



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 307,308 & 309 of 2003

HARUN SITOTE WANGANA & 2 OTHERS.....APPELLANTS

VERSUS

REPUBLICRESPONDENT

[From original conviction and sentence in criminal case number 107A of 2001 of the Principal Magistrate's court at Siaya].

Coram

Karanja, Aroni - JJ

Mr. Gumo for state

Court clerk Laban/George

Appellants in person

J U D G M E N T

The three appellants were jointly charged with the offence of robbery with violence contrary section 296 (2) of the penal code, in that on the nights of 8th/9th December 2001 in Siaya district jointly with others not before court while armed with dangerous weapons namely pangas, iron sheets, rungus and torches robbed Francis Wasuli Magonda of one wrist watch, a pair of sports shoes, a panga, sports radio, a photo album, a jembe and eight small tins of maize grains all valued at Kshs. 1,820/=, and at or immediately before or immediately after the time of such robbery wounded the said F.W.M.

Alternatively, the appellants faced separate counts of handling stolen property contrary to section

322 (2) of the penal code.

The alternative counts were however defective for duplicity in so far as the ingredients of recipient and retention were combined in a single charge (**see Selimina Mbeu Owuor & Another -VS- Republic Criminal appeal No. 68 of 1999 C/A)**,

In addition, the first and second appellants faced a charge of rape contrary to section 140 of the penal code in that on the same date and place they jointly had carnal knowledge of M.J.W without her consent.

This charge was also defective as two individuals cannot jointly and at the same time commit an act of rape. Separate offences of rape respecting each suspect ought to have been preferred (**see, Paul Mwangi Murunga-VS-Republic criminal Appeal [2008] e KLR)**).

Be that as it may, the appellants pleaded not guilty to all the counts and after trial before the learned Senior Resident Magistrate at Siaya were convicted and sentenced to death for the offence of robbery with violence i.e. count one.

The first and second appellants were also convicted for the offence of rape and sentenced to seven (7) years imprisonment with one stroke of the cane each.

The sentence on count two was not held in abeyance as it should have in view of the death sentence imposed on count one.

The evidence adduced at the trial against the appellants was that on the material night, the complainant **F.W.M (PW1)** and his wife **M.J (PW3)** were asleep in their house and at about midnight the complainant heard some movements outside the house. He decided to go out of the house to enquire but as he opened the door a group of people suddenly beamed a bright torch at his eyes. He fell down on the floor of the sitting room after being hit. He was pinned on the floor as some of the intruders entered the bedroom. He later learnt that his wife had been raped and that his property including a wrist watch, shoes, maize, pocket radio, photo album and a screw driver had been stolen. He did not identify any of the robbers.

A small lantern lamp went off when the intruders entered the house. He reported to the village elder on the following day. Some of his stolen items were recovered and some suspects arrested. They were the appellants herein.

The complainant's wife heard the complainant falling down and being beaten after he had opened the door. She thereafter saw a person carrying a torch and armed with a panga (machete), club and jembe (mattock). The person put off the lamp that she had lit and assaulted her while demanding money. She was forced to lie down during which time she was raped by three of the thugs who included the first and second appellants whom she identified. The thugs left and went away with some property. She thereafter administered first aid on the complainant and on the following day

they reported the matter to the village elder and to the police. Later, some of the stolen items were recovered and suspects including the appellants were arrested.

The village elder **N.B.M (PW2)** was in the process of investigating another incident involving a lady called E.A. He was in the company of an assistant chief when E.A mentioned the name of a suspect Morris Otieno Ongo who was the fourth accused in the case.

After apprehending the said Morris, the village elder and company were given the name of a suspect called Kote who in turn gave the name of another suspect called Odhiambo. Kote was the third accused in the trial and is the first appellant herein while Odhiambo was the second accused in the trial and the third appellant herein.

The first appellant and the suspect Morris (fourth accused) led the village elder's team to the home of the first accused in the trial who is the second appellant herein.

The team found a sum of Kshs. 90/= and a pair of shoes stolen from the complainant in the possession of the first appellant. They found a panga in the possession of the second appellant and a small radio in the possession of the third appellant.

