



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO.76 OF 2012

1. AUGUSTINE JUMA.....1ST APPELLANT
2. FREDRICK ODUOR2ND APPELLANT
3. PATRICK OPONDO OCHOLA3RD APPELLANT
4. HUSSEN MOBUTU KHALASI4TH APPELLANT
5. GEORGE OMOLLO ODUOR5TH APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the conviction and sentence of K.W. Kiarie delivered on 13th August 2012 in CM.Cr.case no.395 of 2012)

J U D G M E N T

1. The Five Appellants were each convicted of Four counts of Robbery with violence Contrary to Section 296(2) of The Penal Code. Each one of them was sentenced to suffer death in respect to Count 1. Correctly, sentence in respect to the other Counts was held in abeyance. The Appellants had each filed separate Appeals being Busia Criminal Appeals No's.76/2012, 77/2012, 78/2012, 79/2012 and 80/2012. On the application of the State and by agreement of all the Appellants the five Appeals were consolidated into this appeal for purposes of hearing and disposal. This consolidated Appeal, is against both sentence and conviction.
2. The Prosecution had alleged that on 12th March 2012 at Bondeni estate, Busia township within Busia jointly while armed with dangerous weapons namely AK-47 rifle, robbed REDEMPTA NYATICHI ONYANCHA of one battery chloride exide, one VCD machine make techtron, one power inverter, one set of sub-hooper speakers make Ampex, one bicycle, one radio make sonny, one skirt, two mobile phones make Nokia, one handbag, one jericane of cooking oil of 20 litres, Peau Claire Body Cream and Movit Body Cream and cash ksh.20,600/= all of total value kshs.61,150 and during the time of such Robbery threatened to use actual violence against the said REDEMPTA NYATICHI ONYANCHA. It was also alleged that at the same place and time and while armed with the same weapon, they robbed MARGARET MORAA ONYANCHA of a mobile phone make Nokia 1110C and cash of ksh.650/= all valued ksh.3,650/= and during the time of such robbery threatened to use actual violence against the said MARGARET MORAA ONYANCHA. It being further alleged that at the same time and place and while armed with the same dangerous weapon robbed ISAAC MIRERI of a mobile phone make Nokia valued ksh.3,000/= and during the time of such robbery threatened to use action violence against the said

- ISAAC MIRERI. Lastly it was alleged that at the same time and place and armed with the same weapon robbed DANIEL MARAGIA of a mobile phone make Nokia T8 valued at ksh.2,500/= and during the time of such Robbery threatened to use actual violence against the said victim.
3. In the small hours of 12th March 2012, put by the witnesses at about 4am, Daniel Maragia (PW1), Margaret Moraa Onyancha (PW3) and Isaac Mireri (PW4) were at the home of Redemta Nyatichi (PW2). That house is situated in Bondeni Estate within Busia Town. PW1 suddenly saw some five spot lights. She was forced to sit down by some five people. She was forced into the house of PW2. One of the intruders took her mobile phone.
 4. PW1 was then led by the robbers into the room where PW3 was sleeping. They demanded money from PW3 and forced her to lie on her bed. The five persons took her mobile phone and removed some ksh.650/= from the dress she had slept in. One of them was left guarding her.
 5. The next person to come under siege was the house owner (PW2). She was suddenly and rudely woken up from her sleep by the presence of some people in her bedroom. One of them snatched her mobile phone. They then demanded money from her. As they did so, they placed something like a metal on her head. She was warned not to raise an alarm as she would be shot. They also robbed her of ksh.2,400/= and left her in the room. She was later unable to find her wallet which had ksh.18,200/=. They locked it from the outside.
 6. Just after PW1 had been accosted by the five surprise visitors, PW4 returned into the house to some five strangers and PW1's hands tied with a rope. He was ordered to sit down and one of them watched over him. The rest walked PW1 into PW3 room. After five minutes, they returned to the sitting room where they picked some items.
 7. Later on that day, at around 10.00p.m AP Corporal Peter Odhiambo (PW5) while on patrol at Milimani area of Busia with APC Onyango and APC Antony Ndegwa were to meet some two people coming from the Uganda direction. One was pushing a bicycle and the other was supporting the luggage that was on the bicycle. The two were unable to give a satisfactory account of their possession of the items. The bicycle and an assortment of items were later identified to be some of the property stolen during the robbery that took place in the house of PW2. A more detailed discussion of this recovery and alleged identification will form a substantial part of this decision.
 8. It fell to P.C. Noah Kipkemboi (PW6) to investigate the complaints lodged by PW1, PW2, PW3 and PW4. On 12/3/2012, his colleagues had arrested the two suspects at Milimani. They were later to be charged and are now the 1st and 2nd Appellants. Acting on information from some undisclosed informer, PW6 arrested the 3rd Appellant at Ugunja in Nyanza. He found him with a mobile phone which was identified by one of the complainants to be his. In the house of the 3rd Appellant the Police Officer found the 4th Appellant who was in possession of a Nokia 1110i which was later to be claimed by PW3 as her property.
 9. Two days later, on 14/3/2012, PW3 searched the houses of the 1st and 2nd Appellants. In the house of the 1st Appellant he found 5 litres of cooking oil. He then visited the house of the 5th Appellant in Sofia Estate Uganda. The Police Officer found the suspect in his house and recovered therefrom a Nokia 1110c said to belong to PW5 and taken in the Robbery.
 10. PW6 requested Acting IP Peter Mulai (PW7) to organize and conduct identification parades on the arrested suspects. The conduct and results of those parades are not of concern in this Appeal as the Magistrate found as follows:

