



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 85, 86 & 87 OF 2011

1. GEDION WASUA KINGOO 1ST APPELLANT
2. ANTHONY MUTUA MUSAU 2ND APPELLANT
3. VICTOR NZIOKA MWILU3RD APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 408 of 2009 of the Senior Principal Magistrate's Court at Voi – Hon. Mureithi - SPM)

JUDGMENT

The three (3) 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 of the charge were that:-

“On the 23rd day of April, 2009 at [particulars withheld] Taita – Taveta County, jointly with others not before the Court while armed with offensive or dangerous weapons namely an AK 47 rifle and pangas robbed A K L of cash Ksh. 14,000/=, one mobile phone make Nokia 2630 and two kilogrammes of blue gemstones all valued at Ksh 2, 020, 000/= and at or immediately after the time of such robbery wounded A K L and shot dead M L”.

The brief facts of this case are that on the night of 23rd April, 2009 the Complainant (PW 1) and her children were inside their house when at about 8:00 p.m. there was a loud bang as of a gunshot at the doorway. One of her daughters called **M** (now Deceased) asked her what it was. Suddenly there was a lot of smoke in the room. She heard somebody ask where her husband was. The man was standing at the door way and was demanding to be given money, gemstones and Gold. She raised her hands in surrender and invited them to take what they wanted.

A second man entered while armed with a panga and hit her with the flat part of it. He raised it and cut her on the right thumb.

The man who was standing at the doorway fired again with his gun.

M (her daughter) panicked and started running but she was shot dead. Meanwhile the man with the panga was still cutting her. A third man entered but after a short conversation he was shot by the man who was armed with the gun. The two armed men went and puled out their fallen colleague. A fourth man

emerged while armed with an iron rod. The men proceeded to ransack the house pulling out drawers and made away with precious stones and money in cash Ksh. 14,000/=.

The precious stones were in the form of blue garnets. Her phone which was in a cupboard started ringing.

The man with the panga picked it and put it off and pocketed it. Its make was a Nokia 2630. The gunman fired again, she went to the bedroom but he followed her there. He ransacked her suitcase but only found her clothes. He then said that he was to kill her and shot her at the back of the shoulder and she fell down unconscious. She later gained it while at Moi Hospital Voi. It was her evidence that she was able to see the attackers by means of light from a solar bulb at the ceiling of the house and light emanating from the Television which was sill on. She further told the Court that she was in a position of identifying her attackers. She told the Court that the gunman was the third Accused. That the man who was armed with a panga was the 4th Accused. That the man with the iron rod was the 2nd Accused. That the other man was shot and killed at the scene.

The duties of the first appellate Court are expounded in the Case of **OKENO –VS- REPUBLIC 1972 E.A. 32 MOHAMED RAMA ALFANI & 2 OTHERS CRIMINAL APPEAL NO. 223 OF 2002** which held,

“It is the duty of a first appellate Court to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the Judgment of the trial Court should be upheld”.

The learned trial magistrate at page 10 line 20 of his Judgment had this to say,

“I find the guilt or otherwise of the respective Accused persons being established as follows:-

- 1. Accused number 2 and 4 are guilty on the basis of the identification evidence of PW 1 and PW 5 and the evidence of PW 2 and PW 9 as to the circumstances of their arrest in the sisal Estate the following day after the robbery***
- 2. Accused number 3 is guilty on the basis of the identification evidence of PW 2 and PW 9 relating to the arrest in the sisal plantation the following day after the robbery and on the doctrine of recent possession of stolen items namely the Complainants mobile phone which was stolen during the robbery leading to an interference that the 3rd Accused was part of the robbers”.***

The evidence of PW 1 is as per the brief facts given supra.

That of PW 5 is found at page 30, 31 and 32 of the record of proceedings.

She had testified that at the time of the attack she was outside the main house washing her clothes when she heard the sound of a gunshot outside the main house and upon checking she saw three people standing near the door of their main house. She was enabled to see them from the light generated by a solar bulb at the ceiling of the sitting room and that generated by a Television that was on as the door was open. One of the men slapped her and ordered her to lie down which she did. The man who slapped her was armed with a panga.