The **Chief J.O.A (PW4)** was in the said team. He confirmed more or less what was stated by the village elder.

Cpl Francis Mutai (PW5) of S police post received the suspects after they had been apprehended.

He also received from the chief the goods allegedly stolen from the complainant and E.A.

The four suspects (i.e. the first, second and third appellants herein as well as the fourth accused Morris Otieno Ongo) were formally arrested and later charged with the present offences.

The fourth accused escaped from police custody before the completion of the trial.

In their defence, the appellants denied the offences. The first appellant (**Harun**) said that he was asleep in his house on the 24th December 2001 when the chief and his team arrived there and conducted a search. They found some money under a mattress and then tied him with a rope. He was taken to a strange home where it was alleged that he had committed robbery. He was thereafter taken to S police post and eventually to Yala police station where he saw two women who were strangers to him.

The second appellant (**Meshack**) said that he was arrested on 24th December 2001 while in his garden with his wife when three men and a woman arrived there and asked him to give the woman some tomatoes to take to the chief. He asked for money and was told that it would follow after the delivery of the tomatoes. He went to the chief and asked for the money. He was told to wait and later to go to the police and record a statement.

He was in possession of a hoe which the chief alleged was used in a robbery. He demanded that his

house be searched for any stolen items.

The house was searched but nothing was recovered. He was then framed by the chief who alleged that the hoe and a panga in his possession were used in the robbery. He contended that the hoe and panga belonged to him.

The third appellant (**Peter**) said that he was asleep in his house on 24th December 2001 when the chief and his group arrived there at 5.00 a.m. he was asked to produce a radio which he knew nothing about. His house was searched and in the process something was inserted in a ventilation opening. The chief picked the item which was a radio.

He was asked whether he knew the owner of the radio. He answered negatively and was arrested and taken to the home of a woman where the chief said he would charge him for being tough headed.

He was then taken to the Yala police station where he found his co-accused and was booked for being in possession of an album. He contended that he knew nothing about the album nor the radio.

All the foregoing evidence was considered by the learned trial magistrate who dismissed the defence by the appellants as a fabrication and concluded that their guilt had been proved by the prosecution.

The learned trial magistrate therefore convicted and sentenced the appellants accordingly.

Being dissatisfied with the conviction and sentences, the appellants filed separate appeals which were consolidated and heard together.

The grounds of appeal are contained in the respective petitions of appeal filed on 6th August 2003 and are essentially a complaint on the insufficiency of the prosecution evidence and the failure by the learned trial magistrate to treat with care the evidence of an accomplice.

At the hearing of the appeals, all the appellants relied on their written submissions.

In addition, the third appellant orally submitted that PW1 did not give his description to the police nor did he state the duration of the offence.

The respondent opposed the appeals through the learned Assistant Deputy Public Prosecutor, **Mr. Gumo** who submitted that although there was no positive identification of the appellants at the scene, they were found in recent possession of stolen items without satisfactory explanation.

They were therefore properly convicted on circumstantial evidence based on the doctrine of recent possession as they were found in possession of the stolen items eighteen days after the robbery.

The learned Assistant Deputy Public Prosecutor noted that the learned trial magistrate failed to comply with section 169 of the Criminal Procedure Code but this being the first appellate court it has a duty to scrutinize the evidence afresh.

Also noted by the learned Assistant Deputy Public Prosecution was the fact that the learned trial magistrate failed to order that the sentence on count two be held in abeyance. Otherwise, the learned Assistant Deputy Public Prosecutor contended that the appeals lacked merit and ought to be dismissed.

Having considered the submissions by the appellants and the respondent and also having re-examined the entire evidence as is the duty of a first appellate court while bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses, we accept and hold that indeed the offence of robbery with violence was committed against the complainant (PW1) during which time he was assaulted together with his wife (PW3) who was also raped. It suffices to say that there was no dispute regarding the occurrence of the robbery.

The basic issue that fell for determination was whether the appellants were positively identified as having been part of the group which committed the offences.

