PUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HIGH COURT CRIMINAL APPEAL NO. 9 OF 2012.

(CONSOLIDATED WITH BUSIA H.C. CR. APP. NO. 10 OF 2012)

HUSSEIN ALI WAFULA

HASSAD SIRACH …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(BEING AN APPEAL ON CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 750 OF 2012 IN BUSIA CHIEF MAGISTRATE'S COURT – HON. E. H. KEAGO)

J U D G M E N T.

HUSSEIN ALI WAFULA and **HASAD SIRACHI,** hereafter referred to as 1st and 2nd Appellant, were charged before the lower court with the offence of robbery with violence contrary to section 296 (2) of the Penal Code in that on the 18th day of May, 2011 at [particulars withheld] jointly with another not before court while armed with offensive weapon, namely knife, robbed J A M of cash Kshs.1,000/= , a mobile phone make L.G, a mountain bike make Safari, assorted clothes and 100 lragi Dinars all valued at Kshs.70,000/= and before the time of such robber threatened to use actual violence against the said J A M.

Each of the Appellant was charged with an alternative charge of handling stolen property contrary to section 322 (2) of the Penal Code. Particulars in respect of the 1st Appellant are that on the 19.5.2011 at Nambale Township otherwise than in the cause of stealing dishonestly retained a pair of men's grey suit and pair of red women's suit knowing or having reasons to believe them to be stolen property. In respect of the 2nd Appellant, the particulars are that on 19.5.2011 at Nambale Township other than in the course of stealing dishonestly retained a mountain bike make safari, a pair of grey women's suit, pair of black children's suit, pair of black women's suit, men's black coat, pink blouse, women's sweater and national identity card of J A M, knowing or having reasons to believe them to be stolen goods.

The prosecution presented six witnesses who testified as PW 1 to PW 6, the defence hearing commenced the 1st Appellant indicated he did not have confidence in the trial court and prayed for the case to be transferred to another court. The request was not granted and hearing proceeded without 1stAppellant participating.

The 2nd Appellant gave a sworn statement of defence when he testified as DW1. After considering the evidence presented , the learned trail Magistrate found the Appellants guilty on the main charge and

sentenced both to death.

The Appellants were dissatisfied with both the conviction and sentence and 1st Appellant filed his appeal in Busia H.C.Cr. Appeal No. 10 of 2012 while 2nd Appellant filed Busia H.C. Cr. Appeal No. 9 of 2012. When the two appeals came up for hearing on 15.10.2013, they were consolidated by consent and hearing proceeded on Busia H.C. Cr. Appeal No. 9 of 2012.

SUMMARY OF 1ST APPELLANTS GROUNDS OF APPEAL.

1. That the court relied on uncorroborated evidence.
2. That the record does not reflect the correct evidence given by the witnesses.
3. That he was not allowed to present his defence .
4. That the charge sheet was defective.
5. That the result of the identification were unreliable.
6. That the record does not indicate the language of the witnesses and the name of the interpreter.
7. That the learned trial Magistrate erred in law and fact by relying on the doctrine of recent possession to convict him when the items could have been planted on him.
8. That he was not informed of the true reasons of his arrest which is a contravention of article 49 (1) (a) (i) of the constitution.
9. That the learned trial Magistrate erred in law and fact by declining to allow his application for recusal and proceeding with the hearing without allowing him to offer his defence and mitigation hence failing to afford him a fair hearing as required under article 50 (2) (a) of the constitution.
10. That the learned trial Magistrate erred in law and fact by relying on incriminating evidence of a co-accused on the ownership of the house where the men's grey suit and red lady's suit were found.
11. That the learned trial Magistrate erred in law and fact by relying on contradictory evidence to convict him.

That the learned trial Magistrate erred in law and fact by allowing the hearing to proceed while he had been kept in the cells for 19 days resulting to violation of his rights.

2ND APPELLANT'S GROUNDS OF SUMMARY.

