



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 185,187 OF 2008

RICHARD MWAURA NJUGUNA.....1ST

APPELLANT

THOMAS MWAURA NYOKABI.....

2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

RICHARD MWAURA NJUGUNA and THOMAS MWAURA NYOKABI were convicted for the offence of **Robbery with violence contrary to Section 296 (2) of the Penal Code**. They are now facing the death sentence.

However, they both believe that both the convictions and the sentences were not properly founded. They have therefore asked us to quash the said convictions. They also want to have the sentences set aside.

In challenging the decisions of the trial court, the appellants have made the following assertions;

- (a) *The circumstances in which the single identifying witness allegedly identified them, was not conducive for positive identification.***
- (b) *The prosecution did not prove the case to the standard required by law;***
- (c) *Essential witnesses were not called by the prosecution;***
- (d) *The trial court erred by rejecting the defences for no cogent reasons.***

When canvassing the appeal, the appellants faulted the complainant for failing to disclose the length of time that he spent looking at the robbers, or even the duration of the robbery.

Secondly, the names given by **PW 2** did not relate to any of the appellants. The said names were “Kunga” and “Muli”

The appellants submitted that the police officer, to whom the complainant lodged his report, should have testified. As he did not testify, the appellants argued that there was therefore no evidence of the contents of the first report.

The prosecution was faulted for not exhibiting a document to demonstrate the items that were allegedly recovered from the appellants.

It was also contended that the police officer who investigated the case and the officer who preferred charges against the appellants did not testify.

Finally, the trial court was faulted for relying on accomplice evidence to convict the appellants.

In determining this appeal, we have re-evaluated all the evidence on record, and have drawn our own conclusions. Of course, we have made an allowance for the fact that, unlike the learned trial magistrate, we did not have the benefit of observing the witnesses when they gave evidence.

PW 1 was accosted when the vehicle he was driving got stuck on a muddy road. He said that it is the 1st appellant who accosted him, whilst holding a gun.

The man demanded money, threatening to kill **PW 1** and his passenger. The man also fired one shot into the air.

PW 1 gave his mobile phone to the said man.

For the sake of completeness, we need to point out that there was a second vehicle which was also stuck in the mud. That vehicle got stuck ahead of **PW 1's** vehicle.

After the 1st appellant had got **PW 1's** phone, he went to the other vehicle. Meanwhile, the 2nd appellant, who had been at that other vehicle, came to **PW 1's** vehicle.

The 2nd appellant punched **PW 1** on the neck and also stabbed him on the neck, using a sharp object.

Apart from the mobile phone, the 2 robbers took **PW 1's** torch and cassette.

After the robbers left, some members of the public went to the rescue of **PW 1**. They explained that they could not have come out earlier, as they had heard a gun-shot.

PW 1 then went to the Police Station. He was escorted by police officers, back to the scene, where he pointed out the 2 robbers. The police recovered **PW 1's** phone from the 1st appellant. They also recovered the cassette from the 1st appellant; and the torch from **PW 2**.

PW 2 informed the police that it is the 1st appellant who had given her the torch.

It was the testimony of **PW 1** that his wallet was recovered from the 2nd appellant. The wallet had **PW 1's** Identity Card, Driving Permit, Work Permit, Ugandan Voter's Card, 2 passport photos, Employment Card and UShs.1,000/-.

PW 1 was a Ugandan businessman-cum-artist.

During cross-examination, **PW 1** said that he was able to see the appellants clearly because the lights from the car were on. The 1st appellant had told **PW 1** to put on the lights inside the vehicle, so that the appellant could see everything.

After the lights were put on, the 2nd appellant removed the motor vehicle cassette.

PW 2 was a 14 year old, school girl. She knew the 1st appellant because he and her used to be students at Kangethe Primary School, before **PW 2** moved to Fadhili Junior Academy.

On the material day, **PW 2** was at the house of the wife to the 1st appellant. She testified that the 2 appellants arrived at the said house, at night.

The appellants then told Mama Kunga (who is the wife to the 1st Appellant), and **PW 2** to accompany them to “Progressive” to buy meat.

According to **PW 2**, it was then dark, and the road was muddy and slippery. The 1st appellant gave to **PW 2** a torch, to enable her see well.

Suddenly, a police vehicle stopped, and the 1st appellant was ordered to enter it. When he was inside the vehicle, the 1st appellant was asked for the PIN number and the phone number of the “Samsung” mobile phone he had.

