



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 278 & 279 of 2006

1. SILAS K. NGARI
2. STEPHEN M. MURITHI.....APPELLANTS
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

Silas Kariuki Ngare and Stephen Maina Murithi (hereinafter “*the 1st and 2nd appellants*” respectively), together with one **Stephen Mwaniki Ndungu** were tried by the Senior Resident Magistrate **T. Mwangi** on a charge which contained three counts and an alternative count. They were acquitted of all the counts save for the 1st count of robbery with violence contrary to section 296 (2) of the Penal code. Their co-accused **Stephen Mwaniki Ndungu**, who was the 2nd accused, was acquitted of all the counts. The particulars of the 1st count alleged that the appellants and the said co-accused **on the 14th day of June, 2005, at Tudor Manyimbo area within Mombasa District of the Coast Province, while armed with dangerous weapons namely pistols and a knife, jointly robbed Stephen Onyango Ochola, (hereinafter “*the complainant*”) of his compressor, one bicycle - make Diamond, a wrist watch make Cambridge, cash of Kshs. 425/=, a spanner and a bunch of keys, all valued at Kshs. 21,125/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said complainant.**

The appellants were convicted and each sentenced to death. They were not satisfied with their conviction and sentence and have appealed to this court against their conviction and sentence. They have raised the following issues: that the evidence of identification was not positive; that accomplice evidence was considered in convicting them, yet they were not given an opportunity to cross-examine the accomplice and that the prosecution case was not proved as required in Law.

When the appeal came up for hearing before us, the appellants who were unrepresented, relied upon their written submissions which had been previously filed with the leave of the court. **Mr. Muteti**, Learned Senior State Counsel, represented the Republic and opposed the appeal contending that the same was without merit. In his view, the appellants were convicted on sound evidence; they were found in possession of recently stolen property which had shortly before been robbed from the complainant who had identified the appellants at the scene of crime and at an identification parade.

Briefly the facts of the case before the Learned Senior Resident Magistrate were as follows: - The complainant, **Stephen Onyango Osora**, (PW 1) hired from **Peter Okemo Okumu**, (PW 2), a compressor for his spray painting work on 13th June, 2005. He had painting work at Changamwe. On 14th June, 2005, he completed the work. He loaded the compressor on a bicycle which he had borrowed from the same PW 2 and commenced his trip back home. On the way home, he called on his colleagues at his former work-station at Tudor where he chatted with friends and then proceeded with his return journey. When he reached Tudor Day Secondary School at about 3.00 p.m., a pick-up vehicle approached from behind and stopped where he was. Two men alighted, produced a pistol and a knife and demanded the items he had. They threatened to kill him if he screamed. The men then took the compressor and the bicycle and put it on the pick-up. They also took his watch-make cambridge, house keys, a spanner and a cash sum of Kshs. 425/= all valued at about Kshs. 27,000/=. They drove off. He identified the faces of the men but not the driver of the pick-up and the registration number of the pick-up. He proceeded home and reported to the owner of the compressor and the bicycle, (PW 2). The following day, he reported to the police at Makupa Police Station.

On 18th June, 2005, he was informed by his uncle that the compressor had been recovered and suspects arrested by Makupa Police. He went to Makupa Police station and saw the attackers and the compressor. He described the compressor to the court.

Peter Okemo Okumu, PW 2, confirmed giving the compressor and the bicycle to the complainant on 13th June, 2005. He further identified the compressor at Makupa Police station after it was recovered on 18th June, 2005.

PC Gabriel Nyongesa of Makupa Police Station was the Investigating Officer. He testified as PW 3 at the trial. He recalled the 18th June, 2005, when he received information that there were three men who were suspected to be thieves at a garage at Kiziwi area. Accompanied by his colleague, they visited the said garage where they found the owner, **Joseph Odhiambo Wandai**, PW 4, who pointed out the three suspects. They arrested and escorted them to Makupa Police Station together with the compressor. He produced the compressor at the trial.

Joseph Odhiambo Wandai, PW 4, recalled the same 18th June, 2005, at 9.00 a.m., when one of his colleagues informed him that a compressor had been brought to their place for sale. He also knew that PW 1 had been robbed of a compressor and a bicycle. At about 1.00 p.m., of the same date, the men went to PW 4, at his workplace and offered the compressor for sale at Kshs. 15,000/=. He pretended to be interested and told them to wait for money. As they waited, he informed the complainant and sent his colleague to report to the police. The police came and arrested the suspects. They also carried the compressor with them.

IP Said Bueto, PW 5, mounted two identification parades on 22nd June, 2005 at which the appellants were identified by the complainant.

In their defence, the appellants gave unsworn statements. The 1st appellant recalled the 18th August, 2005, when he was arrested after an unrelated conversation with the police. At the police station, he was pointed out to the complainant and PW 4 who he found at the booking office. He was then taken home where a search was carried out in the presence of the complainant. Later, he was identified by the complainant at an identification parade conducted on 22nd August, 2005.

The 2nd appellant stated that on 18th June, 2005, he went to buy sugar for his snack business. On the way, a motor vehicle approached from behind without hooting. He was enraged and threw stones at the vehicle breaking its windscreen. He was arrested and handed over to police officers who took him to Makupa where he was asked for Kshs. 10,000/= for his freedom which he did not have. On 19th June, 2005, the complainant went to the police cells and pointed him out as one of his attackers. He later participated in an identification parade at which the complainant identified him.