1. That the learned trial Magistrate relied on uncorroborated evidence to convict.
2. The proceedings do not contain the correct version of what the witnesses told the court.
3. That the charge sheet was defective as the occurrence book reference and the date of reporting the incident to the police was missing. That the time of the incident was not shown on the charge sheet. That the charge sheet was not signed by the prosecutor and trial Magistrate.
4. That the evidence adduced was at variance with the particulars of the charge.
5. That he was arrested on 14.7.2011 and taken to court 19 days later on 3.8.2011 which contravenes article 49 (1) (f) (i) (ii) g of the constitution.
6. That documents of ownership of the items said to have stolen from PW 1 were not availed in court.
7. That the incident is said to have occurred at 6 pm and prosecution witnesses did not disclose the source of light that enabled PW 1 to make a positive identification.
8. That prosecution failed to call vital witnesses including investigating officer.

During the hearing Mr. Jumba and Mr. Wanyama advocates appeared for 1st and 2nd Appellants respectively while the state was represented by Mr. Obiri.

Mr. Jumba submitted that the evidence adduced did not show how 1st Appellant, who had a hat on his head, was positively identified by PW 1 who was on the bed. That the court excluded 1st Appellant from participating in the hearing after rejecting his application for refusal without hearing the prosecution. That this resulted to prejudice on the part of the 1st appellant.

Mr. Wanyama submitted that the failure by the learned trial Magistrate to properly analyse the evidence led to unfair conclusions when it disbelieved the 2nd Appellants defence for reasons that he had ran away on seeing the police. That complainant did not identify the 2nd Appellant. That there is no clarity on who owns the houses where some of the items said to have been robbedwere recovered. That there was need to have held an identification parade after the arrest of 2nd Appellant as it happened several months after the alleged incident. That the 2nd Appellant alibi defence show he was not at the scene of the robbery but in Uganda on the material date.

Mr.Obiri for the state opposed the appeal. He said the robbery occurred at 6 pm and darkness had not set in and that PW 1 was able to recognize the 1st Appellant who used to work for her and was a neighbour. Police then followed leads that led to the arrest of 2nd Appellant after recovering some of the stolen goods from premises associated with him. That the 1st Appellant conduct made the court conclude that he was not ready to participate in further hearing. He conceded that the failure by the court not have allowed 1st Appellant to participate in the hearing of 3.1.2012 was not proper. That the fact that Appellants were found with items said to have been stolen during the robbery allowed the court to use the doctrine of recent possession and convict them for the robbery. On delay in bringing 2nd appellant to court after arrest, Mr. Obiri submitted that the 2nd Appellant 's remedy lay in a Civil claim as was decided in the case of **Julius Kamau Mbugua –vs- Republic.** C.A.C.A No. 50 of 2008.

This being the court dealing with this appeal for the first time , it is our obligation to reconsider and re evaluate the evidence and come to our own conclusions as was held in the following cases, **Pandya –vs Republic (1957) E.A. 336, Shantilal M. Ruwalla -vs- Republic (1957) E.A 570 and Okeno –vs- Republic(1972) E.A. 32.** The evidence adduced to support the charge is that J A M, who testified as PW1 entered into her house on 18.5.2011 at 6 pm to place a child on the bed. While in the bedroom, a person armed with a knife entered and threatened to kill her if she screamed. The person had a marvin on his head and a torch and she recognized him as a neighbour who had previously worked for her. He demanded money and she gave him Kshs.1,000/= and 100 Iraqi Dinars. The attacker ordered her to go to bed and sleep on her face. Then he demanded her phone and bicycle and when she went to the sitting room to check on the items, she saw somebody leave with the bicycle. The man who was with her returned with her to the bedroom where he took Kshs.10/= before going to the kitchen where he took Kshs.300/=. He told her that he wanted to have sexual intercourse with her but she told him that she was HIV positive. He tied her with her hands at the back and left with the goods he had collected. She had then recognized the voice of the person who robbed her before he left. After untying herself, she notified neighbours giving them the name of her attacker as Wafula Ali who she said is 1st Appellant. She knew him as he was a neighbour when he was living with his grandmother and she had given him casualwork for a day. She also reported to the police and enquires led them to a house where they found two Ugandans, a man and woman. From that house they recovered assorted clothes and mountain bike which PW 1 identified as among the itemsstolen from her earlier in the evening. The man escaped and the lady led them to another house where they found a man who is 1st Appellant. He was arrested and one red suit and grey men's suit which PW 1 identified as among those stolen, recovered. Some of the witnesses said the lady escaped while PW 5 said she was released to go for treatment. PW4 said he had rented a house to 2nd Appellant for two months in March, 2011 and later learned a person had been arrested from that house. PW 6 also said he had rented a house to 2nd Accused in April, 2011 and on 18.5.2011 heard noises coming from that house. He went to check and learnt 2ndAppellant had escaped. A mountainbike and assorted clothes were recovered from that house. PW 5 told the court how Appellants were arrested and some of the stolen items recovered from two different houses.

