



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL CASE NO. 165 OF 2008

GEORGE GIKUNDI MUNYIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the judgment of the Hon. Mr. M.N. Gichuru SRM in Maua Criminal Case No. 1354 of 1999 delivered on 12th June 2001)

JUDGMENT

The appellant George Gikundi Munyi was charged before the lower court with two counts of robbery with violence. In the first count, he was charged along with others with robbing PC Justus Baariu Thaimuta of motor vehicle registration number KAK 757L and of cash Kshs. 2,600/=. In the second count he was charged with robbing chief inspector Joseph Muriira Thaimuta of cash Kshs. 17,510/= a wrist watch, compact cassettes and a motor vehicle driver's license. The appellant was convicted of the offences he faced before the lower court and on appealing in High Court Meru Criminal Appeals Nos. 214 and 215 of 2001 consolidated was ordered to be retried. This judgment relates to the retrial. His retrial commenced on 22nd February 2006. After the retrial, he was convicted as charged and was sentenced to suffer death as provided under the law. His present appeal is against both conviction and sentence. This is the first appellate court and in that regard we are guided by the principles set out in the case **Okeno Vrs. Republic** 1972 EA 32. It was stated in that case as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and 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 Vrs. R. (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 finding and conclusion; 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 Vrs Sunday Post [1958] E.A 424.”

PW1 PC Justus Baariu Thaimuta stated that in 1999 he was stationed at Maua Police Station. He hails from Kianjai area. On 19th August 1999 at 8.30pm, he was travelling from his home area to Nairobi. He was driving motor vehicle registration number KAK 757L. This vehicle belonged to his nephew Joseph

Muriira PW2. They began their journey at 8.30 and followed through the Meru Kiithilia road. As they were driving they came to a telephone pole that had been placed across the road. They stopped in order to remove the telephone post. It was this witness who went to remove the telephone post and as he did so he saw a group of people besides the road. These people went to both sides of the road. They removed PW2 from the vehicle. They began to beat him and PW2. This witness was injured on the back of the head, ribs and on the legs. They stole from him Kshs. 2,600/=. They also took the motor vehicle ignition key. PW2 had money stolen from him and was also injured. After the robbery, the people drove away and left this witness and PW2 at the scene. About an hour later, a police officer found them at the scene. They reported the matter and later went for treatment. They were later informed that the motor vehicle had been stopped at a roadblock that same night. This witness said that the people who robbed them were all wearing masks and he therefore did not recognize anybody during the robbery. PW2 confirmed that on the material night he was travelling with PW1 in motor vehicle registration number KAK 757L. It was PW1 who was driving. When they came across a telephone post placed across the road he requested PW1 to stop so that he could remove the post. He requested him to reverse the vehicle so that he could have access to the pole. As he began to reverse, this witness saw torch lights at the back of the vehicle. Some of the people came to his side of the vehicle. They commanded him to stop and went to the side of PW1 and obtained the ignition key. They began to beat them. When this witness came out of the vehicle he was hit with something on the left side of the neck. He fell down and lost consciousness. After a while he regained consciousness. When he regained consciousness, some of the robbers said that he was trying to fight them. It was then that one of them hit him on the left leg with an iron bar fracturing it. He was asked whether he had money and he told them that he had Kshs. 17,510/=. They removed it from his shirt. They also took his driver's license from his coat and his wrist watch from his hand. During that time, one of the robbers was reversing the vehicle to face Kianjai. The others boarded the vehicle and they drove off at high speed. Later, two vehicles drove by and gave them a lift to Nchiru Police Station. It is there that the vehicle registration number was circulated to other police stations. They were informed later that the vehicle had been intercepted at a road block in Maua. He too confirmed that he was unable to identify any of the robbers. PW3 was the officer who photographed the motor vehicle. He produced the photographs before court. PW4 was a technician with Telecom Kenya based at Isiolo. He stated that on 20th September 1999 whilst on duty in Kianjai area he found one cable having been cut along Kianjai/Ruiru road. One telephone post had been uprooted and had been used to block the road. He and his co-workers arrived at that scene on 20th September 1999 at 9pm. They rectified the problem. PW5 inspector of police Stephen Kithinji stated that on 19th September 1999 at 9pm he was in charge of a road block at Kachiongo in Maua town. Whilst there he heard communication through his pocket telephone that there had been a robbery at Nchiru area and that motor vehicle registration number KAK 757L Toyota salon had been stolen. He alerted the other policemen at the road block. About an hour later, he saw the motor vehicle approaching the road block. On confirming that the registration number of that vehicle was the same as that which had been circulated, he alerted the other police officers. This witness went the driver's side and requested the driver to switch off the engine. He heard other occupants in the vehicle saying that one of them escaped and only two of them were arrested. On searching the vehicle, the police officers found a simi, a panga, a bunch of keys, a car radio and one pair of socks. This witness identified the appellant herein as the driver of that vehicle. He stated that his co-accused was in the vehicle. The appellant in cross examination asked whether a photograph was taken of him whilst he was in the vehicle. The witness responded in the negative. The witness further stated in cross examination that finger prints were not lifted from the vehicle. The witness denied that the accused had been arrested at Kachiongo where miraa is sold. PW6 Chief Inspector of Police Charles Mwaizinga stated that on the night in question he was stationed at Nchiru police station as the deputy OCS. He received complaint from PW1 and 2 that they had been attacked at Kaliithiria whilst driving motor vehicle registration number KAK 757L. It is this witness who relayed the information of that robbery to all the stations under his command. Further, he went with some police officers in pursuit of that motor vehicle. On reaching Muthara area, he received a telephone call informing him that the vehicle had been intercepted and that one passenger had been arrested whilst another had escaped. This witness proceeded to Maua road block at Mairi Tatu area where he found the appellant detained by PW5. The motor vehicle was taken to Maua Police Station. The appellant at the close of the prosecution's case was put to his defence. He stated in sworn testimony that on 19th September 1999 he was at Maua Kachiongo area at 7pm. Police officers arrested him and two other persons. He was placed in a cell at Maua Police station until 8pm. He was then removed from the cells and was taken to Nchiru police station on the same night. In that police station, he

was interrogated about a vehicle. It was then on 8th October 1999 that he was taken to court and charged with the present charges. As stated before, the learned trial magistrate on receiving that evidence convicted the appellant as charged. Indeed the learned trial magistrate found that it had been proved that the appellant had been found in possession of recently stolen property. The learned trial magistrate was correct to state that the doctrine of recent possession applied in this case. The subject motor vehicle was stolen on 19th September 1999. On the same night within a short time after the robbery the vehicle was found in possession of the appellant. The clear evidence presented by the prosecution was that the appellant was driving the motor vehicle. In considering the doctrine of recent possession of stolen property, the case that comes to mind is **Charles Okelo Olala vs. Republic** CRA No. 328 of 2008 where the Court of Appeal stated thus:-

*”In **Ogembo vs. Republic** [2003] at page 225 this Court said:-*

Dealing with a similar point, the Court of Appeal for Eastern Africa (as it was then) said as follows in the case of R. V. Bakari s/o Abdulla [1949] 16 EACA 84.

That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point no other reasonable conclusion, the presumption can extend to any other charge however penal.”

“This principle was quoted with approval in the case of Obonyo vs. Republic [1962] EA 592. In this case the court stated as follows:-

“If all circumstance of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal.”

“In this we are satisfied the circumstances of the case did not point to any reasonable conclusion other than the conclusion that the appellant was one of the six robbers that terrorized the two families in Bureti District and that he was arrested with some of the stolen property a day after the robbery in Kisii which is not far from Bureti considering the fact that the robbers had easy transport namely the stolen vehicle.”

“And in Matu vs. Republic [2004] 1KLR 510 this court was dealing with a similar situation in which it conducted its judgment thus:-

“The inevitable conclusion therefore is that the appellant was in possession of the goods stolen from the complainant’s kiosk and he could not offer any acceptable explanation of how he came by them. The two courts below came to the same conclusion and rightly so in our view, that the appellant was one of the robbers.”

It is clear that the motor vehicle was identified by PW2 as belonging to him. It is also clear that that vehicle was stolen from him and PW1 on the same night it was recovered being driven by the appellant. Another case that deals with the issue of the doctrine of recent possession is the case of **Antony Kariuki Kareri vs. Republic** Criminal Appeal No. 110 of 2002. Considering the doctrine which is well set out in both the above cases, we too come to the inevitable conclusion that the appellant was one of the robbers. We have considered the written submissions presented by the appellant but bearing in mind the evidence that we have reproduced in this judgment we find that the appellant’s appeal has no merit. It is for that reason that the appeal against conviction and sentence is hereby dismissed.

Dated, signed and delivered at Meru this 31st day of March 2011.

LESIIT, J.

JUDGE

KASANGO, M.

JUDGE

Read, signed and delivered at Meru this 31st day of March 2011.

In The Presence Of:

Kirimi/Mwonjuru Court Clerks

Appellant Present

Mr. Kimathi For the State

LESIIT, J.

JUDGE

KASANGO, M.

JUDGE