



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 62 OF 2009

PAUL MBURU MWANGI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. D. M. Ochenja, PM in Kitale Chief Magistrate's Court in Criminal Case No. 2117 of 2007)

J U D G M E N T

The appellant had been charged with three counts of robbery with violence contrary to Section 296 (2) of the Penal Code and an alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code. Particulars of the first count were that on the 2nd day of July 2007 at Grassland Area in Trans-Nzoia District within Rift Valley Province, jointly with others not before Court being armed with offensive weapons namely pangas robbed Fred Mugodo Sweka of his three pairs of leather shoes, 2 pairs of jeans trouser, one bag containing K. C. S. E. result slip, National Identity card waiting card, cash Kshs. 500, all valued at Kshs. 6,900 and at the time of such robbery used actual violence to the said Fred Mugodo Sweka.

Particulars of the second count are that on the 2nd day of July at Grassland Area in Trans-Nzoia District within Rift Valley Province, jointly with others not before Court while armed with offensive weapons namely pangas robbed David Lugalya Sweka of his mobile phone make Alcatel N-256, one pair of open shoes, two pairs of long trousers, cash Kshs. 450 all valued at Kshs. 10,345 and at the time of such robbery used actual violence to the said David Lugalya Sweka.

Particulars of the third count are that on the 2nd day of July 2007 at Grassland Area in Trans-Nzoia District within Rift Valley Province, jointly with others not before Court, being armed with offensive weapons namely pangas robbed Michael Mbugua Ngugi of his mobile phone make Nokia, a pair of shoes, assorted clothes, cash Ksh. 1,000 all valued at Kshs. 6,700 and at the time of such robbery threatened to use actual violence to the said Michael Mbugua Ngugi.

Particulars of the alternative charge are that on the 12th day of July 2007 at Kitale township in Trans-Nzoia District within Rift Valley Province, otherwise than in the course of stealing dishonestly retained a pair of Safari boots and one long trouser having reasons to believe them to be stolen properties.

The appellant was convicted of all the three counts and sentenced to death in respect of the first count. The sentence in count two and three were left in abeyance as a person cannot suffer death three times. As is expected, the Trial Magistrate did not make any finding in respect of the alternative charge of handling stolen property having found the appellant guilty of the main counts.

The appellant preferred an appeal in which he raised the following grounds:-

1. *That the Learned Trial Magistrate erred in law and fact in relying on the evidence of recognition when circumstances of positive recognition were not conducive.*
2. *That the Learned Trial Magistrate erred in law and in fact by relying on exhibits which had not been dusted.*
3. *That the Learned Trial Magistrate erred in law and fact when he shifted the burden of proof to the appellant by rejecting his defence.*
4. *That the Trial Magistrate erred in law and in fact by holding that the Prosecution had proved its case beyond reasonable doubts.*
5. *That the Learned Trial Magistrate erred in law and in fact in convicting the appellant based on the evidence of a single witness.*

The facts of this case are that the three complainants David Lugalya Sweka (Pw 1), Michael Mbugua Ngugi (Pw 3) and Fred Mugodo Sweka (Pw 4), were all employees of Pinewood Hotel at Kitale. They had all rented a single roomed house at Grassland Area of Kitale Municipality. At the wee hours on 02/07/2007, they were all asleep in the room when they heard a loud bang on the door. The door was forced open and about six thugs who were armed with pangas entered the room. The thugs were flashing torches. The thugs demanded money as they carried away personal items belonging to the complainants.

Pw 1 David Lugalya Sweka removed a box which was under the bed and gave the thugs his Alcatel X256 mobile phone. The thugs took his open shoes and Kshs. 200 as well as his jeans trousers. In the process of the robbery, Pw 1 was cut thrice on the left hand. He was also cut on the small finger of the right hand, left shoulder and left leg.

Pw 4 Fred Mugodo Sweka lost Kshs. 200, 3 pairs of shoes, 3 jeans trousers, a small bag containing Kshs. 600, his K. C. S. E. result slip. During the robbery, Pw 4 was cut on the left hand twice and on the shoulder.

