



REPUBLIC OF KENYA
High Court at Kakamega
Criminal Appeal 120 of 2010

ERICK INGANGA CHRISTOPHER1ST APPELLANT
ALOICE ODUOR 2ND APPELLANT
WYCLIFFE TOLOI 3RD APPELLANT
PATRICK ODUOR 4TH APPELLANT
DANSON MAPESA 5TH APPELLANT
PATRICK ANDALO OSORE 6TH APPELLANT
PETER MAKOKHA WESONGA 7TH APPELLANT
WASHIKA WANJALA 8TH APPELLANT
CONSTANT WASHIKA MASAKWE 9TH APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellants were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that the appellants *on the 5th day of August 2008 at 1.30 a.m. at Sabatia market, Ibokolo sub-location, Marama Central location, Butere District within Western Province, jointly with others not before court while armed with dangerous weapons namely pangas, rungas, iron bars robbed of JOSHUA WETENDE MONDA assorted goods all valued at cash KShs.280,000/= and immediately before the time of such robbery, used actual violence to the said JOSHUA WETENDE MONDA.* Each of the appellants was charged with an alternative count of handling suspected stolen items contrary to **section 322(2)** of the Penal Code.

They were convicted of the main count of robbery with violence and sentenced to death. The appellants filed their respective petitions of appeal. The 1st appellant **Erick Inganga Christopher** relied on his grounds of appeal which are that the prosecution did not prove its case, that the investigating officer failed to connect him with the exhibits produced in court, the conditions were not conducive for

positive identification by PW1 and that there was no identification parade done on him. He also filed written submissions during the hearing of the appeal. He submitted that PW1 denied the 2008 case and said that he was only aware of a 2007 case. The arresting officer did not recover anything from him yet exhibits were produced in court. There was no first report on him and he was not identified during an identification parade.

The 2nd appellant **Aloice Oduor** relied on his grounds of appeal. The grounds are that the ingredients of the charge were not proved, the exhibits he was charged with were his property and that the court relied on extraneous matters in convicting him. He also filed written submissions and further submitted that he was arrested at his hotel with his child who was the 3rd accused. His cooking oil was taken. The case started afresh three times. He was arrested on 6.6.2008 but was taken to court in 2009.

The 3rd appellant **Wycliffe Tolo** relied on his grounds of appeal and filed written submissions. The appellant's grounds of appeal are that the charge sheet was defective, the conditions were not conducive for positive identification, none of the stolen items were found in his possession, the burden of proof was shifted, the appellant's defence was not considered and the prosecution evidence was contradictory. He submitted that he used to work for the 2nd appellant and was very young. PW1 testified that he did not know the appellant.

The 4th appellant **Patrick Oduor** relied on his grounds of appeal. He also filed written submissions. The grounds of appeal are that the prosecution evidence fell short of the required standard, PW1 testified that he did not know him and that the prosecution did not prove its case as required. He submitted that the complainant testified that he did not know him and also he did not know how he was arrested.

The 5th appellant **Danson Mapesa** relied on his grounds of appeal and also filed written submissions. The grounds of appeal are that the charge and its particulars were defective, the circumstances were not conducive for positive identification, nothing was found in his possession, the burden of proof was shifted and that the trial was unconstitutional. He further submitted that the charge had mistakes as he was doing a case of 2008. The case was heard three times. The complainant was his neighbor who lives about 100 meters from his home. He did not give his name to the police and he also did not know how he was arrested. A parade was done yet the witness knew him but had not given his name to the police. The complainant mentioned one Tyson Ingange who was not charged. He called for the relevant Occurrence Book but it was not produced.

The 6th appellant **Patrick Andalo** relied on his grounds of appeal. He also filed written submissions. His grounds of appeal are similar to those of the 5th appellant herein above. The appellant submitted that PW1 knew him since childhood and identified him at the scene yet he did not give his name or description to the police. He was arrested and taken to Mumias police station on the 6.8.2008. He called for the Occurrence Book but it was not produced.

