



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 238 OF 2011

DUKE OYARO NYARIBARI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court Criminal Case No. 311 of 2011 by Hon. N.N. Njagi, P.M. on 2/12/2011)

JUDGMENT

1. The appellant, **Duke Oyaro Nyaribari** was charged with four (4) counts of robbery with violence, contrary to **Section 296(2)** of the **Penal Code**. **Two (2)** of the charges had alternative counts of handling stolen property contrary to **Section 322(2)** of the **Penal Code**.

2. He was tried, convicted and sentenced to suffer death. Being aggrieved by the conviction and sentence he appealed on grounds that:-

- a) Charges were not explained to him as required by the law.
- b) He was not accorded a fair trial having not been supplied with witness statements at the commencement of the trial.
- c) Evidence adduced was not sufficient to sustain a conviction.
- d) Relying on the doctrine of recent possession to dismiss his defence was erroneous.

3. Briefly, facts of the case were that on the night of **22nd - 23rd March, 2011**, some for (4) men dressed in black and armed with crude weapons broke into **Bazz Petrol Station**. They tied up the watchmen and ordered the pump attendants to open the office. They took away their cellphones and money. The police were notified. They moved to the scene and exchanged gunshots with the robbers. One of the robbers was shot dead. Others escaped but the appellant was arrested and charged.

4. In his defence the appellant stated that he used to buy onions from one **Joel Mwaniki**. He decided to get them from the source. While on his way to **Kamana Bus Stage** he heard a loud bang. He

saw two (2) people who were armed. These people turned out to be police officers. They hit him and ordered him to admit being in possession of a gun. He was taken to the police post and later charged.

5. At the hearing of the appeal the appellant relied upon written submissions buttressing grounds of appeal. In response thereto the learned State Counsel **Ms Saoli** opposed the appeal on grounds that the appellant was found at the scene of the crime. He was arrested after he surrendered to police officers. The items that were stolen were recovered from him. He failed to give an explanation as to why he was at the petrol station and how stolen items were recovered from him.

6. This being the first appellate court, it is required to re-consider and re-evaluate the evidence adduced before the trial court and reach its independent conclusions on whether or not to uphold the conviction of the appellant (see **Gabriel Njoroge versus Republic [1987] KLR 19**).

7. Right at the outset we wish to point out that this appeal is surrounded by peculiar circumstances. The appeal was first heard on the **8th October, 2012** by **Makhandia, J** (as he then was) and **Dulu, J**. When the Honourable Judges retired to draft the judgment, it was discovered that the lower court judgment was missing from the record of appeal. Consequently, investigations were carried out and a copy was availed from the Director of Public Prosecution's (DPP's) Office. We heard the appeal afresh. It is now established that the charge sheet is missing from both the original file and record of appeal. Without a copy of charge sheet the court in reaching the decision must consider the interest of justice. (see **Pius Mukobe Mulewa and Another versus Republic – HCR.A No. 103 of 2001**).

8. A perusal of the judgment of the Lower Court is silent on the particulars of the offence. The learned magistrate alluded to:-

“Particulars of the offence as per charge sheet dated 2 4/3/2011”

Without the stated particulars of the offence, the same cannot be ascertained. This court must therefore in the interest of justice determine the appeal on merit based on the evidence captured on record and the judgment of the Lower Court.

9. It is submitted that the typed proceedings of the Lower Court (certified) do not indicate if the appellant was present in court at the time the plea was taken. A perusal of typed proceeding forming the record of appeal show the omission alluded to. However, the original handwritten court record clearly show that the substance of the charges and every element thereof were read and explained to the accused who pleaded not guilty to all the four(4) main and two (2) alternative counts. Subsequently an order was made directing the prosecution to furnish appellant with witnesses' statements.

10. The case came up for hearing on the **3/5/2011**. The prosecution was ready to proceed. The appellant pointed out that he could not proceed without statements. The court adjourned the case on that ground to the **17/5/2011**. The trial only proceeded after the appellant had been supplied with witnesses' statements. At the hearing the appellant was accorded an opportunity of cross-examining witnesses and ultimately defending himself. In all these instances, the record shows that the appellant was aware of the charges against him. In the circumstances, the trial magistrate having complied with **Section 207** of the **Criminal Procedure Code**, the trial was fair.

11. This brings us to the issue; whether the case was proved beyond reasonable doubt. PW1, **Robert Mutiso Musyoka** and PW2, **Peter Musyoka** were watchmen at the **Petrol Station**. They gave an account of how they heard sounds of iron sheets being ripped apart. The incident was at about 2.36am. They saw the intruders who wore black clothes and were armed. PW1 called the police prior to being tied up. By the time the police arrived both of them were untied. Both PW1 and PW2 witnessed when the appellant surrendered after one of the robbers was gunned down.

12. PW3, **Shadrack Kioko** a pump attendant was inside the office when the robbers struck. They opened the door as ordered and complied with the order to lie down. They took away his cellphone and Kshs. 4800/=. PW4, **Simon Mulinge Katunga** a pump attendant just like PW3 saw one of the persons

who wore police uniforms and carried a rifle. His Nokia cellphone was taken away. Similarly, Kshs. 2263/= that was in his possession was also taken without his consent.

13. In his defence the appellant claimed that he was on his way to the bus stage when arrested. Evidence adduced and not challenged is that the robbers gained entry to the Petrol Station by ripping iron sheets. PW6, P.C. **Kirima** arrested the appellant after he called out begging not to be killed. PW1 identified him as the person who ordered him to lie down prior to being tied with ropes. PW2 identified him as the person who went towards him and his mate tied him. After he surrendered he was searched and found in personal possession of items. These were a torch, a cap, jacket and a nokia mobile phone. PW1 identified the torch and mobile phone as some of the items that were taken from him. PW2, lost Kshs. 50/= that was recovered from the appellant. Other items used in the course of the robbery were also recovered at the scene.

14. The Court of Appeal in the case of *Maina and 3 Others versus Republic [1986] KLR 301* quoted with approval the definition by the **Lord Chief Justice of England** as stated in *Republic versus Laughlin 35 Criminal Appeal Republic 69* what constitutes the doctrine of recent possession. He said:-

“If its 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 which the jury can infer that he is the housebreaker or shop breaker”.

15. in the case of *Arum versus Republic- Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005* - it was held that the doctrine of recent possession is applicable where the court is satisfied that the prosecution have proved the following:-

- a) That the property was found with the suspect;
- b) That the property was positively identified by the complainant;
- c) That the property was stolen from the complainant;
- d) That the property was recently stolen from the complainant.

16. This is a case where the cellphone, torch and cash positively identified by the complainants (PW1 and PW2) were found in possession of the appellant at the scene of robbery after he surrendered. In his defence he stated that he was going to buy unions but he did not offer any explanation of how he possessed the complainant's property. From the foregoing, it is apparent that the learned trial magistrate applied the doctrine of recent possession realistically and accurately. It was not erroneous on his part to reach a finding that the appellant participated in the robbery.

17. Having evaluated the evidence, adduced at trial and having come up with our conclusions we find that the appeal has no merit. Accordingly, it is dismissed.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of OCTOBER, 2014.

L.N. MUTENDE

B. THURANIRA JADEN

JUDGE

JUDGE