



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 121, 122 OF 2011

1. YUSUF AMANI OWINO)

2. JOSEPH MUKHWANA):::APPELLANT

VERSUS

REPUBLIC:::RESPONDENT

[Being an appeal from original conviction and sentence of Hon. D. M. OCHENJA, PM at Kitale in Criminal Case No. 3567 of 2007 on the 19th day of August, 2011]

J U D G M E N T

The two appellants viz **Yusuf Amani Owino** and **Joseph Mukhwana Ling'ondo**, appeared before the Principal Magistrate at Kitale charged with Robbery with violence, contrary to section 296 (2) of the Penal Code. It was alleged that on the 11th November, 2007 at Kitale township Trans-Nzoia District, jointly with others not before court and while armed with dangerous weapons namely a pistol, a knife and iron-bars robbed George Njoroge Ngugi of a motor vehicle Reg. No. KAP 353 E Toyota E91 valued at Kshs.360,000/= and an Equity Bank ATM Card No. [particulars withheld] and at or immediately before or immediately after the time of such robbery killed the said George Njoroge Ngugi.

Both appellants pleaded not guilty to the charge but after a full trial were convicted and sentenced to death.

Being dissatisfied with the conviction and sentence the appellants filed separate appeals which were consolidated and heard together.

The grounds in support of the appeals are contained in the respective petitions of appeal filed herein on 1st September, 2011.

The first appellant, Yusuf Amani Owino, mainly complains that the trial court erred by relying on the evidence that he was found with fake notes and on the evidence based on a picture yet he was not found in possession of the vehicle. He also complains that his defence was rejected by the trial court without reason.

As for the second appellant, Joseph Mukhwana Ling'ondo, he complains that the trial court erred by relying on the evidence of PW4 which was not proved and on the evidence of PW5 which mentioned an informer who was not called to testify. That, the trial court also erred by relying on the evidence of PW3 with regard to the images and for holding that the prosecution case was proved beyond reasonable doubt.

At the hearing of the appeal, both appellants appeared in person and relied on their respective written submissions in support of the appeals. The Learned Prosecution Counsel, **M/S Limo**, opposed the appeals on behalf of the State/Respondent by orally submitting that the evidence against the appellants was sufficient and corroborative and did prove that they robbed and killed the deceased.

That, PW1 an employee of Equity Bank showed that the second appellant withdrew money immediately after the deceased had been robbed. That, the CCTV photographs (P. Ex. 5) clearly showed the image of the second appellant and that PW4 showed that both the appellant approached him to change the number plates of the vehicle belonging to the deceased. That, the doctrine of recent possession properly applied by the trial court showed that it was the appellants who committed the offence.

The Learned Prosecution Counsel urged this court to dismiss the appeal and contended that evidence by the prosecution clearly established the charge against the appellants.

In response to the foregoing submissions by the state, the first appellant indicated that the charge sheet and the evidence by PW1 and PW7 did not refer to one vehicle. That, the evidence against him was contradictory and without sufficient corroboration.

The second appellant indicated that the evidence of PW1, PW5 and PW7 did not agree with that of PW3. That, the CCTV snaps produced by PW3 implicated the first appellant only but were not clear. That, the snaps did not agree with the evidence of PW1, 3, 5 and PW7 and were not produced by the person who took them. That, the vehicle mentioned in the charge sheet was a Toyota Corrolla E100 yet the typed proceedings and charge sheet refer to a Toyota Corrolla E91. That, the actual vehicle was a Toyota Corrolla EE101 but three different vehicles were mentioned in the trial. That, PW4 did not prove that the request for new registration number was taken to him by the appellant thereby lying in court for his own benefit.

The second appellant made reference to the doctrine of recent possession and contended that he was found in possession of his own motor vehicle for which he produced a sale agreement and original log book and handed to PW7. That, his vehicle was a Peugeot 504 Station Wagon Reg. No. KZV 801 cream in colour. That PW7 admitted that he was holding him (appellant two's) documents.

Having considered the entire submissions by both sides in the light of the grounds of appeal, our duty as a first appellate court was to re-visit the evidence and draw our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the prosecution case was briefly that on the material date at about 8.00 p.m, the late George Njoroge Ndungu (the deceased) was undertaking his taxi cab operation at a place called Rajan. He was in the company of his brother, **Obadiah Mburu Ngugi (PW1)** but each had a different vehicle. The deceased was using motor vehicle Reg. No. KAP 353E Toyota Corrolla while Obadiah was using motor vehicle Reg. No. KAJ 497 D Toyota Corolla. In the process, the deceased was approached and hired by two young men who wanted to be taken to Misikhu. The deceased negotiated the fare with the two young men and agreed to take them to their destination. Obadiah (PW1) remained behind and later went to his home. He attempted to get in touch with the deceased by phone on the following morning but all in vain. He made efforts to trace the deceased through his driver and wife but all in vain. He then embarked in a search for the deceased together with other relatives. They proceeded to Misikhu and Webuye but did not find the deceased. They then reported the matter at Webuye police station. Later, they learnt that a sum of Kshs.20,000/= was withdrawn from the deceased's Equity Bank account on the material 11th November, 2007 and a further sum of Kshs.20,000/= was withdrawn on 12th November, 2007 at 6.00 p.m. The money was withdrawn from the Bungoma branch of Equity Bank. They reported the matter to the police in Kitale.