The 1st Appellant did not participate in the defence hearing following the court's order to exclude him of 19.12.2011. The 2nd Appellant said on 14.7. 2011 he left him home in Uganda and came to Kenya. As he proceeded to Mumias they found a police road block and he and two others were arrested for being excess passengers. They were taken to the patrol base and later charged with an offence of entering into the country unlawfully. He admitted the offence and was convicted. The same day he was charged with a robbery offence and he pleaded not guilty. On 3.8.2011 he was brought to court and his

charge was consolidated with that of 1st Appellant who he did not know before. He said on that date of the alleged offence he was at his home in Uganda. He denied having been found with any of the items stolen.

We propose to look first at the evidence relating to 2nd Appellant for reasons that will become apparent later. PW 1, who is the only witness who was at the scene of the robbery did not say she had seen the 2nd Appellant at the scene of the robbery. Other than one person whom she said she had recognized, she had seen one other tall person go out her house with the mountain bike. She later said all the robbers were three but never mentioned when and where she saw the third robber. After the arrest of 2nd Appellant almost three months after the robbery, the investigating officer did not arrange for an identification parade to see whether PW 1 or any of the other witnesses who claimed that 2nd Appellant was the man who had escaped from the room they recovered most of the stolen items, could pick him out. The woman who was said to have been in that house was also not made a co-accused or a witness and there is no evidence to show who told the police that 2nd Appellant, who had been arrested and charged with an immigration offences was the man who had escaped from the room in May, 2011. The two landlords, PW 4 and PW 6, who claimed 2nd Appellant had rented a house from them in March and April, 2011 had no identification papers of the tenant and did not personally witness the 2nd Appellant being arrested from either of the two houses. The only evidence that appear to connect 2nd Appellant to the offence is the recovery of the stolen goods from premises he had allegedly rented from PW 4 and PW 6. It is also said he was in one of the houses with a lady but escaped. 2ndAppellant has denied the offence and says on the day of the robbery he was at his home in Uganda. This was an alibi defence. The claim that he was in one of the houses where stolen goods were recovered is also doubtful as none of the witnesses who testified told the court how they saw him. A crowd of people had been involved in going to the house and it was at night. The court was not told of the source of light to determine whether it allowed for a proper identification nor was an identification parade held to confirm whether the 2nd Appellant was the person who escaped was indeed the 2nd appellant. We are of the view the 2nd Appellant was entitled to the benefit of doubt. Prosecution witnesses including PW 5, had said it is the woman who told them the goods found in the room she was found had been brought by another person and led the people to that person. The lady was not charged or availed as a witness and we can only conclude that the police believed her. The alibi defence by the 2nd Appellant was not rebutted by evidence. The learned trial Magistrate analyzed the evidence and found as follows;-

‘’ The possession of stolen properties by Accused 1 and accused 2 was a recent one or immediately after the robbery. I have no doubts as to the identity of accused 2 since PW 6 and PW 3 all identified him as their tenant. Hence his defence that he was arrested on 14.7.2011 because he had boarded an already full matatu is farfetched and does not take him away from the scene of chemi chemi estate where the first exhibits were found. Further the evidence that its accused 1 who brought the items is unbelievable and an attempt to escape criminal liability. If indeed that be the true position, there was no good reason why accused 2 had to run away, otherwise he would have been considered as a state witness.It is also true on 14.7.2011 when Cpl. Kiprotich Koskei went out to arrest him along Mongole road, and he saw him, he started to run away. There was no reason for him to run away if he didn’t have any guilty mind. I therefore do not believe his defence at all.’’

The 2nd Accused may have ran away but that alone is not proof that he had committed the offence charged.

