



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 2 OF 2013**

**JOSEPH MAINA MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This is an appeal against the decision of the Chief Magistrate's Court Narok, in Criminal Case No. 112 of 2012, where Joseph Maina Mwangi, the appellant, was charged with an offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, was convicted on the alternative charge of handling stolen goods contrary to **Section 322(1) and (2)** of the **Penal Code**. He was sentenced to 5 years imprisonment. Being aggrieved by the said conviction and sentence, he preferred this appeal. The appeal was premised on the supplementary grounds of appeal. The grounds can be condensed into the following:-

1. **That the evidence adduced by the prosecution was not sufficient to prove the charge;**
2. **The court failed to consider the appellant's defence;**
3. **The prosecution failed to call key witnesses;**
4. **That the prosecution was conducted by an unqualified prosecutor.**

Based on the above grounds, the appellant prays that this appeal be allowed, conviction quashed and the sentence set aside.

The appeal was opposed by the Learned State Counsel, Mr. Marete. Counsel submitted that PW3 and PW7 found the appellant with stolen goods which PW1 and PW6 identified as belonging to their employer, Pillar of Hope, that PW5, the Landlord of the house where the appellant was found confirmed that the appellant was the tenant; that PW1 and PW6 produced receipts and licenses as evidence of the recovered goods. He urged the court not to interfere with the conviction or sentence.

In support of their case in the lower court, the prosecution called a total of 8 witnesses. PW1, Catherine Kifuoro, the co-ordinator of Pillar of Hope recalled that she was at home at Lenana Estate on 29/1/2012 about 9.00 a.m. when her assistant called to inform her that the office had been broken into and the watchman injured. She proceeded to the office, found the windows and doors of the office broken, computers, TV, cash box, projector, gas cooker had been stolen. She saw the watchman was injured on the face and the head was bandaged. She found that the watchman had reported to police but she still went to report to the Officer in charge Narok Police Station. The scenes of crime visited the scene and took photographs. Later, police informed her that three computers, printer scanner and flat screen TV had been recovered and were at the Police Station. She went to the Police Station with the receipts and identified the computers. She also identified the Japanese stickers on the items since they had been donated by the Japanese Embassy. The receipts were produced in evidence as PEx.1-15.

Collins Kibet Kosgei (PW2) recalled that on 27/1/2012, he reported to work as a guard at VCT at 6.00 p.m. He was armed with a club and whistle but had no torch. Security lights were on and while seated inside the compound, suddenly two people appeared, struggled with him and assaulted him with the clubs they had. He sustained a cut wound on the head. They carried him to the chair, tied him up there, switched off security lights and left. He reported to police and was taken to Narok District Hospital for treatment. He said that the people gained entry by cutting the barbed wire on the fence, broke into the offices and stole goods from therein. PW2 said that the appellant is the person whom he wrestled with when the electric lights were still on. PW2 identified the appellant as one of the people who attacked him and that he was still wearing the clothes he wore on the day of the robbery. He said that he held onto the appellant and it is him who hit him with a nutted rungu and also cut him with a panga on the head.

PW3 is PC Henry Kiboma of CID Narok and PW7 Cpl David Gatimu were the Investigating Officers. They visited the scene of crime on 28/1/2012. He took photographs of the scene, saw where barbed wire was cut, he saw foot prints and was informed of the stolen goods. He also saw and interrogated the watchman, PW2, who was injured during the robbery. On 30/1/2012, acting on a tip off, the two officers, PW3, PW6 and PW7 proceeded to Limuru. The informer gave them the cell phone number of the robber as 0711447223 as a lead and its location was traced through assistance from Safaricom. They solicited help from Tigoni Police Station, and were accompanied by PW5, located the house at Bibirioni, where they found the appellant in the bedroom, conducted a search where they recovered three computers (PEx.2,3 &4), two monitors (PEx.7 &8). Safaricom sent them a message on where the appellant's phone No.0711447223 could be found. They rang the number which rang in the appellant's pocket and they demanded for it. After interrogation, the appellant gave them the phone make Nokia 1110, pin number 8800 PEx.17(a). The recovered items were taken to Narok Police Station. Later, Tigoni Police Station informed PW3 and PW7 that a TV and printer had been found outside the building where the appellant had been arrested. The TV and printer were also identified as belonging to the Pillar of Hope. PW3 also said that he found the appellant wearing boots whose sole matched with the prints found at the scene (PEx.18); that the appellant signed the inventory of the items recovered in his house.

Phillip Kipkemoi (PW4), a Clinical Officer at Narok District Hospital, recalled treating PW2 on 29/1/2012 and filled the P3 form on 15/2/2012. On examination he found that the watchman had deep cuts on both sides of the head and bruises on the elbow. The injuries were one day old and the probable weapon used was sharp.

