



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL 50 OF 2010

(Appeal against conviction and sentence arising from the original Criminal Case No.480 of 2008 in Butere Senior Resident Magistrate's Court at Butere)

JARED OTIENO APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that the appellant on the night of 29th and 30th April 2008 at Shirotsa village, Ebuhalala sub-location, Eshimombe location in Butere District, within Western Province jointly with others not before court while armed with dangerous weapons namely pangas and rungas robbed **BONFACE NGOTE ANYWOLO** of two bicycles make LONAX and another not known, one empty crate, one wooden box, one packet of white polythene papers and assorted clothes all valued at KShs.15,000/= and at the time of such robbery used actual violence to the said **BONFACE NGOTA ANYWOLO** by injuring him. The appellant also faced an alternative charge of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**. The appellant was convicted of the main charge and sentenced to suffer death. He filed eight grounds of appeal which are that:-

1. *The ingredients of the charge were not proved*
2. *The first report was made without his name*
3. *The offence he was booked with is not the one he was charged with*
4. *The language used was English/Kiswahili and nobody translated for the appellant*
5. *PW3 testified that she didn't know the appellant*
6. *The brightness of the torch light used to identify the appellant was not described*
7. *PW4 and 5 got the information of the robbery from an informer who was not called*

8. The conviction is against the weight of evidence on record.

PW1, BONFACE NGOTA ANYWOLO was the complainant. He testified that on the night of 29th April 2008 he was sleeping in his house when he heard his doors and windows being knocked. He put on a kerosene lamp and he had a torch. People entered his house through the window and some remained outside. They were armed with pangas, sticks and knives. PW1 saw the appellant who had a panga and a knife. PW1 was hit on the head and cut on the left eye. His elbow was broken. He was hospitalized for three and half months and was in a coma. According to PW1 the appellant was being called “officer” and he ordered him to be killed as he had identified him. PW1’s two bicycles were stolen, a black phoenix and a green aron, a crate, clothes, KShs.47,000/= and several items were stolen. He was later called to identify some things that were recovered and he identified his black bicycle which was in pieces. He also identified a crate which he used for carrying things. PW1’s further evidence is that he came out from his coma after one week. He called the names of the appellant when they were beating him.

PW2 ALICE MUKHANZI testified that PW1 is her brother in-law. She was informed about the robbery on the 30th April 2008 and went to PW1’s house where she found the window to the house was broken and things were scattered all over. She went to the hospital and saw the complainant PW1 who was in a coma. She notified the chief. The chief later called her to go and identify some stolen items that had been recovered and she identified two bicycles which she knew belonged to PW1.

PW3, COPORAL ELPHAS ODHIAMBO was based at the Kisa West Police camp. On the 1st of May 2008 at about 12.00 noon he was at the camp when he was informed by the Doho Assistant chief that there was information that the accused had stolen from the deceased. PW3 later went to the appellant’s home together with the area chief and other police officers and found the appellant in his house. They searched the house and found dismantled bicycles, a wooden crate which had some other papers inside. They arrested the appellant and took him to the camp. The relatives of the victim identified the items. PW3 later took the appellant to Dudi police post. PW3 recorded the items which he recovered from the appellant’s house on the Occurrence Book which was requested by the appellant during the trial.

PW4, SIMON ACHERO was the assistant chief of Doho sub-location. On the 2nd of May 2008 he was at his office when he got information that the appellant was having suspected stolen goods. He went to the appellant’s house and recovered pieces of dismantled bicycles and a wooden box. They arrested the appellant and took him to Dudi patrol base together with the recovered items. **PW5, JULIUS MASHETI** was based at the Butere District Hospital. He filled the P3 form for the complainant on the 14th of May 2008. It is his evidence that the complainant had a swollen face with bruises, chest had tenderness on the anterior area and the lower limbs were bruised. The complainant was unable to walk.

PW6, PC JOHN NYASOKO was stationed at the Butere Police station. On the 3rd of May 2008 the relatives of the complainant informed him about the robbery that had occurred on the nights of 29th/30th of April 2008. PW6 got information from Dudi Patrol base that the appellant was being held there and some items had been recovered. PW6 went to the scene and found the complainant’s door and window had been broken. They went to Dudi patrol base and took the suspect. PW6 visited the complainant at Yala sub-district hospital but the complainant was unable to talk. The complainant was later discharged from hospital and informed PW6 that he was able to identify one of his robbers from light from the lamp and torch. The complainant went to the police station on 14th of May 2008 and he identified two dismantled bicycles and the crate to be his property.

