



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 442 OF 2008

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 441/08, 443/08 AND 447/08)

MOSES KAMAU NGIGE1ST APPELLANT

DAVID GATONYE MATHENGE2ND APPELLANT

JAMES KAMAU NDUNGU3RD APPELLANT

REUBEN NGUGI WAWERU4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original sentence and conviction in Criminal Case No.667 of 2008 of the Chief Magistrates Court at Kiambu by Mrs. Mutoka (Senior Principal Magistrate))

JUDGMENT

The four appellants, **MOSES KAMAU NGIGE, DAVID GATONYE MATHENGE, JAMES KAMAU NDUNGU** and **REUBEN NGIGE WAWERU**, were all convicted on 2 counts of robbery with violence contrary to **section 296 (2) of the Penal Code**.

In addition, the 1st appellant, **MOSES KAMAU NGIGE**, was also convicted for the offence of Stealing contrary to **section 275 of the Penal Code**.

PW 1 and **PW 2** are the complainants in counts 1 and 2 respectively.

PW 1 lived at Kawaida Village, Kiambu. On the morning of 23rd April 2008, she left her house at about 5.00a.m, to go to Gikomba Market, where she sold bananas.

PW 2 was a night guard at the compound of **PW 4**. The house of **PW 1** was next to that of **PW 4**, and the 2 of them were siblings. **PW 2** was the sister to **PW 3**.

PW 2 left the compound with **PW 1**. He was escorting her to the bus-stop, as he was heading home from his place of work.

The two of them were accosted by about six young men, who robbed them of their mobile phones.

PW 1 had a Nokia 2600, whilst **PW 2** had an Erickson.

PW 1 also lost 2,100/- in cash. But because the robbers felt that the money was too little, they led **PW 1** and **PW 2** back into **PW 1's** house. When at the house of **PW 1**, the robbers also carted away the Television set and a Meko Gas cylinder. The Television set was a “Sanyo”, 14 inches.

After the robbers left, **PW 4** activated his alarm system, which set-off a siren. The siren attracted the attention of neighbours and of some police officers who were on mobile patrol.

When the officers got to the scene, the two complainants described the “general clothing” which the robbers were wearing. The police officers drove in the direction which the robbers are said to have taken.

PW 5 and **PW 6** are police officers. They were part of the team that was on mobile patrol, and who responded to **PW 4's** siren.

As the police officers approached the Kawaida Bus-stop, they noticed four men. The said four men wore clothing that appeared like the clothing which the complainants had described as having been worn by the robbers.

On searching the 4 men, the police officers recovered 2 mobile phones. The officers suspected that the 4 men might be the persons who had robbed the 2 complainants. Therefore, the officers told the 4 men that they (officers) would take the men back to the complainants' place. The idea was to have the complainants indicate whether or not the men were amongst those that had robbed them.

If the complainants said that the men were not the robbers, the police would have set them free.

PW 1 and **PW 2** not only identified the 4 men as being a part of the gang that had robbed them, but also identified the recovered phones as belonging to them.

That prompted the police officers to conduct a more thorough search, which yielded a total of Kshs.30,000/- from the 4 men.

At that stage, the police were convinced that they had arrested the real robbers. Therefore, the officers told two of the 4 men to show them where the rest of **PW 1's** stolen property could be found.

The two men led the police officers to the house where the 1st appellant lived. It is at that house that the police found a bicycle, the Meko gas cylinder and the Sanyo Television.

As the 5th accused, who is the father to the 1st accused, was found at that house, the police arrested him too.

But after trial, the 5th accused was acquitted.

The bicycle which was recovered from the house of the 1st accused belonged to **PW 3**. It had been stolen from his house on the night of 22nd April 2008. However, on the following morning, the bicycle was missing.

PW 7 is the Investigating Officer. He preferred the criminal charges against the 5 accused persons after satisfying himself that they had committed the criminal offences in question.

When the appellants were put to their defences, each of them admitted that he was arrested at the Kawaida Bus-stop in Kiambu. But they all denied committing the offences with which they had been charged.

The 1st appellant said that the Sanyo TV and the Total gas cylinder which were recovered from his house, belonged to him.

The 2nd appellant said that the police stole his Kshs.20,000/- cash. When he insisted that they should

return it to him, the police charged him.

The 3rd and 4th appellants lay claim to the ownership of the money which was recovered from them, by the police. The 3rd appellant had Kshs.7,000/- whilst the 4th appellant had Kshs.8,000/-.

We have re-evaluated all the evidence on record.

We have also given due consideration to the submissions made before us.