“In the instant case, the investigating officer did not record any such evidence from the witnesses. Such evidence would have formed the basis for an identification parade. Without a basis, it would be an academic exercise to analyse how each identification parade came to be made. I must however in passing say that the said parades were very poorly conducted to be of any evidential value. I will not therefore rely on the evidence of the purported identification at the parades. I will also not rely on any evidence of purported identification for one of the witnesses had earlier described any of the culprits and in my assessment of evidence; one was in a position to identify the culprits. I will endeavor to look for independent evidence if any.” (our emphasis)

11. That in a nutshell is the prosecution case. In Defence each of the Appellants made sworn statements. Briefly, the 1st Appellant desired to buy a Video Deck and the 2nd Appellant helped

- him to identify one. The 2nd Appellant introduced him to the 3rd Appellant who sold him a Video Deck at an agreed price of ksh.2500/=. He paid ksh.800/= and the balance was to be paid after a confirmation that it was in good order. Not an unreasonable arrangement. It was as they returned with the Deck that they were confronted by some police officers who arrested them. He puts the time of arrest at 8.30p.m. He was later to lead the Police to the person who sold him the Deck, allegedly the 3rd Appellant. On 14/3/2012 a search was conducted by the Police in his house but nothing was recovered. Subsequently, the Appellant was to participate as a suspect in an identification parade and was later to be arraigned in Court on the charges he faced.
12. The story by the 2nd Appellant did not corroborate that of the 1st Appellant. He denied knowing the 1st Appellant. He infact denied knowing any of the other Appellants. That at the time he was confronted by the Police, he happened to be walking in a direction opposite that of a person who was pushing a bicycle. The bicycle had a bag on it. They bypassed each other with that person who was stopped by three people in civilian clothes. After the three spoke to that person, they beckoned the 2nd Appellant from behind. He was then alongside the other person arrested. That other person is the 1st Appellant. And the three turned out to be Police Officers and one was PW5. The Police Officers are said attempted to extort some money from him in exchange for his freedom. He was unable to produce the ksh.10,000/= demanded. After his arrest, the Police Officers searched his house but recovered nothing. He was later charged.
13. Patrick Opondo Ochola (The 3rd Appellant) says that he visited Busia in February 2012 with a view to purchasing maize. In the process he met the 1st Appellant and they exchanged telephone contacts. That on 13/3/2012, the 3rd Appellant left his house for Ugunja where he sold maize. Later, 1st Appellant called him and asked that they meet at Kenya Commercial Bank Ugunja. He had been duped into a trap. He was arrested by some three people who were with the 1st Appellant. Upon his arrest, a search of his house was conducted by the Police Officers and some household items taken. He says that a Nokia F69 mobile phone was also recovered from him. The 3rd Appellant maintained that it belonged to him.
14. The 4th Appellant was on 13/3/2012 at the home of his sister when at about 3.00p.m some four people came to the house. The house would be that of the 3rd Appellant who is married to the 4th Appellant's sister. The visitors, who were Police Officers, searched the house and took away some household items. They also took a telephone handset from the 4th Appellant. He was later charged. He denied committing the offence.
15. George Omollo Oduor (The 5th Appellant) is a Kenyan residing in Sofia Uganda. On 14/3/2013 at about 3 p.m. some Police Officers visited him at his house from where they took 2 mobile phones Nokia 1110 and Motorola C117, an electric iron box and an air cleaner motor. He was later charged. He denied any links with the Co-Appellants or the robbery.
16. In the separate Petitions of Appeal, the Appellants raised numerous grounds many of which touched on the quality and probity of the identification evidence. The conviction of the Appellants was solely based on the Doctrine of recent possession and to that extent we think that it is only necessary for us to consider the grounds touching on this. It was argued by the Appellant that the evidence on possession was hearsay. And that the Prosecution failed to provide proof that the items found on them belonged to the complainant. Other grounds of Appeal are that:-
- a. The Court failed to consider the Alibi evidence of the Appellants.
 - b. That the Trial Court failed to consider the Appellants mitigation when passing sentence.
 - c. The Rights of the Appellant to fair trial was breached because they were not supplied with all evidence in the possession of the Prosecution to enable them defend themselves.