The learned trial Magistrate had the opportunity to see the witnesses testify which we have not. We however do not agree with him that the act of 2ndAccused of running away alone was enough to conclude that he participated in the robbery in this case or meant he had possession of the stolen goods and therefore the doctrine of recent possession applies.The Court of Appeal in the case of **Maina& 3 others –vs- Republic (1986) KLR 31** quoted with approval the definition of the doctrine of recent possession by Lord Chief Justice of England in the case of **Republic –vs- loughlin 35 Cr. App. R 69**, where he said;

‘’ **If it is proved that premises have been broken into that certain property has been stolen from the premises and that shortly afterwards, a man is found in possession of that property, that is certainty evidence which the jury can infer that he is the house breaker or shop breaker..’’**

In the case of **Richard Karanja Maina –vs- Republic (2005) eKLR**, this court held as follows;-

‘’ **For the doctrine of recent possession to be applied to proof the offence connected with the theft of the item from the owner, the following ingredients must be established ; that the item in question was stolen from the owner ; that the said item was recovered in possession the accused(or appellants as the case may be) ; That the said stolen item was found in possession of accused person so soon after the theft or robbery ; and that the accused did not offer a reasonable explanation how he came to be in possession of the said stolen item.’’**

The law requires evidence to be adduced to prove the charge or charges against each and every accused person and a conviction can only arise where proof beyond reasonable doubt has been complied with. We find no such proof in respect of 2nd Appellant in both the main charge and alternative charge and his appeal is allowed.

Going back to the 1st Appellant, it is clear he was excluded from participating in the defence hearing. He also did not get the chance to offer mitigation after conviction. Article 50 of the Constitution has the following relevant provisions among others:

‘’2. Every accused person has the right to a fair trial which includes –

(c) to have adequate time and facilities to prepare a defence,
……..

(f) to be present when being tried, unless the conduct of Accused person makes it impossible for the trial to proceed,

……..

(i) to remain silent, and not to testify during the proceedings.

…….

(k) to adduce and challenge evidence.

The record does not show that the 1stAppellant had waived his constitutional right to testify or to adduce evidence. The record does also not show that the 1st Appellant had conducted himself, at any time, in a way that made the proceedings of the case impossible to continue before the court made the exclusion order. Had the above scenarios presented themselves before the court, the proper procedure would have been for the learned trial Magistrate to make a note of the Appellants’ representation or details of misconduct before proceedings to made the exclusion orders. All the 1st Appellant had said was captured in the record as follows;-

‘’ **I don’t trust this court. I apply that my case be transferred to another court.’’**

The learned trial Magistrate, apparently without seeking whether the prosecution and 2nd Appellant wished to be heard in the application made the following ruling;

‘’ **There are no good reasons advanced for disqualification and it is apparent that the accused (1st Appellant) does not wish to proceed with his defence he is therefore excluded and the matter will proceed for defence for accused 2 only.’’**

We hold that the exclusion of the 1st Appellant from participating in the defence hearing and the opportunity to offer mitigation amounted to a miscarriage of justice as he did not get a fair hearing which is guaranteed in the constitution. We declare a mistrial in relation to the 1st Appellant and set aside both his conviction and sentence. Should we order a retrial? On this issue our minds are guided by the following principles restated in the case of **FATEHALI MANJI –VS- THE REPUBLIC** (1966) E.A. 343 at page 344;

'' We will not quote the other passages in full but we will content ourselves with stating the principles which emerge from them. They are the following; in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution in fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.''

We have little difficult in finding that this is a fit case for retrial. The 1st Appellant faced a serious offence of robbery with violence. The circumstances of the offence, if the prosecution witnesses were to be believed, were barbaric. The victim of the robbery is said to have been threatened with rape. Justice for the victim cause for a satisfactory trial of the person alleged to have robbed her. We also think that although the 1st Appellant has suffered incarceration from 24th January, 2012, this must be taken against the possible death sentence that is the only punishment for the offence he faces. Against that serious sentence, we are unable to find that the time the 1st Appellant has spent in prison, prejudices him or amounts to an injustice.

Having found as above , the appeal of the 2nd Appellant on conviction and sentence on the main charge and conviction on the alternative charge is allowed, the convictions vacated and the sentence set aside. He should be released forthwith unless otherwise held.

The 1st Appellant shall be escorted forthwith, before another Magistrate of competent jurisdiction, other than the trial Magistrate in this case, for a retrial.

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

F.. TUIYOTT **S. M. KIBUNJA**

JUDGE **JUDGE.**

IN THE PRESENCE OF;-

GEORGE OMGUNGA ……COURT CLERK.

…….FOR THE APPELLANTS

…….....FOR THE RESPONDENT