REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 1 OF 2015

GEREVASIO MUGO KINYUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Sentence and Conviction of Ag. Principal Magistrate Runyenjes in Criminal Case No. 538 of 2014 on 15/1/2015)

J U D G M E N T

1. The appellant was charged and convicted by Runyenjes Ag. Principal Magistrate of 2 counts. In count 1 the appellant faced the offence of robbery with violence contrary to Section 296 (2) of the Penal Code for which he was sentenced to death. In Count II he was convicted with the offence of handling stolen goods contrary to Section 322(2) for which the sentence was not imposed in view of the death sentence in Count I. The appellant was dissatisfied with the said judgment and lodged this appeal.

2. In his petition of appeal, the appellant argued that the magistrate convicted him without sufficient evidence and also relied on uncorroborated and inconsistent evidence. He argued further that the complainant did not give any description in his initial report to the police. It was also contended that the magistrate did not comply with Section 169(1) of the Criminal Procedure Code.

3. In his written submissions the appellant stated that his constitutional rights were violated since he was remanded in police custody for more than 24 hours.

4. The appeal was opposed by the State through the State Counsel Ms. Matere. She argued that the case was proved beyond any reasonable doubt through the evidence of the 7 prosecution witnesses. On identification the evidence of PW1 the complainant was clear that he flashed a torch and saw the face of the appellant whom he knew before the incident. The State submitted that the appellant in his defence did not give a satisfactory explanation as to his whereabouts in the material night. His motor cycle was recovered at the scene of crime together with the stolen items which included the power saw, sewing machine and beans. The recovery of the stolen items together with the motor cycle places the appellant to the scene of crime.

5. Briefly, the facts of the case are that on 21/10/2014 at 12.00 midnight, PW1and his wife PW2 were sleeping in his house at Kiringa sub-location in Embu County where they were attacked by a gang of robbers. PW1 testified that he was woken up by voices of people who were talking outside his house. He flashed a torch through the window and saw the appellant standing between the shop and the kitchen. PW1 said he knew the appellant prior to the incident and he recognized him that night. At the same time

there were other people who were breaking the kitchen door. The appellant demanded for money and he was given Shs. 7,000/= and later Shs.5,000/= through the window by PW1. He demanded to be given more money by the complainant who said he did not have any more. Eventually the gang gained access to the house where they conducted search and took a power saw, a sewing machine and five kilograms of beans.

6. During the raid the PW1 was cut on the head and the shoulder and hit with an arrow. The gang threatened to burn PW1 and his wife with using petrol. After a while, the thugs left the home of the complainant. He raised alarm and neighbours came to the home and took him to hospital where he was admitted for 4 days. PW1 said he reported the matter to Runyenjes police station after he was discharged from hospital. At the police station he was shown the power saw, the machine and the beans.

7. PW2 did not identify anyone during the robbery. Around 1.00 a.m. PW3 a neighbuor to PW1 was informed him that there was a robbery in the home of the complainant. Accompanied by one Njiru, the witness proceeded to the scene. While he was about 50 metres to the complainant's home, PW3 found an abandoned motor cycle, a sewing machine, a power saw and some beans. He saw somebody running away holding a spotlight whom they decided to give a chase but were not able to catch up with him. They called the chief of the area who immediately came to the scene with other members of public. A short while later, police from Runyenjes police station arrived at the scene. The stolen items were taken by the police as exhibits. However, by the time the police arrived at PW1's home, they found the motor cycle burnt by the members of the public.

8. PW5 Sgt. Salim accompanied by other police officers went to the home of PW4 the father of the appellant. PW4 was at home and so was the wife of the appellant. The wife handed over the logbook of the motor cycle Registration No. KMCH 609B. PW4 said that he had bought the motor cycle for his son the appellant. The officers were told that the appellant had left the house earlier with the motor bike and that his wife and PW4 did not know where he was.