In the written submissions the Appellants argued a further ground that PW5 failed to comply with the provisions of Article 49(1) (a) (i) of The Constitution.

17. In opposing the Appeal, the State Counsel, at some length highlighted the evidence at Trial in a bid to demonstrate that the evidence against the Appellants was overwhelming. The Court was invited to find that the convictions were safe based on the Doctrine of recent possession.
18. As a first Appellant Court, we are bound by duty to re-evaluate the evidence presented to the Trial

Court and draw our own independent conclusion. In carrying out this duty the Court would be well aware that unlike the Trial Court it does not have the advantage of seeing and hearing the witnesses testify firsthand. (**Okeno –vs- Republic**) 1972 E.A.32. As we analyze the evidence, we note that we have from time to time had to refer to the Trial Magistrate’s handwritten notes to clarify the correct marking and numbering of Exhibits as the typed proceedings have in some few instances failed to accurately capture the Magistrates handwritten proceedings.

19. PW5 arrested the 1st and the 2nd Appellant. It is said that the 2nd Appellant was pushing a bicycle (P Exhibit 2) while the 1st Appellant was supporting a bag which was on the bicycle. A phone (P Exhibit 7) which was black and red in colour was recovered from the 1st Appellant. And the bag contained the following:-

- I. A blue spotlight (P Exh 18)
- II. Radio (P Exhibit 5)
- III. VCD (P Exhibit 4)
- IV. Adaptor (P Exhibit 3)
- V. Pink bag (P Exhibit 9)
- VI. Green skirt (P Exhibit 10)
- VII. Creams (P Exhibit 11)

The day following some 5 litres of cooking oil (P Exhibit 6) was recovered from the house of the 1st Appellant. The cooking oil and the mobile phone were in the exclusive possession of the 1st Appellant while the other items above and the bicycle would be in the joint possession of the 1st Appellant and the 2nd Appellant. The 1st and 2nd Appellant signed one inventory (P Exhibit 19) to confirm the joint possession of the property while the 1st Appellant signed an inventory (P Exhibit 20) in respect to possession of the cooking oil.

