



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT KISUMU Criminal Appeal 62, 63 & 65 of 2007

LAMECK ALSADI ONYANGO 1st APPELLANT
CALVINS PETER OMONDI OWAYO 2nd APPELLANT
SAMUEL OCHIENG OPONDO..... 3rd APPELLANT

VERSUS

REPUBLIC RESPONDENT
[From original conviction and sentence in Criminal Case number 240 of 2006 of the Chief Magistrate's Court at
Kisumu]

CORAM

Karanja, Aroni J. J.
Gumo for State
Court Clerk – Laban/George
Appellant in person
JUDGMENT

The three appeals were consolidated and heard together. They all arise from the decision of the learned Principal Magistrate at Kisumu made on 4th April 2007 in CMCC No. 240 of 2006 in which the three appellants were convicted and sentenced to suffer death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The charge was the first count in a series of three which included a second count of being in possession of a firearm without a firearm certificate contrary to Section 4 (1) read with Section 4 (3) of the Firearm Act and a third count of being in possession of ammunition without a firearm certificate contrary to Section 4 (1) read with Section 4(3) of the Firearm Act.

The second and third counts however affected only the third appellant (**Samuel**). He was sentenced to seven (7) years imprisonment on each of the counts to run concurrently. The sentence on these two counts should have been held in abeyance in view of the death sentence imposed on count one (**See, Boru & Another =vs= Republic [2005] KLR 649**).

Be that as it may, the particulars in count one were that on the 20th March 2006 at Bondo township, jointly with others not before court, while armed with dangerous weapons namely a gun and panga, robbed **Joseph Opiyo Opeyo** of a panasonic radio cassette, an amplifier, a black and white television set and a VCD player all valued at Kshs. 23,400/= and cash Kshs. 2,000/= and at or immediately before or immediately after the time of the said robbery threatened to use actual violence against the said Joseph Opiyo Opeyo.

Alternatively, the appellants were said to have dishonestly retained a stolen radio cassette, a stolen amplifier and a VCD player on the 25th March 2006. The particulars in count two and three were that on the 25th March 2006, the third appellant was found at Bondo township in possession of a home made gun and a round of ammunition without a firearm certificate.

Being dissatisfied with the conviction and sentence imposed by the learned Principal Magistrate the appellants preferred the present appeals which were filed separately but were consolidated and heard at the same time .

The appeals are more or less based on similar grounds revolving around the prosecution evidence of identification and

possession, its contradictory nature and the failure by the trial magistrate to give due consideration to the defences raised by the appellants.

The appellants appeared in person at the hearing of the appeal and presented written submissions which they essentially relied on.

Mr. Gumo, the learned Assistant Deputy Public Prosecutor appeared for the respondent and opposed the appeals on the basis that the evidence connecting the appellant with the offence of robbery was largely derived from their possession of the complainant's stolen goods.

With regard to the first appellant (**Lameck**), the learned State Counsel submitted that he was identified by recognition at the scene of the offence by the complainant (PW1) who had previously known him for about eight months. The complainant relied on a lantern lamp to make the identification. Further, the first appellant had been in a house where the complainant's stolen items were found showing that he acted in concert with the second and third appellants.

As for the second appellant (**Calvin**), the learned State Counsel submitted that he was seen by his own parents (PW3 and PW4) carrying a paper bag containing the complainant's stolen VCD player and amplifier.

The learned State Counsel further submitted that the third appellant (**Samuel**) was found in possession of the firearm used in the robbery.

The contention by the learned State Counsel was that the doctrine of recent possession was invoked to convict the appellants who acted in concert to commit the offence of robbery with violence. Therefore, the appeals ought to be disallowed in their entirety.

The duty of this court is to re-examine and re-evaluate the evidence adduced at the trial and draw own conclusions bearing in mind to the trial court had the advantage of seeing and hearing all the witnesses.

In summary, the case for the prosecution was based on the facts that follow:-

The complainant **Joseph Opiyo Opeyo (PW1)** closed his butchery situated in Bondo at 8:00 p.m. on the material date. He was watching T.V. in his house when a neighbour called Teresa Anyango visited and went away. Thereafter, a person entered the house holding something like a gun. The person introduced himself as a police officer and called his colleague from outside the house. There was a bright lantern lamp in the house. The complainant recognized the first person as Lameck (first appellant) whom he normally saw in Bondo. After the other persons were called into the house, the complainant lay down and his Kshs. 2,000/= was taken away.

Also taken away were his T.V set, a VCD player, a radio and an amplifier. Thereafter, he was locked inside the house. He shouted for help and neighbours led by **Teresa Anyango** rescued him. He reported the matter to the police and on 25th March 2006 an assistant chief told him to go to the police station. He went to the police station and was told to go to the home of one **Owayo** where music was playing. He went to that home where his stolen VCD player make Samsung was removed from a house by Owayo's second wife. His stolen amplifier and radio – cassette were also recovered. All the recovered items were taken by the police and eventually the first appellant and others were arrested. The others included the third appellant (Samuel) who was found in possession of a home made gun and the second appellant (Calvin).

A village elder **Silvanus Juma Abuko (PW2)** accompanied the complainant and the assistant Chief of Barkowino sub –location to the home of Owayo. Owayo was also present. He took the team to the house of his second wife where the complainant's stolen VCD player was recovered. The team thereafter proceeded to the house of Owayo's first wife where the complainant's stolen amplifier and radio cassette were recovered. The team then proceeded to Bondo Police Station where the third appellant also known as Sande was held. He led the team to his house where a home made gun was found.

James Owayo (PW3) was arrested on 24th March 2006 at 4:30 p.m in Bondo town. He was taken to the Bondo Police Station where he was interrogated. He thereafter led police officers and the assistant chief to his home where the

complainant's VCD player was found in the house of his second wife **Pamela Juma Owayo**. The complainant's radio and amplifier were found in his first wife's house having allegedly been taken there by one **Francis Oloo**. The VCD player was taken to his wife's house by his son Omondi, the second appellant herein. His son Omondi and the third appellant were arrested in his presence in his home. The third appellant is his nephew (sister's son). He had seen the first appellant in his home but he (first appellant) was arrested later.

Pamela Juma Owayo (PW4) was at her home on the 23rd March 2006 at about 1:00 p.m when the first and third appellants arrived there and conversed with the second appellant who was at home. The three went away and the second appellant returned with something wrapped in polythene paper and kept it inside the house. She (PW4) warned him and left the home for Bondo. She returned in the evening at about 7:30p.m when police officers arrived there and arrested the second appellant and his father.

The item brought into the house by the second appellant was recovered on the following day and was the complainant's stolen VCD player.

Judith Atieno Alego (PW5), was at her grandmother's home on the 24th March 2006 at around 3:00 p.m when her neighbour called Lameck (first appellant) brought there a radio cassette, amplifier, speaker and battery which he said belonged to him and Sande (third appellant). He left the items behind save the speaker which he took away.

Police officers arrived at the home at about 7:00 p.m. and arrested her (PW5) husband, grandfather and others. The police returned on the following day accompanied by the assistant chief and the village elder and took away the radio and amplifier. **Teresa Anyango Omondi (PW6)**, confirmed that she rescued the complainant after he had been locked inside his house by those who invaded his house and robbed him.

The assistant Chief Barkowino sub –location **James Abonyo Okumu (PW7)** was on patrol with police officers on 24th March 2006 when they proceeded to the home of Owayo and arrested him with ten (10) litres of illicit brew (Changaa). Owayo was arrested along with others including the first appellant (Lameck). Later, a report was received from the complainant that his property had been stolen.

The Chief was given the name of Lameck Onyango as having been one of the suspects. The complainant confirmed having seen Lameck at the scene.

The Chief later received information that some of the goods stolen from the complainant were in Owayo's home. He proceeded to the said home accompanied by Owayo and Police officers. They recovered the complainant's VCD player from the house of Owayo's second wife.

The complainant's radio and amplifier were recovered in the house of Owayo's first wife.

P. C. Adam Limo (PW8) of C.I.D. Bondo took over the investigation of the case and later preferred the present charges against the appellants who had already been arrested and the stolen items recovered. Also recovered was a home –made gun.

The home made gun was examined by a ballistic expert. **Alex Mulindi Mwandawiro (PW9)** who confirmed that it fell under the definition of a firearm as contained in the Firearms Act (Cap 114 laws of Kenya).

John Odhiambo (PW10) is a neighbour of the third appellant. He confirmed that the home –made gun was found in the third appellant's house which house belonged to his (PW10's) brother in-law and was rented to the third appellant for Kshs. 200/= per month. He (PW10) was the agent of the landlord responsible for collecting rent from the tenants.

P. C. Daniel Chacha (PW11) of Bondo Police Station was with the assistant chief when they arrested the third and second appellant in the home of Owayo. His colleague arrested the first appellant. He confirmed that the complainant's stolen VCD, radio and amplifier were recovered in the house of Owayo's two wives.

The appellants were placed on their defence on the basis of the foregoing evidence. Each elected to make unsworn statements but before the commencement of the defence case, the trial magistrate (**W. B. Mokaya**) was transferred. The matter was then taken over by a different magistrate (**A. C. Onginjo**) who heard the defence case and

delivered the final Judgment.

The appellants on being asked whether they preferred the matter to start afresh and proceed from where it reached indicated that they preferred that the matter proceeds from where it reached. In effect, Section 200 of the Criminal Procedure Code was complied with by the incoming magistrate although that was not indicated in the required manner. Nonetheless the appellants were not prejudiced whatsoever. Therefore, the contention by the appellants in their submissions herein that Section 200 of the Criminal Procedure Code was not complied with by the incoming magistrate is unsustainable.

In his defence, the first appellant who was the third accused in the trial court said that he was a butcher and that on the 24th March 2006 he closed his butchery and arrived at his house at about 8:30 p.m. Later, the assistant chief accompanied by two police officers arrived there. The police officers were previously known to him (appellant one). They ordered him to sit down as they searched the house. They found nothing. He was arrested and taken to Bondo Police Station where he was held for nine days before being arraigned in court. He denied the offence and contended that the complainant said that he did not identify the robbers and did not give his (appellant's one) name to the neighbours.

In his defence, the second appellant who was also the second accused in the trial court said that on the 24th March 2006 at about 7:45 p.m. he was in his father's homestead when the assistant chief and two police officers arrived there. The group searched his house and found nothing. He was taken to his step-mother's house. The step mother was brewing "Changaa". She was arrested together with her customers and ten litres of changaa were seized. The changaa drinkers were arrested along with the second appellant. He was booked at the Bondo Police Station for possession of changaa. He was later taken to court and denied having robbed the complainant. He contended that no recoveries were made in his presence.

The third appellant was the first accused in the trial. He said that he was a fisherman at Usenge and he was at the home of his uncle (James Owayo) on the 24th March 2006 when the assistant chief and police officers arrived there and found ten litres of changaa. He was arrested together with others and taken to court on 3rd April 2006 where he was surprised to hear that he had been charged with robbery instead of possession of changaa. He contended that he did not lead police officers to where the exhibits were recovered and that the firearm was not connected to him. He also contended that his alleged landlord did not testify in court and that the evidence by the land agent was false. He further contended that he was a visitor at his uncle's home and did not commit the offences.

The foregoing defences were considered by the learned trial magistrate together with the evidence adduced by the prosecution against the appellants and in the end result all the appellants were convicted on count one.

In addition, the third appellant was convicted on counts two and three.

Our own consideration of the evidence leaves no doubt in our minds that the offence of robbery with violence contrary to Section 296 (2) of the Penal Code was proved by the complainant's evidence which showed that he was invaded in his home by a group of people armed with offensive weapons including a home-made gun. The home-made gun and its round of ammunition was later recovered in the course of investigations.

Even though the complainant escaped bodily injury at the time of the robbery, the offence was nevertheless complete. The crucial point that fell for determination by the learned trial magistrate was whether the appellants were positively identified as having been part of the gang of robbers. It is apparent from the judgment of the learned trial magistrate that the appellants were convicted on account of circumstantial evidence rather than direct evidence of identification at the scene.

The circumstantial evidence was based on recent possession of some of the goods stolen from the complainant's house. These included a VCD player, a radio cassette and an amplifier.

The direct evidence of identification of the first appellant at the scene of the offence by the complainant (PW1) was in our view un-reliable. The offence occurred in the hours of darkness thereby creating difficult circumstances for identification. It was doubtful that the lantern lamp inside the complainant's house provided favourable conditions for identification by recognition of the first appellant.

Otherwise it would not have been difficult for the complainant to mention the name of the first appellant to his neighbours who arrived at the scene to rescue him. These included Teresia Anyango (PW6). She was not given the name of the first appellant by the complainant. The complainant did not also mention the name of the first appellant to the police in the first instance. He only mentioned the name after one day thereby suggesting that he mentioned the name to the police only as an afterthought. It was possible that his alleged identification of the first appellant at the scene was erroneous or a mistake.

Fortunately, the learned trial magistrate did not seem to have given much emphasize on the alleged identification of the first appellant at the scene.

Although this was a case of purported identification by recognition by a single witness (PW4), we must note that even in cases based on recognition, the evidence must be watertight.

In **R =vs= Turnbull [1976] 3 ALL ER 549**, it was stated that:-

“Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”.

On the doctrine of recent possession we would refer to the decision of the Court of Appeal in the case of **Isaac Nanga Kahiga alias Peter Nganga Kahiga =vs= Republic Criminal Appeal No. 272 of 2005**, where it was stated as follows:-

“It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of 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, and secondly, that the property is positively the property of the complainant, thirdly 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 properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property and in our view any discredited evidence on the same cannot suffice no matter how many witnesses”.

It is our considered view that herein, the evidence by the complainant (PW1) was sufficient to prove that his property was stolen. The property included a VCD player, a radio cassette and an amplifier which were recovered a few days after the offence. The recovered items were positively identified by the complainant as his property. He produced relevant documentary evidence (receipts) to that effect.

As per the evidence of the complainant (PW1), the village elder (PW2), Pamela (PW4), Judith (PW5), the assistant chief (PW7) and **P. C. Chacha (PW11)**, the said items were recovered from houses occupied by the two wives of James Owayo (PW3).

Owayo had been arrested with others on the 24th March 2006 by the assistant chief and police officers on patrol for being in possession of illicit liquor (changaa). Thereafter, the assistant chief received information that some of the complainant's stolen property were in Owayo's homestead.

The VCD player was found in the house of Owayo's second wife (PW4) while the radio and amplifier were found in the house of Owayo's first wife.

Pamela (PW4) said that the VCD player was taken to her house on 23rd March 2006 at about 1:00 p.m. by her son Omondi (second appellant) after he had briefly conversed with the first and third appellants who had come to see him in

the home. She (PW4) implied that the VCD had been brought to the homestead while wrapped in a polythene paper by the first and third appellant.

Judith (PW5) said that the radio cassette and amplifier were brought to her grandmother's house on 24th March 2006 at about 3:00 p.m. by Lameck (first appellant) who told her that they belonged to Sande (third appellant). It was clear from the foregoing evidence that the recovered items were taken to their said houses by the first and second appellant meaning that they were in possession of the same immediately after having been stolen from the complainant.

In their defence, both denied possession of the items but this was clearly rebutted by the evidence of Pamela (PW4) and Judith (PW5) which evidence was found reasonably credible by the learned trial magistrate and which showed that they (Appellant one and two) were in possession of the items before they took them to those houses and continued exercising constructive possession of the same upto the time of their recovery by the police together with the assistant chief, the village elder as well as the complainant.

As regards the third appellant, we are of the view that the evidence of possession against him was insufficient. He was seen together with the first appellant in the homestead of Pamela (PW4) when the VCD player was taken there her son (second appellant). However, Pamela did not see him appellant one handing over the thing wrapped in polythene paper to the second appellant.

The second appellant brought the thing after he had briefly conversed and left with the first and third appellants. Judith (PW5) said that the radio cassette and amplifier were brought by the first appellant. She did not implicate the third appellant in that regard apart from saying that the first appellant told her that the items belonged to the third appellant. This was not sufficient evidence of possession against the third appellant.

Whereas we would on the basis of the aforementioned case of Isaac Nanga Kahiga (supra) find that the first and second appellants were properly convicted on account of the doctrine of recent possession, the same would not apply to the third appellant. His conviction on count one for the offence of robbery with violence was not proper and lawful.

However, his conviction on the second and third counts for the offences of unlawful possession of a firearm and round of ammunition was proper. He led the police to his rented house where a home-made gun with a round ammunition was recovered. This was in the presence of a neighbour cum the landlord's agent John Odhiambo (PW10).

In sum, with regard to the first counts the appeals by the first and second appellant are unmerited and disallowed. The appeal by the third appellant succeeds with respect to the first count but is disallowed with respect to the second and third counts. He shall serve the seven (7) years imprisonment imposed on each of the two counts by the learned trial magistrate.

The sentence shall run concurrently. Otherwise, his conviction on count one is quashed and the mandatory sentence imposed in respect thereof set aside.

Those are our orders.

Dated, signed and delivered at Kisumu this 4th day of May 2010

J. R. KARANJA
JUDGE

ALI-ARONI
JUDGE

JRK/aao

