



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL 39 OF 2011

FRANCIS WAWERU GATHENJI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence in Criminal Case No. 143 of 2010 of the Principal Magistrates Court at Kangundo(Hon. C. Obulutsa PM) dated 18th February 2011)

JUDGMENT

The appellant, **Francis Waweru Gathenji**, was charged with two counts of **capital robbery** contrary to **section 296 (2)** of the **Penal Code**. In the alternative, he was charged with handling stolen goods contrary to section 322(1) 92) of the Penal Code. In count 1, the particulars were that on 13th April 2010, at Joska village, Muthuani Location, Matungulu District jointly with others not before court while armed with runigus and axes robbed Paul Patrick Omondi, cash Kshs.26,000/=, two mobile phones make Nokia and Dorado, one radio cassette make Shonashi, five loaves of bread, eight Afya juice and four packets of cigarettes all of total value of Kshs.54,395/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Paul Patrick Omondi. In count 2, the particulars were that on the same date, in the same village, jointly with others not before court while armed with runigus and axes robbed Nancy Wanjugu Kimangu, cash Kshs.2,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Nancy Wanjugu Kimangu. The particulars of the alternative charge of handling stolen goods were that on 13th April 2010, at the same village did receive one radio cassette make Sonashi valued at Kshs.15,000/= the property of Paul Patrick Omondi, knowing the same to have been unlawfully obtained.

After a full trial, he was found not guilty of count 2 and the alternative charge. He was however, found guilty of count 1, convicted on the same and sentenced to suffer death. Being dissatisfied, he has appealed to this court against both the conviction and sentence. He filed his initial grounds of appeal on 25th February 2011. At the hearing of the appeal, with the leave of the court, the appellant filed amended grounds of appeal and written submissions, which we have perused.

Learned State Counsel, Mr Mwenda, opposed the appeal. Counsel contended that the complainant PW1, and his wife PW2 were able to identify the appellant and they picked him at the identification parade. Though the two witnesses did not describe the conditions for identification, the appellant was found barely six (6) hours after the incident in possession of the complainant's radio, which was one of the items stolen. The said radio was produced in court as an exhibit and identified. The appellant did not give any satisfactory explanation on how he came to be in possession of the radio. Counsel submitted that the finding of the magistrate that the doctrine of recent possession applied was proper.

In brief the evidence of the prosecution is as follows. On 13th April 2010, at 2.30 a.m., PW1, Patrick Omondi, the complainant in count 1 was asleep with his family at his home at Joska village, Matungulu District, when he heard the barking of dogs. Shortly, thereafter, some people banged the doors and windows of his house. Due to threats of being killed if they did not open, he opened the door and when the people entered, they demanded money and he gave them Kshs.26,000/=. When he gave them the money, they struggled to count it using torches and he saw two of them clearly. One of the robbers tried to hit him on the head with an axe, but he shielded the head with his right arm which got injured. They ordered him to get under the bed and took his two mobile telephones a Nokia Q7 and Dorado. He then heard his wife PW2 Leah Omondi being taken to the shop, while he was under the bed. His wife, on the other hand, was made to give them Kshs.1,500/= when the robbers demanded for money. They entered the shop and took 10 juice packets, eight loaves of bread and cigarettes and then disappeared.

Later PW1 picked the appellant at an identification parade. The radio cassette of PW1 was also recovered. This was the subject of the count 1.

On the same night, PW3 Nancy Wanjugu (complainant in count 2) was sleeping in her house at Joska at 1.30 a.m, when people broke her door and entered. They had torches and she had her own torch. They demanded money and she showed them where the money was, took it and gave it to them. It was Kshs.2,000/=. They also took her Motorola CII8 Mobile phone and a hammer.

This was the subject of count 2.

During the same night at about 3 a.m., PW4 Duncan Wandaka, was sleeping at his house in Joska when his door was banged and broken. Eight people entered and told him to lie down. They then ordered him to stand up and beat him up demanding for money. They then commanded him to go with them. They walked together for a distance, in the moonlight. However, he somewhat managed to escape. He was the one who took the police to the home of the appellant, a person whom he knew before. According to PW4, the appellant was one of the people who raided his house. No charge was brought in respect of this witness.

In the meantime, a report was made to the police on phone and radio communication the same night. The next morning members of the public chased the appellant into Joska Police Post, where he found Sergeant Wekesa (PW6). According to PW6, the appellant was interrogated and led them to his house where he showed them a radio cassette make Shonashi, which was taken to Kangundo Police Station. That radio was later handed over to PW8, Corporal Mwenda, by Inspector Ann, (who did not testify) on 21/4/2010. PW8 was also given broken padlocks and phones (by Inspector Ann).