Pw 3 Michael Mbugua Ngugi lost three trousers, shoes and money. The thugs left and locked the complainants in the room from outside. Pw 4 who had not been injured banged the door attracting neighbours who came and opened for them. Pw 3 then went and woke up Pw 2 David Kipkoech Maiyo who was their neighbour and colleague at Pinewood Hotel. Pw 2 called Police on 112. He also called their employer Mr. Karanja who sent a taxi which took the injured to hospital.

Pw 2 and Pw 3 shifted from Grassland Area and rented new rooms at Tiwani estate. A week after the robbery, their colleagues Pw 1 and Pw 4 resumed duty. On 12th July 2007 the two that is Pw 2 and Pw 3 decided to take their colleagues to show them their new houses at Tiwani. It was around 9.00pm. They decided to pass through Toplife hotel for tea. Immediately they entered the hotel, they saw the appellant who wore a jeans belonging to Pw 1 and shoes belonging to Pw 3. When the appellant saw the complainants looking at him keenly, he became uneasy and walked out of the hotel. He went round the hotel and re-appeared wearing a jacket but he was still wearing the shoes and jeans. The appellant then entered into a stall which was very dark. The complainants feared to follow him. Shortly Police who were on patrol were informed and one of the officers accompanied them and had the appellant arrested. The stall where the appellant had entered was searched and two other jeans trousers belonging to Pw 3 were recovered. The appellant was arrested and taken to Kitale Police Station. The complainants later went and recorded their statements. The appellant was then charged for the offences for which he was convicted.

In his defence, the appellant stated that he was a hawker based at Naivasha. On 12/07/2007 he left Naivasha early in the morning and headed to Kitale where he wanted to see his grandmother at Cherangany. He arrived at Kitale at 9.00pm. There was no vehicle going to Cherangany. He was not familiar with Kitale. He went to one of the hotels where he had supper. After supper, he asked one of the waiters if he could show him a room where he could sleep. The waiter took him to a dark room behind the hotel. Later, three people joined the one who had directed him to the dark room and they started

interrogating him. They then forced him to remove his clothes and they gave him old clothes to wear. He returned to the hotel where he informed people that he had been robbed. He was asked to stay in the hotel until morning. After a short while a Police vehicle arrived. Some people alighted from the Police vehicle and started beating him. They told him that he was a visitor to Kitale. He was arrested and taken to Kitale Police Station where he was charged. He denied committing the robbery.

We have set out the facts of this case. Our duty as a first appellate Court was set out in the case of **Okeno Vs. Republic [1972] EA 32**. We are supposed to exhaustively examine the evidence adduced in the Lower Court and reach our own findings. We are also expected to weigh any conflicting evidence and arrive at our own findings and conclusions. In doing this, we however have to give allowance to the fact that unlike the trial Court, we did not hear or see the witnesses testify.

We have analyzed and evaluated the evidence adduced by the Prosecution witnesses as well as the defence of the appellant. There is no doubt that a robbery occurred on 02/07/2007 involving the complainants. The robbery was reported to Kitale Police Officers via Police emergency line 112. This is confirmed by Pw 6 PC Philip Ekirapa who testified that when they received a call via emergency line 112, they proceeded to Grassland Area and entered the scene of the robbery where they saw blood on the floor. They were informed that two victims had been taken to Kitale District Hospital. Those who were injured later had their P3 forms filled which P3 forms were produced by Pw 5 Linus Ligale a Clinical Officer attached to Kitale District Hospital. P3 form for David Sweka was produced as *exhibit 3* whereas that of Fred Sweka was produced as *exhibit 6*.

The issue which we have to determine is whether the appellant was one of the robbers. The State Counsel Mr. Chelashaw opposed the appellant's appeal arguing that the appellant was found in possession of stolen property a week after the robbery and that therefore the doctrine of recent possession was rightly applied.

Pw 1 testified that he was able to see the appellant as one who had a panga and that he is the one who cut him. He said that he was able to identify him using torch light which the other thugs were flashing.

