REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 6 & 8 OF 2010

(From the original Conviction and Sentence in the Criminal Case No. 3947/2006 of the Chief Magistrate's Court at Mombasa: M.K. Mwangi – SRM)

1. DOUGLAS OWIYE ONYANGO

2. ASSUMPTA S. KIVINDYO……APPELLANTS

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

The two appellants herein namely **DOUGLAS OWIYE ONYANGO** (hereinafter referred to as the 1st appellant) and **ASSUMPTA SYUWAI KIVINDYO** (hereinafter referred to as the 2nd Appellant) have jointly filed this appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The two appellants were first arraigned in court on 30th March, 2007 when they were both charged with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were given as follows:

> **"On the 15th and 16th day of October, 2006 at Tudor 4 within Mombasa District of the Coast Province, jointly robbed VICTOR KARANU MBUGUA of his DVD machine, table cloth, one radio cassette, 10 DVD discs, one iron box, 10 video cassettes, two rental receipts, six pairs of shoes, two nokia mobile phones, all valued at Kshs. 30,000/= and at or immediately before or immediately after killed the said VICTOR KARANU MBUGUA by strangulation."**

Each appellant entered a plea of *'Not Guilty'* to the charge and their trial commenced before the lower court on 3rd August, 2007. The prosecution led by **INSPECTOR KITUKU** called a total of seven (7) witnesses in support of the charge.

The brief facts of the case are as follows. **PW5 MICHAEL KARIUKI** told the court that he was a neighbour of the deceased at Tudor Estate in Mombasa. He told the court that on the evening of 15th October, 2006 he arrived home and went to his apartment. At about 10.00 p.m. he heard the deceased drive in. **PW5** peeped out through the window and saw the deceased go to his upstairs flat alone. A few minutes later he heard a loud bang from the deceased's house. **PW5** did not bother to go and check what was happening. He merely commented on the incident to his girlfriend Nthenya who was with him at the

time. The next morning of 16th October, 2006 he left to go to work. He noticed that the vehicle of accused was still parked in the car park. This struck **PW5** as odd because the accused often left for work before him. In the evening **PW5** returned home at 5.00 p.m. and found the car of the deceased still in the car park. The next day on 17th October, 2006 the housemaid of the deceased reported that deceased was not in his house. **PW5** called the school where the deceased worked as a teacher and was informed that the deceased had not reported on duty. His disappearance was reported to police and **PW5** also alerted **PW1 JANE WANGUI** a sister to the deceased.

PW1 takes up the story and states that upon being informed that her brother was missing and had not reported on duty at the school where he taught she liaised with police who had broken into the deceased's house but found nothing amiss. **PW1** also went to the house of the deceased and searched it. She found that some items were missing. As she searched the compound she noted a foul smell emanating from a septic tank. **PW1** alerted police who came and checked the septic tank. Inside was found the decomposing body of the deceased. The 1st appellant who was the caretaker was arrested. Later police returned to search the house of 1st appellant. Inside the house was the 2nd appellant who was the wife to the 1st appellant. Inside the house police recovered a table cloth, receipts for rent in the name of the deceased, a table clock, video cassette and a nokia mobile phone make 110. **PW1** who was present during the search identified all these items as belonging to the deceased. The 2nd appellant was also arrested and taken to the police station. A post mortem was conducted on the body of the deceased. Upon completion of police investigations the two appellants were both arraigned in court and charged with the offence of Robbery with violence.

At the close of the prosecution case each appellant was found to have a case to answer and was placed on their defence. They both gave sworn defences in which they each denied any and all involvement in the robbery and death of the deceased. On 31st December, 2009 the learned trial magistrate convicted each appellant of the offence of Robbery with violence and sentenced each one to death. Being aggrieved the appellants both filed this appeal. At the hearing of the appeal each appellant opted to rely entirely upon their written submissions which with the leave of the court had been duly filed. **MR. MUREITHI**, learned state counsel opposed the appeal on behalf of the respondent state.

As confirmed by the learned state counsel this is a case in which there was no eye-witness. Nobody appeared to testify in the trial court regarding exactly what happened inside the apartment of the deceased on the material night. **PW5** is only able to state that on the evening of 15th October, 2006 at 10.00 p.m. he saw the deceased walk into his apartment alone. He later heard a suspicions bang but did not bother to check what was happening. Therefore there is evidence that the deceased was alive on the night of 15th October, 2010. That is the last time the deceased was seen alive. The next day **PW5** did not see the deceased and neither is there evidence that any other witness saw him alive on 16th October, 2010. Indeed **PW5** states that he was surprised to see the deceased's vehicle still parked at the parking bay when he left for work. From this it is quite safe to assume that the deceased met his untimely end on the night of 15th/16th October, 2010. Evidence on the cause of the deceased's death is given by **PW6 DR. MANDALYA** who was by then the Coast Provincial pathologist based at the Coast General Hospital. He told the court that he performed an autopsy examination on the body of the deceased. He noted that the hands had been tied at the wrists. An internal examination revealed a *"spiral upper cervical spinal fracture"*. The doctor opined that the cause of death was *"axphyxia due to strangulation and associated fracture"*. This was expert medical evidence which was neither challenged nor controverted by the appellants.

