REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL. NO. 339 OF 2010

JUSTIN MUSHANI IRERI ……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(From original conviction and sentencing in Criminal Case No. 3000 of 2008 at the Chief Magistrate's Court in Makadara by T. Ngugi Senior Resident Magistrate on 9th June, 2010)

JUDGMENT

The appellant Justin Muchangi Ireri was charged with another with the offence of robbery with violence contrary to Section 296 (2) of the Penal code. In the alternative charge the appellant was charged alone with the offence of handling stolen property contrary to Section 322 (1) (2) of the Penal Code.

He denied the offences but after a full trial he was convicted of the main count of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. This appeal arises from the said conviction. His co-accused is said to have died in the cause of the trial.

The evidence adduced by the prosecution witnesses is that the complainant was walking to a bus stage at about 5 a.m. when he was confronted by two people and robbed of personal goods set out in the charge sheet. It was his evidence that one of the two people was armed with a machete which was used to cut him on the left side of the face below the eye. Subsequently, two suspects were arrested and the complainant's personal effects recovered from the house of one of the suspects. That suspect is said to be the appellant herein.

The appellant in his defence denied the offence under oath and said that he was arrested by police officers while on his way home after leaving a club. He was charged with the offence which he denied and also denied that the complainant's goods were found in his house. It is his position that the case was made against him to make him continue being in custody. He was never arrested with any other person and never saw his co-accused wearing shoes belonging to the complainant.

In his appeal, he has challenged his conviction and faulted the learned trial magistrate for relying on dock identification by P.W. 1 which was not credible. He also faulted the learned trial magistrate for relying on circumstantial evidence of the recovery of exhibits which were never found in his control or possession. He further stated the learned trial magistrate erred for convicting him without calling vital witnesses before the court and also relying on contradictory evidence. Finally, he complained that his defence was rejected without any good reasons.

As the first appellate court it is our duty to evaluate the evidence on record and come to independent conclusions. The attack upon the complainant P.W. 1 appears to have been sudden. This is because

while he was walking the appellant is said to have appeared suddenly and went ahead of him while the co-accused was behind him. The complainant was ordered to stop whereupon his pockets were ransacked by assailants. He was dispossessed of the bag and cut on the left side of the face below the eye and fell down. He did not know the two assailants before and came to know them when they were brought to his house after arrest. That is when he saw the first accused wearing his shoes. He could only say that one was tall and one was short. Under normal circumstances that is not positive identification of anybody.

However, there is evidence that after the arrest of the suspects the appellant herein led the police P.W. 3 together with P.W. 1 and P.W. 2 to his house where a black bag containing a tooth brush and toothpaste was recovered. There was also a shirt hanged on a nail that was recovered. These items were identified by P.W. 1 the complainant as his which were robbed from him about two weeks earlier. It is the appellant who led the police, P.W. 1 and P.W. 2 to this house. It is he who allegedly opened the door for them.

The appellant did not question P.W. 1 as to the identity or any particular marks on the items recovered. The evidence of recovery in his house therefore remained uncontroverted. The appellant was known to P.W. 2. It is the evidence of P.W. 2 that he had known him for 6 months as he was a caretaker of a construction site.

The appellant could not have led the police and other witnesses to the house where these items were recovered if he did not know that house or did not have control over it. There is evidence that a lady who claimed to be the wife of the appellant was found in that house, but there was no evidence that she was connected with the offence. The appellant was therefore in control of the house and had constructive possession of the goods recovered therefrom.

The recovery of these items from his house at his own direction was about two weeks from the date of the alleged offence. No explanation was offered by the appellant to explain how those things ended up in his residence. He was either involved in the main offence of robbery or was the handler of the said goods. His original co-accused refused to show the police where he lived. It is not known whether he was in possession of the items not recovered from the appellant. Whatever the case, the fact that the appellant was found with personal effects of the complainant only days after the alleged offence points to the irresistible conclusion that he was involved in the robbery. The doctrine of resent possession placed him at the scene. His defence was considered by the learned trial magistrate and found to be incredible. His denial of the offence cannot withstand the evidence adduced by the prosecution witnesses.

Our assessment is reinforced by the fact that P.W. 2 also gave evidence of an attack upon him where the appellant was also charged in a different case. In fact it was at the instance of P.W. 2 that the appellant was arrested in respect of this case.

The appellant was in company of others and violence was visit upon the complainant. We are satisfied that the ingredients of the offence under Section 296 (2) of the Penal Code were met. We are persuaded that the offence was proved beyond reasonable doubt and that the conviction was justified. The sentence is mandatory and we have no reason to disturb the same. This appeal is therefore dismissed.

Orders accordingly.

SIGNED, DATED and DELIVERED in open Court this 25th Day of March, 2014

A. MBOGHOLI MSAGHA **L. A. ACHODE**

JUDGE **JUDGE**