



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEALS NO. 66 & 65 OF 2012 (CONSOLIDATED)

1. ANDREW NTHIWA MUTUKU

2. MUSYOKA MULI KALYAKA APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate M.K.N. Nyakundi PM delivered on 4/5/2012 in Kangundo Principal Magistrate Criminal Case No. 506 of 2010)

(Before B.T. Jaden and J.M Ngugi JJ)

J U D G M E N T

1. The 1st Appellant, **Andrew Nthiwa Mutuku** and the 2nd Appellant, **Musyoka Muli Kalyaka** were charged with two counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the offence in the 1st count were that on the 31st day of October, 2010 at **Mwala Trading Centre** in **Mwala District** within **Machakos County** jointly with others not before court, while armed with offensive or dangerous weapons namely Patchet firearm serial number **KR 20430** robbed **Duncan Kimanthi Muindi** cash Kshs.160,000/=, assorted airtime scratch cards of **Safaricom, Zain** and **Yu**, sixty three satchets of assorted cigarettes all valued at Kshs.212,130/= and at or immediately before or immediately after the time of such robbery shot dead **Eunice Mbula Kimanthi**.

2. The particulars of the offence in the 2nd count were that on 31st day of October, 2010 at **Mwala Trading Centre** in **Mwala District** within the **Machakos County**, jointly with others not before court while armed with offensive or dangerous weapons namely Patchet firearm serial number **KR 20430** robbed **Mary Syombua Mutua** cash Kshs.400/= and one mobile phone make **Nokia 2600** all valued at Kshs.4,900/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said **Mary Syombua Mutua**.
3. In the 3rd count the 1st Appellant was further charged with the offence of possession of a firearm contrary to **section 89 (1)** of the **Penal Code**.

The particulars of the offence were that on the 31st day of October, 2010 at **Koma Shrine** area in **Matungulu District** within the **Machakos County**, without reasonable excuse had in his possession a firearm namely Patchet serial number **KR 20430** in circumstances which raised reasonable presumption that the said firearm had recently been used in a manner prejudicial to public order.

4. In the 4th count, the 1st Appellant was charged with the offence of possession of ammunition contrary to **section 4 (1)** of the **Firearms Act Cap 114 Laws of Kenya**.

The particulars of the offence were that on the 31st day of October, 2010 at **Koma Shrine** area in **Matungulu District** within **Machakos County**, was found being in possession of eleven rounds of ammunition of 9mm calibre without a firearm certificate.

5. The Appellants pleaded not guilty. After a full trial, the 1st and 2nd Appellants were convicted in all the counts as charged and sentenced to death in count I and II and the sentence in count II and IV held in abeyance.
6. The prosecution case was that on the material day at about 7.15 p.m. PW1 **Duncan Kimanthi Muindi** and his wife **Eunice Mbula Kimanthi** (deceased) were at their wholesale shop at **Mwala Township** when robbers struck and demanded money from them. The robbers wore headgear which covered their faces. One of them was armed with a gun and started threatening to shoot. They demanded money. The couple gave out Kshs.160,000/= which was in the shop, a carton of assorted cigarettes, airtime cards and some receipts.
7. PW2 was lead out of the shop by one of the attackers and shortly thereafter he heard two gun shots. PW1 went back to the shop and found his wife on the floor of the shop. The wife had chest injuries and was bleeding from the mouth. PW1 screamed for help and neighbours assisted him in taking the wife to the hospital. She was pronounced dead on arrival.
8. The same night at about 9.30 p.m. police officers manning a road block at **Koma Shrine** area in **Kangundo** stopped motor vehicle registration Number **KAL 435N**. The motor vehicle had three occupants inside. The 1st Appellant who was the driver of the said motor vehicle was arrested but two other people who were in the motor vehicle fled into the darkness. A gun was recovered from a bag that was in the motor vehicle. The gun was loaded with eleven (11) rounds of ammunitions. Two jumpers, a headgear, rain coat, jacket and a spanner were also found inside the bag. A carton containing assorted cigarettes was found in the motor vehicle's boot. The 1st Appellant and the exhibits were escorted to the police station. A cell phone and scratch cards recovered from the motor vehicle linked the recoveries to the scene of robbery at **Mwala Township**.
9. In the course of the investigations, the 1st Appellant lead the police officers to **Mbilini** area where they recovered more scratch cards and two tins of washing detergent and some receipts. During the investigations the 1st Appellant mentioned two accomplices and gave their cell phone numbers to the police officers. The 2nd Appellant was tracked through a tip off given to the police officers by an informer. The cell phone line company provided printouts for the 2nd Appellant's telephone line.
10. The gun ammunition and the spent cartridges collected from the scene were taken to the ballistics expert for examination. The gun and ammunition were certified to be a firearm and ammunition as provided for under the **Firearms Act**. After the investigations the 1st and 2nd Appellants were charged with the offences herein.
11. In his defence, the 1st Appellant gave a sworn statement. He did not call any witnesses. The 1st Appellant described himself as a taxi driver in **Nairobi**. He stated that on the material date at about 5.30 p.m. he received a telephone call from a customer who he picked from **Tala Township** at about 8.30 p.m. The customer was accompanied by another man and the Appellant was to ferry them to **Nairobi**. They came across a police road block in **Koma** market. The police officers stopped them and checked the boot of the motor vehicle. The 1st Appellant was told to surrender and he raised his hands up. He was searched and the police took his cell phone, wallet, identity card, voters card, two ATM cards, driving licence and cash Kshs.6,000/=. The 1st Appellant's hands were tied up and he was made to lie down on his stomach. After about thirty minutes the 1st Appellant was escorted to the police station and subsequently charged with the present offence.