The 7th appellant **Peter Makokha Wesonga** relied on his grounds of appeal and also filed written submissions. His grounds of appeal are that the prosecution did not prove its case beyond reasonable doubt, no identification parade was done on him and that the trial court introduced extraneous matters. PW1 testified that he did not know him and did not know how he was arrested. When the administration police officers went to his house he was not there and they took salt claiming it belonged to the complainant.

Mr. Mwebi for the 8th and 9th appellants relied on the grounds of appeal. The grounds are that the evidence on record did not prove the charge and the case was not proved beyond reasonable doubt, the prosecution evidence was full of contradictions, there was no evidence on proper identification, the appellants' defences were not considered and the sentence is excessive. Counsel submitted that the charges were not proved beyond reasonable doubt. The charge sheet was amended two times and no leave of the court was sought. The witnesses who had testified were never recalled and Section 200 of the

Criminal Procedure was not complied with. On identification only the 6th, 7th and 3rd appellants were identified but the 8th and 9th appellants were not. PW2 who had originally testified but was not recalled stated that the vehicle was found in the compound of the 8th appellant but did not mention about the shop items. The complainant did not testify as to how he identified the shop goods indicated on the charge sheet yet these were ordinary items. There is no evidence as to who was the owner of motor vehicle registration number **KAA 927 K Isuzu Pickup**. The 8th appellant was arrested because he was the usual driver of the vehicle. PW1 did not identify him during the robbery. PW1 allegedly gave out some names of some of the robbers whom he knew and had identified yet he also attended an identification parade.

Mr. Orinda, State Counsel, opposed the appeals. Counsel submitted that six witnesses testified and their evidence is consistence. PW1 was a watchman and was overpowered by the large group of robbers. PW2 conducted identification parade and some of the appellants were identified. Medical evidence was also produced. The conviction was based on identification and the doctrine of recent possession. The appellants failed to give explanation for the possession of the stolen items. There was a spate of robberies in the area and that led to the different dates of arrest and arraignment in court of the appellants. The appellants also had other cases. The 1st appellant was found with ufuta cooking oil and quencher juice in large quantities. He did not give good explanation on how he came to possess the items. The 2nd appellant was also found with some of the stolen items and was also identified. The 2nd appellant did not raise the issue that he had a shop and a hotel and the submissions are an afterthought. The 3rd appellant was also found with the items together with the 2nd appellant. All the other appellants were found with stolen items and the way they were being kept did not show that they were meant for daily consumption. PW1 identified the 1st, 6th, 7th and 9th appellants. Identification parades were done and the 1st, 2nd, 5th and 6th appellants were identified. There was sufficient light to identify the robbers. Other than identification the evidence on recovery of stolen items also connects the appellants to the crime.

Six witnesses testified for the prosecution. **PW1. JOSHUA WETENDE MONDA**, testified that he was employed by Aggrey Manyasi to guard his shop at Sabatia. On the 4.8.2008 he was on duty and at about 1.30 a.m. robbers who were armed with pangas, rungas and metal bars attacked him. There was electricity light and he had his torch. There were about 10 robbers and he was cut. He was able to identify the 3rd accused before the trial court who was **Aloice Oduor**, the 6th accused before the trial court who was **Danson Osore Mapesa** and the 7th accused before the trial who was **Patrick Andalo Osore**. He also identified another person who died. The robbers took several shop items and loaded them onto motor vehicle registration number KAA 927 K Isuzu pickup. He was taken to Butere District hospital where he was treated and later reported the matter to Butere police station. He informed the police that he could identify some of the robbers. He then attended an identification parade and he identified some of the robbers.

