REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

NAKURU LAW COURTS

HIGH COURT CRIMINAL APPEAL NO. 144 OF 2011

PETER MWANGI KINYANJUI.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT AT MOLO

(HON. SMS SOITA – P.M) IN CRIMINAL CASE NO. 1802 OF 2009 DELIVERED ON 16TH JUNE 2011)

JUDGMENT

1. The appellant, Peter Mwangi Kinyanjui was charged before the Principal Magistrate's Court at Molo with the offence of robbery with violence contrary to Section 296(2) of the Penal code. It was particularized that on 27th July, 2009 at Kiambogo farm in Molo District he together with George Kimani Wanjiru jointly robbed Ruth Wanjiru Mbatia of cash Kshs.470/-, one sack of dry maize, one debe of beans, one mobile phone Nokia 3310, one Radio Sonitec, two blankets, two pangas, 45 plates and two padlocks all valued at Kshs.11,040/00 and at or immediately before or after the time of such robbery wounded the said Ruth Wanjiru Mbati. They were also charged with two other counts of gang rape. His co-accused was found with no case to answer but after the full trial, the appellant was acquitted of the charges of gang rape but convicted of the offence of simple robbery under Section 296(1) and sentenced to 10 years imprisonment.

2. The Appellant has now appealed to us against his conviction and sentence. At the hearing, he argued four grounds of appeal which can be compressed as follows:- that the trial court erred in convicting him under the doctrine of recent possession whilst the evidence of PW7 and PW8 was contradictory, that the trial court failed to make a finding that there was no proof linking him with the robbery; that the trial court failed to consider that the mode of his arrest did not link him with the offence, and that the trial court failed to consider his defence. Mr. Marete Learned Counsel for the State opposed the Appeal.

3. This being a first Appeal we are enjoined to review and re-evaluate the evidence and arrive at our own findings and conclusions. In so doing, we are alive to the fact that we did not see the witnesses when they testified. See the case of **Gabriel Kamau Njoroge vs. Republic (1982-88) 1KAR 1134** and **OKENO VS REPUBLIC 1972 E.A 32.**

4. Ruth Wangari Mbatia, the complainant was a widow aged 72 years and was staying alone in

Kiambogo, Molo. On 27th July, 2009 at 9.30 p.m. she was in her kitchen ready to retire to bed. When she opened the door to go out to the main house to sleep, she was attacked by two people who gagged her mouth and tied her face with her headscarf. They then proceeded to take her to the main house and took Kshs.470/- from her bedroom which they indicated was not enough whereupon she offered them maize and beans instead. The two then raped her in turns and left. Later, she was able to untie herself and immediately raised an alarm which was answered by George Muiruri (PW2). The matter was reported to Molo Police station. She was treated at Molo Hospital. On 29th July, 2009 at 11.00 p.m. she was called to the Appellant's house where she identified her items which had been stolen. She had not identified anyone at the time of the robbery.

5. Peter Muchai Muigai (PW3) told the court how he took the complainant to hospital after being told of her attack. He explained how on the night of 28th July, 2009 he took the police to the Appellant's house and had the stolen items recovered therefrom. He was able to identify the phone as he was the one who often took the same for charging at the complainant's request. The rest of the items were identified by the complainant. On his part, John Kimani Njure (PW4) narrated how on the evening of 28th July, 2009 he saw the Appellant with another person carrying a bag of maize in a motor bike registration No. KBF 955B. The owner of the motor bike took the police to the person who bought the maize, PW6.

6. Milkah Njoki Njuguna (PW6) recalled that on 28th July, 2009 at 5 p.m. she found the Appellant and his co-accused in the lower court at her posho mill. They told her they had some maize which they wanted to sell to her. The maize was later brought and payment of Kshs.2,250/- was subsequently effected.

7. APC Elisha Oter (PW7) was at Matumaini AP Camp at midnight of 29th July, 2009 when Peter Kimani came with someone and reported the incident of the robbery of the 27th July, 2009. They told him that they had suspects and gave the names of the Appellant and his co-accused. They went to the house of the Appellant at 1.30 a.m. and on finding him, recovered the various items set out in the charge sheet save for the maize and beans. These were identified by the complainant. The appellant led the police to the house of his accomplice from where nothing was recovered.

8. AP Edward Obonyo Kamene (PW8) recalled that on 29th July, 2009, he and another officer received a report of robbery and rape of 27th July, 2009 and they were given the names of the suspects. They went to the house of the Appellant from where they recovered the various items set out in the chargesheet. Nothing was however recovered from the house of the Appellant's accomplice.

9. There was also sergeant Rose Cheptanui (PW9), who investigated the case and charged the Appellant and Macharia Mwangi (PW10) who examined the complainant and filled in the P3 form.