In the meantime, PW1 was taken for treatment. A P3 form was filled and produced by PW7 Dominic Mbindyo a Clinical Officer. In his opinion, PW1 was injured by a blunt object. The degree of injury was classified as main.

The appellant was then charged with the offences.

When put on his defence, the appellant gave unsworn defence. He stated that he was a driver. While he was at Joska with a pick up waiting for work, a person whom he knew as Duncan pointed at him and said he was one of them. People removed him from the vehicle and led him behind the shops and beat him. He was then taken to the police post, and then to his house where a search was conducted. He was taken back to the police post, and after an hour, put on a vehicle to Kangundo Police Station and later charged.

Faced with this evidence, the learned magistrate found that the 2nd count regarding robbery of Nancy Wanjugu, was not proved, as she did not identify the appellant in any parade, after the incident. The learned magistrate, however found that count 1 was proved, not on identification, as the officer who conducted the parade neither gave evidence nor was the identification parade form produced, but on the doctrine of recent possession of stolen property. He went on to state in the judgment:-

“PW1 Paul said he was attacked at 2.30 a.m. and at day break the accused was arrested and found

with the radio less than six hours after its disappearance. The fact that he was found with it hours later positively puts the accused at the scene. He has failed to rebut the prescription (sic) by giving any explanation as to how the radio was found in his house. It is also curious that six broken padlocks were recovered in his house. The same were also produced in court which the accused has also not explained. It goes further to corroborate that he is indeed a criminal.”

This being a first appellate court, we must first of all caution ourselves that we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences, giving allowance to the fact that we did not see the witnesses testify to determine their demeanour – see **Okeno –vs- Republic (1972) EA**.

We have evaluated the evidence on record. The learned magistrate took the factors on positive identification into focus. He concluded that the visual identification was not satisfactory. The incident occurred at night. There was no description of the favourable circumstances that could lead to positive identification without the possibility of error. The identification parade was also not relied upon, as the parade officer did not testify, nor was the identification parade form produced in court.

The learned magistrate convicted the appellant on the doctrine of recent possession. In **Odhiambo –vs- Republic (2002) 1 KLR 241** at page 248, the Court of Appeal stated:-

“Finally, there is evidence of the appellant’s possession of the robbed motor vehicle. The robbery took place on 4th November, 1997 at or about 4 a.m. Within about six hours later, the appellant was found driving the same vehicle. When stopped, he was rough with the police and engaged them in a fight which resulted injury to one of them. It is settled in law, that evidence of recent possession is circumstantial evidence, which depending on the facts of each case, may support a charge, however, penal.”

The learned magistrate found that the appellant was found in possession of a radio cassette, broken padlocks, and mobile phones about 6 hours after the incident. Indeed, the appellant admits being taken to his house for a search the next morning after he was arrested. The police officer who took him there was PW6 Sergeant Wekesa. He stated in cross-examination:-

“You took us home, opened it and recovered the radio. I also remember we found several broken padlocks which are also in court.”

The investigating officer PW8 Cpl. Mwendwa, produced a radio, six broken padlocks, and a phone as exhibits.

The padlocks could be items from broken houses, but are not the subject of any charge, and therefore, the doctrine of recent possession of stolen goods does not apply.

The phone was not identified by PW1 and PW2. The radio cassette belonging to PW1 however, was recovered from his house. It was positively identified by PW1 and PW2. The appellant did not say anything about the evidence of the recovery of the radio from his house some less than 12 hours after the incident.

He did not even attempt to give a reasonable explanation as to how the radio got there. His defence was as follows:-

“I am called Francis Waweru aged 33 years reside in Joska. I was a driver. The complainants are not known to me. I only saw them in court. On the material date I was at Joska with pick up waiting for work while two people came to me. One is known to me. He is called Duncan. He pointed at me and said I am one of them. They removed me from the vehicle took me behind the shops. I was beaten and taken to the police post. When the officers took me to the house they searched and took me back to the police post. After about an hour I was put in a vehicle and taken to Kangundo Police Station. After a few days I was charged with the offence which I deny.”

In our view, the doctrine of recent possession applies with regard to the radio, which was positively identified by PW1 and PW2 as belonging to PW1. We therefore find that the appellant was one of the robbers of the radio, as he did not give any explanation as to how the said radio got to his house. It was in his possession. On the basis of this evidence, we will dismiss the appeal and uphold the conviction of the learned magistrate. The sentence is the only lawful sentence allowed by law.

Consequently, we dismiss the appeal and uphold both the conviction and sentence.

Dated and delivered at Machakos this **17th** day of **July** 2012.

Asike - Makhandia

George Dulu

Judge

Judge

In presence of:

Nyalo – Court clerk

Appellant present in person