



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 84 OF 2007

STANLEY KIARA KALII APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate E.K. Makori SRM delivered on 3/5/2007 in Kitui Principal Magistrate Criminal Case No. 683 of 2006)

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

J U D G M E N T

1. The Appellant, **Stanley Kiara Kalii** was charged and convicted of two counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

In Count I, the particulars of the offence were that on the 30th day of May 2006 at about 10.00 p.m. at **Imuatine village, Kawala Sub-location, Kaliku Location** in **Kitui District** of the **Eastern Province**, while armed with offensive weapons namely pangas and metal rods jointly with another not before court robbed **Charles Makathu Musinga** Kshs.78,000/= and one electronic watch make **Casio** valued at Kshs.200/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence on the said **Charles Makathu Musinga**.

In Count II, the particulars of the offence were that on the 31st day of May 2006 at around 11.00 a.m. at **Kabati market, Zombe Location** in **Kitui District** of the **Eastern Province**, otherwise than the course of Robbery dishonestly handled cash Kshs.19,000/= knowing or having reasons to believe the same to be stolen or unlawfully obtained.

2. The prosecution case was that on the material day at about 10.00 p.m, the complainant in Count I, **Charles Makathu Musinga** was asleep in his bedroom. His wife PW2, **Nzemi Makathu** the complainant in Count II was outside preparing to take a bath. Three people who had torches and were armed with a panga and an iron bar entered their compound. One of them was left outside keeping guard over the complainant in Count II while the other two entered the house and proceeded to the bedroom and directed torch light into the eyes of the complainant in Count I and demanded money from him. The complainant in Count I had sold four oxen in **Zombe market** that very day. He gave them Kshs.78,000/=.
3. The robbers then led the complainant in Count II into the house and demanded for more money while threatening to kill. The complainant in Count II had Kshs.10,000/= from the church

collections which she handed over to the robbers. The robbers searched the house then tied up the complainants before leaving. The complainants later called for help. The complainant in Count I realized his wrist watch was missing. The complainant in Count II had also lost a wrist watch and a pair of slippers.

4. The complainants mentioned one **Museveki Musava** who was known to them and two others who were not known to them as their attackers. A report was made to the police. The neighbours and the police officers mounted a manhunt for the attackers. Footprints followed lead to **Kaliku area**. Inquiries made lead to **Kabati in Zombe area**. The three assailants were spotted and surrounded and arrested. One of them tried to escape and was lynched by the mob.
5. A search was carried out. From the Appellant they recovered a panga, a wrist watch and Kshs.19,000/=. Kshs.19,000/= and a torch was recovered from the other one and Kshs.12,000/= from the one who was lynched.

The Appellant and the other person he was arrested with were escorted to the police station where they were jointly charged.

6. In his defence, the Appellant gave sworn evidence. No witnesses were called. He stated that he carries out business in **Mwingi, Nuu, Zombe, Miwani and Nairobi**. That at the time of his arrest on 31/5/2006 at about 11.00 a.m he had gone to **Kabati** market. He had Kshs.19,200/= but had used Kshs.600/= by the time he was arrested and this case framed upon him. He was beaten at the time of arrest until he lost consciousness. When he came to the next day his money and jacket were missing. He denied the offences and stated that the Kshs.19,000/= was his money for his business.
7. After a full hearing, the trial court arrived at the conclusion that the prosecution case was proved beyond reasonable doubt. The trial court relied on the evidence of identification and the doctrine of recent possession. He did not find the defence case convincing. The Appellant was convicted and sentenced to death in both Count I and II.
8. 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*.
9. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

- v. **The evidence of identification was not free from error or mistake.**
- v. **The evidence of recovery of some of the exhibits did not link the Appellant to the commission of the offence.**
- v. **The evidence adduced against the Appellant was inconsistent and not credible.**
- v. **The Appellant was arrested before the offence took place.**
- vi. **The trial magistrate erred when he dismissed the defence case.**

10. The Appellant in his written submissions essentially expounded on the grounds of appeal.

Ms. Maingi for the State opposed the appeal. She submitted that the Appellant was positively identified and also arrested with some of the stolen items.

