



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

Criminal Appeal 18 of 2009

SAMUEL MBURU NJOGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.5112/2007 by Hon W. M. Kagendo, Senior Resident Magistrate, dated 15th January, 2009]

JUDGMENT

The appellant, Samuel Mburu Njogu, was charged with four counts of the offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**.

The particulars of the offence, in accordance with count 1 in criminal case No.5112/07 were that, during the night of 25th and 26th day of October, 2007 at Kware area Subukia location in Nakuru North District, the appellant jointly with others not before the court being armed with dangerous weapons, namely AK 47 rifle and pangas robbed Peter Maina Thuku of one radio make Sonitec valued at Kshs.700/= and at or immediately before or immediately after the time of such robbery threatened to use actual force to the said Peter Maina Thuku.

In count 2, it was alleged that during the same night, the appellant in jointly with others not before the court, still armed as aforesaid, robbed Loice Wanjiru Mbugua of one radio make Sonitec valued at Kshs.700/= and at or immediately before or immediately after the time of such robbery threatened to use actual force to the said Loice Wanjiru Mbugua and also robbed Rose Wairimu Kimani of one mobile phone and Joseph Kinyanjui of two weighing machines, two boxes of batteries, two packets of sweets, two packets of match box and cash money all valued at Kshs.8,000/=

From the record before us, it is apparent that the only evidence led in court was in respect of the charge in Criminal case No. 5111/07 which was consolidated with criminal case No. 5112/07 which is the subject of this appeal. We clarify this point at this stage because both counsel for the appellant and for the respondent laboured under a mistaken belief that the complainants were not called.

According to P.W.1, Joseph Njoroge Kinyanjui, who is the complainant in criminal case No.5111/2007, he was sleeping in a room behind his shop at Subukia when at about 2 a.m he heard many people talking in the shop. As it was not safe to go out and find out what was happening, he kept quiet and listened. After the people in the shop left, he went to the shop and noticed that the front door of his shop was open and some items were missing, namely 2 weighing machines, coins with approximate value

of Kshs.2000/=, one packet Eveready batteries, some match boxes, 1 dozen black kiwi polish and some sweets with total estimated value of Kshs.8000/=. He made a report at the police station 2 km away. In the morning the police came to the crime scene looked around and left. Later in the day police officers from Nyahururu came with a person they had arrested and some of the stuff that they believed had been stolen from the shop. He positively identified some of the things recovered as those stolen from the shop.

P.W.2, Geoffrey Kiarie Mwaura told the court that he was guarding a bar next to the complainant's shop when at about 2 am the door to the bar he was guarding was broken with a stone by about 4 people with pangas and iron bars. The people tried to enter the bar but he struggled with them and managed to prevent them from entering the bar. When they left, he went and reported at Subukia Police Station. He did not identify them because of darkness. On return from the Police Station, he met the complainant from whom he learnt that his shop had been broken into. He escorted him, (PW1) to the Police Station to report.

The evidence of PW3, the complainant's wife, was similar to that Of PW1. Like PW1, she identified some of the properties allegedly recovered from the appellant as those stolen from their shop.

P.W.4, IP Erastus Tathithiawas on duty on 26.01.2007 at around 5 am when he received a report of an illegal road block at Subukia along Subukia- Nyahururu Road. Accompanied by his colleague P.C Macharia they rushed to the road block. Before they reached the road bock, they met a group of 4 people heading towards Nyahururu, passed them, went to the road block and removed the stones that had been used to make the road block. on their way back, near Laikipia Campus, they caught up with the 4 people they had met earlier on, stopped the Police vehicle they were travelling in, alighted and chased the 4 who were fleeing upon seeing them. In trying to restrain them, he, P.W.4, shot and fatally wounded one of the 4 people while the appellant was arrested by P Macharia. From the fatally wounded suspect, they recovered a toy pistol and from the appellant they recovered 2 radios, some shop items and other things. The other two disappeared.

P.W.5, George Satia, the investigating officer. received the report of the alleged robbery on 26.10.2007, He carried out investigations and confirmed that several houses had been broken into including the complainant's shop during the night in question. Later, officers from Nyahururu Police Station came with the appellant and some recovered properties some of which were identified by the complainant as those stolen from his shop.