10. In his defence the Appellant told the court that on the material day 28th July, 2009, he was being ferried home at 9.00 p.m. by a motor cyclist with whom they disagreed on the fare whereby people including PW3 and PW4 came. When the issue was sorted out, he was forced to walk the rest of the journey home. That on the way, he met the police with PW1 together with the items set out in the charge sheet. They took him to the police post and later to Molo Police Station. He denied having been in possession of the maize. He also denied that the house from where the items were recovered belonged to him. He indicated that he had been locked in a dispute with PW3 over a donkey which the latter had borrowed from him. This then was the evidence before the trial court.

11. At the hearing the Appellant submitted that there was no evidence linking him with the offence and that the mode of his arrest did not link him with the offence charged. From the record, PW4 told the court how on 28th July, 2009, he saw the Appellant with another person carrying a bag of maize on a motor bike. He gave the registration number of the motor bike. The police traced the motor cyclist who led them to the posho mill which belonged to PW6. PW6 identified the Appellant as one of the persons who had sold her 83Kg of Maize on the 28th July, 2009.

12. As to the Appellant's arrest, PW4 told the court that the Appellant was living in the house of one

Muiruri. PW8, an Administration Police officer told the court how PW3 and PW4 went to Matumaini AP Post where he was stationed on the midnight of 29th July, 2009. That he and PW8 accompanied the two to the premises where the Appellant was residing. They found the Appellant and recovered therefrom the various items set out in the charge sheet. The items were positively identified by the complainant as hers. In our view, the evidence of PW3, PW4, PW6, PW7 and PW8 positively linked the appellant to the commission of offence under the doctrine of recent possession. The items recovered from the house where the Appellant was residing barely 48 hours from when they had been stolen on the night of 27th July, 2009. We find the evidence of PW7 and PW8 to be consistent and there is no material contradiction thereon.

13. The Appellant relied on the case of **Ng'ang'a Kahiga Vs Republic C.A Cr. Appeal No. 272/2005** for the proposition that for the doctrine of recent possession to apply possession must be positively proved and the items must be proved to have been stolen from the complainant. We have considered this ground and the argument by the Appellant. When a person is found in possession of recently stolen property, a strong presumption arises that the person must have stolen the property unless he gives a satisfactory explanation of how he came to be in possession of the item. This principle of law was set out in the case of **R.V. LOUGHIN 35 CR. APP R 69 1951** where the Lord Chief Justice of England stated as follows:-

"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker"

14. This principle has been followed by the courts in Kenya and it is now settled that the evidence of recent possession, though circumstantial, is enough to support a conviction on any charge depending on the circumstances of each case. In the case relied by the Appellant of ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005,*** the Court of Appeal held that:-

"….It is trite that before a court of law 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 proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

15. Following the above parameters, we are satisfied that the items recovered from the premises where the Appellant was residing were positively proved to have been stolen from the complainant. There was sufficient and satisfactory evidence that the premises from where they were recovered was exclusively occupied by the Appellant. The recovery was under 48 hours from the time of the robbery. We are satisfied that the arrest of the Appellant was consistent with the commission of the offence charged and reject the Appellant's contention. The Appellant did not deny that he was in occupation of the premises where the stolen items were recovered. Therefore we agree with the trial court that the Appellant was in recent possession of items which had been stolen a few hours before his arrest. From the foregoing, there can be no explanation other than that the Appellant was involved in the robbery. In the case of **Francis Kariuki Thuku & 2 Others -vs- Republic [2010] eKLR** the Court of Appeal held that:-

"Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. Loughin 35 Cr. Appl. 269 by the Lord Chief Justice of England and this Court's own decision of Samuel Munene Matu V. R. Criminal Appeal No. 108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the MATU case (supra) a period of 20 days was held to be recent. We accordingly uphold the superior court's view of the law on the point. In this regard, we would re echo the decision of this Court in the case of Hassan -vs- Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-

"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver."

In the case before us, the Appellant was found in possession of the items barely 48 hours from the time of the robbery.

16. As regards the Appellant's complaint that his defence was not considered, we find that the learned magistrate did consider and weigh the Appellant's defence against the prosecution evidence and properly rejected that defence. We find that the evidence of PW1, PW4, PW6, PW7 and PW8 was consistent and remained unchallenged. The defence put forward by the Appellant did not cast any doubt on the evidence of the said witnesses. The trial court having made findings on the evidence before it and the defence of the Appellant, this Court cannot interfere with such findings which are not based on any misapprehension of the evidence or the law. See the case of ***Chemangong -vs- Republic [1984] KLR 611.***

17. The upshot of the matter is that we find the Appeal without merit and hereby dismiss the same. The conviction was safe and sentence lawful. We uphold the same.

DATED and **DELIVERED** at Nakuru this 17th day of February, 2014.

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R.P.V WENDOH

JUDGE

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A. MABEYA

JUDGE