PW2, CI FRANCIS KIPROP, was the OCS Butere police station. On the 12.8.2008 he conducted identification parade for **Erick Inganga** who was the 2nd accused before the trial court. The witness was **Joshua Wetende PW1**. The witness did not identify the 2nd accused. He then conducted a parade for **Aloice Makokha** and the witness was still PW1 and he managed to identify the accused who was the 3rd accused before the trial court. He also conducted a parade **Danson Osore Mapesa** who was the 6th accused before the trial court and PW1 identified the appellant. He also conducted another identification parade for **Patrick Andalo** who was the 7th accused and PW1 identified him.

PW3, PC OUMA, investigated the case. He was informed about the robbery on 5.8.2008 at 2.00 a.m. He went to the scene and found PW1 having cuts on his head and left hand. PW1 informed them that the robbers had a pickup registration number KAA 927 K Isuzu pickup. PW1 told them that he had identified some of the robbers. PW1 was taken to hospital and he was later issued with a P3 form. On the 5.8.2008 he got a call from the owner of the shop informing him that the motor vehicle registration number KAA 927 K had been seen at Bubala area. Together with other officers they went to that place and met two Administration Police officers and they went to Ogalo market. They were told that Aloice

Oduor (2nd appellant) who owned a hotel at the market had been seen with the vehicle. They were shown his hotel and they went inside. They recovered two tins each of four kilogram kimbo and ufuta cooking oil 7 litres. They went to the house of **Peter Makokha** who managed to run away. They went to the house of **Danson Osore** where they recovered two bars of soaps, two bags of salt, steel wire, 5 sleeping baby oils and ten matchboxes. They then went to the house of **Patrick Andalo** who was the 7th accused and they found three bar soaps, one belt and four sleeping baby oils. They went to the house of **Constant Washika** and they recovered seven always pads and ten mathematical sets. The vehicle was also found at the home of **Washika Wanjala** and they also recovered a blood stained panga. The panga was taken to the government chemist Nairobi together with blood samples from PW1 and the report from the Government Chemist indicated that the samples matched those ones on the panga. The report was produced as exhibit 21. They also recovered from **Aloice Mukoya** who was the 3rd accused several shop goods from his store. The shop goods were identified by **Aggrey Munyasa** the owner. **Wycliffe Tolo** and **Patrick Oduor** 4th and 5th accused before the trial court, had locked themselves inside the store and they were arrested. The 1st accused before the trial court **Donald Mukoya** was taken to the station on the 8.8.2008 with 7 basins having been recovered from him and a weighing machine. He was also found with assorted shop goods. **Peter Makokha** who had run away was later arrested and charged. The owner of the goods identified them using the price list he had fixed on the items.

PW4, OLIVER MAHASO, was a clinical officer based at Butere District hospital. He attended to PW1 Joshua Wetende and produced his P3 form. According to him PW1 had a cut on the head and a deep cut on the hand. He classified the degree of injury as harm. **PW5, SGT CHRISTOPHER JEPTOO**, testified that on the 7.8.2008 he was at Butula division in Busia and was informed by the assistant chief of Elukonyere sub-location that a house was suspected to storing stolen items. They went there with other officers. This was at Ogalo market. They were led to the house of the 1st accused before the trial court Donald Mukoya and on searching they recovered two weighing machines and several shop items. PW5, later handed over all the items to Butere police. They also went to the house of Erick Inganga where they also recovered several shop goods including quencher juice, cooking fat and three packets of baking flour.

PW6, CPL DAVID ANDERA SAMUEL, was based at the Makale Patrol Base. His evidence was that on the 6.8.2008 they looked for Peter Makokha alias Mayor who was a suspect of robbery with violence that had occurred at Sabatia in Butere area. He was arrested at his sister's place at Bukosia. The following day he was handed over to Mumias police station.

All the appellants were put on their defence. The 1st appellant **Christopher Erick Inganga** gave sworn evidence and informed the court that he was at his home on the 5.8.2008 when police officers went to arrest him at 8.00 p.m. He was taken to Butere police station where he stayed for 7 days. And identification parade was conducted and nobody picked him. He was later charged with the offence. He denied that he was found with any stolen items.

