



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 1 OF 2016

ROBIM MARONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction in Ogembo SPMCR. NO. 1149 of 2012)

(Hon. N. Wairimu, Principal Magistrate)

JUDGMENT

1. The appellant, **Robin Maronga** or **Robin Marunga** or **Robin Maranga Ogo**, appeared before the Principal Magistrate at Ogembo charged with four counts of robbery, contrary to **S.296(2)** of the Penal Code and **S.296(1)** of the Penal Code. He also faced two alternative counts of handling stolen goods, contrary to **S.322 (2)** of the Penal Code and one count of assault causing actual bodily harm contrary to **S.251** of the Penal Code.
2. The particulars of the first count of robbery with violence were that on the **21st July 2012**, at Nyangusu Market, Nyamache District of Kisii County, the appellant jointly with others not before court while armed with dangerous weapon namely iron bars and panga, robbed **Samuel Ondabo Omare**, of his mobile phone make Nokia valued at Kshs. 3,900/=.
3. The particulars of the second, third and fourth counts of robbery with violence, contrary to **S. 296(1)** of the Penal Code were that on the **21st July 2012**, at Nyangusu Market, Nyamache District of Kisii County, the appellant robbed **Samson Alfred Abuga**, **Edna Moraa** and **James Mwangi Ndungu**, of their respective personal property. Alternatively, the appellant allegedly handled stolen goods from Edna Moraa and James Mwangi Ndungu.
4. The last count was that of assault, contrary to **S.251** of the Penal Code, in that on the **21st July 2012**, at Nyangusu Market, Nyamache District of Kisii County, the appellant unlawfully assaulted, **Samuel Ondabo Omare**, and occasioned him actual bodily harm.
5. After pleading not guilty to all the counts, the appellant was tried and convicted on counts one, two and three. He was sentenced to suffer death on count one, fourteen (14) years imprisonment on count two and five (5) years imprisonment on count three. The sentences were to run concurrently.
6. Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds contained in his Petition of Appeal filed herein on the **19th January 2016**. He appeared in person at the hearing of the appeal and relied on his written submissions which seemingly

contains additional grounds of appeal and shows that the appellant's main complaint was that he was convicted on the basis of evidence which was insufficient, uncorroborated and contradictory. He urged this court to allow this appeal.

7. The Learned Prosecution Counsel, **M/s Mbelele**, represented the State/Respondent and opposed the appeal by arguing that the appellant robbed the victims while armed. That PW 1, PW 2 and PW 3, were employees of the material bar and testified against the appellant. That, PW 1, was removed from his vehicle and injured while escaping. He stated that there was sufficient moonlight at the material time of the offence.

8. The Learned Prosecution Counsel further argued that the appellant was previously known to PW 1, PW 2 and PW 3, such that they all identified him as a customer who frequented their bar. That, property belonging to PW 3 was recovered from the appellant without any explanation from himself.

9. It was thus the contention of the Learned prosecution Counsel that there was sufficient evidence to show that the appellant was one of those who committed the offences. Therefore, this appeal ought to be dismissed.

In response to the respondent's arguments, the appellant contended that PW 1 did not identify him as referred to an identification parade consisting of fourteen (14) parade members instead of eight(8). That, PW 3 did not state that her property was found with him (appellant) but indicated that it was found at a field within Rioganda Primary School.

10. The appellant further contended that the doctor (PW 4) indicated that the person examined by him was not any of the complainants. That PW 5 stated that he arrested him with a bag yet he was an innocent passenger in a public service vehicle. That, the driver and the conductor of the said vehicle were not called to testify yet they were vital witnesses. That, PW 5 arrested him merely on orders from the Officer Commanding Police Station (O.C.S.) and that the owner of the bar by the name of Onduso was not called to testify.

11. The appellant also contended that the Prosecutor in the lower court was substituted and no witnesses were re-called to testify. He (appellant) urged this court to allow the appeal.