20. PW2 was able to identify the mobile phone (P Exhibit 7) as belonging to her. In the Gallery of that phone was the photograph of her child Faith. As to the VCD player, radio and inverter, PW2 produced a receipt (P Exhibit 13) to prove that she had purchased them. As for the bicycle she had a receipt (P Exhibit 12) for its purchase. She further identified it from the repairs on its saddle. Those repairs were carried out by PW1 who confirmed this in his testimony. We do hold that in respect to the mobile phone (P Exhibit 7), the bicycle (P Exhibit 2) the VCD player (P Exhibit 4) radio (P Exhibit 5) and inverter (P Exhibit 3), the Prosecution positively proved that the property belonged to PW2. In addition there was proof that the property had been recently stolen, less than 24 hours, before their recovery.

21. What explanation, if any, did the 1st and 2nd Appellants give for possessing the property? The 1st Appellant told Court that he had just bought the Video Deck from the 3rd Appellant and that the 3rd Appellant had been introduced to him by the 2nd Appellant. That as they left the place of sale, 2nd Appellant returned with a bicycle and on it was a black bag. He did not know the contents of the bag. They were later confronted by the Police. The 2nd Appellant contradicted him and denied knowing the 1st Appellant. He accused the 1st Appellant of possessing the bicycle and the bag tied on it. He claimed that he had just bypassed the 1st Appellant, then for unknown reasons the Police stopped him and arrested him.

22. After analyzing the explanations, the Learned Magistrate held as follows:-

- i. **“When this officer testified that the VCD player was inside the black bag, the first accused did not challenge him on this contention whereas he had testified he was carrying it in his hand. He also did not offer any explanation as to when he put it in the handbag and why.**
- ii. **Though the first accused testified that he told the police officers that he had just bought a deck for his barber shop in Uganda, he never challenged the evidence of corporal Peter Odhiambo (PW5) who said that the two said they were carrying their tools of trade and that they were barbers in Uganda.**
- iii. **The second accused did not challenge the evidence of AP corporal Peter Odhiambo on how he was arrested and I therefore take this contention on how he was arrested as an**

afterthought and an attempt to shift blame to his co-accused (accused 1).”

23. We agree with the Trial Magistrate's assessment. On our part we add that it is curious that some 5 litres of cooking oil was recovered from the house of the 1st Appellant. Curious because some cooking oil had recently been stolen from PW2. Its recovery would seem to be a further link of the 1st Appellant to the Robbery. We also did not find any reasonable explanation by the 1st Appellant for possessing PW2's mobile phone which was found on him. As for the 2nd Appellant, although he claims that he did not have joint possession of the bicycle and the items on it, he does not explain why he signed the inventory which tells a contrary story.

24. We turn to the 3rd Appellant, a mobile phone Nokia T8 (P Exhibit 1) was found on this person. The inventory (P Exhibit 2) that he signed confirmed this. PW1 claimed ownership of the phone. In his own words,

“This is my phone (MFI 1). The phone is worn out.”

PW 1 identified the phone because it was worn out. From the inventory it would seem that 3 mobile phones Nokia were recovered from the 3rd Appellant. In his defence the 3rd Appellant spoke of Nokia F69 which he says was produced as evidence. This presumably is the phone claimed by PW1. The Appellant says of this phone:-

“Police found me with Nokia F69. This phone is mine. It is a duo phone and has touch screen. I have no evidence that the phone is mine.”

25. The phone that was produced as an exhibit was a Nokia T8. PW1 laid a claim on it and told the Court why. He was able to identify it because it was worn out. From the Court record the phone that was identified by PW1 and produced as an exhibit was a Nokia T8. That phone had been lost in the robbery on 12/03/2012. That phone was found with the 3rd Appellant one day after. In our view the Trial Magistrate was entitled to hold that the possession connected the 3rd Appellant to the robbery.

26. In the Robbery, PW3 was robbed of a Nokia phone. She described this (P Exhibit 14) phone as follows,

“My phones battery had my name and the serial number paper is missing for it came off after the phone fell in water. Inside the phone I had written “I.M”.”

The Trial Magistrate who saw the phone at Trial, remarked

“On checking the phone I noted that the paper with the serial number was missing, that it has letters “IM” etched inside. The etching does not appear to be recent. The battery has a sticker written “Magy” which also appears old from handling.”

