REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 84 OF 2012

PAUL MULINGE .....1st APPELLANT

FARUK GITONGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Consolidated with

CRIMINAL APPEAL NO. 83 OF 2012

FARUK GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 1915 of 2011 in the Chief Magistrate's Court at Garissa - J. N. Onyiego (SPM) on 8th August, 2012)

JUDGMENT

Paul Mulinge (the 1st Appellant) and Farouk Gitonga (the 2nd Appellant) were the 2nd and 1st accused persons respectively in Garissa Chief Magistrate's Court Criminal Case No. 1915 of 2011. They had in the main count been charged with robbery with violence contrary to Section 296(2) of the Penal Code; the particulars being that on 31st October, 2011 at Village Two, Bura Location in Tana North District within Tana River County being armed with an offensive weapon namely a knife they jointly robbed Pius Munyua of his motorcycle Registration No. KMCM 822F valued at kshs.82,000/=, a Nokia 6080 Mobile phone valued at Kshs.4,500/ and cash Kshs.1,600/= and at the time of the robbery threatened to use actually violence to the said Pius Munyua.

Each appellant was faced with an alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code. The 2nd Appellant was said to have on 3rd November, 2011 been found with the complainant's stolen phone knowing or believing that the same had been stolen or unlawfully obtained. As for the 1st Appellant it was alleged that on 3rd November, 2011 otherwise than in the course of stealing dishonestly received and retained one motorcycle ignition key knowing or having reason to believe that the same was stolen or unlawfully obtained.

At the conclusion of the trial the magistrate found the two appellants guilty in the main count. Each

appellant was sentenced to death. The appellants being aggrieved by the decision of the trial court have now appealed to this court.

When the matter came before us on 15th October, 2013 Mr. Onono for the 1st Appellant indicated to us that he would rely on the memorandum of appeal filed by the 1st Appellant in person on 17th August, 2012. In our view the eight grounds of appeal can be summarized as follows:-

a. THAT 1st Appellant was convicted without proper identification;
b. THAT the 1st Appellant was convicted without evidence that he was in possession of the property allegedly stolen from the complainant and without evidence that the said property indeed belonged to the complainant;
c. THAT the prosecution evidence used to convict the 1st Appellant was contradictory; and
d. THAT the trial court failed to consider the fact that there was a grudge between the 1st Appellant and the prosecution witnesses.

The 2nd Appellant's memorandum of appeal was filed on 17th August, 2012. He filed supplementary grounds of appeal on 30th September, 2013. The 2nd Appellant's grounds of appeal are similar to those of the 1st Appellant save for the fact that the 2nd Appellant faults the trial magistrate for failing to consider his defence before convicting him.

Mr. Mulama for the state opposed the appeal. He submitted that the magistrate warned himself before relying on the evidence of the complainant as relates to the identification of the appellants. Mr. Mulama submitted that even without the evidence of identification, the trial court had correctly convicted the appellants relying on the fact that the appellants had been found with the complainant's property three or four days after the robbery.

It is our duty as the first appellate court to reconsider and evaluate the evidence adduced in the trial court before reaching our own conclusion. In doing so we must take cognizance of the fact that we did not see or hear the witnesses when they testified. In saying this we are guided by the decision in **OKENO v. REPUBLIC [1972] E.A. 32** where the Court of Appeal outlined the duty of the first appellate court in the following words:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post,* [1958] E.A. 424."

In our view two issues emerge from this appeal namely whether the complainant identified any or both of the appellants at the time of the robbery and whether the doctrine of recent possession was correctly applied in this case.

The only evidence of identification was that of the complainant who testified as PW1. He told the court that on 30th October, 2011 at around 7.30 p.m. he was at Bura Manyatta within Bura Town when he was approached by two customers who requested him to transport them to Village Three using his motor bike. They agreed on fare of Kshs 500/- to be paid on arrival. They started the journey and between Village Two and Village Three the 1st Appellant asked him to stop so that he could answer to a call of nature. When he stopped the two appellants alighted. That is when the 1st Appellant grabbed the ignition key. The 2nd Appellant drew a knife and aimed it at him and told him to surrender the motorbike. The complainant complied. They rode away leaving him at the scene. He proceeded home and the following

day he reported the incident to the police. He told the court that he identified the appellants using moonlight, light from his motor cycle at the time they were negotiating the fare and light from motor vehicles passing by.

When the appellants were arrested he identified them as the people who had robbed him. The case that speaks clearly on the issue of identification is **REPUBLIC v. TURNBULL [1976] 3 All ER 549** where it was held that the circumstances under which a witness made the identification must be examined closely. In this regard the court should ask itself the following questions:-

"How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

We have asked ourselves questions similar to the above, in relation to the evidence of the complainant, as concerns the identification of the Appellants. It is noted that the complainant informed the court, upon being cross-examined by the 2nd Appellant, that he saw the appellants for the first time on the material night. His source of light was the headlamp of his motorbike and passing vehicles. The complainant admitted that as a boda boda transporter he never knew all his customers. There was no particular reason why he should have taken keen interest in the physical appearance of the appellants. He had no clue about their intentions otherwise he would not have accepted to transport them. With the circumstances prevailing on the material night we would hesitate to find that the complainant positively identified the appellants on the material night. We note that the complainant testified that when the appellants were arrested he recognized them as the people who had robbed him. The complainant may have been telling the truth but there is the flash of doubt that crosses our minds.

We also note that the appellants were allegedly arrested with the complainant's stolen items. The complainant's brain was naturally tuned into connecting the appellants with the robbery even if they were not the people who robbed him. If, the conviction of the appellants was based on the issue of identification alone, we would have found the conviction unsafe. There is, however, the evidence of the recovery of the complainant's stolen items from the appellants.

In order for the doctrine of recent possession to be used in arriving at a conviction, certain things must be proved. The Court of Appeal in **ISSAC NG'ANG'A KAHIGA alias PETER NG'ANG'A KAHIGA v. REPUBLIC**, Criminal Appeal No. 272 of 2005 identified those ingredients in the following words:-

"....It is trite that 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 be positive proof, first: that the property was found with the suspect, secondly that the 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 to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

We will proceed to apply the above ingredients to the instant case.

In his testimony the complainant told the court that on 3rd November, 2011 his friends told him that a young man had been looking for spanners to use to dismantle a motorcycle in Village Two. They proceeded, with his friends, to where the young man slept. Among the complainant's friends was PW4 Timothy Cherot Nyongesa alias Timona who had told him that one of the young men wanted to sell him a mobile phone. When they arrived at the house they told PW4 to go and pretend he wanted to buy the phone. PW4 called the 2nd Appellant who emerged from the house and after talking with PW4 he produced the mobile phone which the complainant identified as his stolen phone. They then pounced on

the 2nd Appellant. Inside the house they saw the 1st Appellant holding a motorbike key holder. He also identified the ignition key of his motorbike. They arrested the two appellants and led them to the village elder. They at the same time telephoned police officers who came to the scene.

When the police officers arrived, they asked the appellants to produce the motorbike. The appellants claimed the motor bike was in the house of one Muchiri before changing the story and saying that it was in the house of one Njau. A search was mounted and the motorbike which had been dismantled was found concealed about ten metres from the house in which the appellants were arrested. The complainant identified the parts using the engine and frame numbers.

PW2 Johnstone Obwoge Mogeri, PW3 Joseph Kople Mboga, PW4 Timothy Cherot Nyongesa and PW5 Musa Mbudu all told the court that they were present during the arrest of the appellants. They confirmed that the complainant's stolen items were recovered as narrated to the court by the complainant.

PW6 Police Constable Cyrus Korir and PW7 Corporal Shadrack Olang told the court that they rearrested the appellants from members of the public and recovered a phone and an ignition key from them. After interrogating them the appellants were reluctant to show them where the motorbike was. They conducted search and recovered the complainant's dismantled motorbike from a shrub.

In his defence the 2nd Appellant who testified as DW1 told the court that on 3rd November, 2011 he was at Bura when he met his friend the 1st Appellant who had arrived from Mombasa. The 1st Appellant told him he had a problem with accommodation and he decided to accommodate him. At around 9.00 p.m. they heard a knock on the door and the 1st Appellant's name was called. The 1st Appellant opened the door and he suddenly heard him scream. People were trying to arrest the 1st Appellant. He tried intervening and that is when PW4 removed an ignition key and phone from his pockets. They were beaten as the complainant insisted that he only wanted his motorbike. Police officers later came and found them in the house of the village elder. That is when PW4 handed over the phone and the ignition key to the police. As they were being taken to the police station a call was made to the police officers informing them that the dismantled motorbike had been recovered. They were taken back and from the place where the motorbike parts were recovered the police officers traced footprints to the house of one Muchiri. Muchiri was arrested and he admitted having dumped the motorbike parts in the bush. Muchiri and his friend were later released after they allegedly bribed the police with Kshs.60,000/=.

The 1st Appellant who testified as DW2 gave evidence similar to that of the 2nd Appellant. He told the court that he had a land dispute with PW4.

Was any property stolen from the complainant on the night of 31st October, 2011? The evidence adduced before the trial court and which was not disputed confirmed that on the material night the complainant was violently robbed of this mobile phone, motorbike and kshs.1,600/=. He reported the incident to the police. The people who robbed the complainant were armed with a knife which in the circumstances under which the complainant's property was stolen became an offensive weapon. The offence of robbery with violence contrary to Section 296 (2) of the Penal Code was thus committed.

There is also undisputed evidence that the complainant's stolen property was recovered on 3rd November, 2011. The complainant described his mobile phone in detail. He identified it by its age and a cut on the top. He also clearly identified the ignition key of his motorbike. He stated that the key had a number. The appellants did not challenge the complainant's ownership of the mobile phone, key holder and ignition key.

Were these items recovered from the appellants? The answer is in the affirmative. PW1 to PW5 described in detail how the items were recovered from the appellants. The 2nd Appellants had been looking for a market for the mobile phone. Somebody had been looking for spanners to use in dismantling a motorbike. PW7 appears to have given contradictory evidence when he stated that PW6 told him that the mobile phone was recovered from the 1st Appellant and the key was recovered from the

2nd Appellant. We note that PW6 and PW7 arrived at the scene after the appellants had been arrested and they may not be clear as to who had what. The contradiction does not change the overall picture which shows that the complainant's stolen property was recovered from the appellants.

The appellants' attempt to discredit the evidence of recovery clearly fails. It is noted that the 1st Appellant only talked about having a land dispute with PW4 during his defence but when this witness testified he never asked him any question about the alleged land dispute. The claim by the appellants that PW4 had the mobile phone and ignition key cannot be believed. How could this be possible and yet the robbers had taken them from the complainant?

We are also convinced, as the trial magistrate was, that it is the appellants who gave the name of Muchiri to the police and that is why he was arrested. The prosecution witnesses clearly testified that the dismantled motorbike was found in a bush not far from the appellants' house. We are therefore satisfied that the appellants were found with the complainant's property. The property was recovered a few days after the robbery. The appellants were in the process of disposing of the mobile phone. It cannot be said that the recovered items could have changed hands in that short period.

In our view the learned trial magistrate correctly applied the doctrine of recent possession in concluding that the appellants were guilty of robbery with violence. We find that this appeal has no merits. The appellants' appeal against both conviction and sentence fails and the appeal is therefore dismissed.

We make orders accordingly.

Signed and dated this 22nd November 2013

S. N. MUTUKU, W. KORIR,

JUDGE JUDGE

Dated and delivered this 27th day of November 2013

S. N. MUTUKU,

JUDGE