



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 298 of 2008

DAVID KIMUTAI KOECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 72 of 2006 of the Senior Principal Magistrate's court at Narok –S. M. GITHINJI, PM)

JUDGMENT

DAVID KIMUTAI KOECH, 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 against him alleged that during the night of 14th and 15th January 2006 at Shule ya Mbogani Camp in Narok District within Rift Valley Province, together with others not before court, while armed with dangerous weapons, namely rungas and swords, he robbed Scott Gregory Macaulay of one Fuji camera, one bag and one torch all valued Kshs.33,000/- and at or immediately before or immediately after the time of that robbery he wounded the said Scott Gregory Macaulay. He pleaded not guilty to the charge but after trial before the Principal Magistrate at Narok he was convicted and sentenced to death. This appeal is against that conviction and sentence.

In his petition of appeal the appellant has raised four main points. They are that his identification by PW1 as one of the robbers was not reliable; that he was not found with the complainant's torch as alleged; that the learned trial magistrate erred in dismissing his defence and shifting the burden of proof to him and that there was no credible evidence to warrant his conviction.

The appellant submitted that his identification by the complainant cannot be relied upon for three reasons. One, the attack on the complainant was not only sudden but he only had a fleeting one second glance of the attackers. Two, the complainant did not give his description to the police prior to the identification parade. At the identification parade the complainant was hesitant and asked the appellant to shout the words "Give me money", which he claimed the appellant had shouted at the time of robbery. The appellant said that was contradicted by PW2 who said that the robbers had shouted the words "Toa money." Three, that the learned trial magistrate did not warn himself of the danger of relying on the evidence of a single visual identification witness in such a difficulty circumstances as were in this case.

The appellant also faulted the trial magistrate for relying on the doctrine of recent possession. He submitted that the complainant did not point to any particular mark on the torch he was allegedly found with to prove that it was his. He dismissed the contention that being of Noma brand with special batteries make it unique. He said no normal person can go walking around with a torch during the day.

The third point the appellant raised related to his defence. He faulted the learned trial magistrate for dismissing alibi his defence as a well planned afterthought. He said on the material night he was with the defence witnesses between Longisa and Tenwek hospitals attending to DW2's sick child. He wondered how the learned trial magistrate could dismiss that defence simply because DW2 did not produce the treatment cards for her child and thus shift the burden of prove to him. He urged us to find that there was no credible evidence to warrant his conviction and allow this appeal.

For the state Mr. Nyakundi submitted that this appeal has absolutely no merit. He said that when the robbers went into the complainant's tent he shone torch light on their faces and managed to see the appellant. Thereafter the appellant shouted several times "Give me money" and the complainant mastered his voice. At the identification parade he asked him to repeat the same words and that reinforced his identification of him. From the scene of robbery the footsteps lead to the appellant's house and later the appellant was found in possession of the complainant's torch. All those factors, he said lead to the inevitable conclusion that the appellant was one of the robbers. He urged us to dismiss the appeal.

This being a first appeal, we have as required by law – **Okeno Vs Republic [1972] EA 32** and **Mwangi Vs Republic [2000] 2 KLR 28** - carefully re-evaluated the evidence on record. Briefly the facts of this case are that on 15th January 2006 at about 2.00 a.m. while the complainant, Scott Gregory Macaulay, PW1, was sleeping in his tent at Shule ya Mbogani in Narok District, he was woken up by noise outside his tent. Before he did anything, his tent zip was opened and about five people entered. He flashed his torch on their faces and managed to see the appellant. The

Appellant snatched the torch from him and he was thereafter viciously beaten and his leg was broken. He was robbed of a camera, that torch and a travelling bag. His screams attracted the attention of the camp guards who engaged the robbers in an arrow shooting battle. The assailants, however, managed to escape and the matter was immediately reported to the area chief, PW5, and police.

Early that morning, as it had rained, the police, the area chief and the camp guards followed footsteps to the appellant's house. He was not in but his wife opened the house for them. They found 7 wet arrows and 6 bows. From there they went to a meeting where they hoped the Appellant could be. When the Appellant saw police in uniform, he attempted to escape but the Chief who was near him bounced on him and he was arrested. PC Richard Towett, PW9, recovered a torch from his jacket pocket which the complainant later positively identified as the one he was robbed. The complainant later also identified him at the identification parade after which he was charged with this offence.

In his defence the appellant testified on oath and called three witnesses. He said during the material night DW2 sought his assistance to take her sick child to hospital. He called DW3 in whose vehicle they took the child to

Longisa Hospital from where they were referred to Tenwek Hospital. That night he was with those witnesses from 10.00 p.m. to about 5.00 a.m. when he was dropped at his home. He said he could not therefore have been at the scene of the robbery at around 2.00 a.m. His wife, DW4, corroborated that story.

We have considered this evidence. On identification, PW1 testified that before the robbers went into his tent, he had been woken up by noise outside. When the robbers unzipped his tent and went in, he flashed his torch on their faces and he saw the Appellant's face. True that was only a fleeting one second glance but one of the robbers uttered in English the words "Give me money" several times and the witness mustered that voice. At the identification parade, he asked all the parade members to shout those words. He picked out the Appellant as the one who had uttered them at the scene. We are satisfied that that, together with the fact that at the parade the Appellant was in the same clothes that the complainant had seen him in at the time of robbery, made his identification reliable.

Though this is evidence of a visual identification by one witness, it was not the only evidence upon which the appellant's conviction was based.

At the scene, the camp guards exchanged the shooting of arrows with the robbers. From there, footsteps led the searching party to the Appellant's house where they found wet arrows and bows. When the Appellant was traced to a meeting, he attempted to escape when he saw police. The conduct of an accused person escaping from the scene is a circumstance which is indicative of his guilty. See **Terikah –**

Vs- Uganda (1975) EA 60 and Malova –Vs- Republic (1980) KLR 110.

The other piece of evidence the learned trial magistrate relied on to convict the Appellant was his possession of the torch stolen from the complainant. This is the doctrine of recent possession.

As to when the doctrine of recent possession can apply, the Court of Appeal stated the law in the case of **Isaac Nganga Kahiga Vs Republic Criminal Appeal No. 272 of 2005 (CA Nyeri)** in the following terms:-

“It is trite that before a court can rely on the doctrine of recent possession as a basis of a conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, the property was stolen from the complainant; and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search for the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”

In this case the stolen torch was found by PW9 in the Appellant's jacket pocket a few hours after it was stolen. Contrary to the appellant's assertion, it is not strange for one to be found with a torch during the day. It all depends on where one hopes to be when night falls. The complainant positively identified the torch from its make, colour and the batteries in it as his. In his evidence the Appellant did not say it was his. There was also no reason whatsoever why police would plant it on him.

The Appellant's alibi defence did not feature in his or his counsel's cross-examination of the prosecution witnesses. In the circumstances, we concur with the trial magistrate's finding that the same was a well planned afterthought.

Having considered the evidence on record in its totality, we are satisfied that the Appellant was properly convicted. Consequently, we dismiss the appeal against conviction.

The law provides only one sentence for the offence of capital robbery and that is death which is the sentence that the trial court passed against the Appellant. In the circumstances we also dismiss the appeal against sentence.

In the upshot we dismiss this appeal in its entirety.

DATED and DELIVERED at Nakuru this 26th day of May, 2010.

D. K. MARAGA
JUDGE.

M. J. A. EMUKULE
JUDGE.