12. At this point, the duty of this court is to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. This guideline is laid bare in a number of decisions of the Superior Courts beginning with **Okeno Vs. Republic (1972) EA 32.**

13. Briefly, the prosecution case was that on the material date at about 12.00 midnight, **Samson Alfred Abuga (PW 1), Samson Alfred Abuga (PW 2) and Edna Moraa (PW 3)**, were on duty at Corner Bar in Nyangusu. Being a security guard, Samuel (PW 1) was outside the bar inside a motor vehicle dozing. He was awakened by a person who introduced himself as a police officer. The person wore police uniform and a hat. He was joined by two others and ordered Samuel to follow them to a nearby river where his mobile phone and money (Ksh. 550/=) were taken away.

14. It did not take long before Samuel (PW 1) became suspicious of the three people. He decided to fight them but was injured in the process. His tormentors ran away after hitting one of them with a maize plant. He did not know any of the three people but said that the appellant was one of them as he was able to see him due to the presence of bright moonlight on the material night.

15. Samson (PW 2), was at the counter of the bar selling beer. By 1.00am, the bar was locked from the inside and Samson decided to sleep therein together with some of his colleagues. It was at that juncture that two people knocked the door of the bar and thereafter made an entry therein.

They switched off the light and announced that they were thieves. They proceeded to steal Samson's mobile phone and money Kshs. 150/= before heading to another room where Edna (PW 3) was sleeping.

16. Samson (PW 2) was unable to see the intruders as they used their torch to flash its light on his face.

Edna was suddenly awakened by the two men. She and her colleagues were ordered to cover themselves with blankets. She was also ordered to provide the keys to the counter. She did not look at the intruders but they shortly thereafter went outside the bar. She and others raised alarm one hour after the intruders left. She later realized that her bag containing clothes and a photo album had been stolen. Her clothes were recovered at a field within Rioganga School and from a person found at the Kilgoris bus stage.

17. Edna did not identify the intruders but found the appellant at the police station having been arrested. She knew him as one of their bar customers. She learnt that he was arrested with her stolen bag and clothes.

Wycliffe Atambo (PW 4), a clinical officer at Gucha level 4 hospital undertook a medical examination on Samuel (PW 1) and found that he was assaulted and occasioned bodily harm.

18. **Cpl. John Odaris (PW 5)**, of Nyangusu Police Station investigated the case after receiving the necessary report from the proprietor of the material bar. In the process, he was directed by his superior officer to proceed to Nyangusu Market Stage where a person with a black bag had boarded a motor vehicle Registration No. KBB 617G. He proceeded to the stage with his colleagues where they waited for twenty (20) minutes before apprehending the suspect with the black bag containing stolen items. The said suspect was the appellant. He was charged with the present offences after investigations were completed.

19. On being placed on his defence by the trial court, the appellant apparently elected to remain silent when he stated that "*I shall not give evidence*". The court noted that there was adamant refusal by the appellant to elect any of his rights under S. 211 of the Criminal Procedure Code and ordered that the defence case be closed. This action in this court's opinion did not stifle the appellant's constitutional right to a fair hearing. He was given every opportunity to exercise his rights but deliberately chose not to for reasons best known to himself.

20. Be that as it may, upon due consideration of the evidence adduced by the prosecution against the appellant, the learned trial magistrate concluded that the case had been proved beyond reasonable doubt with regard to counts one, two, three and five. However, the sentence on count five i.e. assault causing actual bodily harm, was erroneously omitted by the magistrate who passed the sentence after reading the trial court's judgment.

21. This court, having re-visited the evidence adduced at the trial court, is of the opinion that there was sufficient and undisputed evidence establishing the commission of the offences of robbery with violence, simple robbery as well as assault causing actual bodily harm.

22. The three main witnesses (i.e PW 1, 2 & 3) vividly narrated to the court the manner in which they were robbed. Although, Samuel (PW 1) suffered bodily injury in the process, Samson (PW 2) and Edna (PW 3) did not.

A fourth victim called James Mwangi Ndungu was not called to testify and this explains why the appellant was not convicted on the fourth count of simple robbery.

23. By and large, the basic issue that presented itself for determination was the identification of the appellant as being one of the two or three offenders.