Pw 3 testified that he saw the appellant as the one who was armed during the robbery and that he is the one who cut David (Pw 1).

Pw 4 testified that on the day of the robbery, he saw the appellant who was armed with a panga. There was one thug who was standing on the door and flashing his torch. He testified that when he saw the appellant at Toplife Hotel, he recognized him as the one who attacked him on the day of the robbery.

We have examined the evidence of the three complainants who all testified that they identified the appellant as the one who was armed with a panga and that he is the one who cut two of the complainants. The robbery took place at around 4.00am. The complainants were all in one room. About six thugs entered the room and started ransacking it. They were flashing torches. It is not possible in the circumstances that any of the complainants would have been able to identify the appellant whom they all said never knew before. The effect of torch light was to dazzle the complainants and it was not possible in the circumstances to identify any of the attackers. Two of the victims were also cut and in the circumstances it was not possible to recognize a person they had never seen before. The Trial Magistrate was correct in finding that there was no identification of the appellant. He did not base his conviction on evidence of identification of the appellant and as such the appellant's ground that the Trial Magistrate convicted him based on identification in difficult circumstances is misplaced.

There is evidence from the complainants that they spotted the appellant at Toplife hotel. He was wearing shoes belonging to one of the victims of the robbery and a jeans belonging to yet another victim of the robbery. The jeans trouser belonged to Pw 1 David Lugalya Sweka. This witness identified the jeans through white paint stains on it. The jeans was produced as *exhibit 1*. The shoes which the appellant was wearing belonged to Pw 3. The shoes were produced as *exhibit 2*. There are two other jeans trousers belonging to Pw 3 which were recovered from the stall where the appellant had entered.

One of the jeans was produced as *exhibit 4*. Pw 3 identified it through a cut on the rear pocket. Another jeans was produced as *exhibit 5*. It was torn on one of the legs. The jeans had markings identified as “G Unit”. We find that the items which were stolen during the robbery were properly identified by the complainants. Pw 6 P. C. Philip Ekirapa was one of the officers who went to where the appellant was arrested from. He was in the company of P. C. Kamanda and P. C. Masige who investigated the case. Pw 6 confirmed that when they took the appellant from Toplife hotel, he was wearing the trouser produced as *exhibit 1* and the shoes produced as *exhibit 2*.

The conduct of the appellant upon being sighted by the complainants was suspect. When the appellant saw the complainants closely looking at him, he went behind the hotel and came back wearing a jacket. His intention may have been to disguise himself and shake off the complainants. When the Police arrived, they accompanied the complainants to the room at the rear of the hotel where they recovered two other jeans trousers belonging to Pw 3. The trousers were positively identified by Pw 3 as among the items he lost during the robbery.

We have considered the evidence of the appellant in light of the evidence adduced by the Prosecution witnesses. We do not find any truth in it. The appellant claims that he was the one robbed of his clothes behind the hotel in a dark room. His claim that he had left Naivasha early in the morning and arrived at Kitale at 9.00pm after vehicles going to Cherangany had stopped operating is doubtful. A journey from Naivasha to Kitale cannot take more than 10 hours. There was no truth in the Defendant's defence.

The robbery occurred on 02/07/2007. The appellant was found in possession of some stolen items on 12/07/2007 ten days after the robbery. He did not offer any explanation as to how he came by the stolen property. We find that the doctrine of recent possession is applicable in the circumstances. We find that Trial Magistrate was correct in applying the doctrine of recent possession. The clothes and shoes were worn by the appellant at the time of arrest. Two other jeans trousers were retrieved from the room where the appellant had entered. There is evidence that, he came back wearing a jacket which he did not have when the complainants first saw him. It is therefore possible that he got the jacket from the same room where the two jeans trousers were found. We find that conviction of the appellant was proper and the sentence was lawful. We do not find any merit in the appellant's appeal which we dismiss in its entirety.

Dated, signed and delivered at Kitale on this19th... day of November, 2013.

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellant:

Respondent:

Court Clerk: