



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

Criminal Appeal 263 of 2008

**1. JOSEPH WAMBUA MASOO
2. JOHN MUNUVE MUSYOKA.....APPELLANTS
VERSUS
REPUBLIC.....RESPONDENT**

JUDGMENT

Joseph Wambua Masoo and John Munuve Musyoka, the appellants, herein were jointly charged with John Muganda Muia with three counts of robbery with violence contrary to section 296 (2) of the Penal Code. Three alternative counts of handling stolen property contrary to section 322 (2) of the Penal Code were preferred against John Munuve Musyoka only. The appellants were convicted by **D. O. Ogembo**, the Learned Principal Magistrate, on the main counts of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. Their co-accused, John Muganda Muia was acquitted.

Being dissatisfied with the conviction and sentence, the appellants have preferred this appeal against both conviction and sentence on the main grounds that the evidence on recovery of the stolen goods was not conclusive; that their arrest was not connected with the offence charged; that the evidence was contradictory and that their defences were not adequately considered.

The particulars of the first count of robbery with violence contrary to section 296 (2) of the Penal Code were that, the appellants with the said co-accused **on the 4th day of October, 2007, at Pine Wood area, Kinondo Location in Kwale District within Coast Province, jointly with another not before the court, being armed with dangerous weapons, namely iron bars and rungun, robbed Nils Filip Ossian Anderson (hereinafter “the 1st complainant”) of his mobile phone make Sony Erickson, a wrist watch make Poseldon and a pair of leather shoes all valued at Kshs. 80,000/= and a cash sum of Kshs. 5,000/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said complainant.**

The second count of robbery with violence contrary to section 296 (2) of the Penal code, carried the following particulars: **that the appellants and their co-accused on the same date at the same place with another not before the court, being armed with dangerous weapons, namely, iron bars and rungun robbed Hamisi Athman Mohamed (hereinafter “the 2nd complainant”) of his mobile phone make Motorola L-6, a pair of shoes, a pen-knife and a cap all valued at Kshs. 11,000/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said complainant.**

The particulars of the third count of robbery with violence contrary to section 296 (2) of the Penal Code stated that **the appellants and the co-accused on the same date at the same place with another not before the court, being armed with dangerous weapons, namely, iron bars and rungun robbed William Ngala (hereinafter “the 3rd complainant”) of his mobile phone make Nokia 3310 and one wrist watch make Quartz all valued at Kshs. 4,700/= and at or immediately before or immediately after the time of such robbery used actual violence to the said complainant.**

When the appeal came up before us for hearing, the appellants appeared in person and opted to rely upon written submissions in which their grounds of appeal were elaborated. **Mr. Muteti**, Learned Senior State Counsel, who appeared for the Republic, opposed the appeal contending that the appellants were found with recently stolen property and proffered no explanation. In counsel’s view, the doctrine of recent possession was properly applied by the Learned trial Magistrate.

This is a first appeal. That being the case, this court is mandated to re-consider and re-evaluate the evidence which was adduced before the Learned Principal Magistrate and arrive at its own decision on whether to uphold the conviction, bearing in mind that the court did not see or hear the witnesses testify and must give allowance for that. (See **Njoroge – v – Republic [1987] 1 KLR 19**). We also bear in mind that an appeal court will not normally interfere with a finding of fact by the trial court unless the finding is based on no evidence or on a misapprehension of the evidence or the trial court is shown to have acted on wrong principles in reaching the finding it made. (See **Chemogong – v – Republic [1984] KLR 61**).

The background facts of the case are as follows:-

On 4th October, 2007, at about 10.10 p.m., the 1st complainant (PW 1) was driving home-Kinondo Kwetu Hotel, with his wife and another couple when, near Pine Wood Hotel he hit an object which deflated two of his car tyres. He called the second complainant (PW 3), who was his driver, on his mobile phone. The latter responded and drove to the scene in another vehicle with the third complainant (PW 2) who was the 1st complainant's security guard at his hotel. The couple and the 1st complainant's wife then drove to the 1st complainant's hotel using the vehicle which the 3rd complainant had used. Shortly thereafter the complainants were attacked. They were ordered to lie down and give the attackers money. The 1st complainant gave them Kshs. 5,000/=. The thugs also took his Sonny Erickson mobile phone, a Caseldon Nutio watch and leather shoes. They also beat up the complainants with iron bars. They stole from the 2nd complainant a Motorola-6 mobile phone, a pen-knife, shoes and a cap. From the 3rd complainant they stole a wrist watch and a Nokia 3310 mobile phone.

