



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 216 OF 2009**

**JOHN KINUTHIA NJEHIA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(From original conviction and sentence in criminal case Number 144 of 2008 in the Senior Resident Magistrate's court at Githunguri – Abdul Lorot (SRM) on 13/5/2009)***

**JUDGMENT**

1. This is an appeal against conviction and sentence in **Cr. Case no. 144 of 2008**, before Hon. Abdul Lorot, Senior Resident Magistrate as he then was. The appellant was charged with two counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**, and in the alternative to each count, with handling stolen goods contrary to **Section 322(2)** of the same Act.
2. In **count I**, it had been alleged that on 23<sup>rd</sup> March 2008 at Kagwe village in Kiambu District within Central Province, he robbed David Chege Gathuru of one mobile phone make Motorola F-3 valued at Kshs.2,100/=, National identity Card, Voters Card, Employer's card and cash kshs.6,000/= and at or immediately before or immediately after the time of the robbery they used personal violence to the said David Chege Gathuru.
3. In the alternative it was alleged that on 24<sup>th</sup> March 2008 at Kagwe village in Kiambu District within central Province, otherwise than in the course of stealing, he dishonestly retained; one mobile phone make Motorola F-3 valued at Kshs.2,100/=, National Identity Card, Equity ATM Card, voters card and Employer's Card, knowing to it to be stolen or unlawfully obtained.
4. In **count II**, it was alleged that on 23<sup>rd</sup> March, 2008 at Kagwe village in Kiambu District within Central province, he robbed Francis Kago Kamau of one mobile phone make Nokia 2626 valued at Kshs.4,700/=, and cash money Kshs.3,450/= at or immediately before or immediately after the time of the robbery they used personal violence to the said Francis Kago Kamau.
5. In the alternative it was alleged that on 24<sup>th</sup> March, 2008 at Kagwe village in Kiambu District within Central Province, otherwise in the course of stealing dishonestly retained; one mobile phone make Nokia 2626 valued at Kshs.4,700/=, knowing or having reason to believe them to be stolen goods.

6. The appellant was convicted on both main counts and sentenced to suffer death in the manner prescribed by law. He filed an appeal based on four substituted grounds in which he contended that the charges were defective, the evidence of arrest and recovery of exhibits was not proved, there was no evidence of identification, and that the learned trial magistrate was in error in rejecting his otherwise plausible defence.
7. Learned state counsel Mrs. Aluda opposing the appeal on behalf of the respondent, urged that the appellant was known to **PW1** before the attack, and had been properly identified by aid of moonlight and torchlight during the attack. Further that all the items stolen from **PW1** and **PW2** were recovered from the appellant's house the following morning. Miss Aluda also pointed out that the learned trial magistrate had considered the manner of framing the charge sheet before he convicted the appellant and that although no weapon was mentioned in the charge sheet the complainants were wounded during the attack. Lastly she averred that the appellant's defence was considered in the judgement.
8. This being the first appeal we considered and re-evaluated the evidence adduced by witnesses to arrive at our own independent decision whether or not to uphold the conviction of the appellant. In drawing our own conclusion we were cognisant of the fact that we neither saw nor heard the witnesses as they testified. - (*see Njoroge vs. Republic [1987] KL 99*).
9. We note that although this case rested on the evidence of a single identifying witness in each count, the learned trial magistrate did not appreciate this and did not warn himself at all, before he convicted the appellant in reliance of the evidence of a lone identifying witness in each count. This failure per se is not fatal to the prosecution case if it is shown that the appellant was convicted on sound evidence – (see **Anthony Kangethe Mwangi v Republic Cr. App 81 of 2008** (unreported) which is of persuasive value).
10. Each complainant testified that he was walking to his respective home from Kahuruko trading centre on the evening of 23<sup>rd</sup> March 2008 when he was attacked and robbed of the property listed in the charge sheet by a lone assailant. **PW1** was robbed at 11 p.m. while **PW2** was robbed at 10 p.m. Both reported the robbery at Kagwe Police Post which led to the arrest and arraignment of the appellant as stated above.
11. The appellant denied the offence in his unsworn defence and stated that he was going about his business at Kahuruko Trading Centre on 24<sup>th</sup> March 2008 when a vehicle stopped next to him. Three people emerged therefrom, handcuffed him and took him to his house to conduct a search which yielded nothing. He was subsequently charged with offences which he steadfastly denied.
12. On the first ground of appeal the appellant submitted that the charges were defective, since they showed that each of the two complainants was attacked by a single assailant and further, that no weapon was listed in the charge sheet. For better understanding as to whether or not the charge sheet was deficient by reason of the above omissions, we must restate the often stated case of **JOHANNA NDUNGU VS REPUBLIC Cr. App No. 116 of 2005 (unreported)** which sets out vividly what constitutes robbery under **Section 295** of the **Penal Code** and under what circumstances such robbery may progress to become robbery under **Section 296(2)** of the **Penal Code** as hereunder:

