



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL APPEAL NO. 338 OF 2008

1. ERICK OCHIENG.....1ST APPELLANT

2. FESTUS MWOVA.....2ND APPELLANT

3. PETER MUSYOKI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 2157 of 2007 of the

Chief Magistrate's Court at Mombasa – Hon. Mwangi – S.R.M.)

JUDGMENT

The three Appellants were Convicted and Sentenced to suffer death for the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars being that:-

“On the 22nd day of July, 2007 at about 10:00 pm at Bombolulu–Mombasa County jointly, being armed with dangerous weapons namely knives, robbed GEORGE MUTUA TALIANI his mobile phone, wallet containing cash Ksh. 1,400/= two pairs of glasses, job identification card and assorted items of the value of Ksh. 8,700/= and at or immediately before or immediately after the time of such robbery used actual violence to the said GEORGE MUTUA TALIANI”.

This case was heard and determined and the Appellants were Convicted and Sentenced accordingly. Being dissatisfied with the Conviction and Sentence they lodged this appeal.

The main grounds are that of lack of proper identification.

Unprocedural admission of Exhibits, failure to consider defence mounted by the appellants.

The prosecution called six (6) Witnesses in support of their case. The first and 2nd Appellant gave unsworn statements whereas the 3rd appellant gave a sworn one. They did not call Witnesses in their defence.

It behoves us as a first appellate Court to evaluate and re-evaluate the evidence adduced in the lower

Court so as to arrive on our own conclusions or agree with those of the trial magistrate. See **Okeno – Vs- Republic 1972 EALR.**

The brief facts of this case are that the Complainant is a Clinical officer at Coast Provincial General Hospital. On the 2nd July, 2007 he alighted at Bombolulu bus stage at about 10:00 pm and was walking home when he was confronted by three (3) men who got hold of the handbag he was carrying and proceeded to ransack his pockets. He screamed and the men punched him severally. He managed to slip away and went and sought shelter in a friends house.

The following day he went home and he was informed that some of his items had been recovered. He went to police station and identified his bag. He was issued with a P3 form which was later filled at Coast General Hospital.

In the handbag he recovered his duty roster, his reading glasses, copy of his identity card and business cards. These items he was informed were recovered by police. Police were not able to recover his money and mobile phone.

Another Complainant Simon Kahindi Mburu (PW2) was outside his house making a phone call at about 9:30 pm when he was accosted by the three appellants who took his Nokia mobile phone and cash Ksh. 6,300/= and they disappeared in the darkness. Later, he got information from local security vigilantes that the thieves had been arrested at Makaburini and that they also had stolen from another Complainant.

He was able to identify the three men after the arrest though he did not know them before. The three Appellants were arrested by PW 6 PC Joseph Yolego on the same night of the attack at 11:00 pm. The three men were in a possession of a black handbag which upon arrest of the men he found contained documents belonging to the first complainant who was later called at the police station and identified them as his.

The main issue in this case is that of the applicability of the doctrine of recent possession.

In the case of **Arum- Vs- Republic (2006) 2EA** page 10 it was held,

“Before a Court can rely on the doctrine of recent possession as a basis of Conviction in a Criminal case the possession must be positively proved, that is there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively proved and identified as that of the Complainant, thirdly, that the property was stolen from the Complainant and lastly, that the property was recently stolen from the Complainant”.

In the present case the Complainant was not able to identify his attackers but he was able to identify his handbag (Exhibit 1), brown wallet (Exhibit 2) name tag (P. Exhibit 3), civil servant identity card (P. Exhibit 4), laminated identity card (P. Exhibit 5), Nakumatt smart card (P. Exhibit 6) empty case of reading glasses (P. Exhibit 7) a pair of reading glasses (P. Exhibit 8).

He found these items at the police station the following day after the robbery.

As to whether there is positive proof that the property was found with the suspects we find the evidence of PW 6 to be unshaken during cross examination by the Appellants. He was among a group of other police officers from Nyali who were on patrol duties that night. At around 11:00 pm they heard screams from the neighbourhood. They went to check but did not find the person who was screaming.

They took cover and after a short while they saw three (3) men emerge carrying a bag. They ordered them to surrender. They searched the bag and found documents of identification belonging to one Tahani. They ordered the men to take them to the area where they had stolen the bag. Neighbours gathered and informed the police that they knew the owner of the identity card and they showed them his house. They found the wife of the Complainant who recognized the identity card as belonging to her husband who worked at Kilifi. They informed her to notify her husband of the recovery of his items which she did and

the Complainant presented himself at the police station and identified eight (8) exhibits as belonging to him.

The Complainant was attacked at around 10:00 p.m of the night of 2nd July, 2007. The recovery of the bag and its contents was at around 11:00 pm one hour after the robbery incident. This was quite recent and there was no time for the goods to change hands.

We find that the doctrine of recent possession was applicable in the present case. The Conviction was safe and the Sentence was lawful. We find no good reason to disturb them .

The appeal has no merit and its disallowed.

Judgment delivered dated and signed this 15th day of April, 2015.

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M. ODERO

M. MUYA

JUDGE

JUDGE

In the presence of:-

Court clerk

Learned State Counsel

Appellant