PW5, Moses Titus Mbugua Mwaura, is a resident of Limuru, Bibirioni and owns houses which he rents out to people. He identified the appellant as one of his tenants since November 2011. He produced the lease agreement PEx.18. He only learnt that the appellant had been arrested by CID Officers from Tigoni. He identified the photographs taken of his plot and confirmed that the appellant had occupied House No. 3.

PW6, Pareiyio Emmanuel Soitara, works with Pillar of Development & VCT. He recalled having closed the offices on 27/1/2012 while in company of Jack. They left the watchman at work. He was called on 29/1/2012 at 5.00 p.m. and informed of a theft having taken place. On 31/1/2012 at 11.00 a.m., a person using a private number called him and informed him that the stolen items were at Limuru and he informed the CID Narok. He accompanied Narok Police to Tigoni Police Station, where he was left behind as the police went in search of the goods. They returned with three CPUs, two monitors and the appellant. He identified the CPUs and monitors as belonging to Pillar Development.

PW8, IP Lembu Langat of Tigoni Flying Squad recalled that on 30/1/2012, when at the office, police officers from Narok CID requested to be shown Bibirioni where it was suspected there were stolen goods. They used safaricom to locate the area. They found the house where they recovered some items. On 1/2/2012, he received a tip off that some stolen items were at Railways in Limuru. He went to the place, the suspects ran off but he managed to recover a TV, printer and electronics. He called Narok and the complainants identified the TV and printer.

When called upon to defend himself, the appellant gave a sworn statement in which he denied having been involved in the robbery or having been found with the items produced in court. He said he was

arrested with changaa at a bar in Limuru where he works. Thereafter, the police took him to his house but nothing was recovered therein.

As the first appellate court, it behoves this court to consider and evaluate the evidence afresh and make our own conclusions in order to satisfy ourselves that there has been no failure of justice. See **Ngui v Rep (1989) KLR 729** and **Okeno v Rep (1972) KLR 32**.

The first question we consider is whether a robbery was committed. The ingredients for the offence of robbery with violence are set out in **Section 296(2)** of the **Penal Code** and are as follows:-

1. **“If the offender is armed with any dangerous or offensive weapon or instrument, or**
2. **is in company with one or more other person or persons, or**
3. **if, at or immediately before or immediately after the time of the robbery, he**
  - i. **wounds,**
  - ii. **beats,**
  - iii. **strikes or**
  - iv. **uses any other personal violence.”**

See **Mneni Ngumbao Mangi v Rep HCR 141/2005**. Robbery with violence is committed if any one of the ingredients is proved. In the instant case, PW2 was attacked by a group of people who beat and slashed him on his head. PW4, a Clinical Officer examined him on the day after the incident and confirmed the said injuries. The injuries were assessed as harm. PW1, PW2, PW3, PW6 and PW7 who saw PW2 confirmed having seen the said injuries. All the ingredients of robbery with violence were proved.

The next question is who committed the offence. The only eye witness to the incident is PW2. PW2 recalled that he was attacked by 2 people, security lights were on; he struggled with them and was hit on the head with rungu during the struggle. He said it is the appellant whom he held onto tightly and that the appellant was wearing the clothes he had on that day. Unfortunately, no identification parade was conducted and the police officer who recorded PW2’s statement did not tell the court whether PW2 described the two robbers that he allegedly saw during the robbery.

The above notwithstanding, we find that there is overwhelming evidence that the appellant was found in possession of some of the stolen goods. PW3 and PW7 who are the investigating officers in the case together with PW6 an employee of Pillar for Development acted on information given by undisclosed caller who gave them the cell phone 0711447223 through which they traced the appellant with assistance from Safaricom. PW8 of Tigoni Police Station joined PW3 and PW7 and they went to a house in Bibirioni Limuru where they found the appellant. Both PW3 and PW7 said that though the appellant had denied having a phone, they called the number, it rang in his pocket and they retrieved it from him. In the presence of PW3, PW7 and PW8, the house in which the appellant was arrested were found 3 CPUs and a monitor identified by both PW1 and PW6 as belonging to Pillar Development. As earlier noted, the goods were positively identified. The appellant did not lay claim to them. PW5, the appellant’s Landlord confirmed that the appellant had rented the house where he was arrested. The appellant was arrested on 30/1/2012 and the robbery had taken place on the night of 27<sup>th</sup> and 28<sup>th</sup> January 2012. He was arrested a day after the robbery. The trial court found that the appellant handled stolen goods. In our view, the appellant was found in recent possession of stolen goods. In the case of **Isaac Nganga Kahiga alias Peter Nganga Nganga Kahiga v Rep CRA 272/05**, the court set down the guidelines of what needs to be considered before a conviction can be based on the doctrine of recent possession. The court said:-