P.W.6, PC Robert Macharia's evidence is similar to that of P.W.4. He told the court that he personally pursued the appellant who dropped a polythene bag when he shot in the air. He managed to arrest him and from the bag that the appellant dropped he recovered 2 weighing scales, 1 Sonitec radio, batteries, and Rhino match boxes, some coins, a small handmade gun and 2 torches. Later they visited the scene of crime and saw several doors that had been broken.

In his defence the Appellant stated that he was at the bus stage near Laikipia Campus waiting for a bus to travel to Nyahururu where he works when the police officers came. Upon seeing the police, the people at the stage fled. The police chased them and arrested him and another woman whom they later on released. That the police collected everything at the stage and put it into the police car and after being questioned about his involvement in a theft that had taken place, he was taken to the scene of crime and shown some people who the arresting officer alleged he had robbed. He denied having committed the offence and contended that the evidence against him was fabricated.

That was the evidence upon which the trial court found the offence of **robbery with violence** contrary to **Section 296 (2)** of the Penal Code proved against the appellant, convicted him of the offence and sentenced him to suffer death. As for the 2nd Accused, Simon Maina Gacheru, the court found him without a case to answer and acquitted him under **Section 210** of the **Criminal Procedure Code**.

Aggrieved by the decision of trial court, the appellant filed this appeal challenging the decision of the trial court on eight grounds reduced to the six as summarized below:

1. that the trial Magistrate failed to note that the three complainants did not testify hence the offence allegedly committed against them was not proved;
2. that the learned trial Magistrate failed to note and consider that none of the prosecution witnesses identified the appellant as having participated in the robbery;
3. that the learned trial Magistrate failed to consider that the ingredients of breaking and stealing were not proved;
4. that the trial Magistrate inappropriately applied the doctrine of recent possession;
5. that the trial Magistrate erred in law and in fact in failing to note and consider that the substantive charge was not supported by an alternative charge for which an alternative finding could have been found hence a miscarriage of justice was occasioned
6. that the trial Magistrate failed to give the appellant and his co-accused an opportunity of objecting to consolidation of the charges hence a miscarriage of justice was occasioned.

During the hearing of the appeal, learned counsel for the appellant submitted that as none of the complainants testified, the three counts of robbery with violence were not proved; that there was no proof of breaking and stealing as the witnesses simply found the houses broken into; that the witnesses confirmed that the appellant was not seen at the scene; that the doctrine of recent possession was wrongly applied and; finally that consolidation of charges was inappropriately done as the appellant was not given an opportunity to object.

Learned counsel for the respondent, while conceding the appeal noted that it was unsafe to convict the appellant when the complainants did not testify. He also observed that the appellant and his co-accused were not charged with handling stolen property.

This being a first appeal, it is the duty of this court to re-evaluate the evidence, adduced during trial, in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses testify.

It is important at this stage to reiterate that initially there were two cases filed before the trial court to wit, Criminal case No. 5112 of 2007 in which the appellant and his co-accused were charged with three counts of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code** and criminal case No. 5111 of 2007 in which the two were also charged with the same offence. The complainants in Criminal case No. 5112 of 2007 were Peter Maina Thuku, Loice Wanjiru Mbugua and Rose Wairimu Mbugua while the complainant in criminal case No. 5111 of 2007 was Joseph Njoroge Kinyanjui.

On 14th May 2008, following an application by the prosecution, the court allowed the charges in the two cases to be consolidated and consequently criminal case No.5111 of 2007 was withdrawn under **Section 87(a)** of the **Criminal Procedure Code**.

Before consolidating the charges the court explained to the appellant and his co-accused that the charges were being consolidated. It also read the charges afresh to the accused persons and gave them the opportunity to plead afresh to the charges, to which they both pleaded not guilty.

Apparently, the appellant and his co-accused were only tried in respect of the charge carried over from criminal case No. 5111 of 2007. The trial court in its judgment identified the offence in respect of which the appellant and his Co-accused was convicted of as the offence in Criminal case No. 5111 of 2007 as opposed to the offences in criminal case No. 5112 of 2007 in which the complainants did not testify.

Did the consolidation of the charges of the two cases occasion any injustice to the appellant and his co-accused as submitted by the appellant's advocate? With respect, we do not think that any injustice or

prejudice was occasioned to the appellant. The court explained to the appellant and co-accused before consolidating the charges and also gave them the opportunity to plead afresh to the consolidated charges.

Going back to the evidence adduced before the lower court, we find as a fact that P.W.1 and P.W.3's shops were broken into and that nobody saw those who broke into the shop and stole therefrom. We are satisfied that both PW1 and PW3 positively identified some of the things that were allegedly recovered from the appellant particularly, the 2 weighing balances from the rope that they had used to tie them together and a broken glass pane on one of the machines. They were also able to prove ownership of the machines by production of the receipts. The appellant who was equally pursued was found with the recovered properties did not offer any explanation of his possession of the items. We are further satisfied that the complainants, PW1 and PW3, were able to positively identify the weighing machines. We are also satisfied that some of the properties that the police recovered were stolen by the people who broke the door to the shop on 26.10.2007 at around 2 am.

PW4 and PW6 testified that they arrested the appellant at around 5.30 am and that he was carrying some of the items identified by PW1 and PW3 as theirs in a paper bag. PW6 evidence was that he ran after and caught up with the appellant when he (appellant) was tripped by wheat plants. The appellant in his defence confirms that he was arrested at around the same time and place but denied having had the recovered properties.

We reiterate that none of the prosecution witnesses was an eye witness and that the only evidence that links the appellant with the alleged offence is that of the stolen items recovered from him a few hours after the robbery and identified by the complainant.

The court of Appeal in **Hassan V. Republic** (2005) KLR 151 held:

“Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for the possession, a presumption of fact arises that he is either the thief or a receiver.”

Having found that the appellant was found in possession of recently stolen goods the question we must determine next is whether the offence of robbery with violence was proved beyond doubt.

The offence of robbery with violence is committed when an offender does any of the acts prescribed in **Section 295** as read with **Section 296(2)** of the **Penal Code**:

- (1) if the offender steals anything and in the course of stealing is armed with any dangerous or with any offensive weapon or instrument; or
- (2) is in company of one or more other persons; or
- (3) immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other personal violence to any person.

The existence of any of the circumstances listed above is sufficient to sustain a conviction under section 296 of the Penal Code (See the decision in **Munyi alias Karaya & Another V. Republic**, (2005)1 KLR 441).

None of the circumstances listed above was, in our view established as there was no proof that the appellant was armed with any offensive weapons or that he immediately before or after the alleged theft used or threatened to use any violence on the complainants or any other person. Regarding the question whether at the time of the robbery there was more than one person, on our own assessment of the evidence on record, that evidence was not credible. For this reason, we are of the considered view that it was unsafe to convict the appellant of the offence of robbery with violence on the allegation that there was more than 1 person when the other person(s) involved were not identified or any of the stolen properties recovered from them. As the appellant did not give a reasonable account of how he came into

possession of the goods he can only be presumed to be the person who stole or received the goods after they were stolen. See the decision of the court in Hassan V. Republic (Supra).

The trial court ought to have found the appellant guilty of the offence of **theft** contrary to **Section 275** of the **Penal Code** or in the alternative with **handling stolen property** contrary to **Section 322(2)** of the **Penal Code** as these are minor and cognate offences to the offence of **robbery with violence** contrary to **Section to 296(2)**. We are of the considered view that those offences were proved against the appellant beyond any reasonable doubt.

For the aforesaid reasons, we allow the appeal to the extent explained, quash the conviction for the offence of **robbery with violence**, set aside the death sentence and in place thereof convict the appellant for the offence of **theft contrary** to **Section 275** of the **Penal Code** and sentence the appellant to three (3) years imprisonment from 15th January, 2009.

Those shall be the orders of the court.

Dated, Signed and Delivered at Nakuru this 6th day of August, 2012.

W. OUKO
JUDGE

H. OMONDI
JUDGE