REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEALS NO. 53 & 54 OF 2013

JOHN KAGO……..1ST APPELLANT

KASAINE KASANA…….……2ND APPELLANT

VERSUS

REPUBLIC OF KENYA……..RESPONDENT

JUDGMENT

John Kago and Kasaine Kasana, the appellants herein, were charged jointly with Oloshorua Lepore (3rd accused) with an offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It was alleged that on 14/11/2011, at Ewaso Nyiro Christian Missionary Fellowship Health Centre in Narok South District, with another not before the court, while armed with dangerous weapons, robbed Kamoonte Ole Nampaso, of the properties listed in the charge sheet. In the alternative, the two appellants were charged with the offence of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. They were allegedly found in possession of one laptop on 14/11/2011, the property of the complainant. After the full trial, the 3rd accused, Oleshorua Lepore was acquitted of the charge, while the appellants were convicted on the alternative charge and each was sentenced to serve seven years imprisonment. The appellants are dissatisfied with both conviction and sentence and filed appeals numbers 54/2013, **John Kago v Rep** and 53/2013, **Kasaine Kasana** which were consolidated at the hearing and proceeded as CRA 53/2013. Both appellants base their appeals on the amended grounds of appeal contained in their written submissions that were filed in court on 27/3/2014. The first appellant's 6 grounds of appeal can be compressed into the following:-

1. **The trial court erred in failing to find that the laptop was not recovered with 1st appellant;**
2. **That the court erred in failing to find that the laptop allegedly recovered was not one of the items stolen during the robbery;**
3. **That the weight of the evidence went against the conviction and the case was not proved to the required standard;**
4. **That the trial court shifted the burden of proof onto the appellant.**

The 1st appellant therefore prays that the conviction be quashed and sentence set aside and he be set at liberty.

The 2nd appellant raised four grounds which can be summarized as follows:-

1. **That the court erred by basing the conviction on a defective charge sheet;**
2. **That the conviction was based on contradictory evidence;**
3. **That the prosecution failed to prove beyond any doubt that the laptop allegedly recovered was the property of the complainant;**
4. **That the court failed to consider the 2nd appellant's defence.**

The 2nd appellant also prays that the conviction be quashed and sentence set aside.

Mr. Chirchir, Counsel for the State conceded the appeal on the following grounds:- that the court in its judgment, said that PW3's evidence required corroboration yet the trial court went ahead to convict the appellants based on the same evidence; that on the recovery of the laptop, PW3 claimed to have been with many other police officers who were never called as witnesses but instead PW3, who was the Investigation Officer was also the arresting officer. He urged the court to quash the conviction for being unsafe.

As the first appellate court, it is required of us to re-evaluate the evidence adduced in the lower court afresh and draw our own independent conclusions. In the trial court, the prosecution called a total of 4 witnesses in support of their case.

When called upon to defend themselves, the appellants made unsworn statements.

Kamoonte Ole Nampaso (PW1) was working at Ewaso Nyiro Mission Health Centre as a night watchman on the night of 13th and 14th November 2011. At about 2.00 a.m. while at the veranda, five people entered the compound pretending to be carrying in a sick person. While on phone trying to call the Doctor, he was suddenly attacked by the 5 people, tied up at gun point. Two others joined later. The robbers took all keys to the hospital from him and his phone. They took him to a store in a nearby school and tied him up there. Two people guarded him as others went and they left about 5.00 a.m. He managed to free himself at 7.00 a.m. and at scene he found a black shoe lace. He informed Ole Soit about the robbery who went to call Doctor John Sankok (PW2). PW1 was not able to see any of the 7 people who attacked him. Later, when they checked the hospital, they found all computers and electronics stolen.

PW2 confirmed that on 14/11.2011, upon being called by PW1, he went to the office and found 4 laptops, safe, cash Kshs.7,800/-, ignition keys for Toyota Land Cruiser, 3 desktop computers and 2 printers all missing. He reported to the police who visited the scene and took photographs. The next day, a laptop was recovered which had the organisation's information and later a broken safe was recovered with some documents in it.

PW3, PC Henry Kiboma, of Narok Police Station received a robbery report on 14/11/2011. He visited the Health Centre, he took photographs of the scene, produced in court the items he recovered at the scene. Acting on a tip off, he arrested the 2nd appellant with a laptop in a bag – PEx.6. He said that the 2nd appellant had first alighted from a motor cycle. The 2nd appellant claimed that the laptop belonged to another and led police to the stadium where he pointed to the 1st appellant and he too was arrested and both were charged with the offence of robbery after PW2 identified the laptop as belonging to the organisation and found it to contain the organisation's information.

In his defence, the 1st appellant, John Kago, said that on 14/11/2011, he was at the stadium airing wheat for people when two people came there, asked for Kamau, arrested him, searched him and took him to police station. He said that PW3 arrested him with his shoes which had both laces and that he was still wearing the same shoes; that he was framed. He denied knowing the 2nd appellant or committing the offence.

The 2nd appellant stated that on 14/11/2011, he was at his home with his two sisters. He was on a motorbike when he was arrested. He denied having been arrested by PW3 or having been carrying anything or having led to the arrest of the 1st appellant.

Having considered the prosecution evidence, there is no doubt that a robbery occurred at Ewaso Nyiro Health Centre. PW1 explained in detail how he was first attacked by 5 people who were armed with guns; two other robbers arrived; he was injured and tied up. Later, photographs were taken of the offices of the centre which showed things scattered all over. PW2 found the items listed in the charge sheet having been stolen. The question is who are the robbers? Are the 2 appellants among the 7 men who attacked PW1 on the said night?

PW1 was not in a position to identify anybody. He said so. He did not see the appellants at the scene of the robbery. The only link between the appellants and the robbery is a shoe lace found at the scene and the laptop allegedly found with the 2nd appellant.

PW3 testified that he acted on a tip off which led to the arrest of the 2nd appellant whom he found with a bag containing a laptop. This was on 14th November 2011. The robbery had taken place the same morning, on the night of 13th and 14th about 2.00 a.m. If that was the case the trial court should have invoked the doctrine of recent possession because the laptop was recovered only hours after the robbery. When does recent possession arise? The court discussed the doctrine of recent possession in the case of **Peter Kahiga alias John Kamau v Rep** where it laid down some of the principles to guide a court in determining the doctrine of recent possession. The court said:-

> **"….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.'……."**

Flowing from the above decision, it was the duty of the prosecution to establish that the said recovered property i.e. laptop, was recently stolen and was positively identified as the property of the complainant. The charge sheet listed the following laptops as having been stolen:-

1. **S/W 32Y825800 HP;**
2. **6146318 A2Q HP.**

3. Pavilion DC 61.

In his testimony, PW2 said that infact they lost 4 laptops. He did not produce any receipts to prove that the complainant owned that number of laptops. As regards the laptop allegedly found with the 2nd appellant, PW2 did not produce any evidence as proof that it belonged to the complainant but promised to produce the documents later. By the time the case was concluded the said documents were not availed to the court. We find that the complainant failed to positively identify the laptop allegedly found with 2nd appellant as its property. It was alleged that the laptop contained information from the complaint's organisation but there is no evidence to demonstrate that fact nor was the said information shown to the trial court or produced in evidence. We find that the trial court was in error in making a finding that the laptop belonged to the complainant or that it is one of the items stolen during the robbery.

According to PW3, it is the 2nd appellant who, upon arrest, led them to the first appellant as the owner of the laptop. Of course both appellants have denied knowing each other. The identification of the 1st appellant by the 2nd appellant was therefore evidence of an accomplice. Who is an accomplice? The Court Appeal in the case of **Antony Kinyanjui Kimani v Rep** (2011) KLR (CRA 157/2007) said the following of what should be considered an accomplice:-

> **"What legally constitutes an accomplice is not defined in our statutes but *section 20* of the Penal Code makes every person who counsels or procures or aids or abets the commission of**

an offence, a principal offender. *Section 396* of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of *Watete v Uganda* [2000] 2 EA 559, the supreme court held that *"in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or* an *accessory in the commission of the offence, the subject of the trial"*, The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:

"On the authorities, there appears to be no one accepted formal definition of "accomplice". Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davies of Director of Public Prosecutions (supra), the House of Lords said at 513:

'On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as failing within the category: (i) on any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).'

This is surely the natural and primary meaning of the term "accomplice....."

In the instant case, from the trial court's finding that the 1st and 2nd appellants were the robbers, it follows that the 1st appellant was a principal offender together with the 2nd appellant. The 2nd appellant's evidence could not found a conviction unless it was corroborated by other independent evidence.

The only other evidence adduced against the 1st appellant is that a shoe lace found at the robbery scene belonged to him and that at time of arrest, one of his shoes was without a shoe lace. The only evidence on the shoe lace is by PW1 who said at page 15 line 10 **"I struggled to free myself till 7.00 a.m. I managed to cut the ropes and MFI 1 & 2 and a black shoe lace MF1 3."** PW1 only described it as a black shoe lace. PW3 also talked of the shoe lace. At page 23 line 5, PW3 said; **"Accused 2 led us to arrest you. I got shoes from accused and found that right shoe lace was missing. I compared shoe lace found at the scene with left shoe you wore."** Neither PW1 nor PW3 described the shoe lace save for PW1 saying it was black. PW3 did not tell the court what he found after comparing the shoe laces the one found at the scene with that on 1st appellant's shoe and whether they were similar. This court can only guess. It cannot be said with certainty that the shoe lace found at the scene belonged to the 1st appellant. Therefore, there is no independent evidence linking the 1st appellant to the robbery.

As regards the State Counsel's submissions questioning why PW3 did everything from investigating to arrest, the nature of the work of an investigator is such that he can investigate and the investigations may lead to an arrest of an accused person and the actions of PW3 cannot be faulted in any way. In any event, **Section 143** of the **Evidence Act** provides that a fact can be proved by evidence of one person. It is unnecessary to call a superfluity of witnesses if they will only come to repeat the same story or the evidence adduced is barely sufficient.

In the end, we agree that the appellants may be prime suspects in the robbery that took place, but a conviction cannot be founded on mere suspicion. The evidence adduced by the prosecution falls far below the threshold of standard of proof required in a criminal case especially one of this magnitude where the sentence is death. For all the above stated reasons, we find merit in the grounds of appeal, we allow the appeal, quash the conviction and set aside the sentences. The appellants are set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 18th day of July, 2014.

R.P.V. WENDOH

JUDGE

A. MSHILA

JUDGE

PRESENT:

The appellants both in person

Mr. Omari for the State

Kennedy – Court Assistant