**“In order to appreciate properly as to what acts constitute an offence under Section (296) (2), one must consider the sub-section in conjunction with section 295 of the Penal Code.**

**The essential ingredients of robbery under Section 295 are use of or thereof to use actual violence against any person or property and at or immediately before or immediately after to further in any manner the act of stealing. Therefore the existence of the aforescribed ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section.**

1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
2. **If he is in the company with one or more other person or persons, or**
3. **If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.”**

13. Analysing the first set of circumstances the essential ingredient, apart from the ingredient including the use or threat to use actual violence constituting the offence of robbery, is the fact of being armed with a dangerous or offensive weapon at the time. No other fact need to be proven. Thus if the facts show that at the time of commission of the offence of robbery as defined in **Section 295** of the **Penal Code**, the offender was armed in the manner aforescribed then he is guilty of the offence under **sub-section(2)**.

14. In the same manner in the second set of circumstances, if it is shown and accepted by the court that at the time of robbery the offender is in company with one or more person or persons then the offence under **sub-section (2)** is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two sets of circumstances.

15. With regard to the third set of circumstances, there is no mention of the offender being armed or being in the company of others. The court is not required to look for either of these two ingredients. If the court finds that at or immediately before or immediately after the time of the robbery the offender wounded, beat, struck or used any other violence to the victim or any person (not necessarily the complainant or victim of theft) then it must find the offence under sub-section(2) proved and convict accordingly.

16. The case before us is built on the third set of circumstances which were proved in the evidence. The evidence dwelt less on the presence of a dangerous or offensive weapon during the robbery, but more on the fact that the two complainants were struck and wounded at the material time. **PW1** testified that the assailant hit him above the right eye with a metal bar/rod, hit him on the head, boxed him in the rib-cage, hit him in the left eye, and bit him on the chest near the left arm pit, and held him in a strangle hold. **PW2** was also held in a strangle hold and bitten on both the second and third fingers of the left hand.

17. The evidence of the injuries was corroborated by **PW4**, Dr. Ndolo of Kiambu District Hospital who testified that he examined **PW1** and **PW2**, and filled P3 forms in their regard on 27<sup>th</sup> March 2008. He noted the following injuries on **PW1**:

- Cut wound above the right eye brow
- Scalp haematoma right side of the occipital lobe
- Conjunctiva right eye with periorbital haematoma
- Bruises on the thorax and abdomen

At the time of examination the injuries were three days old and were probably caused by both blunt and sharp weapons. **PW2** had:

- Tenderness on right side neck and lower back
- Visible injuries left hand and second and third fingers
- Injuries were four days old and were probably caused by blunt weapon.

We therefore find that failure to name the weapon used in the charge sheet did not render the charge sheet defective.

18. In his second and third grounds of appeal the appellant contended that the evidence of arrest and recovery of exhibits was not proved, and that there was no evidence of identification. On the evidence of identification, it is trite law that a fact can be proved by the evidence of a single

witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken. – (see the decision of Hon. Judges of Appeal Omolo, Githinji and Onyango Otieno, JJA in **Ogeto v Republic [2004] 2KLR**).