11. The complainants (PW1 and PW2) who are husband and wife gave a corroborative account of evidence detailing how they were attacked by three men on the night of 30/5/2006. From their evidence, there is no doubt that they were robbed of their aforesaid properties. The complainant in Count I explained that he had sold four oxen at **Zombe** market. The complainant in Count II testified that she had Kshs.10,000/= amount of collections from the church. PW1 and PW2 described their ordeal, stating that the three men had torches and were armed with a panga and a metal bar and threatened them during the robbery then tied them up before leaving.

The main issue for this court to grapple with whether the Appellant was one of the robbers. Both PW1 and PW2 testified that there was light from a hurricane lamp that was in the house and they could see well. Indeed the evidence of both PW1 and PW2 is that they were able to recognize one of the robbers as a neighbour by the name **Museveki Musava**. PW1 stated that the lamp was at the wall while PW2's

evidence is that the lamp was at the corridor but the door was open. Both witnesses also described the robbers as having used torch light. According to PW1 the torch light was used to flash all over the house. PW1's further evidence was that at some point the Appellant directed the torch light on himself and asked PW1 if he knew him. The encounter between the complainants and the attackers was in close proximity. There was time for the complainants to observe them during the handing over of the money, the conversations held and the flashing around the house with torch light by the attackers. We are therefore satisfied that the circumstances of the offence were conducive to positive identification. We note that this was evidence of recognition which is more reliable than that of mere identification. **"A case of recognition, not identification is more satisfactory, more assuring and more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other."** (See *Anjoni –vs Republic*).

12. The evidence of identification was buttressed by the evidence of the recovery of the stolen goods. PW3, **John Musembi**, a neighbour who went to the complainants' rescue and who participated in tracking down the robbers narrated to the trial court how they followed footprints and made inquiries which lead them to **Kabati** area where they caught up with the robbers and arrested them and one of them who was known to the complainants was lynched by the mob. According to PW3, the Appellant was arrested with a panga and with the PW1's wrist watch. PW3 described the panga as having a black rubber band and further stated that the watch marked with the initials **"CM"**.
13. PW7 and **APC Mohamed Difo** and PW8 **AP Vitalis Suma Muanga** and two of the Administration Police officers joined the complainants' neighbours in the manhunt for the robbers. The two police officers gave evidence on how the robbers were found in **Kabati** area and mob justice administered on them. The two police officers have given evidence that corroborates the evidence of PW3 in relation to the recovery. According to PW7, they recovered Kshs.19,000/=, a watch and a panga from the Appellant.
14. PW4 **Wanza Munyu** and the complainant in Count I (PW1) found the robbers under arrest. They found the money having been recovered. PW1 identified the panga recovered at the scene as the one used to hit him and to break into a box in his house. He pinpointed that the panga looked new and had a rubber band. He identified the wrist watch make **Casio** as his and pointed out that he had labeled the same.
15. The **Investigating Officer**, PW6 **PC Erick Makokha** produced the recovered items as exhibits. He produced cash Kshs.38,000/=, a panga, a torch and a wrist watch make Casio with the initials **"CM"** inscribed on the same. He also pointed out that the complainant's initial were **"CM"** and that the complainant identified the watch by the said initials.
16. The defence raised by the Appellant that he was carrying out his business of buying and selling chicken when he was arrested and framed up with this case is not convincing. There are no reasons that emerge from the record to show why anybody would want to frame him up. It was clear from the evidence of the complainants that they did not know him before. With the overwhelming evidence from the prosecution witnesses, the trial magistrate was right in arriving at the convictions. We are satisfied that the Appellant was found in possession of some of the properties that had been recently stolen from the complainants. The Appellant gave no explanation for the same.
17. 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."

18. The conviction was based on sound evidence. We uphold the same. On sentence, the Appellant

was sentenced to death in both Count I and II. However, the sentence in Count II is held in abeyance.
19. Subject to the above, the appeal has no merits and is dismissed.

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B. THURANIRA JADEN

J.M. NGUGI

JUDGE

JUDGE

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

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B. THURANIRA JADEN

JUDGE