The 2nd appellant **Aloice Oduor** gave sworn evidence. He stated that on the 5.8.2008 at 8.00 p.m. police officers went to his hotel and he was arrested. They took his cooking fat and he was taken to Butere police station. The police then went and arrested his worker **Wycliffe OloToloyi** who was the 4th accused. While being held at Butere police station the police went and broke his shop and took all his goods. After three days, his son **Donald Munyasia** was also arrested and taken to the police station. He was charged with the offences on the 14.8.2008. Before then an identification parade had been conducted and PW1 picked him. His evidence was that the items produced in court were his. He produced his license for a shop and a hotel. The 3rd appellant **Wycliffe OloToloyi** gave sworn evidence and indicated that he worked for the 3rd appellant. On the 6.8.2008 about 6.00 a.m. he was at his place of work at Ogalo market working in a hotel owned by the 3rd appellant. Three police officers went to the hotel and he was arrested. They broke into the shop of the 3rd appellant and removed some goods. He was later charged with the offence. The 4th appellant **Patrick Oduor Kamba** in his sworn evidence stated that on the 6.8.2008 he went to his farm in the morning. Police officers went to his home and upon conducting a search recovered nothing. He was taken to Butere police station where he stayed for 8 days. He denied

committing the offence or being found with any stolen items.

The 5th appellant **Danston Osore**, gave sworn evidence and stated that he was arrested on the 6.8.2008 at 3.00 a.m. They arrested his brother **Patrick Andalo Osore** and after conducting a search they recovered nothing. He was taken to Butere police station where his neighbor **Joshua Wetende** picked him from a parade. He further stated that PW1 did not give his name in his statement. He is his neighbor and yet he was allowed to identify him. The 6th appellant **Patrick Andalo Osore**, in his sworn evidence indicated that he was asleep on the 6.8.2008 at about 3.00 a.m. when police officers arrested him. He was taken to Mumias police station where **Joshua Wetende** who is his neighbor identified him. The 7th appellant **Peter Makokha Wesonga** in his sworn evidence informed the court that on the 5.8.2008 he was at his house asleep. He stayed in his house and continued working up to 10.8.2008. On that date he went to Ogalo market at about 1.00 p.m. He operates boda boda business and collected a client. Two police officers went to arrest him and he was taken to Butere police station. The police referred to his customer as his wife which was not the case.

The 8th appellant **Washika Wanjala** gave sworn evidence. He was arrested on the 6.8.2008 at 6.00 a.m. The police asked the owner of motor vehicle registration number KAA 927 K which was parked outside his home. He was taken to a police post where he stayed upto 14.8.2008. He was later charged with the offence.

The 9th appellant **Constant Washika Masakwe** in his sworn evidence stated that he is a fishmonger. On 6.8.2008 at 7.30 a.m. police officers went to his house and they conducted a search. They then left and he decided to follow them. On reaching where their vehicle was they told him to accompany them. He was taken to Butere police station and later charged with the offence.

The main issues for determination are whether the appellants were positively identified by PW1 and whether the appellants were found in possession of the stolen items. According to PW1 there were about 10 robbers, there was electricity and he also had a torch. The incident occurred at about 1.30 a.m. and he was assaulted by the robbers. Given the numbers of the robbers and the fact that PW1 was alone we do find that it would have been impossible for PW1 to identify four of the robbers within the short time he came into contact with the robbers. PW1 was attacked although the injuries seemed not to have been serious as per the evidence of PW4 Olive Mahaso who produced his P3 form. PW2 conducted several identification parades. It is the evidence of the appellants who were identified by PW1 that he is their neighbor at home. That evidence is corroborated by the information indicated in the parade forms whereby the appellants gave the comment that the identifying witness was their neighbor. That being the case we do find that the identification of the appellants was not proper and raises doubts in our minds.

