



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 145 OF 2012
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 146 OF 2012

BETWEEN

JOHN NGARI NJIRU 1ST APPELLANT

DAVID MUGO KIMUNGE 2ND APPELLANT

AND

REPUBLICRESPONDENT

*(Being an appeal from the original conviction and sentence in Embu Criminal Case 1890 of 2010 by
Hon. L. Mbugua, S.P.M on 20th September, 2012)*

JUDGMENT

1. The two appeals were consolidated and heard together as they arise from the same incident. The appellants, **John Ngari Njiru alias -Muriithi** and **David Mugo Kimonge**, were among six accused persons charged with two counts of the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. They were tried, convicted and sentenced to death in respect of one count while the sentence on the other count was held in abeyance. The 2nd appellant was also charged with alternative counts of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. The appellants appeal against conviction and sentence.

2. The first count was against the all the six accused and it alleged that on the 18th day of August, 2010 at Evurore, Kimachaki village in Embu County, they jointly with others not before court while armed with offensive weapons namely axe, pangas and rifle, robbed Simonda Igoki of her 40 shirts, 35 metres of curtains, 2 women suits, 1 lessa, 2 tops and one Nokia phone make 1680 all valued at Kshs 38,300/= and at or immediately before or immediately after the time of such robbery murdered Fredrick Mugendi Njuki.

3. The particulars of the first alternative charge to count one were that on the 28th day of September 2010 at Kathiga sub-location, otherwise than in the course of stealing, David Mugo Kimunge dishonestly retained 33 pairs of shirts, 35 metres of curtains knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

4. The particulars of the second alternative charge were that on the 24th days of September, 2010 at

Kathiga Village sub-location, otherwise that in the course of stealing dishonestly disposed off 3 shirts to Ann Wanjiru Muthee knowing or having reasons to believe them to be stolen or unlawfully obtained.

5. The details of the second count of robbery with violence were that on 18th day of August 2010 at Evurore, Kiamachaki village in Embu county, the six accused, jointly with others before the court while armed with offensive weapons namely, an axe, pangas and rifle, robbed Michael Ileri of his motor vehicle Registration number KBH 122N Mitsubishi Cedia, multi-purpose pliers make Shang Xing, a wrist watch make Jaz-Ma, a mobile phone make Nokia 2612 all valued at Kshs. 707,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Michael Ileri.

6. The 2nd appellant faced an alternative charge of handling stolen goods. The particulars of the offence were that on the 28th day of September 2010 at Kathiga sub-location, otherwise than in the course of stealing, dishonestly retained one wrist watch Jaz-Ma, one multi-purpose pliers make Shang Xing, knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

7. The material evidence of the prosecution case relating to the appellants was as follows. PW1, Philip Mugendi Matero testified that on the 18th August 2010 at about 10.45 pm he drove motor vehicle KBH 122 N Mitsubishi Cedia make from Ishiara carrying Michael Ileri and his wife Simendo Igoki. On reaching Ileri's home, the watchman, Munyi opened the gate to the compound. He heard the watchman cry out for help as he was under attack. PW1 then attempted to jump over the fence to escape but he was caught by four thugs. They wore black clothes and had their faces covered. They were armed with an axe which they used to cut him on the head. He was dragged into a room with Igoki and one Godfrey Njiru. The thugs took the car keys, his Nokia mobile phone and Ksh. 800/= and drove off with the vehicle. It was PW1's testimony that he did not identify any of the attackers.

8. PW2, Joseph Munyi Nyaga, a night guard at Ileri's home testified that on the material day, he reported to work as usual when at about mid night, Ileri and his wife Igoki returned home. He opened the gate for them and while closing it, he was hit by something as a result of which he fell down. He was hit on the left shoulder then cut on the head and face. He did not identify the attackers. He became unconscious and only later recovered at Ishiara Hospital.

9. Simendo Igoki Nyaga, PW4, the wife of Michael Ileri, PW11 testified that on the material day, she had bought uniform in Nairobi for church choir members for a thanks giving ceremony after her husband had returned from Dubai. She had 20 light blue shirts, 20 shirts cream colour, 35 metres of cream curtain, 2 women suits, a lessa, 2 tops, cream and red. She proceeded to Embu to meet her husband and they proceeded home at about 10.00 pm. When they arrived home, the watchman opened for them the gate and as they entered the compound, an unknown person opened the vehicle door while pointing a gun at her and demanded the house key. She was dragged out of the vehicle, kicked on the back and stomach until she fell down. She could see her husband and another person lying down. Her bag was also searched. Together with PW1, the watchman and another person were taken to a worker's room and locked up. She heard the vehicle being driven away with everything she had bought. They later realized that the watchman had passed away and her husband was lying unconscious. She started to scream and the public responded. They were taken to Ishiara Hospital. She testified that she was not able to identify any of the assailants though she was sure that they were four of them. On 29th August 2010 she was called to Ishiara Police Station to identify some goods which had been recovered. She was able to identify the items which she had bought and avail the receipts for the shirts.

10. This version was corroborated by PW11, Michael Ileri Njeru, PW4's husband. He testified that on the material night, his wife came with many items she had bought from Nairobi, they met in Embu and proceeded home at about 11.00pm. As the watchman opened the gate, he heard some movements outside. He opened the door to see what was going on. He saw a man standing next to the rear door of the vehicle who shouted at him to lie down. He then felt a sharp pain on the left side of his head and lost consciousness. He woke up the following morning to find himself in Ishiara Hospital, bleeding from the left ear and nose. He was later transferred to Nairobi Hospital for treatment. He learnt that the vehicle, his wallet and wrist watch *Jas ma* make and mobile phone Nokia 2612 had been stolen. On 28th September

2010 at Ishiara Police Station, he was able to identify his wrist watch and the multipurpose pliers which was inside the vehicle. He testified that he did not identify any of the robbers and they were unknown to him.

11. PW10, Corporal Reuben Rwambi, was the investigating officer. He testified that he was led to the 1st appellant by the 4th accused who was staying with him. The 4th accused then led them to trace the 1st appellant at Mitunguu area in Meru County whereupon he was arrested. His room was searched and nothing relevant to the case was found. Upon interrogation, the 1st appellant led the police to Kutus area where the 2nd appellant was arrested. His house was searched and several items were recovered and recorded in the inventory. These items included 19 light blue shirts, 14 cream shirts, a multipurpose pliers and a Jaz Ma wrist watch. Through the 2nd appellant's mobile phone, PW10, communicated with Ann Wanjiru Muthee, PW7. He was able to recover some shirts from Ann Wanjiru Muthee, PW7, who the 2nd appellant had some shirts to sell. It was his testimony that the paper receipts were still inside the paper bag that had the items.

12. Ann Wanjiru Muthee, PW7, testified that on 24th September 2010 at about 1.00 pm, while at Kerugoya, the 2nd appellant called her and requested them to meet. When they met he told her he had 5 shirts to sell. He gave her 3 shirts, 2 cream and 1 sky blue. He informed her that he has started a business. As she did not get customers she sent him a text message. He called her back and when he came to see her he came with the police. She was able to sell two items but still has a cream and sky blue shirt with her which were recovered.

13. When put to their defence, the appellants opted for sworn testimony. They denied committing the alleged offences. The 1st appellant testified that on the material day he closed his business at 6.00 pm as usual. He denied leading the police to arrest the 2nd appellant. He worked as a businessman in Mitunguru Town in Meru County where he operated a *boda boda* business and sold second hand clothes. He contended that he was not mentioned by any of the witnesses in connection to the offences he was charged.

14. In his sworn defence, the 2nd appellant testified that he owned a shop where he sold new clothes within the Kerugoya market. His case was that the items recovered were his and produced receipts to prove the allegation. He stated that on the material day, he was in his shop which he closed at about 9.00 pm and proceeded home where he stayed the whole night. He further stated that on 24th September 2010, he went to Kerugoya market to sell clothes and at about lunch time he called PW7 who was his friend. They met and he gave her some samples of the clothes to sell. On 20th September 2010, he proceeded to Nairobi in Eastleigh to get more stock in form of clothes. On 28th September 2010 at 11.00am while at his home he was arrested by two police officers. The officers collected several clothes from his house. He allegedly showed them the purchase receipt but they refused to listen to him. In cross-examination he stated that Ann Muthee, PW7, was her customer and a family friend and he wanted to greet her after a long time. He gave her three shirts as a sample.