The one at the rear was armed with a big gun.

She further testified that the man who was armed with the gun was the third Accused (2nd Appellant). The man who was armed with a big stick was the 2nd Accused (1st Appellant). The man who was armed with a panga and a torch was 4th Accused (3rd Appellant).

PW 8 M L a minor aged thirteen (13) years old testified to have been present when four (4) men entered into their house and ordered his mother (PW 1) to give them money and gemstones. He singled out the 3rd Accused as the man who was armed with a gun. The second Accused as the man who was armed

with a panga and the 4th Accused as the one who had been armed with a big stick.

During cross-examination by the 2nd Accused he told the Court that the man was wearing a red woolen cap. As for the 3rd Accused he said that he was the one who was armed with a gun.

PW 9 MWAMIDI DAVID is a security supervisor at Taita Sisal Estate who helped in arresting three (3) people who had been sighted at the sisal plantation. He saw them moving towards the fence, upon stopping and interrogating them they said that they were charcoal dealers from Ziwa La Simba which was a far off place. They said that they were trying to get out of the sisal plantation.

As they were suspicious of the men they took them to a nearby patrol base and handed them over to police. Later they received information that a panga was recovered near where the three men had originally been seen.

That they admitted the panga to be theirs. At the police base they found members of public who were saying that they had followed foot prints of the robbers to the said sisal plantation and they wanted to lynch the suspects who were 2nd, 3rd and 4th Accused persons (1st, 2nd and 3rd Appellants).

During cross-examination by the 2nd Accused he conceded that there were roads criss-crossing the plantation and that he had not seen the footprints members of public were talking about.

KENETH NGEIWA PW 13 received three suspects from Taita Sisal Estate who had been arrested by **GODFREY MWAMIDI PW 9** and one of his security officers. He testified that when he first received the three suspects Accused number 2, 3 and 4 no exhibits had been recovered from them but later they got information that a blood stained panga and jacket had been recovered near where they had been first seen (The Accused persons).

A mobile phone make Nokia 2630 was also recovered from the place the suspects had first been sighted. During cross-examination the Witness did concede to have recovered a Nokia phone from the 3rd Accused (2nd Appellant) but did state at page 60 line 1,

“I did receive a phone, Nokia from you. It is the one on the prosecutions desk. It is not an exhibit. I gave it back to you at the report office Voi. I do not know how come we still have the phone with us”.

At line 14 of the same page this is what he had to say,

“I signed my statement. I said I had recovered a phone with no cover or sim card. I also said you had a mobile phone in your pocket and another mobile phone inside the clothes he had”.

The investigating officer in this case was Sergeant **GABRIEL ROTICH PW 14**. He testified to have received Accused number 2, 3 and 4 from the DCIO and one **PC MAMAI**. An inventory had been prepared by **PC MAMAI**. The one for **GEDION WASUA KINGOO** contained 1 Nokia mobile make 2630 serial number 357691019367809 valued at Ksh. 5,700/= and assorted clothes and one Cap. The third inventory was money recovered from two suspects from **GIDEON WASUA KINGOO** Ksh. 2,900/= and **VICTOR NZIOKA** Ksh.1,000/=. The other inventories were for assorted clothes which were not part of the alleged stolen items.

We have deliberately expounded on the evidence touching the recovery of the mobile phone because the learned trial magistrate in Convicting the Appellants relied on the doctrine of recent possession stating that Complainants phone was recovered from the 3rd Accused (2nd Appellant) not long after the robbery. He placed a lot of reliance on the evidence of PW 9 who arrested the suspects at the sisal plantation where he worked as security supervisor. He had testified in Court that at the time of arrest nothing had been recovered from the Accused persons and he had treated them as trespassers in the plantation but later he got information that a panga and a jacket which were blood stained had been found dug in the

soil near where the suspects had been earlier seen. It is noted that it is not the Accused persons who led to the recovery of the said jacket and panga.

It is also noted that the alleged blood stained jacket and panga were not produced as exhibits as it was said that they had been taken to government chemist for analysis and they had not been returned.