The trial court held that the appellants were found in possession of recently stolen items. The court applied the doctrine of recent possession and convicted the appellants. It is the evidence of PW3 PC Ouma who investigated the case that they went to the homes and places of all the appellants and recovered the stolen items. They were with the complainant. The complainant testified as the second witness but when the matter was heard afresh he did not testify. Counsel for the 8th and 9th appellants submitted that the charge sheet was amended three times and the witnesses were not recalled. The record shows that when the last amendment was done PW1 was recalled and the original PW2 Aggrey Manyasa who had already testified was not recalled. The new PW2 is CI Francis Kiprop who conducted the parade. It is therefore clear that the complainant who was the owner of the stolen items did not testify. However, the person who was robbed of the items was PW1 Joshua Wetende Mondo and he testified. We find that **section 20** of the Criminal Procedure Code was complied with.

Having found that the appellants were not positively identified the only issue which connects the appellants with the stolen items is whether the items were found with the appellants. It is the evidence of PW3 that they went to the homes of all the appellants and recovered some of the stolen items. The 3rd and 4th appellant were arrested within the business premises of the 2nd appellant. It is the evidence of the 2nd appellant that these two appellants are his workers. From the evidence on record we do find that the 3rd appellant Wycliffe Tolo and the 4th appellant Patrick Oduor did not participate in the robbery and they

were merely connected to the case because some suspected stolen items were found in the hotel of the 2nd appellant where they used to work. The two appellants were on duty that day. The items recovered include kimbo and ufuta cooking oil. We do find that the appeals by the 3rd and 4th appellant are merited and the same are allowed.

The prosecution evidence does establish that the robbers loaded the stolen items on motor vehicle registration number KAA 927 K Isuzu Pickup. These were shop items. The investigations were initiated soon after the robbery. The prosecution evidence does establish what was found in each of the premises of other appellants. Each appellant face an alternative charge of handling stolen goods and the items recovered in their respective premises are indicated in the alternative count. The prosecution evidence does not establish who was the registered proprietor of the motor vehicle, that was used to ferry the goods. Since there is no evidence that the 8th appellant was part of the robbers, the fact that he used to drive the vehicle does not mean that he was involved in the robbery. However, the 8th appellant was found with one basin, two sleeping baby jelly oil and ten knitting threads which were suspected stolen properties. The defence evidence simply indicates how the appellants were arrested. The 2nd appellant contends that the items were his. However, there was the weighing machine and other items that were found not to be his property.

Given the evidence on record we do find that the prosecution did not prove the charge of robbery with violence against the appellants. We do find that the prosecution proved the charge of handling stolen goods contrary to **section 322 (2)** of the **Penal Code** and the appellants shall be convicted of that offence. Although the trial court invoked the doctrine of recent possession, we do find that given the circumstances of the case the doctrine cannot be applied. The nature of the items is that they could quickly be disposed of as they are consumables. The appellants could have bought the items from the robbers. That should not be interpreted to mean that one cannot be convicted on the doctrine of recent possession merely because the stolen items are consumables.

In the end, the appeals on the main count of robbery with violence succeeds. The appeals by the 3rd and 4th appellants are allowed. Wycliffe Tolo and Patrick Oduor shall be set at liberty unless otherwise lawfully held. The 1st appellant, 2nd appellant, 5th appellant, 6th appellant, 7th appellant, 8th appellant and 9th appellant are hereby found guilty of the offence of handling stolen goods contrary to **section 322 (2)** of the **Penal Code** and are convicted accordingly. The appellants were charged before the court on the 14.8.2008. They have been in custody for about five years. The maximum sentence under **section 322(2)** of the **Penal Code** is fourteen years imprisonment. Each of the convicted appellants is sentenced to serve **seven (7)** years imprisonment from the date of conviction.

Delivered, dated and signed at Kakamega this 13th day of June 2013.

SAID J. CHITEMBWE

J U D G E