15. In their grounds of appeal the appellants raise several grounds which may be consolidated as follows; That the trial court erred in convicting them on the uncorroborated evidence of the prosecution; that the trial court failed to consider that the 2nd appellant's constitutional rights were violated when his house was searched without a search warrant and that the trial magistrate erred in convicting on the basis of evidence of items recovered despite the fact that the offence was committed more than 40 days before their arrest. The State supports both the conviction and sentence on the grounds that the evidence before the court was overwhelming and that the prosecution discharged its burden of proof.

16. We are alive to our duty as the first appellate court to subject the evidence before the subordinate court to fresh scrutiny, weigh conflicting evidence and draw its own independent conclusions, while making allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses (See *Okeno v Republic* [1972] EA 32).

17. We shall begin with the issue of defective charge sheet. The appellants allege the charge sheet was defective as it mentioned the murder of one Fredrick Ireri. We find this ground to be without merit and in this regard we do no better than quote the decision of the Court of Appeal in **Julius Maina Ndirangu v Republic CA Nairobi Criminal Appeal No. 48 of 1997 [2001] eKLR** where it rejected a similar argument. It observed as follows; “...As we shall show later in this judgment, the deceased in that count was killed in the course of stealing a motor vehicle and money. The Legislature by enacting section 296(2) of the Penal Code was in effect validating what otherwise would have been an omnibus charge. The standard form for a robbery charge provided in the Second Schedule of the CPC has a framework for drawing such a charge. Section 137(a)(iv) CPC, is clear that the standard form may be modified as deemed appropriate depending on the circumstances of each case. To our minds therefore, the addition of the word "dead" or words to the effect that the violence which was meted out to the victim of the robbery charged caused his death is merely descriptive of the nature of the violence which was meted out in the course of the robbery charged. It is that aggravating factor which brings the offence within the ambit of section 296(2) aforesaid.”

18. The appellants also took issue in the manner in which PW11 was called to testify as he had been present in the court room when the other witnesses testified and the fact that the charge sheet was amended late in the trial which according to the appellants was meant to accommodate the witness. The presence of the witness during the trial process is corroborated by the PW11's own testimony when upon cross examination by the 1st appellant he stated; “I was before this court yesterday. I was inside the court. I heard everything that went on yesterday. I heard what the investigating officer said and the cross-examination. I wasn't called upon to testify in court yesterday. I was summoned to attend court today.” We must point out that it was wrong for the PW11 to be allowed in court as the witnesses testified. However, we find that this by itself cannot invalidate the whole trial process but is a factor the court may take into account in assessing the weight it should give the testimony of such a witness.

19. On 28th June 2011, after PW11 had testified, the prosecution applied to amend and substitute some of the charges to accommodate the evidence presented by the witness. The prosecution sought to add alternative charges of handling stolen goods against the 2nd appellant. The application by the prosecution was opposed by all the accused on the ground that it was brought late and that it would prejudice them. The learned magistrate considered that the application was within the law having been brought before the close of the prosecution case and that the charges were not prejudicial to the accused. After delivering the ruling on 30th June 2011, the accused were called upon to plead to the new charges and given an opportunity to recall any of the prosecution witnesses. All the accused declined the opportunity to recall any witnesses and the prosecution case was closed.

20. We have reviewed the proceedings and are satisfied that the learned magistrate adopted a proper course. **Section 214** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** allows for amendment of charges at any stage of a trial before the close of the case for the prosecution. What is important is that the rights of the accused persons must at all times be safeguarded. The accused must be allowed to plead to the altered charge and be given the opportunity to recall any witness who has testified for cross-examination. **Subsection (3)** of the section also allows the court to adjourn the trial in cases where an alteration of a charge is such that there is a variance between the charge and the evidence. In this case, we are satisfied that the accused persons were each allowed to plead afresh to the altered charges and to make their defences and submissions. We are thus unable to read a violation of the law or the **Article 50** of the Constitution in the circumstances.

