and a woman who were inside the pub. Among the men arrested were the Appellants. They were escorted to Shauri Moyo Police Station where they were interrogated by among others PW4 IP Jackson Owino then attached to Pangani Flying Squad. In the course of interrogation, the Appellants led the police to the houses at Ongata Rongai which they had on the previous night broken into and stolen the particular items.

Among the houses visited was that belonging to the complainant. The complainant was summoned to go to the police station on 15th November 2004. He testified that while at the police station he saw four men, among them the Appellants, being escorted by police from a police motor vehicle to the police station. He positively identified the Appellants as the persons who robbed him. He also identified a T-shirt that the 1st Appellant was wearing at the time. He told the court that this was the T-shirt that was stolen from him on the night of the robbery. He also positively identified the television set and the radio that was recovered in the Appellants' possession upon their arrest. He produced a permit which showed the particulars of the radio. He also positively identified the clothes that were robbed from him on the material night of the robbery. It was on the basis of this evidence that the trial magistrate found that there was sufficient proof that the Appellants were indeed the persons that robbed the complainant.

In their defence, the Appellants denied that they robbed the complainant. They denied that the items that were recovered were in their possession. They took issue with the manner in which the complainant is purported to have identified them. They explained the circumstances of their arrest. They were of the view that the circumstances of their arrest did not suggest that they were in actual possession of the stolen items. They urged the court to uphold their innocence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellants. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding their demeanor (See **Njoroge –vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution established the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** against the Appellants to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made by the parties to this appeal. It is clear from the said submission that the issue for determination by this court is whether the evidence of identification and that of recovery of the stolen items was sufficient to establish the guilt of the Appellants to the required standard of proof. As regard the evidence of identification, the complainant testified that he was able to identify the Appellants during the course of the robbery. He testified that although the robbery took about five minutes, he was able to positively identify the Appellants. He explained that the electric light had been switched on. The Appellants wore no disguises. He described to the court the clothes that the Appellants wore at the time of the robbery. He also explained the role that each Appellant played during the robbery. However, it was clear from his evidence that he did not give this description in the first report that he made to the police. He testified that he was assaulted several times during the course of the robbery. He also told the court that he had never met with the Appellants prior to the robbery incident. This court is unable to make a positive finding that indeed the complainant, in the short time that he interacted with the robbers, was able to be positive that he had identified them.

Although the complainant gave consistent evidence in regard to how he was able to identify the Appellants, this court has warned itself of the danger of convicting the Appellants based on the sole evidence of identification made by a single identifying witness in difficult circumstances. The Court of Appeal in **Maitanyi –Vs- Republic [1986] KLR 198 at P.200** held thus:

“Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification,

although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

In the present appeal, it is clear to this court the circumstances under which the complainant is said to have identified the Appellants as the persons who robbed him is such that this court cannot rule out the possibility that he could have been mistaken that he had identified the Appellants as the persons who robbed him. Other evidence is required to corroborate this evidence.

The prosecution did not however solely rely on this evidence. It relied on the evidence of the recovery of the stolen items in the Appellants’ possession. In that regard, the prosecution is on firmer ground. It was the prosecution’s case that a few hours after the robbery, the Appellants, with others, were found in possession of the stolen items. According to PW3 and PW4, when they arrested the Appellants after receiving information from a member of public, they found the Appellants in possession of the television set, the radio and the clothes that were later positively identified by the complainant as the property that was stolen from him a day earlier. Although the Appellants disputed that they were found in possession of these stolen items, having re-evaluated the evidence adduced in that regard, we are convinced beyond any reasonable doubt that indeed the Appellants were found in possession of the said stolen items. If there was any doubt that they participated in the robbery, that doubt was removed by the evidence of PW4 who testified that it was the Appellants who showed them the house of the complainant after they were asked to indicate to the police where they robbed the particular recovered items. The complainant was able to positively identify the items recovered from the Appellants as the ones that were robbed from him. Indeed, he positively identified a T-shirt that the 1st Appellant was wearing at the time of his arrest as the one that was robbed from his house.

We are of the considered view that the prosecution was able to connect the Appellants with the stolen items and therefore connect them to the robbery of the same from the complainant. The trial court, properly in our view, applied the doctrine of recent possession to convict the Appellants of the robbery: the Appellants were found in possession of stolen property so soon after the same was robbed from the complainant. According to PW3, he recovered the stolen items from the Appellants’ possession a few hours after the said property was robbed from the complainant. The Appellants failed to give a persuasive explanation how they came to be in possession of the said stolen items (*See **Malingi –Vs- Republic [1989] KLR 225***). We find no merit in the grounds of appeal raised by the Appellants challenging their conviction by the trial court. They were properly convicted on the basis of the evidence of the recovery of the stolen items in their possession. The doctrine of recent possession was properly applied by the trial court. The trial court correctly dismissed the Appellants’ defence as being a sham and self-serving. The said evidence adduced in their defence by the Appellants did not otherwise dent the strong culpatory evidence that was adduced against them by the prosecution witnesses.

As regard whether the ingredients to establish the charge of robbery with violence were proved, we hold that the same were proved to the required standard. The Appellants while armed with crude weapons, broke into the house of the complainant and robbed him of his property. In the course of the robbery, the complainant was injured. The Appellants were more than one in number. Under **Section 296(2)** of the **Penal Code**, it is clear that these ingredients were established. The Appellants’ consolidated appeals lack merit and are hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JUNE 2016

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE