



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 124 OF 2009

EMMANUEL SUIPANU SIYANGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No. 4 of 2008 in the Chief Magistrate's Court at Nairobi – S. Muketi)

JUDGEMENT OF THE COURT

Mr. Omirera – State Counsel

VERSUS

1. Emmanuel Suipanu Siyanga (the Appellant) faced 6 counts and an alternative charge of which 5 were for robbery with violence, one for rape and alternative charge for handling stolen good, after a full trial the learned trial magistrate acquitted him of the 3rd and 5th counts on rape and proceeded to convict and sentence him on the other for of robbery with violence and handling stolen good. The charges facing the Appellant were: Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of these charges read that on the 21st day of December 2007, at oleroiemen reserve Ngong in Kajiado district of the Rift Valley province, jointly with others not before court while armed with dangerous weapons namely pistols robbed JOHN KARIUKI NDUNGU of his motor vehicle reg. KAX 637S, two mobile phones nokia and depod, lap top and cash 900/= all valued at kshs.702, 400/=. On this same day the appellant with others proceed and robbed ELIZABETH WANGU KARIUKI cash Kshs.700/=, one holy bible all valued at Kshs.1, 100/=, they robbed VICTOR NJUGUNA of his phone make Samsung C140 valued at kshs.4000/= and cash Kshs.150/=, they robbed WILLIAM CHARLES KINYANJUI of his phone make Siemens valued at kshs.2750/=and cash kshs.200/=, they robbed S A O of her motor vehicle make Nissan Patrol reg. No. **[Particulars withheld]**, 2 mobile phones make Quicktel wireless and Motorola C168, tool box and cash kshs.1700/= all valued at Kshs.1, 614,700/=. At the time of these robberies, the appellant together with others not in court at or immediately before or immediately after the time of each robbery threatened to use actual violence. On this same day the appellant while in the company of others not before court committed the act of inserting his male organ into the female genital organ of S A O which caused penetration. On the same day the appellant, otherwise than in the course of stealing, dishonestly received or retained, tool box, maasai sword, mobile phone make huawei knowing or having reason to believe them to be stolen.

2. On the 21st December 2007 john Kariuki PW1) and his wife Lydia Wanjiku (PW2) were driving motor

vehicle reg. No. KAX 637S when they were accosted by robbers and robbed of their personal effects. They were then ordered to drive and made to block the vehicle of PW4 who was robbed, they drove on and PW1 was made to hit and block a vehicle that was being driven by PW3 who was also robbed. At this point PW1 said that his vehicle KAX 637S had little fuel where the robbers abandoned it and took PW3 vehicle a Nissan Sahara and transferred the stolen goods to the Nissan Sahara. PW1 did a U-turn and drove home where a neighbour gave them a phone and they called the police. On this same night as S A O (PW3) while in the company of her nephew and son was driving home around 7.15 to 7.30p.m. She saw a car in front of her as she approached her house in Matasia, soon after a vehicle that was behind her banged her car and she got into shock but two men came out each to each side of her car doors and demanded for her phones. They had small guns. She removed documents from her handbag and she gave the rest to the two, there was a bible, phone and phone. One hit her and took over the car and turned to follow the car that had hit hers and drove to Oloika road a rough murram road, her lights were off. They stopped at some point and took her tool box which was a distinct one, a Maasai sword. She also saw them with a laptop and one robber started searching her for money. She was forced to alight from the vehicle and remove her clothes and proceeded to rape her. The other one was waiting and also raped her as each held his gun. She was made to go back to the car and with her children drove back to the road and went to report to the police. She was treated at the Nairobi Women Hospital.

4. The trial magistrate considered all the materials placed before the court at the trial of the appellant, was convinced that the offences took place. The defence of the appellant was rejected on the basis that the appellant was found with recently stolen goods, goods that belonged to PW3 and invoked the doctrine of recent possession to convict appellant and sentenced him to death as prescribed by law for the offences under section 296(2) of the Penal Code. The appellant being dissatisfied with the conviction and sentence preferred this appeal.

5. The appellant initially filed seven (7) grounds of appeal; these were amended and submitted together with his written submissions. These grounds as outlined by the appellant challenge the conviction and sentence of the trial magistrate in that she relied on the doctrine of recent possession of stolen property but failed to note the defence that nothing was found on the appellant upon his arrest, that the trial court relied on contradictory evidence where there were doubts and that she failed to consider the defence that was plausible.

6. In submissions the appellant supported his appeal that there is doubt as to his arrest as he could not have been arrested before there was a report and the alleged stolen items recovered from him noting that the robberies took place at different times and he was arrested on the same night. That if he was booked at the police station at 8.20p.m. On 21/12/08, then it was highly unlikely that it was a mistake for him to be arrested. That when he was first arraigned in court, the alternative charge was not presented and this was only introduced later. That he was not found in possession of the stolen goods yet the phone recovered was not produced and the Maasai sword was disputed. That the motor vehicle said to have been stolen KAX 637S was said to be KAX 637X by PW2 and the contradiction is material to create doubts. That the appellant's defence was not considered, he was going home from his business and got arrested.

Determination of the issues

The property was found with the suspect;

The property was stolen from the complainant; and

9. Does the property said to have been found on the appellant then amount to him being in possession of stolen property contrary to the law? We have carefully analysed all the evidence as required of this court as established in the case of **Okeno versus Republic [1972] EA 32**. We have addressed our minds to all the robberies that took place on 21/12/07 and the large number of people affected in the course of these robberies and established that to rely on the doctrine of recent possession, and place the appellant as the person who committed these robberies together with others, then time was of the essence. The appellant was arrested by PW8 who stated;

10. These recovered items are said to belong to PW3 who was attacked and robbed on this same night. In her evidence she testified on the issue of time that;

11. PW5 gave evidence that he was driving from home in Lower Matasia at around 7.10p.m. On 21/12/07 and along the way he was attacked and robbed of his property. PW4 gave evidence that she was attacked and robbed around 7 to 8p.m. PW6 on the other hand gave evidence that;

12. We did not have the opportunity to hear and see the witnesses as this is an appeal. We exclusively rely on the record and the judgement of the learned trial magistrate. Our assessment of the record is that the robberies forming the crimes committed against PW1, PW2, PW3 and PW4 all took place between 7.30pm.m. To around 8.30p.m. On the night of 21/12/07. None of these witnesses were able to positively identify their attackers. The complainants were attacked in Matasia, Upper Matasia and Lower Matasia. PW8 arrested the appellant from Kiserian town.

14. We find the time too short from the events as related by PW3 to have happened and for the robbers to have moved so first from Oloika road that had murrum and be found at Kiserian town a different location immediately to be found in possession of stolen goods.

15. Such suspicion must have been reasonable and it follows that the factual basis which would make any suspicion which is actually formed a reasonable one must also exist at the material time: a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not grounds which then made suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at the time is to be tested objectively. Consequently a suspicion may be reasonable even though subjectively it was based on unreasonable grounds. To prove reasonable suspicion, it must of necessity be recognised that a reasonable suspicion never involves certainty as to the truth. Where it does, it ceases to be suspicion and becomes fact. A reasonable suspicion that goods have been stolen is based on conjecture and therefore always admits to the possibility that the goods may have been obtained not by theft but by some other unlawful means or, of course, innocently. It follows that a reasonable suspicion that goods have been stolen does not cease to be either a suspicion or to be reasonable because the person entertaining it perceives the possibility that his suspicion may be unfounded and that the goods may have been acquired by unlawful means or innocently. There must be a satisfactory account. The basis and suspicion of PW5 that led to the arrest of the appellant does not relate to a satisfactory account to enable us make a finding that indeed there existed reasonable suspicion.

17. in conclusion, based on the evidence we are satisfied there exists doubts and will allow the appeal. The appellant be released unless he is otherwise lawfully held.

Judge

Judge

<p justify;"="">