The robbers escaped when another motorist approached the scene.

The 1st complainant was then driven to his hotel and he called police. The 2nd and 3rd complainants proceeded to replace the damaged tyres. Police officers later arrived and took the complainants' statements. The following day, **Bakari Hamisi Likongo**, (PW 4) was at his video show business when the 1st appellant offered to sell to him a mobile phone. The consideration was agreed at Kshs. 3,000/= of which PW 4 paid Kshs. 2,300/= leaving Kshs. 700/= to be paid the next day. At the time of the transaction, the 1st appellant was accompanied by the 2nd appellant. PW 4 approached his neighbour to show him how to operate the mobile phone. The neighbour suspected the phone to belong to the 2nd complainant who had been robbed of the same the previous night. PW 4 knew the 2nd complainant and telephoned him to report to the police that the appellants would return for the balance of purchase price the next day. The 2nd complainant duly reported to Diani Police Station the next day (6th October, 2007) who then laid a trap at PW 4's premises the same day. The ambush team included **P.C. Stephen Muli**, PW 5. The 1st appellant in fact went to collect the balance of purchase price from PW 4 and was arrested by PW 6 and his team. The 1st appellant then led them to a house where the 2nd appellant was found with one **Shadrack Wambua** who escaped when he saw PW 6's team. A search was carried out in that house and a Sony Erickson mobile phone and a pen-knife were recovered therefrom. The appellants then led PW 6's team to their house at Ibisa Corner where they recovered iron bars, a cap and white leather shoes. The appellants were then taken to the police station. Later the same day the appellant led police officers, this time including **Cpl. Issa Wachisa**, to a matatu vehicle where the appellants co-accused was found and arrested. A second visit was made to the appellants' house and led to the recovery of a pair of shoes. The appellants finally led the police to the house of **Shadrack** who had earlier escaped and a cap and two jackets were recovered therefrom.

The appellants gave unsworn statements at the trial and called no witnesses. The 1st appellant testified that on 6th October, 2007, he was at his business of selling chips at Mbuyuni, when a man who had been his partner but they had disagreed went to him claiming his business stall. The former business partner was with a police officer who demanded to be shown his licence. He had none and was arrested. He was later charged with an offence which he knew nothing about.

The 2nd appellant also gave an unsworn statement. He testified that on 6th October, 2007 while he was at his place of work police officers went there and arrested him for associating with drug dealers. They asked for Kshs. 5,000/= for his freedom but he did not have it. He was then taken to Diani Police Station and later charged with an offence he did not commit.

The Learned Principal Magistrate was satisfied that the prosecution had proved its case against the appellants on the main counts of robbery with violence contrary to section 296 (2) of the Penal Code. He therefore convicted them and sentenced them as already stated. In his own words:-

“It is noted that the robbery herein was on 4th October, 2007 at about 10.10 p.m., and barely a few hours thereafter on 5th October, 2007, at about 11.00 a.m., the phone robbed from PW 3 was allegedly being sold to PW 4 by accuseds 1 and 2. Similarly, leather shoes (Exhibit 1), sonny Erickson phone (Exhibit 2), watch (Exhibit 4),

pen-knife (Exhibit 7) and cap (Exhibit 8) all of which had been robbed from the complainants were soon recovered from the houses of the accused and their accomplice still at large.

It is also noted that none of the prosecution witnesses knew any of the accuseds. And even the accuseds have not raised any issue of malice or bad faith on the part of the witnesses who testified on behalf of the prosecution. I find no reason whatsoever to disbelieve the evidence of these witnesses.”