However, the 1st appellant did not know either the phone number or the PIN.

Meanwhile, **PW 2** explained to the police that the torch which she was holding, had just been given to her by the 1st appellant.

By the time the police had ordered the 1st appellant and **PW 2** into the police vehicle, the 2nd appellant had run away. He and his wife disappeared as soon as they saw the police vehicle

However, before the police vehicle reached “Progressive”, **PW 1** saw the 2nd appellant, and pointed him out to the police. The 2nd appellant was arrested and the complainant’s wallet was recovered from him.

During her testimony, **PW 2** revealed that the 1st appellant’s nickname was “Kunga”, whilst the nickname for the 2nd appellant was “Muli”.

PW 3 was a police officer who was on mobile patrol duties within Githurai area, on the material night.

After **PW 1** made a report at the police station, **PW 3** told the officers at the Report Office, to send **PW 1** to him. When **PW 1** linked up with **PW 3**, he joined the officer inside the police vehicle.

PW 1 pointed out the 1st appellant and **PW 2**. **PW 3** arrested them. He recovered a phone from 1st Appellant. The phone was positively identified by **PW 1**.

PW 3 also arrested the 2nd appellant after **PW 1** pointed him out. **PW 3** recovered a wallet from the 2nd appellant.

PW 3 testified that **PW 2** did inform him that the torch which she was holding, had been given to her by the 1st appellant.

After **PW 3** testified, **PW 1** asked that the phone together with his personal documents be released to him. The learned trial magistrate ordered that they be so released, after the appellants said that they had no objection.

When the 1st appellant was put to his defence, he said that he was only charged because he did not have Kshs.8,000/- to bribe the police.

On his part, the 2nd appellant said that it was true that **PW 2** had been in the same school as he. But he denied the charges.

Both appellants said that **PW 2** was only released because her mother paid a bribe to the police. They denied having committed the offence.

In our considered opinion, the circumstances prevailing were not harsh, as alleged by the appellants. In so finding, we are not oblivious to the fact that the incident took place on a dark night. We also acknowledge that one of the robbers did fire a shot into the air.

That “warning shot”, if we may so describe it, served to keep at bay, the members of the public. It also

sent a clear message to the complainant that the robbers meant serious business.

Thereafter, the 1st appellant ordered **PW 1** to switch-on the lights inside the vehicle, so that he could see everything clearly.

Just as much as the appellant was able to see everything clearly, **PW 1** was also enabled to see him clearly.

The 2nd appellant then went about removing the cassette from the vehicle. Again, as the light inside the vehicle was on, **PW 1** was able to see the 2nd appellant clearly.

Thereafter, the 2 appellants arrived at the residence of the 1st appellant, together. **PW 2** was present when they got there.

The 1st appellant gave to **PW 2** a torch which belonged to the complainant.

And shortly thereafter, the police arrested both **PW 2** and the 1st appellant when **PW 1** pointed out the 1st appellant.

When the 1st appellant was searched, **PW 1**'s phone and cassette were recovered from him.

As the 1st appellant was in possession of the complainant's property, which had only just been stolen from **PW 1**, the doctrine of recent possession was applicable to him.

The same doctrine was applicable to the 2nd appellant.

Therefore, even if the complainant had not identified the appellants, the conviction would still be sound, based on the doctrine of recent possession.

In our considered view there were no essential witnesses who the prosecution failed to call.

The first report would only have been necessary, as evidence, if the information contained in it is what led to the arrest of the appellants.

However, in this case, it is the complainant who led the police to arrest the appellants.

Secondly, **PW 2** made it clear that the names "Kunga" and "Muli" were simply the nicknames used by the appellants. Therefore, it is obvious that those names did not relate to persons other than the appellants.

As the stolen items were recovered shortly after the incident, there was no need for further investigations to verify that it is the appellants who were the robbers.

PW 2 was not an accomplice to the appellants. Her evidence, in that respect was simple and straightforward. But even if her story had not been accepted by the trial court, it could not exonerate the appellants from their culpability in connection with the complainant's wallet, mobile phone and the cassette.

In the result, after re-evaluating all the evidence, we are satisfied that the evidence produced by the prosecution was simply overwhelming. The defences put forward by the appellants did not cast any doubt on the case.

Accordingly, the appeal is dismissed. We uphold both the convictions and the sentences.

Dated, Signed and Delivered at Nairobi, this 20th day of February, 2012

.....
FRED A. OCHIENG
JUDGE

.....
L.A. ACHODE
JUDGE