12. The 2nd Appellant in his defence case gave sworn evidence. No witnesses were called. He stated that he owns a shop and a bar in **Mwala** area, that on 8/11/2010 he was in **Chumvi** area of **Machakos County** where he had gone to buy goods for his shop. While he was at the bus stage a police officer approached him and handcuffed him and escorted him to **Machakos Police Station**. He was later transferred to **Masii Police Station** then to **Kangundo Police Station** where he was charged with the present offence. The 2nd Appellant denied that he knew the 1st Appellant.
13. The trial magistrate relied essentially on the doctrine of recent possession and the cell phone communication records in arriving at the convictions. The defence cases were found unconvincing.
14. The appeals by the 1st and 2nd Appellant were consolidated and heard as one. This judgment is therefore in respect of both appeals.
15. The Appellants were dissatisfied with the conviction and sentence and appealed to this court. The grounds of appeal can be summarized as follows:-
 - **That the evidence of the prosecution witnesses was contradictory inconsistent, unreliable and lacked corroboration.**
 - **That crucial witnesses were not called.**
 - **That no identification parade was conducted.**
 - **That the prosecution case was not proved beyond reasonable doubt.**
 - **That the trial magistrate shifted the burden of proof to the Appellants.**
 - **That the defence case was rejected without any valid reasons.**
16. During the hearing of the appeal, each of the Appellants relied on their written submissions which basically expounded on the grounds of appeal.
17. **Ms. Maingi** the State Counsel opposed the appeal. The doctrine of recent possession was relied on. The recovery of the firearm and ammunition from the motor vehicle that the 1st Appellant was driving was also relied on. In regard to the 2nd Appellant, it was pointed out that he was mentioned by the 1st Appellant and that the cell phone communications linked him to the other perpetrators of the offence.
18. This being a first appeal, we are duty bound to re-evaluate the evidence and the record afresh and come to our own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*
19. The witnesses from the scene are PW1, **Duncan Kimanthi Muindi**, the owner of the shop where the robbery took place, a neighbour, PW2 **Mary Syombua Kiio** and PW3 **Elizabeth Mwelu Mutua** a domestic worker at the home of the victims of the robbery. The attackers had covered their faces. The lights at the shop were also switched off at some point. None of the aforesaid witnesses was able to identify the robbers.
20. There is however no doubt that the robbery took place. PW1 the shop owner narrated to the court how he was in his shop with his late wife when the attack took place. It is clear from the evidence of PW1 that they were robbed of Kshs.160,000/= and the aforesaid goods and PW1's wife shot dead during the robbery. The neighbour (PW2) and the house help (PW3) were within the vicinity at the material time and corroborated PW1's evidence.
21. The evidence of the police officers at the road block, that is, PW4 **P.C. Geoffrey Ombati** and PW5 **P.C Philip Omayo** establishes that the 1st Appellant was stopped at the roadblock while driving motor vehicle registration **KAL 435** and was in the company of two other men. It is clear from the evidence of these two police officers that the firearm and eleven (11) rounds of ammunition were found in the said motor vehicle. The evidence of PW6 **C.I.P Alex Mudindi Mwandawiro**, the ballistics' expert confirmed that the gun and ammunitions recovered were indeed firearm and ammunition as provided for in the **Firearms Act Cap 114 Laws of Kenya**. The cartridge recovered from the scene of robbery was found to have been fired from the recovered gun.
22. PW7 **Ag. SSP Shem Nyamboki** and PW8 **Cpl. Henry Githinji** the investigating officers gave a corroborative account of evidence that the 1st Appellant led them to **Mbilini** area where they recovered two detergent tins, receipts, airtime cards and rubber bands. These items and the cigarettes were identified by PW1 as some of the properties he was robbed of. PW1 also