None of the three complainants (PW 1, 2, & 3) identified any of the offenders during the occurrence of the offences. Samuel (PW 1) said that he did not know any of the three men who attacked and robbed him. He could not therefore later purport to say that he saw and identified the appellant with the help of moonlight.

24. Samson (PW 2), was categorical that due to the torch flashes directed on his face he was unable to identify the two people who stole his mobile phone and money.

Edna (PW 3) was also categorical that she did not identify the two men who invaded her room and stole her property including a bag and clothes.

In short, there was absolutely no direct evidence of identification against the appellant and as such his purported identification by Samuel (PW 1) was mere dock identification which could not be relied upon in the absence of credible corroboration direct or indirect.

25. If there was any identification of the appellant, then it was circumstantial based on the doctrine of recent possession.

Under the said doctrine a person is presumed to be the actual offender if found with suspected stolen property without proper explanation.

The parameters for the application of the doctrine were clearly set out in the case of **Isaac Nanga Kahing'a alias Peter Kahing'a Vs. Republic, Criminal Appeal No. 272 of 2005.**

26. In that case, the Court of Appeal stated that:-

“It is trite law that 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 that, the property was found with the suspect and secondly that, the property is positively the property of the complainant; thirdly that the property was recently stolen from the complainant”.

27. In this case, there was no dispute that Edna (PW 3) lost her property to the people who invaded her and her colleagues on the material night. However, there was no sufficient evidence showing that the property recovered by the police allegedly from the appellant belonged to her. No sufficient evidence was led by Edna to prove ownership of the property by her. She merely stated that the property belonged to her but did not adduce any form of evidence to establish the fact yet such property could be owned by any person.

28. Even if it were held that the property actually belonged to Edna (PW 3) it was incumbent upon the prosecution to prove that it was recovered from the appellant within a short period of time after the offence.

The suggestion herein was that the property was found in possession of the appellant from whom it was recovered a few hours after the offence.

29. According to the investigating officer (PW 5), he received a call from his superior officer and told to rush to Nyangusu Market Stage where a suspect who had boarded a motor vehicle Reg No. KBB 617G Toyota succeed was expected. That, the suspect was carrying a black bag and ought to be arrested on arrival.

The investigating officer and his colleagues lay in wait for the suspect and after about twenty minutes they spotted the appellant alighting from the material vehicle carrying a black bag. They arrested and took him to the police station where the black bag was inspected and found to contain assorted clothes and a photo album.

30. The bag and its contents were allegedly stolen from the third complainant (PW 3). This prompted the third count of simple robbery against the appellant.

What is intriguing about the evidence of the investigating officer (PW 5) is the manner in which he identified the appellant while alighting from the vehicle yet there was no indication that the two had previously met or known each other. There was also no indication that the appellant was the only passenger carrying a black bag.

31. Basically, the recovery of the material items allegedly from the appellant was shrouded with mystery if the evidence of recovery by the investigating officer is anything to go by. Such evidence would have been credible if there was independent corroboration of the same at least from a member of the public who was at the bus-stage at the material time of the appellant's arrest and in particular the driver or conductor of the vehicle in which the appellant had boarded.

32. So, even if the bag and other items belonged to the third complainant (PW 3) there was insufficient and incredible evidence of possession and recovery against the appellant. There was no positive proof that the items were found with the appellant at the time of his arrest.

It would therefore follow that the doctrine of recent possession could not apply to the appellant to hold that he was positively identified by circumstantial evidence as having been part of the people who offended all the three complainants.

33. Consequently, the conviction of the appellant on counts one, two, three and even four was unsafe and erroneous and is hereby quashed. The sentences on counts one, two and three are thus set aside and the appellant set at liberty unless otherwise lawfully held.

On sentence, it was undesirable for the trial court to order that sentences do run concurrently in view of the death sentence imposed on count one. In such circumstances, the sentences on counts two, three and four would be held in abeyance (See, **Boris & Another Vs. Republic (2005) KLR 649**).

[Delivered and signed this 27th day of October 2016.]

J.R. Karanjah

Judge

In the presence of

Njoroge CC

Mr. Muhindi – State Counsel

Appellant – Present in person