The basis upon which the appellants were convicted was therefore their being found in possession of recently stolen goods. The legal position regarding the doctrine of recent possession has been stated in several decisions of the Court of Appeal, among them, the case of **Christopher Rabut Opaka – v – Republic [CR. APPEAL NO. 82 OF 2004] (UR)**. In that case the court cited with approval its own decision in **Isaack Ng’ang’a Kahiga – v – Republic** in which it had stated, *inter alia*, as follows:-

“It is trite 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; secondly, that the property is positively the property of the complainant; thirdly, that 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 of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses.”

The complainants in these case testified that on the material date and time they were attacked by about 4 and 5 thugs whom they did not identify at the time of the robbery. There is no doubt in our minds that the attack on the complainants amounted to robbery as defined in section 296 (2) of the Penal Code. The complainants before being attacked heard a gun shot. The thugs then beat them up with iron bars and stole various items from them. Thus all the elements of the charge of robbery with violence were proved to the required standard.

The very next day following the robbery, the 1st appellant was offering a mobile phone for sale to **Bakari Hamisi Likongo**, PW 4. PW 4 was in no doubt that the offer to sell the mobile phone was made by the 1st appellant. The sale price was agreed and PW 4 paid Kshs. 2,300/= leaving the sum of Kshs. 700/= due, to be paid the next day which was 6th October, 2007. Meanwhile, PW 4, sought the assistance of his neighbour on how to operate the mobile phone. The neighbour had already been informed of the robbery of the previous night in which the 2nd complainant had been robbed of among other things, a motorolla mobile phone. He therefore suspected that the mobile phone which PW 4 had bought could have been the one robbed from the 2nd complainant. The 2nd complainant indeed confirmed to PW 4 that they had been robbed and PW 4 advised him to report to the police about the sale and that the seller would return the next day for his balance of purchase price. The 2nd complainant indeed made the report and a trap was laid by among others **Stephen Muli**, PW 6. The 1st appellant went for his balance of purchase price from PW 4 and was arrested. The recovered mobile phone was produced at the trial and the 2nd complainant identified it. He even produced the receipt he had been issued with when he purchased it. That, in our view was positive identification of the mobile phone by the 2nd complainant. In the premises, we have come to the conclusion with respect to the Motorola mobile phone, that the prosecution established to the required standard all the ingredients required to be proved for the doctrine of recent possession to apply.

PW 6 further testified that, the 1st appellant volunteered to take police officers to his accomplices. He led them to a house where the 2nd appellant was found. In the house the police recovered a Sonny Erickson phone and a pen knife. The 1st complainant identified the Sonny Erickson mobile phone as his and the 2nd complainant identified the pen knife at the trial.

PW 6 also told the court that the appellants further volunteered to take them to their house in Ibisa Conner where they recovered metal bars, a cap and white leather shoes. The 1st complainant identified the shoes as his at the trial and the 2nd complainant identified the cap. The search for the stolen items was continued by PW 7, **Cpl. Issa Wachifa**, who testified that the appellants led them to a house they shared with their co-accused and produced a pair of shoes. The appellants then led PW 7 and his team to the house of **Shadrack** who had earlier escaped and they recovered a cap and two jackets.

The above evidence, in our view, established that the 1st appellant was found in possession of some of the items which had recently been stolen from the 1st complainant and the 2nd complainant. He led police officers to where recoveries were made of items which were partly contained in counts one (1) and two (2) of the charge. Those items were positively identified by the 1st and 2nd complainant. The doctrines of recent possession therefore applied with regard to both counts 1 and 2 of the charge with respect to the 1st appellant. The 3rd complainant, **William Chirau Ngala**, PW 2 identified his

watch which was produced at the trial as PEX. 4. Our scrutiny of the entire evidence which was presented before the trial magistrate however does not show how that watch was recovered and from who. The recovery of that watch was the only link between the appellants and the 3rd count of robbery with violence contrary to section 296 (2) of the Penal Code. In the premises, it is our view that the 3rd count was not proved to the required standard against any of the appellants.