**“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 first, that the property was found with the suspect, and secondly, that the property is positively identified to be the property of the complainant, thirdly, 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 another. In order to prove possession, there must be**

**acceptable evidence as to search of the suspect; and recovery of the alleged property; and in our view, any discredited evidence on the same cannot suffice no matter how many witnesses.”**

There is overwhelming evidence from PW3, PW7 and PW8 that the appellant was found in possession of 3 CPUs and 1 monitor which were positively identified by PW1 and PW6 as belonging to Pillar of Hope and Development by production of receipts. These are items that cannot be easily disposed of in a day and in our view, the appellant was in recent possession of them. We therefore find that he was involved in the robbery. The trial court erred in finding the appellant guilty on the alternative charge.

The case before the trial court was prosecuted by PC Ihaji whom the appellant alleges to have been unqualified. Under **Article 157(6)** of the **Constitution**, the Director of Public Prosecution’s (DPP) mandate is to institute and undertake criminal proceedings against anybody before any court in respect of any offence allegedly committed. Under **Article 157(9)**, the Director of Public Prosecution’s powers may be exercised in person or by subordinate officers acting in accordance with general or special instructions. **Section 85** of the **Criminal Procedure Code** which has not yet been amended donates the power to appoint public prosecutors for Kenya to the Attorney General (should be the DPP now). The Section stipulates:-

**“85. (1) The Attorney General by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.**

2. **The Attorney General, by notice under his hand, may appoint an advocate of the High Court or person employed in the public service to be a public prosecutor for the purposes of any case.**
3. **Every public prosecutor shall be subject to the express directions of the Attorney General.”**

Under the new **Constitution** the Attorney General no longer exercises prosecutorial duties but the Director of Public Prosecution and **Section 85** of the **Criminal Procedure Code** must be read with **Section 7** of Transitional and Consequential Provisions of the **6<sup>th</sup> Schedule** which reads as follows:-

**“7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.**

2. **If, with respect to any particular matter –**
  - a. **A law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and**
  - b. **A provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer,**

**The provisions of this Constitution prevail to the extent of the conflict.”**

2. The Director of Public Prosecutions has taken over prosecutorial powers from the Attorney General and it means that **Section 85** of the **Criminal Procedure Code** should be construed in light of the above Transitional provisions.

The appellant was not specific whether PC Ihaji was not qualified by virtue of being a police constable or that he was not gazetted. Our understanding of **Section 85** of the **Criminal Procedure Code** is that a public prosecutor must be of the rank of an Advocate of the High Court, or a person employed in the public service. PC Ihaji is a public servant and therefore qualified to prosecute once appointed. It must be remembered that **Section 85(2)** was amended in 2007 to remove the requirement that a prosecutor would only be an advocate of the High Court and a police officer of the rank of Ag. Inspector and above. The objection to PC Ihaji as prosecutor is unfounded.

On 16/1/2013, the Office of the DPP Act 2013 came into force and **Section 20** thereof mandates the DPP to appoint prosecution assistants. It reads:-

**“S.20 (1) Pursuant to Article 157(9) of the Constitution the Director may, by a notice in a Gazete, delegate any powers or functions conferred upon the office to a prosecution assistant;**

**(2) For purposes of this Act, a prosecution assistant shall be a person –**

- a. appointed as such by the Director in accordance with subsection (1);**
- b. not qualified to be appointed as prosecution counsel but with relevant experience and expertise; and**
- c. currently serving in the National Police Service and exercising prosecutorial powers as is, was or shall be delegated by the Director;**

**3. A prosecution assistant shall exercise delegated authority under this section to the extent as shall be determined by the Director in the notice of appointment.”**

It is worth noting that on 16/3/2013, the office of the Director of **Public Prosecutions Act** came into force. **Section 20** thereof.

Having been charged with violently robbing Kibet Collins at Pillar of Hope Development, the appellant should not have been charged with the offence of assaulting the said Kibet Collins because it amounts to duplication of the charges. We acquit the appellant of the charge of assault contrary to **Section 251** of the **Penal Code**.

In light of the overwhelming evidence, that a robbery was committed, we hereby quash the conviction on the alterative charge of handling stolen property and set aside the sentence. Instead, we convict the appellant of the main charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentence him to death. It is so ordered.

**DATED and DELIVERED this 8<sup>th</sup> day of April, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**A. MABEYA**

**JUDGE**

**PRESENT:**

In person for the appellant

Mr. Chirchir for the State

Kennedy – Court Assistant