21. We now turn to the substantive ground of the appeal which relates to the identification of the appellants as participants in the robbery. Like the learned magistrate, we have no doubt that a robbery was committed. The evidence of PW1, PW4 and PW11 was precise and corroborated by that of PW2, the watchman. PW5, the doctor who examined that PW1, PW2 and PW11 confirmed that their injuries were caused by a sharp object consistent with the evidence of given by each victim. PW5 also produced the post-mortem report which confirmed the death of Fredrick Mugendi Njuki.

22. The testimony of PW1, PW2, PW4 and PW11 were not able to identify their assailants. As a result the learned magistrate convicted the appellants on the basis of the doctrine of recent possession. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Criminal Appeal No. 272 of 2005 (unreported)***, the Court of Appeal held, “...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.”

23. In convicting the 2nd appellant, the learned magistrate considered the evidence of the property found in his home and concluded as follows, “This court has looked at these items keenly from the court stores. The shirts and curtains are rather ordinary items that could be found in many shops. However on the other hand, there is a unique aspect of these items. For the shirts, they are all in cream colour and the others have light blue colour. A person selling shop goods would surely be having assorted garments of assorted colours. PW4 on the other hand has given a plausible explanation as to why she had bought these garments. Her husband came from Dubai and she wanted to celebrate with the church. She had hence bought the garments for the church choir members for the occasion. As for the particular curtains, the court found that it was very lengthy it must have been acquired for a specific purpose. There is no logical explanation as to why the accused was having such a curtain. As regards the watch, I find that this is a very personal item. The owner of such an item would ordinarily be wearing it unless it is for sale. Why was 3rd accused having the wrist watch in his personal items? There is no explanation advances. However, PW11 has stated that he bought this watch from Dubai. Finally, 3rd accused was found with a multipurpose. This is a common item. However, it was an item PW 11 lost. There is not the slightest logic that the 3rd accused was found with all these different items along with pliers which happens to be the very same things that PW4 and 11 had lost during the robbery attack.”

24. We have reviewed the evidence and we agree with the learned magistrate that the finding of all the items stolen from PW4 and PW11 found in possession of the 2nd appellant at the same time without a reasonable explanation being proffered by him leaves the irresistible inference that he was involved in the violent felony. The 2nd appellant’s defence that he was in business of selling clothes was rightly disregarded. Although he stated that his shop was within his house, he did not have a trading licence and there was nothing in the evidence of PW10, who searched the house, that demonstrated that indeed the house was a shop. Even though he had receipts for the clothes he had allegedly purchased, he could not explain how he had in his possession all the items that had been stolen from PW4 and PW11. We also find that in light of the events particularly the time it took to investigate and locate the 2nd appellant, we do not think the length of time taken from the time the robbery was committed until he was arrested displaces application of the doctrine of recent possession. We therefore uphold the 2nd appellant’s conviction.

25. The basis for the conviction of the 1st appellant was that he is the one who led the police to the home of the 2nd appellant where the stolen goods were recovered. The learned magistrate concluded that from the evidence of PW10 and the conduct of the 1st appellant in directing him to 2nd appellant where the stolen goods were recovered led to an irresistible inference that he was implicated in the robbery.

26. As there was no direct evidence implicating the 1st appellant in the robbery, the evidence leading to his conviction is purely circumstantial. In ***Mwita v R [2004] 2 KLR 60, 66***, the Court of Appeal said the following in relation to a conviction founded wholly on circumstantial evidence, “...the Court must ... find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon other hypothesis than guilt.”

27. Unlike the evidence implicating the 2nd appellant, there was nothing found in his possession which would point to his involvement in the felony. His only connection is that he knew the 2nd appellant and

when he was interrogated he led them to him. It is possible that the 1st appellant only knew the 2nd appellant and had no knowledge of the stolen goods or the robbery. In our view this evidence falls far short of the kind required to convict him. His conviction is unsafe and in the circumstances and we allow his appeal and quash his conviction.

28. In the result the 1st appellants appeal is allowed and his conviction is quashed and the appellant is set at liberty unless otherwise lawfully held. The conviction and sentence against the 2nd appellant is affirmed and consequently the appeal is dismissed.

DATED and DELIVERED at EMBU this 16th December 2013.

D.S. MAJANJA

H. I. ONG'UNDI

JUDGE

JUDGE