On the basis of the same analysis, we have come to the conclusion that none of the counts was proved beyond reasonable doubt against the 2nd appellant. We have come to that conclusion because the evidence of possession of the stolen properties by the 2nd appellant was not positive. The Motorola mobile phone whose recovery led to the arrest of both appellants was offered for sale to PW 4 by the 1st appellant. He is the one who received the first payment of Kshs. 2,300/= for the mobile phone. He is also the one who went to collect the balance of purchase price when he was arrested. The 2nd appellant's participation when the mobile phone was offered for sale to PW 4 was suspect but in our view suspicion alone could not amount to positive possession. It is significant that he did not accompany the 1st appellant when he went back for the balance of purchase price.

The 1st appellant led police officers to a house at which the 2nd appellant was found. It is not disputed that that house did not belong to the 2nd appellant. In the house the police recovered a Sonny Erickson phone and a pen knife. Since the house did not belong to the 2nd appellant, it is our view that it could not positively be said that the items recovered in that house were found in his possession.

The prosecution further contended that both appellants led them to their house at Ibisa Corner where they recovered metal bars, a cap and white leather shoes. The testimony regarding the ownership of the house as belonging to both appellants only came from the police officers. The police officers were more emphatic with respect to the ownership of the house by the 1st appellant. According to PW 6, **PC Stephen Muli**, when they went to that house, it was opened by the 1st appellant. On cross-examination by the 1st appellant PW 6 stated as follows:-

“You admitted and led us to accused 2. My statement shows what we recovered in your house. It was a rented house and you confirmed it was yours.....It is your admission that led us to accused 2 and your house.”

And PW 7, **Cpl. Issa Wachifa**, testified as follows when he was cross-examined by the 1st appellant:

“The house you 3 shared is in Ibisa area with adjacent houses.....You even opened the door voluntarily and your items were inside the house.”

On cross-examination by the 1st appellant PW 8, **PC Kenneth Murithi** testified as follows:

“You led us to accused 2 and 3. You led us to the house you were staying in..... You opened the door for us. You left the keys to a neighbour.....”

The prosecution in our view did not positively, prove beyond reasonable doubt, that the house where some of the items were recovered indeed belonged to the 2nd appellant. We entertain doubt that that was the case. We resolve that doubt in favour of the 2nd appellant.

In the end we find that the 2nd appellant was not properly convicted. Accordingly, we allow his appeal, quash the conviction in respect of all the counts and set aside the sentence of death imposed upon him. He shall be set at liberty forthwith unless otherwise lawfully held.

As for the 1st appellant, we have found that the prosecution proved, beyond reasonable doubt, that he was on 5th and 6th October, 2007, found in possession of property which had been stolen from the 1st and 2nd complainants on 4th October, 2007. Both complainants identified their property and proved to the required standard that the same had been robbed from them. The 1st appellant did not claim ownership of the same property. He offered no explanation as to how he came to be in possession of the property. It was his duty to do so (see **section 111 (1) of the Evidence Act Cap. 80** Laws of Kenya). In his defence, the 1st appellant denied the offence and testified on how he was arrested at the instigation of his former business partner ostensibly for operating a business without a licence. Like the trial magistrate, we found the 1st appellant's defence incredible and the Learned Principal Magistrate was right in rejecting the same.

In the result we find no basis for interfering with the decision of the Learned Principal Magistrate with respect to the 1st and 2nd counts of robbery with violence contrary to section 296 (2) of the Penal code. We hereby dismiss the 1st appellant's appeal with respect to those counts.

With regard to sentence, only one sentence of death can be executed. The Learned Principal Magistrate should have

imposed only one death sentence. Having imposed the sentence of death on the 1st count he should not have proceeded to impose the death sentence on the other counts. In the premises, the sentence on count two (2) will be left in abeyance. We otherwise uphold the appellant's conviction and sentence as stated and hereby dismiss this appeal as already stated. It is so ordered.

DATED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2010.

J. B. OJWANG
JUDGE

F. AZANGALALA
JUDGE

Read in the presence of:-

The Appellants and Mr. Onserio for the Republic.

F. AZANGALALA
JUDGE
22ND SEPTEMBER 2010