- identified the gun found in the motor vehicle in question as similar to the one he saw the robbers with. PW2 identified her cell phone which was recovered from the motor vehicle in question. PW2 identified the cell phone by the sim card and the data in the phone which included her own photograph as the screen saver.
23. The 1st Appellant did not deny having been stopped while driving the motor vehicle in question. What the 1st Appellant contends is that he was a taxi driver and that he had been hired by a customer to ferry him from **Tala to Nairobi**. During cross-examination, the 1st Appellant stated that he did not see his customers carrying anything and nor was he shown the firearm at the scene of arrest.
24. The evidence of PW5 and PW6 the arresting officers shows that they found a bag and a carton of assorted cigarettes from the motor vehicle. As the driver of the motor vehicle, the 1st Appellant would at least know whether he opened the boot of the motor vehicle for the carton of cigarettes to be placed there. The learned trial magistrate disbelieved the 1st Appellant's evidence that he was a taxi driver. As the court that heard and saw the witness, we have no reason to disagree with the learned trial magistrate.
25. PW7 and PW8, the investigating officers, link the 1st Appellant to the further recovery of more goods from **Mbilini** area. The goods recovered at the scene of arrest and from **Mbilini** area have been identified by PW1 and the phone identified by his neighbour (PW2) as the properties they were robbed of. PW4 and PW5 the arresting officers and PW7 and PW8 the investigating officers did not know the 1st Appellant before. There is no reason why the said police officers would plant the said items on the 1st Appellant. We do not find the defence raised by the 1st Appellant convincing in view of the strong prosecution evidence against him.
26. In **Arum –vs- Republic (2006) 1 KLR 233**, at **page 237** the Court of Appeal stated as follows with regard to the application of the doctrine of recent possession:-
- “In our view, before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must positive proof first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly; that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as of time, as has been stated over and over again, will depend of the easiness with which the stolen property can move from one person to the other.”**
27. The 2nd Appellant was arrested following a tip off by a police informer according to the evidence of PW7 the investigating officer. The printout of the cell phone number **0713-332-098** which was given to the investigating officer by the informer was obtained from **Safaricom Limited**. The same showed that the 2nd Appellant had been in communication with one of the suspects by the name **Kaloki**. The 2nd Appellant was tracked and arrested through the cell phone number that was given out by the police informer to the investigating officers.
28. Being mentioned by a police informer without any other evidence incriminating the 2nd Appellant does not sufficiently connect the 2nd Appellant with the offences herein. The tip off by the informer only lead to the arrest of the 2nd Appellant. The 2nd Appellant was not arrested with anything in his possession. The cell phone printouts only show communication with a suspect who is yet to be arrested.
29. The appeal by the 2nd Appellant has merit and succeeds. Consequently we allow his appeal, quash the conviction and set aside the sentence. The 2nd Appellant is at liberty unless otherwise lawfully held.
30. The appeal by the 1st Appellant has no merits and fails. Consequently we uphold the convictions in the count 1-4. The death sentence in Count 1 is upheld. The sentences in Count 2, 3 and 4 are held in abeyance.

.....

B. THURANIRA JADEN

JUDGE

.....

J.M. NGUGI

JUDGE

Dated and delivered at Machakos this 15th day of October 2013.

.....

B. THURANIRA JADEN

JUDGE