SERGEANT NGEIWA PW 13 had also testified on the issue of the phone by stating that a mobile phone make Nokia 2630 was also recovered from the place where the suspects had allegedly been hiding. That phone was therefore not found on any of the Accused persons. As to the phone found on the 3rd Accused (2nd appellant) he did tell the Court that he did receive a phone from the 3rd Accused and that it was the one at the prosecutions desk but he was surprised as he had returned it to the Accused.

Still on the issue of the recovered phone. The Complainant during cross-examination by 3rd Accused at page 19 line 12 did state that her phone was Nokia 2630.

“I lost the receipt. I did not record the serial number. The phone has my photograph and that of her cow. I have left the charger at home”.

She was shown a receipt dated 2nd February, 2009 number 19906 serial number 3576921019367809 from Nyali electronics (DMF one).

From the above it can only be deduced that she did not clearly identify the phone as hers. She had no receipt for it. She did not know its serial number. It was not tested to ascertain whether it still bore her image saver and the photograph of her cow.

We are of the considered view that undue reliance should not have been placed on this phone which the Complainant in the first case did not satisfactorily prove ownership and which the arresting officer had returned to the Accused after being satisfied that it belonged to him.

In the Court of Appeal Case of **ARUM –VS- REPUBLIC EALR 2006 EA.** The constituents elements of the doctrine of recent possession were held to be thus,

“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 identified as the property of the Complainant, thirdly the property was stolen from the Complainant and lastly the property was recently stolen from the Complainant”.

We find that those constituent elements of the doctrine of recent possession were not proved in the present case.

Identification

According to the evidence of the Complainant (PW 1). The time of attack was at around 8:00 p.m. She first heard a loud bang at the door way which she said was gunfire and she suddenly saw a lot of smoke. She was attacked by a man who was armed with a panga. She heard another burst of gunfire from the man who was armed with a gun. There was another burst of gunfire and she realized that her daughter (M the Deceased) had been shot. After a while there was another burst of gunfire from the man armed with the gun and she realized that one of the attackers colleague had been shot dead. The Complainant further did tell the Court that she knew all the 4 Accused persons before and further that she had been called at an identification parade but the Accused persons declined to participate. The Complainant also testified to have seen the attackers from the light generated by a solar bulb at the ceiling and light from the Television which was on.

In the Court of Appeal Case of **AJODE -VS- REPUBLIC CRIMINAL APPEAL NO. 87 OF 2004.** It was held,

“ It is trite law that dock identification is generally worthless and a Court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.

(2) It is trite law that before such a parade is conducted, and for it to be properly conducted, a Witness should be asked to give the description of the Accused and the police should then conduct a fair identification parade”.

In the present case no identification parade was conducted in respect of PW 1 and PW 5 and PW 8. Although the Complainant alleged to have known the Accused persons before she did not give their names to police or to prosecution Witnesses **PW 2 ANTHONY MUTINZIE KAMOSI PW 3 STEPHEN MUTUKU, PW 4** her husband.

It is noted that PW 5 and PW 8 did not state to have known the attackers before, hence there was need to hold an identification parade for them. None was carried out. The situation is compounded by the fact that in their statements to police the Witnesses had not identified the source of light at the time of the incident as having emanated from a solar bulb and a Television set which was on at the time.

Further and more importantly we find that the circumstances obtaining at the time were shocking and horrifying to say the least. There were not less than four gun shots fired at the time. One at the door way which raised a lot of smoke as per the Complainants evidence. Another round of fire to make her hurry in giving them money and other valuables. Two shots fired at M her daughter and the one of the attackers and in which both succumbed to the injuries.

Such a situation cannot be said to afford conditions for proper identification. We are therefore of the considered view that the Conviction of the Appellants for the offence of robbery with violence was not safe.

We quash the Conviction and set aside the Sentence. The appellants are set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **2nd** day of **April, 2014**.

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MARY KASANGO

JUDGE

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M. MUYA

JUDGE

In the presence of:-

Learned State Counsel

The Appellants

Court clerk