Accompanied by the police officers from Kitale, Obadiah (PW1) and others proceeded to Bungoma police station. In the meantime, the deceased's Equity bank card was blocked to prevent further withdrawals.

Later, further information was received from Equity Bank Bungoma that a further attempt had been made to withdraw money from the deceased's account but the bank card was captured such that no withdrawal could occur. Equity Bank later availed photographs taken during the withdrawal transactions at its ATM Bungoma.

Obadiah (PW1) was unable to identify the persons appearing in the photographs. He therefore continued to search for the deceased and in the process learnt from Safaricom that the deceased's cell phone No. [particulars withheld] was being used in Bungoma by a person using a line from celtel. Two weeks thereafter, he (PW1) proceeded to Bungoma police station where he was informed that a dead body had been sighted in a river between Kakamega and Bungoma but had not been retrieved from therein. He proceeded to the said river Nzoia at a later stage accompanied by police officers from Kitale and Bungoma. It is then that he saw the dead body and identified it to be that of his deceased brother. He noted that the body had injuries on the head, hip and tongue. Police officers took photographs of the body while it was in the river and when it was removed from therein.

The body was thereafter taken to Bungoma mortuary before being transferred to Webuye mortuary. It was later identified by Obadiah (PW1) for post mortem purposes. He also later identified the deceased's stolen vehicle which was recovered by the police who had arrested two suspects. He (PW1) noted that the vehicle had been tampered with such that its actual registration number was altered to read KAN 753F. He availed a copy of the vehicle's log book and indicated the suspects who were arrested were the two appellants herein.

The deceased's wife, **Mary Wanjiku (PW2)**, confirmed that the deceased left home at 6.30 p.m. and proceeded to town to carry out his taxi business using his motor vehicle Registration No. KAP 353E. He did not return home and she could not reach him on his mobile phone despite several attempts. She reported the matter to his brothers including Obadiah (PW1) and later identified to the police the type and colour of the clothes he was wearing when he left home. His dead body was retrieved from River Nzoia by the police on the 25th November, 2007.

George Maloba (PW3), an employee of Equity Bank was at the material time based in Bungoma as an accountant. He was on duty on 15th November, 2007 when he was approached by police officers and requested to provide the image of the person who had withdrawn money from the deceased's A/C No. [particulars withheld] on the 11th and 12th November, 2007. He asked for the necessary court order and the police provided necessary affidavit which was forwarded to the bank's security department in Nairobi. Three images were then provided by the security department and handed over to the police. There were later produced in court (P. Ex. 5) together with the deceased's ATM Card (P. Ex. 6) which was captured at the bank's Bungoma ATM on the 13th November, 2007.

A print out of the deceased's account was also produced (P. Ex. 7).

Maloba (PW3) indicated that the three images were those of the first accused (herein, second appellant) whom he had not previously known.

Joseph Shikuku Wekesa (PW4), a sign writer in Bungoma town was at his place of work on the 12th November, 2007 at 5.00 p.m. when two people took to him a vehicle registration plate bearing the number KAN 753E for purposes of repair. The plate had already been painted and all he had to do was to repair it. He charged a fee of Kshs.850/- for the work and said that the second appellant was one of the two people who took the plate to him. He said that the second appellant was a person he normally saw in Bungoma Town and on the 15th December, 2007 he (PW4) was arrested and released after recording a statement.

Cpl Frank Anunda (PW5), of the scenes of crime section Bungoma, proceeded to the scene where the body of the deceased was found and took photographs of the body from the river, the material motor vehicle and its false registration number plate. Acting on information from a police informer he (PW4) proceeded to Chepkube market within Bungoma Town and together with his colleagues pursued a vehicle which was allegedly being driven by persons suspected of having committed the present offence. The

vehicle reached a bus park and stopped. It was then that the two suspects were arrested and the vehicle stolen from the deceased recovered with false number plates.

Cpl Anunda (PW5) identified the appellants as having been the two suspects and indicated that the second appellant's image was captured on CCTV camera as he was withdrawing money from the deceased's bank account.