The appellant was put on his defence and gave sworn evidence. His evidence is that on the 2nd of May 2008 he was at home and went to his farm where he found a son of his brother had stolen his tomatoes. He continued with his work at the farm and went home. At about 11.00 a.m. the assistant chief and Administration police officers went to arrest him accusing him of smoking bhang. They searched his house but nothing was recovered and he was taken to Yala police station. He denied committing the offence. His further evidence is that the exhibits produced by the prosecution were not his property and they were not found with him.

The trial court correctly framed the issues arising from the case as whether there was robbery in the first instance and whether the appellant was positively identified. We shall add a third issue as to whether the prosecution's case was proved beyond reasonable doubt. The trial court indeed dealt with the third issue by trying to find out whether the evidence of PW1 was corroborated by the rest of the evidence.

As to whether PW1 was robbed on the night of 29th/30th April, 2008, the evidence of PW1 is that he was sleeping in his house that night when about six robbers entered his house through the window. PW1 had a torch and the robbers had torches. PW1 put on the kerosene lamp. Some of the robbers did not enter the house. According to PW1 the robbers hit the lamp but he had managed to identify the appellant. The robbers were armed with pangas, knives and sticks. There were more than one robbers. PW1 was injured and he was hospitalized for 3 ½ months. PW5, Julius Masheti produced medical evidence that established that PW1 was assaulted. We do find that PW1 was violently robbed on the nights of 29th/30th April 2008.

The next issue is whether the complainant was able to identify the appellant. PW1 testified that he called the appellant by his name and he ordered that PW1 be killed as he had identified him. PW1 indeed sustained very serious injuries. According to PW1 not all the robbers entered the house. He did not indicate how long the robbery took place. However, taking into account the number of items stolen and the injuries sustained by the complainant, it can be deduced that the robbery was not a one minute affair. Although PW1 sustained serious injuries and was in a coma later and had to be hospitalized for over 3 ½ months, we do find that he was able to identify the appellant before the injuries incapacitated him. It is his evidence that he even called the appellant by his name including that of the appellant's father. There were torches in the house and PW1's evidence is that he saw the appellant from the light coming from the torches of the other robbers. It is our finding that PW1 identified the appellant. PW1 was in a coma for about one week and the issue of first report to the police does not arise. The appellant was arrested on 2nd May 2008 while the robbery had taken place on the nights of 29th/30th April 2008. By the time the appellant was arrested, PW1 was still in a coma. There was no need for an identification parade as PW1 knew the appellant before the robbery.

It is the evidence of PW3, Corporal Elphas Odhiambo and PW4, Simon Acheru that they went to arrest the appellant on the 2nd of May 2008 and recovered some of the stolen items. The appellant himself confirms that he was arrested on the 2nd of May 2008 while at his house. It is the appellant's defence that he was accused of smoking bhang and nothing was found in his house after the search. The appellant called for the Occurrence Book of 2nd May 2008 from the police station and the same was produced by PW3. It did indicate that the appellant was arrested on 2nd May 2008 and was wanted at the Butere Police station on suspicion of having committed a robbery with violence. PW3 testified that he indicated the items recovered in the Occurrence Book.

From the evidence of PW3 and PW4, we are satisfied that the appellant was arrested on 2nd of May 2008 and some of the items stolen from PW1 were recovered in his house. The contention by the appellant that he was suspected of smoking bhang does not arise as the same was not indicated in the Occurrence Book. We do find that the recovery of the stolen items in the appellant's house does corroborate PW1's evidence that he was violently robbed and that it was the appellant who was one of the robbers. PW1 was robbed on the nights of 29th/30th April 2008. Some of the stolen items were recovered in the appellant's house on the 2nd of May 2008. We do find that the doctrine of recent possession does apply. Even if the evidence of PW1 on identification was to be kept aside, the prosecution evidence still does establish that the appellant was one of the robbers as he was found in possession of items that had been recently stolen from PW1. In the case of R V. LOUGHIN 35 CRIMINAL APPEAL R. 69 [Reproduced in Maina and 30 others v. Republic 1986 KLR 301] the court did establish the doctrine of recent possession in the following terms:

“If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop-breaker.”

We do find that the appellant was not only identified by PW1 but was also found in possession of recently stolen items. PW1 identified the stolen items as his. PW2 knew the two bicycles belonged to PW1 and she went to identify them even though they had been dismantled. We do find that the prosecution did prove its case beyond reasonable doubt. The appeal is hereby disallowed.

Dated, delivered and signed at Kakamega this 28th day of June, 2012.

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SAID J. CHITEMBWE

J U D G E

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B. THURANIRA JADEN

J U D G E