9. The appellant went to Runyenjes police station where he reported that he had been abducted by some people and robbed of his motor cycle. He explained that after the attack, his hands were tied with a rope and his mouth with a piece of cloth. It was around 6.00 a.m. when he was rescued by two people whom he did not know.

10. In the case of ***JOSEPH NJUGUNA MWAURA & 2 OTHERS VS REPUBLIC [2013] eKLR*** it was held that the duty of the first appellate court is to analyze and re- evaluate evidence which was before the trial court and before itself and come to its own conclusions on that evidence without overlooking the conclusions of the trial court.

11. Regarding identification, PW1 said that he flashed his spotlight across the window. He described the size of the window as that of A4 paper. It was through the said space that PW1 said he saw and recognized the appellant. He also testified that he saw him again when he entered the house but did not explain what light assisted him to see the appellant. The conditions of identification at night were difficult and it was not possible for PW1 to see the appellant clearly and recognize him. We opine that the magistrate rightly disregarded the complainant's notion of recognition of the appellant and held that there was no positive identification.

12. PW4 handed over to the investigating officer the ownership documents for motor cycle KMCH 609B which he explained that he had bought it for his son the appellant. This motor cycle was recovered near the complainant's home together with the stolen items. It was clear from the testimony of PW4 & PW5 that the appellant was not at his home in the material night. He gave an alibi defence claiming that he had been abducted by some people and abandoned in the bush where he was rescued at 6.00 a.m. On interrogation by PW6 regarding how he was rescued, the appellant was not able to give the particulars of the people who rescued him. He also failed to explain why the rescuers did not escort him to the police station to report the matter. Neither did the appellant produce the rope or the piece of cloth that his attackers had used to tie him. He did not deny having been in possession of the motor cycle which was recovered at the scene just a short while after the robbery.

13. The appellant's defence was considered extensively by the trial magistrate who found it untenable. Similarly, we find that the appellant's defence was not able to dislodge the evidence of the prosecution which placed him and his motor cycle at the scene of crime at the material time. The investigating officer produced the ownership documents in evidence which in addition to the testimony of PW4 which placed the possession and control of the motor cycle at the material time to the appellant.

14. The circumstances surrounding the recovery of the motor cycle and the stolen items point to the appellant as one of the people who attacked and robbed the complainant. The doctrine of recent possession is applicable to the facts of this case considering that the stolen items were recovered within less than one hour from the time of the robbery together with the appellant's motor cycle. The principles guiding courts in the application of the doctrine of recent possession were explained in the case of ***ANDREA OBONYO VS REPUBLIC [1962] EA 542*** where it was held that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession.

15. The Court held in the case of ***ANTONY KARIUKI KARERI VS REPUBLIC [2004] eKLR*** that:-

> *"When a person is charged with theft and, in the alternative, with receiving and the sole evidence connecting him with the offense is the recent possession of stolen property, ten, if the only reasonable inference is that he must have either stolen the property or received it knowing it to be stolen, he should be convicted either of theft or of receiving according to which is more possible or likely in the circumstances. He is not entitled to be acquitted altogether merely because there may be doubt as to which of the two offences he has committed."*

16. Although the magistrate did clearly indicate that he invoked the doctrine of recent possession in convicting the appellant, it is clear from his judgment that he was convinced that the facts before him pointed at no other person but the appellant together with other persons not before the court as having robbed the complainant. He stated;

> *"That the accused was not abducted by people who stole his motor cycle as alleged. That there is overwhelming evidence that demonstrates that the accused person was among the robbers who went to the complainant's home".*

17. The fact that the appellant was not in physical or personal possession of the stolen property does not exclude the application of the doctrine of recent possession. Section 4(a) of the Penal Code is wide enough to include constructive possession in its words "be in possession" or "have in possession" are defined as:

> *"Includes not only having in one's own personal possession but also knowingly having anything in actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or of benefit of oneself or any other person."*

It is our considered opinion that the appellant was convicted of the charge of robbery with violence based on cogent evidence.