Dr. Edward Bilembwa (PW6), produced the post mortem report (P. Ex. 4) compiled and signed by his colleague Dr. Steven K. Ngugi. The report showed that the deceased died from cardio pulmonary collapse due to head injuries and multiple injuries to the lower limb.

Cpl David Makau (PW7), of C.I.D Kitale, investigated this case and thereafter preferred the present charge against the two appellants.

In his defence, the first appellant (Yusuf) denied the charge and said that he was a carpenter by profession and lived at Moi's Bridge where he was on the 27th November, 2007 when two police officers arrived at his workshop and ordered him to accompany them to the Moi's Bridge Police Station where he was to explain his failure to possess some licences. He was searched at the police station and found with fake money amounting to be 52,000/=. He was then placed in the cells pending investigations and on 15th December, 2007 he was taken to Majanja trading centre where he could not trace one John Simiyu who normally gave him the fake money. He was thereafter taken to Bungoma Police Station and then Moi's Bridge Police Station where police officers demanded a bribe of Kshs.15,000/= to set him free. He did not raise the amount and on 21st December, 2007 he was arraigned in court for the present offence which he did not commit. The second appellant (Joseph) also denied the offence and contended that the first appellant was not known to him. He said that he left home at 6.00 a.m. On the 4th December, 2007 and drove his vehicle Reg. No. KZF 801 Peugeot 504 Station Wagon to the Bungoma Bus stage from where it operated as a public service vehicle plying the Bungoma – Malava route.

He worked upto 6.00 p.m. and thereafter took the vehicle to a car wash facility within Bungoma Town. It was at that juncture when he received a telephone call from a mechanic friend called James Ole who informed him that there was some work of towing a vehicle from Bungoma to Kitale. He accepted the job at a cost of Kshs.6,500/= and after a few minutes his friend arrived in the company of three people.

He (second appellant) towed the vehicle to Kitale where they arrived at 11.00 p.m. The vehicle was a Datsun pickup light blue in colour with a registration number beginning with KAC. He towed it to a garage called Tony and thereafter went to a hotel in Kitale for his supper. The three people were with him. They asked to be taken to Kisumu Ndogo but he declined. On his way to Bungoma he found a Nissan vehicle doubled parked beside the road. Its occupants attempted to stop him but he ignored. After driving for a distance of about 3 km, he noticed a motor vehicle pursuing him. He gave way but the vehicle stopped ahead of him and four people alighted. They were armed with guns and identified themselves as police officers. He was questioned as to why he had earlier refused to stop and where he hailed from. He was also asked for his driving licence which was contained in a wallet taken from him by the police officers. The wallet also contained Kshs.9,000/=: his identity and election cards. His mobile phone was also taken away. He was arrested and taken to Kitale Police Station. On 5th December, 2007, the police officers took the particulars of his vehicle and on 7th December, 2007, police officers took him to his home at Sikata village where he availed his vehicle's ownership documents. His house was searched but nothing was recovered. His vehicle's documents were retained by the police and on 18th December, 2007, he was asked for a bribe of Kshs.20,000/= to end the matter. However, he was arraigned in court on the 21st December, 2007 for the present offence which he did not commit. His documents and property were never returned to him by Cpl Makau (PW7).

The Learned trial magistrate after due consideration of the evidence for and against the appellants concluded in his Judgment that the deceased was indeed robbed of his motor vehicle and his Equity Bank ATM card and was in the process killed by the offenders and

That, on the basis of the images captured by CCTV camera and on the doctrine of recent possession the

two appellants were the persons who robbed the deceased of his motor vehicle and thereafter killed him.

On our part, we are satisfied and agree with the learned trial magistrate that the ingredients for the offence of robbery with violence under section 296 (2) of the penal code were fully established. Indeed, the evidence availed by the prosecution through PW1, PW5, PW6 and PW7 indicated that the deceased while in the course of his business as a Taxi operator was approached and hired by two people who pretended to be genuine customers headed for Misikhu. It was not until the following day that it dawned upon PW1 who was with the deceased when the two people hired the vehicle that something had gone terribly wrong as the deceased could not be traced even on his mobile phone. The anxiety of PW1 led him to the police at Webuye where he first reported the matter before continuing with the search for his missing brother whose dead body was later “fished” out of River Nzoia and his stolen vehicle and Equity Bank ATM card recovered within Bungoma town.

Indeed, there was no dispute whatsoever that the deceased was robbed and killed.

The bone of contention was the alleged involvement of the two appellants in the offence. Both denied such involvement and indicated that they were separately arrested for other reasons and later charged with the present offence after failing to part or raise money demanded by police officers as bribe.

With regard to the first appellant who was the second accused in the trial, his contention was that he was arrested for trading as a carpenter without necessary licences and for dealing in fake currency.

