



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 49 of 2011

MAIKO LOZURU LUKUT..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment/Conviction and sentence of Mr. M. Maundu, Principal Magistrate in Isiolo Criminal Case No.136 of 2011)

J U D G M E N T

The appellant MAIKO LUZURU LOKUT was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the charge were that the appellant on 2nd day of March, 2011 at Maili Tano area of Isiolo County jointly with others not before court robbed the complainant ISAAC BAARIU cash Kshs.500/- one blanket, 2 sufurias, maize, 60 kgs, one pair of safari boots, a grey cap, 20kg of beans and assorted clothes, all valued at Kshs.10000/= while armed with dangerous weapons namely firearms and at or immediately before or immediately after the time of such robbery, threatened to use actual violence on the complainant.

The appellant faced an alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code. The particulars were that on 2nd day of March, 2011 at Maili Tano area Burat sub-location of Isiolo County otherwise than robbery with violence dishonesty retained one blanket, a pair of safari boots, 30kg of maize, a grey cap all valued at Kshs.3600/= property of the complainant. The appellant faced second count of being in possession of a firearm without valid certificate C/S 4 as read with section 4(3) of the Firearms Act(Cap.4) Laws of Kenya. The particulars are that on 2nd March, 2011 at Maili Tano area, Burat sub-location in Isiolo County the appellant was found in possession of two firearms wit.G3 riffle S.No.A.3.605195 and a.m.16 rifle S.No.5395646 without a valid certificate. The appellant also faced a third count of being in possession of ammunition without a firearm certificate C/S 4(1) as read with section 3(1) of the Fire Arms Act(Cap.14) Laws of Kenya. The particulars are that on 2nd March, 2011 at Maili Tano area, Burat sub-location in Isiolo County, the appellant was found being in possession of 11 rounds of 7.62mm and 7 rounds of 5.56 of ammunition without the firearms certificate.

The appellant was convicted on all the three counts and sentenced to death in respect of Count 1; and sentence in respect of Count 2 and 3 suspended.

Being aggrieved by the conviction and sentence he filed this appeal. The appellant relied on 5 grounds of appeal being as follows:-

1. That I pleaded not guilty during the trial.
2. That the pundit Magistrate erred in law and facts by relying on identification by PW1 which was insufficient and incredible.
3. That the learned trial magistrate erred in law and fact in convicting I the appellant on contradictory evidence of prosecution witnesses PW1 and 2 and PW3 and 4 on my mode of arrest with the said exhibits.
4. That the trial Magistrate erred in law and fact in convicting I the appellant in the instant case yet failed to find that the evidence against me was a pure conspiracy among the prosecution witnesses.
5. That the trial Magistrate erred in law and facts when he rejected my defence contrary to the provisions of section 169(1) of the C.P.C.

During the hearing of the appeal the appellant handed over to this court amended grounds of appeal and written submissions. The said amended grounds of appeal are as follows:-

1. *That the learned trial Magistrate erred in law and fact to convict and sentence me to death in reliance of the exhibits in question.*
2. *That the learned trial Magistrate erred in law and fact to convict me to death in the name that from the house and compound where some items in question allegedly were found belonged to me.*
3. *That the learned trial Magistrate erred in both law and fact in failing to resolve material contradiction riddled with prosecution in favour of the appellant.*
4. *That the learned trial Magistrate erred in both law and fact when he found that prosecution has proved their case beyond any doubt and yet they failed to produce some of the essential documents, such as, inventory form, search warrant and finally recovery form.*
5. *That the learned trial Magistrate erred in both law and fact by failing to give due consideration to my defence.*
6. *That the learned trial Magistrate further erred in both law and fact by failing to observe that during the time of my arrest I had possession of exhibits in question neither found at my shamba nor in my house or compound.*

This is first appeal from the conviction. We are therefore the first appellate court and are guided by the principles enunciated in the case of OKENO –V-REPUBLIC(1972) EA 32 where Court of Appeal set out the duty of the first appellate court in the following terms:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

The appellant filed written submissions which he relied upon. The main bone of contention was that the doctrine of recent possession did not apply to the appellant as he was not found in possession of the stolen items and nothing connected the appellant to the stolen items. The appellant further contended that the

prosecution evidence was contradictory and insufficient to sustain conviction. The appellant further contended that the house from which the stolen items were recovered was not proved to belong to the appellant.

The appellant's appeal was strongly opposed. Mr. Moses Mungai, learned State Counsel urged us to dismiss this appeal for lack of merits. He urged that though the appellant was not identified at the scene of crime, the footprints and trail of maize grain led to appellant's home from where the complainant with the help of police were able to recover 30kg of maize, 1 black sonitec radio, a blanket and a pair of safari boots. There was also recovery of rifle M16, G3 rifle, a single trouser, a hat, a pair of brown plastic sandals and 2 ammunition magazines.

That this evidence was corroborated by PW2, PW3, PW4 and PW6. He urged that the nexus is found in evidence of PW3 and PW4. He urged that PW3 and PW4 knew the appellant and knew his house and the house from which stolen items were traced belonged to the appellant. He urged that the doctrine of recent possession was well established and that the items subject of robbery were identified to belong to the complainant. He concluded by stating that the appellant's defence was considered and urged this court to dismiss the appeal.

The facts of the prosecution case are that the complainant was on 2nd March, 2011 at 12.30a.m asleep with his wife at his house at Kambi ya Juu estate in Isiolo when he heard dogs barking outside. That when the complainant went to check he heard his fence being broken near the gate. He threw a stone where the noise was coming from. Somebody then shouted from outside ordering him to open the gate. The same person said "piga yeye risasi". Then there was a gunshot. The complainant then laid down near the fence. Complainant's wife came out and ran away. It was a dark night. The complainant's fence was violently broken down and three persons entered inside complainant's compound one of whom was armed with a rifle. That he ordered his colleagues to remove everything from the complainant's house. The assailants then entered into the complainant's house and started removing items from complainant's house.

The assailants did not see the complainant. That the assailants after removing items from the complainant's house broke the gate and ran away. The appellant saw four of the assailants as they left. The complainant could not identify any of the assailants as it was dark. That after the assailants left the complainant went to the house and found their 8 months old baby lying on the bed uncovered as the attackers had carried away all the beddings. In the morning the complainant(PW1) found 60kg of maize, 20kg of beans, one blanket, 6 cushions, a radio, a pair of safari boots shoes, identity card, wallet which contained Kshs.500/=, mobile phone make Nokia 1280, 2 sufurias, his clothes, his wife's clothes and children clothes missing.

The following morning a report was made at Kambi ya Juu AP camp and PW1 was given two police officers. PW1, PW2, and PW6 noticed that there was a trail of maize from the complainant's home with footprints.

They followed the trail of maize and footprints which led them to Maili Tano. The footprints entered into a certain home. The trail entered to a certain house. They found maize grains which had poured outside the house. PW1, PW2 and PW6 met the appellant trying to sweep the maize trail using euphorbia branch. PW2 and PW6 ordered the appellant to open the house and he kicked open the door which was locked with padlock. The appellant kicked the door open as the police officers told him instead of using the keys he should open the way he opens other people's houses. PW1, PW2, PW6 and appellant entered the house which is one roomed. PW1 identified 30kg of maize in a gunny bag which was in the same sack when stolen and which sack PW1 identified because of a hole caused by chicken. They recovered the complainant's radio which had no handle and which radio PW1 testified he had used for long time and knew it. It was a Black Sonitec Radio Model No.ST.50400. They also recovered a blanket and safari boots shoes which belonged to the complainant. Appellant then led PW2, and PW6 in presence of PW1 and showed them where he had dug the rifle. Appellant dug with his hands where soil was wet, removed a sack from which sack was a black (M16 rifle serial No.5395646. In another area the appellant removed soil and removed a rifle which was covered with clothes. The rifle was a G3 rifle serial

No.A3051915. From a different site appellant dug out a green jungle camouflage trouser, G3 rifle magazine and M16 rifle magazine. That appellant moved to another hole where he removed the hat and brown plastic sandals. PW1 identified the hat as his own. PW1 testified that the footprints they followed were of the plastic sandals which appellant had removed from a hole.

The appellant was then arrested and taken to Isiolo Police Station. Complainant testified the value of the stolen items were Kshs.10000/=. PW1 testified the trail led them to appellant's house and there was nobody else apart from the appellant in his compound. PW2 testified that the appellant confirmed he was the owner of the house.

PW3 received report that certain people had been threatened with guns on 2/3/2011 and commenced search and one of the robbers was arrested.

PW3 showed PW2 the house of the appellant. The appellant dug the soil and removed a G3 rifle, and from another hole he removed M16 rifle and jungle trouser. From another hole and two magazines.

PW4 testified that on 2/3/2011 at 7.00 a.m. he saw five people outside the gate of the appellant who claimed they had been attacked the previous night and followed the footprints up to the house of the appellant. PW4 called PW3 and they followed maize trail and footprint up to the appellant's home. They did not find the appellant hence they started to look for him. That the complainant and his group were ahead of PW4 and PW3. PW4 received a call from the complainant and his group that they had arrested the appellant. That after a while three Police Officers from Kambi ya Juu came. Appellant led Police Officers to his house. PW4 did not accompany the police officers but he later met police officers and members of public who informed him two guns were recovered from appellant's compound. PW4 testified that he knew the appellant very well.

PW7 the Investigating Officer was on 2/3/2011 at 1.30 p.m instructed by DCIO to investigate this matter. That on the same day PW1 went to PW7's office accompanied by PW2 and PW6. He took the items recovered from appellant's house and compound and Pw7 took possession of the same. PW7 visited the scene and saw the holes from where stolen items and guns were recovered. PW7 produced the recovered items as exhibits.

The appellant in his unsworn defence averred that on 1/3/2011 at 2.00p.m. he went to his shamba at Maili Tano where he worked up to midnight. That he went to home of person who had leased his shamba and stayed there up to 3.00 a.m. when he returned to irrigate his crops up to 8.00 a.m. That when he finished watering his crops people called him telling him to accompany them as there was someone who had been robbed. That after walking for some time they met 8 people who were tied with ropes and he stayed with them for a while and saw police enter a house whose owner he averred he did not know. That later police came and handcuffed the appellant. He was then taken to Isiolo Police Station and later charged with this offence.

PW1, PW2, PW4 and PW6 testified that the footprints and maize trail were traced to a certain house. PW3 and PW4 positively identified the house as that of the appellant. It was the only house in the compound. PW1 testified that when they arrived at the house they found the appellant trying to sweep the trail of maize using euphorbia branch. That when police asked the appellant to open the door he kicked it open. PW2 testified that appellant told him the house was his own. We therefore find that the house in which the complainants stole items were found belonged to the appellant.

PW1 identified 30 kg of maize in a sack, radio, black Sonitec radio model No.5150400, Blanket, safari boot shoes as his own and gave particulars which enabled him to identify the same. That the other items were found in the appellant's compound hidden in various holes. The appellant did not claim ownership of the said items save he denied that he has was not the owner of the house and compound.

The appellant was found with the complainant's items barely a day after the same had been stolen. We therefore find the appellant was in this case found with stolen goods after robbery. We find that the appellant failed to give satisfactory explanation on how he came into possession of the same.

In the case of SAMSON ETYANG & 2 OTHERS –V-REPUBLIC CRIMINAL CASE NO.1249 OF 2012, a two Judge Bench quoted with approval the case of MALINGU-V-REPUBLIC(1989) KLR 225 where the Court applied the doctrine of recent possession in which court held:-

“The doctrine of recent possession is one of fact and it arises under section 119 of the Evidence Act (cap 80).

With respect to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver.

By application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about.

The accused can only be asked to explain his possession after the prosecution has proved certain basic facts.”

“The trial court has the duty to decide whether from the facts and the circumstances of the particular case under consideration the accused person either stole the item or was guilty or innocent receiver. By the application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”

Further to the above in the case of WANDUE –V-REPUBLIC-(2003) KLR 26 Court of Appeal stated:-

“.....the doctrine of recent possession of stolen property to be invoked and a conviction founded, the prosecution must prove that the appellant had physical possession or control of the stolen items. We entirely agree with him. See Charles Lamamba vs Republic (Criminal Appeal No 8 of 1984) where this court held that: “The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved.”

In the case of MWACHANGE & 2 OTHERS –V-REPUBLIC(2002) KLR 341, the High Court stated as follows:-

“Where an accused is found in recent possession of goods alleged to have been stolen, he is under an obligation to explain how he came into such possession and that such possession is innocent. Failure to do so lead to the inescapable conclusion that he is a thief or robber.”

Having carefully considered the evidence on record, we are convinced that the evidence which was adduced by prosecution witnesses in the lower court prove the main charge of robbery with violence beyond any reasonable doubt. Significantly the footprint and maize trail led the complainant and prosecution witnesses to the appellant’s house.

The appellant was found sweeping the maize trail and admitted the house was his. Prosecution witnesses who knew the appellant knew his home and confirmed it was the one where things were recovered. The stolen items were found at appellant’s house. The appellant was arrested just a few hours after commission of the offence and stolen items were found in appellant’s physical possession or control.

We find that the recovered property which had recently been stolen items were satisfactorily proved to

have been in appellant's possession. On Count 2 and 3 we have confirmed that the trial court correctly noted there was a typographical error in citing the relevant chapter as Cap.14 instead of Cap. 114 Laws of Kenya. We find the error do not affect the substance of the charge and the same did not prejudice the appellant. The rifles and eighteen rounds of ammunitions were recovered from the appellant's compound. The appellant showed where the rifles and ammunition were buried within his compound. The appellant was the only person in occupation of the house and compound when the guns and ammunition were buried. We therefore find that the prosecution proved count 2 and 3 beyond any reasonable doubt.

We have no doubt in our minds that the appellant was a member of the gang of robbers who robbed the complainant and actually participated in the robbery that took place on the material night. We are of the considered opinion that the conviction is safe and well deserved.

The upshot is that we hereby dismiss the appeal since the same has no merits at all. In the same breath, we hereby uphold the conviction and confirm the sentence that was imposed by the learned trial Magistrate.

Right of appeal explained.

DATED, SIGNED AND DELIVERED AT MERU THIS 29th DAY OF NOVEMBER, 2012.

J. LESIIT

J. MAKAU

JUDGE

JUDGE

Delivered in open court in presence of:

Mr. Mungai State Counsel – For State

Appellant in person – present

J. LESIIT

J. MAKAU

JUDGE

JUDGE