Close to the time when the body of the deceased was recovered in a septic tank, his sister **PW1** visited his house after the deceased had been reported missing. She searched her brother's flat and noticed that some items were missing. In her evidence at page 42 line 21 **PW1** says:

> **"I went back to the house, the late Victor Mbugua used to live alone. I picked keys from Kariuki, where police had left it. I went to check around. I saw TV, DVD and iron box was not there….."**

PW1 told the court that she often used to go to the flat of her late brother to cook and clean for him therefore she was very familiar with the contents of the flat. Once again given that there is no evidence that deceased had earlier reported any theft from his house it is safe to assume that these items were stolen from the house of the deceased on the material night. Thus it is clear that the deceased was killed in the course of a robbery from his house. This makes this incident a Robbery with Violence as envisaged by section 296(2) of the Penal Code.

We take note again of the fact that there was no eyewitness to the incident. Thus the evidence against the appellants is circumstantial and largely revolves around evidence of recovery of the stolen items. **PW1** told the court that as he walked around the compound searching for the deceased, she met the 2nd appellant who was the wife of the 1st appellant (the caretaker) washing clothes outside her house. After the body of the deceased was recovered in a nearby septic tank the police searched the house occupied by the two appellants. This search was conducted in the presence of **PW1**. Inside the house police recovered a table clock, two receipts for payment of rent in the name of the deceased, one video cassette bearing the name of the deceased *'Victor Mbugua'* and a mobile phone make Nokia 1110. **PW2 PC JOHN MUTINDA** of Makupa police station confirms that he did conduct a search in the house of the two appellants and he further confirms recovery of the items in question. **PW1** identified the recovered items as belonging to the deceased. **PW1** was able to retrieve the documents for the mobile phone i.e. receipt and warranty from the house of the deceased. The 2nd appellant however insisted that the mobile phone belonged to her.

The prosecution relies on the doctrine of *'recent possession'* in order to link the appellants to this crime. The key ingredients for reliance on the doctrine of *'recent possession'* were set out in the case of **ARUM VS. REPUBLIC [2006] E.A. 10** where the Court of Appeal held as follows:

> **"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is, there must be positive proof, first, that the property was found with the suspect, secondly, that the property is positively identified as the property of the complainant, thirdly, that the property was stolen from the complainant, and lastly the property was recently stolen from the complainant."**

Therefore before the doctrine of *'recent possession'* can be relied upon in a criminal case the prosecution must adduce evidence to prove the following:

1. That the property alleged to have been stolen was found in the possession of the accused.
2. That the property so recovered is proved to belong to the complainant, and,
3. That said property was recently stolen from the complainant.

On the question of possession, both **PW1** and **PW2** have testified that a mobile phone as well as receipts and a video cassette belonging to the complainant were recovered in the house occupied by the two appellants. The fact of the recovery of the items in that house is proof enough of their possession by the appellants. The appellants have not in their defence denied the recovery of the items from their house. Instead they claim that the mobile phone and the clock were their own properties.

The next question this court needs to determine is whether there is sufficient proof that the recovered items belonged to the complainant (who in this case was the deceased). With respect to the rent receipts in the name of the deceased the 1st appellant has explained that being the caretaker of the building he would often be in possession of receipts to be issued out to the tenants. We do agree with the finding of the trial magistrate that this fact is a reasonable explanation for the appellants' possession of these receipts.

With respect to the video cassette **PW1** and **PW2** confirm that it bore the title *'Escape from sohibor'*. **PW1** the sister to the deceased identified the video cassette as one which she often saw in the house of the deceased and that she at times did borrow it. Further the cassette bore the name *'Victor Mbugua'* which was the name of the deceased. This is proof enough and the appellants offered no explanation of how they came to have in their home a video cassette belonging to the deceased. They do not even allege that

the deceased lent them the cassette to watch.

Lastly, there is the question of the Nokia mobile phone recovered in the home of the appellants. The 2nd appellant claimed that the mobile phone was her property and that it had been given to her by the 1st appellant. However, **PW1** was able to retrieve the receipt and warranty for the mobile phone from the house of the deceased. **PW3 CORPORAL DANIEL OTIENO** who was the investigating officer told the court that he compared the serial number on the receipt to the one appearing on the mobile phone and found that they matched. Further, when police scrolled through the mobile phone they found contacts of the deceased relatives and friends including the contact of **PW1** herself. Why would the 2nd appellant be in possession of a mobile phone having the deceased's contacts? The 2nd appellant did not know **PW1** thus would not have needed to save the contacts for **PW1** in her phone. It is quite clear that this mobile phone actually belonged to the deceased and that is why it bore his contacts. We therefore find as a fact that the mobile phone and video cassette found in the appellants house actually belonged to the deceased.

These items had been stolen from the deceased on the night of 15th/16th October, 2010. Recovery was made on 19th October, 2010 barely three (3) days after the theft and murder of the deceased. This certainly amounts to recent possession. We agree again with the learned trial magistrate that this set of facts leads to the *'rebuttable presumption'* that the appellants were actively involved in the theft of these items and the murder of the deceased. The appellants have not in their defences rebutted this presumption at all. They are unable to give any reasonable explanation for their possession of the deceased's stolen property. As such we are satisfied that guilt by way of circumstantial evidence has been proved.

Lastly, the appellants did raise the issue of the fact that a wrong or erroneous OB number was cited on the charge sheet. This is not a fatal defect – it is more of a clerical error and does not invalidate the charge they face. On the whole we find that the prosecution did prove their case to the standard required in law. The appellants' conviction was sound and we do confirm the same.

The appellants were each given an opportunity to mitigate after which the death sentence was passed on them. We note that the robbery was particularly aggravated in that a human life was lost as a consequence. We are satisfied that the sentence imposed was both lawful and appropriate and we do uphold the same. Finally, this appeal fails in its entirety.

Dated and delivered in Mombasa this 28th day of August, 2013.

M. ODERO **M. MUYA**

JUDGE **JUDGE**