



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 61 & 62 OF 2010
(As consolidated on 17/2/2012)

SIMON ATOKA OKOLA.....1ST APPELLANT

FRANCIS OTWOMA NGOSYWE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellants herein were jointly charged together with others with four Counts of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. They also faced the charges of having suspected stolen property contrary to **Section 323** of the **Penal Code** and the alternative charge of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**. They denied all the charges and in her judgment, the learned trial Magistrate found that the Appellants who were the 1st and 3rd Accused persons respectively were guilty of the charge in the first Count whose particulars were as follows;

“1. Simon Atoka Okola, 3. Francis Otwoma Ngosywe - On the 14th day of December 2003, along M.S.C. Munganga Road in Nucleus Sub-Location, Nabongo Location in Butere/Mumias District within Western Province, jointly with others not before Court, being armed with dangerous or offensive weapons namely a panga and clubs robbed Albert Makokha Temesi of his mobile phone make Sagem MW 3020 valued at Kshs.4,500/-, one bicycle make Hero Jet valued at Kshs.5,000/- and cash money Kshs.150/- all totaling to Kshs.9,650/- and at or immediately before or immediately after the time of such robbery wounded the said Albert Makokha Temesi.”

2. The 1st Appellant was also found guilty of the charge in the alternative, that is, handling stolen goods whose particulars were as follows;

“Simon Atoka Okola - On the 15th day of December 2003, along M.S.C. Mwatota Road, Nucleus Sub-Location, Nabongo Location in Butere/Mumias District within Western Province, otherwise than in the course of stealing, dishonestly received or retained one bicycle make Hero F/No. not clear, knowing or having reason to believe it to be stolen property.”

3. The 2nd Appellant was also found guilty of the charge of having suspected stolen property contrary to **Section 323** of the **Penal Code**. Particulars of which were that;

“Francis Otwoma Ngosywe – On 15th day of December 2003, at Shichiraryi Sub-Location, Shieywe Location in Kakamega District within Western Province, having been detained by No.78735 P.C. John Nyasoko, No.74593 P.C. Bernard Shikuku and No.52017 P.C. John Baraza as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code, had in his possession assorted shop goods namely:- six packets of salt, seven packets of tea leaves, eight sachets of glucose, two packets of royco, one pair of tiger batteries, three bars of panga bar soap, one wall clock make ARYAN

and one 25 gms omo sachet reasonably suspected to have been stolen or unlawfully obtained.”

4. On Count I, they were both sentenced to death and on the other charges they were sentenced to serve six (6) months imprisonment each and the Appeals as can be gleaned from the Petitions of Appeal are against conviction in the 1st Count only since the sentences in the other charges have been served. In any event, we are obligated to analyse and re-evaluate the evidence in totality and in doing so we note as follows;

5. That the Complainant in Count I was PW1, Albert Makokha Temesi and his evidence was that on 14th December 2003, he was going home at 2.00 p.m. when a group of five men emerged from a cane plantation nearby and attacked him, viciously. They used pangas and rungas and he stated that he identified the two Appellants as part of the gang. He stated further that the 1st had a panga and the 2nd had a rungu and it was the 1st who hit him in the mouth and removed three of his teeth and it was he that took the Complainant's cash Kshs.4,000/- and a mobile phone Sagem make. After the robbers had fled, PW1 was taken to hospital where he was treated for a month and later Police told him that some suspects had been arrested and he went to the local Police Station and he identified the two as part of the gang that attacked him.

6. PW6, Henry Kanda of Matungu Health Centre confirmed that PW1 had been injured and produced the P3 form showing that a sharp and blunt object caused the injuries.

7. As to how the 1st Appellant was arrested, it was the evidence of PW2, Moses Masakhu Were, the Complainant in Count IV that when he was attacked on 14th December 2003 at 10.00 p.m., the robbers stole his bicycle make Hero Jet and the next day he saw two people in Matungu and one of them was riding his bicycle. He confronted him and got assistance from members of the public who beat and apprehended him. It was the 1st Appellant who later led Police officers and PW3, Samuel Shabale Sande, a Security officer at Mumias Sugar Company to the 2nd Appellant's house where suspected shop goods were recovered.

8. PW5, Francis Situma was with PW2 when the 1st Appellant led the Police to arrest the 2nd Appellant and according to him, a Sagem phone was also found under a mattress when the 2nd Appellant and one, Nathaniel Okwemba Olembo was also arrested.

9. PW6, P.C. John Nyasongo of Bookers Police Post was the one who re-arrested the Appellants and was present when the Sagem phone was recovered from the home of the then 2nd Accused, Benson Sachi Omondi. It was his evidence that the bicycle that was recovered from the 1st Appellant was make “Atlas” and what was recovered from the 2nd Appellant were shop goods of an assorted nature. He also added that Albert Makokha Temesi **“did not make a report to the Police and never came to identify the accused at the Station.”**

10. In cross-examination, he clearly stated that the Sagem phone was recovered between two mattresses in the house of Benson Sachi Omondi.

11. When they were put on their defences, the 1st Appellant stated that he was apprehended on the 15th of an unclear date and beaten by a group that claimed that he had stolen from them. He denied knowledge of the incident and the charges.

12. The 2nd Appellant on his part stated that he was arrested without reason and he was put in a land-rover and later the other suspects were released and he was charged with an offence he had no knowledge of.

13. Having reproduced the relevant evidence in respect of the charges reproduced above, we have no doubt in our minds that the conviction of the two Appellants was in error. We say so, and with respect, for the following reasons;

14. Firstly, we do not doubt that PW1 was indeed attacked and his bicycle stolen but that is the only certain evidence on record. He did not make a report to the Police and he did not therefore describe the circumstances of his alleged attack or the identity of the robbers if at all, he had such knowledge. His bicycle was a “**Hero Jet**” but the one he allegedly recovered from the 1st Appellant and which he took to the Police was an “**Atlas**” make bicycle. That contradiction is material because without a report to the Police, then it is difficult not to disprove the Complainants evidence.

16. Secondly, the 2nd Appellant was apprehended allegedly because the 1st Appellant led the Police to his house. Neither PW1 nor any other witness mentioned him as having been at the scene and although PW1 purported to identify him, his evidence is suspect for reasons we have given above. In any event, the shop goods allegedly recovered from his house had no connection to the incident involving PW1.

17. Thirdly, the charge facing the Appellants was serious and required proof beyond reasonable doubt. The threshold in the present case was certainly not met.

18. In the end, we find merit in the Appeals and will quash all the convictions, on all the Counts and Charges reproduced above and will order that the Appellants be released unless they are otherwise lawfully held.

19. Orders accordingly.

D. A. ONYANCHA

I. LENAOLA

JUDGE

JUDGE

**DELIVERED, DATED AND COUNTER-SIGNED BY S. CHITEMBWE, JUDGE AT
KAKAMEGA THIS 23RD DAY OF FEBRUARY, 2012**

S. CHITEMBWE

JUDGE