19. As stated earlier, the attack on each of the two complainants occurred at night. **PW1** testified that there was moon light but the strength of that light was doubtful in light of his testimony that he flashed his torch light at his attacker. **PW2** said that he was not able to identify his assailant because the night was dark. Of note however was **PW1**'s evidence that he managed to identify his assailant and what followed thereafter.

20. **PW1** testified that he woke up his cousin Wahotho, **PW3**, at 5 a.m. the following morning and explained to him what had happened. In his own words he had this to state:

**“He asked if I had identified the mugger. I had in fact identified him. I saw him clearly during the incident. It was someone I knew well. He is called Kinuthia. This Kinuthia was known to me only as Kinuthia who is usually around Kahuruko Shopping Centre. My phone was still on. I asked Wahotho to take me to spy at Kinuthia’s home if we could find him. I knew Kinuthia’s home.”**

The two witnesses went to the appellant's house which they found padlocked from outside. Upon hearing a radio playing inside, **PW3** kept watch as **PW1** went to fetch the police. On their way back with the police, **PW3** called to inform him that the appellant had left his house and was moving towards Kahuruko shopping Centre.

21. At Kahuruko the police arrested the appellant and when asked to take them to his house, he led the police back to the same house where **PW1** and **PW3** had traced him and where **PW3** had seen him emerge from. It was a two roomed structure and there was no one else inside it since the appellant had to unlock the door to let in the police himself. A search in the house yielded **PW1**'s torch, phone, wallet and several documents including bank cards and a voter's card all in the names of **PW1**. The police also recovered the implement used to injure **PW1**. **PW1** also testified that a second phone was recovered from the appellant but it did not belong to him.

22. **PW1**'s evidence on recovery was corroborated by **PW6**, P.C. Kipkemei of Githunguri Police Station who made the recovery. **PW6** also testified that **PW2** identified the second phone, a Nokia 2626 recovered from the appellant as the phone stolen from him during the robbery when he came to the police station to report the robbery, that same day.

23. In our assessment of the evidence we found that it was fortified by the doctrine of recent possession which is applicable in these circumstances. We subjected this case to the acid test in the case of **Arum vs Republic 85 of 2005 KLR [2006] Vol. I Pg 233**, which set out what a court must establish before relying on the doctrine of recent possession. In the case before us the evidence shows that the property was found in the possession of the suspect and was positively identified to be the property of the complainant. There was acceptable evidence as to search of the appellant and recovery of the stolen property, from **PW1** and **PW6** respectively.

24. There was no doubt that the property was recently stolen from the complainant. Even considering the easiness with which the stolen property could move from one person to another, these goods were stolen at 10 p.m. and 11 p.m. respectively on 23<sup>rd</sup> March 2008. Shortly after 6 a.m. on 24<sup>th</sup> March 2008 **PW1** and **PW3** arrived outside the appellant's house where **PW3** kept vigil as **PW1** fetched the police. At 7.15 a.m. the appellant emerged from his house and **PW3** trailed him to the shopping centre from where the police arrested him at about 8 a.m. It was improbable that the property had changed hands in the interceding time.

25. On the appellant's contention that the learned trial magistrate was in error in rejecting his

otherwise plausible defence, we note the trial court's sentiments that the appellant's "goose was cooked the minute his movements were under watch." In our view **PW1**'s evidence that he identified the appellant at the scene of attack, and was able to track him to his home early next morning was lent credence by the evidence of recent possession and all together this evidence makes nonsense of the appellant's defence.

26. That being the case we are satisfied that the appellant was properly convicted on the two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. This appeal therefore has no merit and is dismissed. The sentence imposed upon the appellant in **count 1** shall remain in force while the sentence in **count II** is held in abeyance.

It is so ordered.

**SIGNED DATED and DELIVERED** in open court this **29<sup>th</sup>** day of **August 2013**.

**F. A. OCHIENG**

**L. A. ACHODE**

**JUDGE**

**JUDGE**