PW3 had without doubt proved ownership of P Exhibit 14. That phone was found, a day after the robbery, in the possession of the 4th Appellant. The 4th Appellant signed an inventory to confirm this (P Exhibit 22).

27. Why would the 4th Appellant be in possession of PW3's phone? He claims that the phone was his. But he offers no evidence whatsoever for his claim. Instead he gives this evasive answer,

“My phone had no scratch...The phone that was produced is mine. I did not buy it from the shop.”

We have to find, like the Trial Court, that the possession of the phone links him to the robbery that took place on the morning of 12th March 2012.

28. The fate of the 5th Appellant lay with his possession of a mobile phone Nokia 1110. In his

defence 5th Appellant admitted being found with the phone. He said,

“I was found with two phones. One was produced as an exhibit in Court. I signed the inventory of the items taken from my house.”

He claimed that the phone belonged to him. This would not agree with PW2’s claim. PW2 was more specific in staking her claim.

She testified,

“Nokia 1110 has its filter at the ear piece missing.”

She was able to point out a feature to prove ownership of that phone. The Trial Court observed the phone and found that **“this indeed how the phone that was produced appeared.”** We again are in agreement with the Learned Magistrates assessment that ownership was proved and the 5th Appellants unlawful possession of it linked him to the robbery.

29. The Alibi Defence of the Appellants was first raised by them in their Defence. Whilst it is the duty of the Prosecution to disprove an Alibi raised as a defence, different considerations arise when it is first taken up in the course of the hearing of the defence case. This is because coming so late in trial, the Prosecution would not have fair opportunity of confronting it and could be hampered in its duty of disproving the Alibi. The approach to be taken by Court in those circumstances is to weigh the evidence of the Alibi against the weight of the Prosecution case. (**Wangombe –vs- Republic**) [1980] KLR 149. The Prosecution case satisfactorily proved that each of the Appellants had recent possession of at least one item stolen in the course of the Robbery. None of the Appellants offered satisfactory explanation as to why they possessed the stolen items. The Prosecution case overrun any of their weak and uncorroborated explanations.
30. We make some short observations on the allegations of the Constitutional infringement raised in the Appeal. The record shows that the Court on 16/03/2012 ordered that witness statements be supplied to the accused persons. This was reiterated on 19/04/2012 when the 2nd Appellant complained that he had not received some of the statements. Thereafter there was no further complaint by the Appellants about the statements. And in the course of cross examining witnesses, the Appellants repeatedly made reference to those statements. We believe that they were duly supplied. We have no basis therefore to find that the Prosecution failed to supply the Appellants with evidence in advance of the trial.
31. There is the allegation that the arresting officers failed to uphold the provisions of Article 49 1(a) of the Constitution when arresting the Appellants. Those provisions are:-

“49.(1) An arrested person has the right-

(a) to be informed promptly, in language that the person understands, of-

(i) the reason for the arrest;”

PW5 arrested the 1st and 2nd Appellants. In cross-examination, they did not take up the issue at all. PW6 arrested the rest of the Appellants. Again, they did not take up the issues of the alleged Constitutional infringement at trial. We must conclude that it is an afterthought.

32. There was an issue raised about sentencing. As expected, each of the Appellants was asked to offer mitigation and each took the offer and made short statements. Then the Learned Magistrate pronounced himself as follows:-

“I have considered that each accused is a first offender. I sentence each to suffer death in the manner prescribed by the Law in count 1. Right of Appeal 14 days.”

We cannot fault the Learned Magistrate. Even after considering that the accused persons were first offenders he could only impose the death sentence. It is the only sentence available for capital robbery. That has been put to rest, at least for now, in the recent decision in Criminal Appeal No 5 of 2008 **Joseph Njuguna Mwaura & others –vs- Republic.** (unreported)

33) We uphold the convictions and sentences and dismiss the appeals.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 13TH DAY OF NOVEMBER 2013.

F. TUIYOTT

S.M. KIBUNJA

J U D G E

J U D G E

IN THE PRESENCE OF:-

.....**COURT CLERK**

.....**FOR THE APPELLANTS**

.....**FOR THE RESPONDENT**