It is our considered view that direct evidence of identification at the scene of the offence was rather scanty to a point of non-existent.

The complainant conceded that he did not identify any of the robbers. The purported identification of the appellants and in particular the first and second appellants came from the complainant's wife (PW3).

We do not think that her evidence of identification was proper, cogent and thus reliable. This is because the offence occurred in difficult circumstances in the hours of darkness yet she (PW3) did not tell the court how she was able to see and identify the first and second appellant whom she also accused of having raped her.

She did not mention the source of light (if any) which helped her identify the said appellants or any of the robbers. She talked of a lamp which was put off no sooner had the robbers entered the house meaning that the house was left in darkness while the robbers were in the process of accomplishing their illegal mission. She also talked about the first appellant having a torch but did not say whether it helped her make a positive identification of any of the robbers or whether it was bright enough to adequately illuminate the scene. Further, there was no mention of the existence of adequate opportunity to make a correct and positive identification if at all there existed a reliable source of light.

It is obvious from the foregoing that we cannot possibly disagree with the learned Assistant Deputy Public Prosecutor when he stated that there was no positive identification of the robbers at the scene.

There being no proper evidence of identification at the scene, it became apparent that the appellants were arrested and charged on account of their alleged recent possession of property

which had been stolen from the complainant.

Possession of property recently stolen would invariably lead to the presumption that the person in possession was the thief. However, the presumption may be rebutted if reasonable and satisfactory explanation is given for the possession.

The application of the doctrine of recent possession is therefore dependant on the following factors:-

Firstly, proof that the property was found with the suspect. Secondly, proof that the property is positively the property of the complainant (i.e. ownership). Thirdly, proof that the property was recently stolen from the complainant **(see, Isaac Nanga Kahinga alias Peter Nganga Kahinga - VS- Republic Criminal Appeal No. 272 of 2005).**

In this case, there was sufficient evidence from the complainant and his wife showing that the goods stolen from them included a pair of shoes, a panga, a radio and a photo album.

These items were recovered by the village elder (PW2) and the chief (PW4) during the apprehension of the appellants.

Apparently, the village elder and the chief were led to the appellants by the escaped accomplice (accused four) who had been arrested on suspicion that he had stolen property from the lady called El.A.

The said accomplice did not testify in court against the appellants. He escaped from police custody while the trial was in progress. There was in the circumstances no issue pertaining to accomplice evidence.

The village elder and the chief said that they recovered a pair of shoes from the first appellant and a panga from the second appellant. They also said that a radio and photo album were recovered from the third appellant. All the said items were said to belong to the complainant (PW1). This fact was not disputed save for the panga. The second appellant contended that the panga belonged to him. As to the shoes, the first appellant said nothing about them except to imply that he was only found with some money and not shoes.

As to the radio and photo album, the third appellant merely denied possession thereof and implied that the radio was "planted" on him by the chief and his team.

We think that the village elder and the chief gave credible evidence showing that the first and third appellant were in possession of a pair of shoes, a radio and photo album which had been stolen from the complainant a few days ago. The items were recovered from the two appellants and positively identified as the property of the complainant. With regard to their explanation of the possession non existed.

As for the panga, we do not think that the complainant offered tangible evidence to prove ownership thereof and thus rebut the second appellant's claim of ownership.

A panga is an ordinary item found normally in any Kenyan rural household. There was no special mark on the panga that was found with the second appellant as to hold that it belonged to no other than the complainant herein.

In sum, the circumstantial evidence adduced against the first and third appellant was sufficient enough for a proper and sound conviction. The same did not however apply to the second appellant. Consequently, the appeals by the first and third appellants are dismissed.

The appeal by the second appellant is allowed to the extent that his conviction on the first count is quashed and the death sentence set aside. He will be set at liberty unless otherwise lawfully held.

With regard to the second count of rape, the appeals by the first and second appellants are allowed. Their conviction in respect thereof is quashed and the sentence of seven (7) years imprisonment set aside.

Ordered accordingly.

Dated, signed and delivered this 18th day of May 2010.

J.R. KARANJA
JUDGE

A.A. ARONI
JUDGE

JRK/va