Although Mr. Kimani, learned advocate for the appellants submitted that the appellants were arrested separately, about 2 hours after the robbery, that is not borne out from the facts on record.

PW 5 and **PW 6** are the 2 officers who arrested the appellants. When the 2nd appellant was cross-examining **PW 5**, the officer said;

“It is a fact that I arrested you all together.”

And as regards the time of arrest, we note that the two officers both made reference to 5.00a.m., as the time they heard the siren. They thereafter arrested the suspects.

We find that there is no justification for the appellants' contention that their arrest was effected 2 hours after the robbery in issue.

The appellants submitted that the testimony given by the prosecution witnesses was inconsistent, especially concerning the features which enabled **PW 1** and **PW 2** to identify their assailants.

We note that the two complainants gave “general descriptions” about the colours of the jackets worn by the robbers. But when they were pressed to specify which jacket was worn by each of the robbers, the complainants failed to do so.

Whilst both **PW 5** and **PW 6** said that the 1st and 3rd appellants led the officers to the house where the 1st appellant lived, one officer said that the house was 0.25 kilometres from the house of the complainant, and yet his colleague said that the distance was 5 kilometres.

It is conceded by the 1st appellant that the police officers went to his house. Therefore, there can be doubt about that fact. But we are unable to understand why the 2 officers who went to that same house, gave such different estimates as to the distance between the house and the complainant's house.

As regards the charge sheet, the appellants asserted that it was defective. It cited a Nokia 1600 as having been stolen from **PW 1**. However, when she testified, **PW 1** said that her phone was a Nokia 2600.

The Respondent contends that that discrepancy was not fatal, as **PW 1** positively identified the phone, after it had been recovered.

Mr. Kabaka, learned state counsel, submitted that the failure to cite the specific model of the phone which **PW 1** lost to the robbers was not prejudicial to the appellants.

That submission cannot alter the fact that the evidence tendered by the complainant was a departure from the particulars specified in the charge sheet. Surely, this is not a failure to specify a particular model in the charge sheet. It is a matter of giving particulars of a model that was different from that which the complainant lost.

Another issue that was raised by the appellants was that whilst **PW 5** recovered the Errickson mobile phone from the 3rd appellant, the charge sheet had attributed the possession of that phone to the 4th appellant.

That observation by the appellants is accurate. Therefore, the evidence regarding the identity of the person who was found in possession of the Erickson phone is not in consonance with the charge sheet.

The 3rd and 4th appellants admitted, in their respective defences, that the police recovered money from them. From the 3rd appellant, the police recovered Ksh.7,000/-, whilst from the 4th appellant they recovered Ksh.8,000/-.

That sum of money may well be part of the Kshs.40,000/- which the complainant lost to the robbers shortly before the police recovered the said money. However, the money was not unique in any manner whatsoever. Therefore, although there might be reason to suspect that the money recovered from those suspects was part of what **PW 1** had lost to the robbers, there was no proof to establish that the money so recovered was actually stolen from **PW 1**.

Meanwhile, as regards the 1st appellant, he confirmed what the prosecution witnesses had said, about the recovery of the Sanyo TV and gas cylinder from his house.

His own father, who had been a co-accused also confirmed that fact.

And although the 1st appellant lay claim to those two items, he did not prove that claim. By so finding, we are not shifting the burden of proof to the 1st appellant. We are simply making a factual statement which contrasts with the proof provided by **PW 1**. In other words, the proof of ownership which **PW 1** provided, displaced the 1st appellant's assertion of ownership.

The bicycle belonging to **PW 3** was also recovered from the house of the 1st appellant.

For those reasons, the doctrine of recent possession was properly invoked by the learned trial magistrate, in relation to the 1st appellant, Moses Kamau Ngigi. He was therefore convicted on sound evidence, in respect to counts 1, 2 and 3.

As for the other appellants, we find that the evidence against them is either inconsistent with the particulars of the charge sheet, and do not therefore support the charge; OR the evidence tendered by the witnesses was inconsistent so as to be unreliable. It would therefore be unsafe to uphold the convictions of the 2nd, 3rd, and 4th appellants.

We allow their appeals, quash their convictions and set aside the sentences. We order that the 2nd, 3rd and 4th appellants be set at liberty forthwith unless they are or any of them is otherwise lawfully held.

Finally, we dismiss the 1st appellant's appeal, and uphold both the convictions and sentences.

Dated, Signed and Delivered at Nairobi, this 25th day of July, 2013.

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A. MBOGHOLI MSAGHA

JUDGE

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FRED A. OCHIENG

JUDGE