18. From the charge sheet it is clear that the offence of robbery with violence contrary to Section 296(2) and that of handling stolen goods contrary to Section 322(2) of the Penal Code were allegedly committed in the cause of the same transaction. In convicting the appellant, the magistrate said;

"*My humble opinion is that from the evidence and the circumstances of this case, the accused person must have participated in the removal of the items to where they were recovered. As such, he must have handled the items which he knew clearly to have been stolen".*

19. In the charge of robbery with violence, the appellant was charged with robbing the complainant of the same items. It is our considered opinion that the prosecution should have charged the appellant with the

offence of robbery being the main charge. The charge of handling stolen goods ought to have been brought in as an alternative charge. Instead the prosecution charged the appellant with the two offences numbered as count 1 and 2. It is not possible for an accused person to commit the offence of robbery with violence regarding the same complainant and involving the same exhibits as well as handle stolen goods being the same exhibits in the robbery charge.

20. It follows that it was a misdirection by the trial magistrate to convict the appellant of the two charges and we so find.

21. The appellant argued that the trial magistrate did not comply with Section 169(1) of the Criminal Procedure Code. Section 169 provides:-

> *(a) Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*
>
> *(b) In the case of a conviction, the judgment shall specify the offense of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.*
>
> *(c) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.*

22. On perusal of the judgment of the trial magistrate, we find that he clearly spelt out the offences of which he convicted the appellant and gave reasons for his findings. It leaves no doubt that the appellant was convicted of both count 1 and 2. It was held in the case of ***JAMES OCHOLA ADUNDA VS REPUBLIC [2014] eKLR*** that in an ordinary criminal appeal, non-compliance with Section 169 does not render the trial a nullity. Similarly, in the Court of Appeal case of ***REPUBLIC VS EDWARD KIRUI [2014] eKLR*** it was held:-

> *"Where there has not been a strict compliance with the provisions of Sections 168 and 169 of the Criminal Procedure Code, that will not necessarily invalidate a conviction and the court will entertain an appeal on its merit in such a case if it can be done with justice to the parties."*

23. The appellant complained that he was remanded in police custody for more than 24 hours. The record shows that he was arrested on 21/10/2014 and arraigned in court on 3/11/2014 which was more than 10 days and contrary to the constitutional requirement that remand in police custody shall not exceed 24 hours. We note that the appellant did not raise the issue before the trial court for consideration. This would have given the prosecution an opportunity to explain the delay before the trial magistrate. It was held in the case of ***MUSEMBI KULI VS REPUBLIC [2013] eKLR*** that failure to raise the issue of constitutional right violation at the earliest moment amounts to forfeiture of the right to obtain an explanation from the State.

24. In the case of ***JULIUS KAMAU MBUGUA VS REPUBLIC [2010] eKLR*** it was held that prolonged detention has nothing to do with the nature of the charges facing the accused person and such violation cannot render the criminal trial a nullity. The violation of right if proved can only be a basis for an action for damages in a civil suit.

25. In view of the foregoing authorities we find no merit in this ground of appeal.

26. In conclusion we are of the considered opinion that the conviction of the offence of robbery with violence contrary to Section 296(2) was safe and it is hereby upheld. The sentence imposed was within the law and it is accordingly upheld.

27. The conviction of the charge of handling stolen goods contrary to Section 322(2) was a misdirection and error on the part of the trial magistrate. We note that sentence was not imposed in respect of this count for the reason that the appellant had been sentenced to death on Count 1. The said conviction is hereby quashed.

28. Save for the quashing of the conviction in count II, the appeal is unsuccessful and it is hereby dismissed.

29. It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT EMBU THIS 14TH DAY OF MAY, 2015.

F. MUCHEMI **J. BWONWONGA**

JUDGE **JUDGE**

In the presence of:-

Ms. Matere for the State

The Appellant