The most crucial evidence against him was that of police officers (i.e PW5 and PW7) and this related to the recovery of the deceased's motor vehicle following a tip off by a police informer. Cpl Anunda (PW5) led a team of police officers who recovered the vehicle. The team did not however include Cpl Makau (PW7), the investigating officer. Cpl Makau therefore relied on what he was told by Cpl Anunda regarding the recovery of the vehicle and the trial magistrate clearly relied on the evidence of Cpl Anunda and by extension that of Cpl Makau to arrive at a finding that the first appellant was found in recent possession of the deceased's stolen vehicle without proper explanation and must therefore have been among those who committed the offence.

Recent possession of property stolen from an individual would provide strong circumstantial evidence against a suspect if the evidence is cogent and credible. In the case of **Isaac N. Kahiga Alias Peter Nganga Kahiga Vs. Republic Criminal Appeal No. 272 of 2005**, the court of Appeal stated that:-

“It is trite law that before a court of law can rely on the doctrine of recent possession on 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 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 properties 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 stolen property and in our view any discredited evidence on the same cannot suffice no matter how many witnesses.”

In this case it was established that the material vehicle belonged to the deceased and that it was stolen from him on the 11th November, 2007 and recovered on 5th December, 2007 having been tampered with for purposes of concealing its identity.

Undoubtedly, the person found in possession of the vehicle at the time of its recovery was required to give a satisfactory account of how he came in its possession failure to which he would be presumed to be the offender.

In the presence circumstances, possession would imply having control and/or management of the vehicle at the time of its recovery.

Cpl Anunda (PW5), was the person who actually recovered the vehicle following a tip off from an informer. He implied that the informer pointed to or showed him one suspect at Chepkube market but when the suspect drove away in a vehicle he was with another suspected person.

He (PW5) and his team followed the suspects' vehicle upto the bus park where it was stopped as the suspects conversed with somebody. It was at that juncture that the suspects were arrested and their vehicle impounded. It later turned out that the vehicle was in fact the vehicle stolen from the deceased but fitted with false number plates i.e Registration No. KAN 753E.

During cross examination, Cpl Anunda clearly indicated that the person in control of the vehicle as at the time it was recovered was the second appellant. He implied that the first appellant was arrested together with the second appellant simply because the two were together in the vehicle. He did not show any other link between the second and first appellant and particularly in relation to the circumstances that befell the deceased.

Therefore, we may safely state that the evidence of recovery of the motor vehicle by Cpl Anunda (PW5) was not cogent enough for a holding that the first appellant was in recent possession of the deceased's vehicle in as much as he was not in control of the same and may have been inside it as an innocent occupier. Consequently, the doctrine of recent possession was erroneously applied against him by the trial court thereby leading to his conviction. As there was no other direct or indirect evidence linking him to the offence his conviction by the trial court was in our view unsafe.

With regard to the second appellant, the evidence by Cpl Anunda (PW5) showed that he was in actual possession of the deceased's motor vehicle when it was recovered. He was the person driving the vehicle and therefore in control thereof. He was clearly caught up by the doctrine of recent possession as he failed to give a satisfactory account of how he came by the vehicle. He never even attempted to give any explanation and instead implied that he was found in possession of his own motor vehicle but not that belonging to the deceased, an allegation which was rebutted by Cpl Anunda (PW5) and the investigation officer (PW7).

Other than the incriminating possession of the deceased's vehicle, there was additional circumstantial evidence identifying the second appellant as having been among the people who robbed and killed the deceased. Such evidence came from Wekesa (PW4), who repaired a registration number plate bearing Registration No. KAN 753E which had been handed to him for such purpose at a fee by the second appellant and another person. It is the same registration number which was fitted into the deceased's vehicle when it was recovered while in the possession of the second appellant.

There was also evidence from Maloba (PW3) who produced three CCTV images of the second appellant while withdrawing money from the deceased's bank account using an ATM outlet in Bungoma on the 11th and 12th November, 2007, a few minutes or hours after the deceased had been robbed.

A third attempt to withdraw more money was made on 13th November, 2007 but did not succeed as the deceased ATM card being used by the second appellant was captured by the machine.

In sum, there was credible and cogent evidence establishing beyond reasonable doubt that the second appellant was involved in the material offence. His conviction by the trial court was thus proper and sound and is hereby upheld with the result that his appeal is dismissed.

The first appellant's appeal is however allowed with the result that his conviction by the trial court is hereby quashed and the sentence set aside. He shall forthwith be set at liberty unless otherwise lawfully held.

Ordered accordingly.

J. R. KARANJA

K. KIMONDO

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JUDGE

JUDGE

[Delivered & signed this 18th day of November, 2014]

[In the Presence of the Appellants and M/S Koga for the state]