On the basis of the above evidence, the trial Magistrate made findings of fact that the complainant had been attacked by the appellants during the day when visibility was good and that his testimony of the robbery had not been challenged by the appellants. The Learned Magistrate further found that the prosecution had proved that the appellants were found in possession of property which had recently been stolen from the complainant. He further found that the complainant had identified the appellants at the identification parade conducted by PW 5, **IP Said Bueto**. He concluded that the charge had been proved to the required standard.

We have, on our own, independently re-evaluated and re-examined the evidence which was presented before the Learned Senior Resident Magistrate. Having done so, we have come to the following conclusions. On the issue of identification, we note that the attack on the complainant took place in broad day light at about 3.30 p.m. The appellants were not disguised. The complainant was therefore able to see their faces well. The conditions, in our view, favoured a positive identification. The identification was however by a single witness. In **Maitanyi – v – Republic [1986] KLR 198**, it was held, with respect to the reliability of the evidence of a single identifying witness as follows:

“The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.”

We have not been able to find any warning administered by the trial court. There was however, other evidence upon which the Learned

Senior Resident Magistrate relied in convicting the appellants. He may in the circumstances have felt that a warning was not necessary. There was the evidence of the recovery of the compressor. PW 4, **Joseph Odhiambo Wamdai**, to whom the stolen compressor was offered for sale testified that the appellants, with another, went to his place of work on 18th June, 2005, at about 1.00 p.m. and offered the compressor for sale to him at Kshs. 15,000/=. He pretended to be interested as he contacted the complainant and sent for the police. He had been earlier informed of the robbery against the complainant. PW 3, **PC Gabriel Nyongesa** was one of the police officers who responded to PW 4's report. When he arrived at the place of work of PW 4, he found the appellants and arrested them. He also took possession of the compressor. That compressor was positively identified by the complainant and PW 2, **Peter Okemo Okumu** from whom the complainant had hired the compressor.

The evidence of recovery provided proof that the appellants were found in possession of stolen compressor just four (4) days after the robbery on the complainant. The doctrine of recent possession therefore applied. For the doctrine to apply, the following must be proved.

The possession must be positively proved in that:

(a) The property must have been found with the suspect.

(b) The property must be positively identified as the property of the complainant.

(c) The property must be proved to have been recently stolen from the complainant.

The above ingredients have been restated in a plethora of authorities, among them, (**Arum – v – Republic [2002] 2 EA 10**). Our analysis above shows that all the above ingredients were proved by the prosecution. The complainant was robbed of several items including the compressor on 14th June, 2005. On 18th June, 2005, the same compressor was being offered for sale at Kshs. 15,000/= to PW 4, **Joseph Odhiambo Wamdai** by the appellants. The complainant and PW 2, **Peter Okemo Okumu** positively identified the compressor. In her judgment, the Learned Senior Resident Magistrate stated as follows:-

“The three accused persons were arrested in possession of the compressor as they waited for a buyer.

PW 3 arresting officer and PW 4 the owner of the garage did confirm that the compressor was recovered in the presence of the accused persons at the time of arrest. None of the witnesses knew accused persons prior to that day. There would have been no reason for the witnesses wanting to frame accused persons therefore.”

In our view the Learned Senior Resident Magistrate clearly had the doctrine of recent possession in mind as he considered the evidence adduced before him. On our part, we have found that the recent possession of the compressor by the appellants clearly implicated them in the robbery.

The appellants have discredited their identification at the identification parade mounted by **IP Said Bueto**, (PW 5). We think the appellants were entitled to complain. We say so, because the complainant stated in his evidence that when the appellants were arrested, and were taken to the police station, he was at the police station and saw them even before anyone could tell him who they were. He also accompanied the appellants when police officers visited their homes in Mariakani. In those premises, an identification parade served no purpose and if it had been the only evidence of identification, it would have been unsafe to rely upon it for conviction.

The appellants have further complained that they were convicted on the evidence of an accomplice (the 2nd accused who was acquitted) which evidence was not tested by cross-examination. We have indeed noted that the 2nd accused, **Stephen Mwaniki Ndungu** testified on oath at the trial. The record shows that he was then cross-examined by the prosecutor. The appellants do not appear to have been given an opportunity to cross-examine him. In our view, if the conviction of the appellants depended entirely on the testimony of the 2nd accused, it would have been unsafe. Our re-examination of the evidence however shows that the conviction of the appellants was not dependent on the testimony of the 2nd accused. The Learned Senior Resident Magistrate concluded as follows:-

“I am satisfied with the evidence on record that the prosecution did prove its case as required in respect of the 1st and 3rd accused on count 1. The two persons were positively identified by the complainant. The robbery took place during the day. None of the two would give an account of their whereabouts on 14th June, 2005 to take them away from the scene of crime. Having failed to do so and considering that the evidence by the prosecution was well corroborated and overwhelming, I do find both accused one and III guilty as charged on count 1.”

In coming to that conclusion, the Learned Senior Resident Magistrate would appear not to have been influenced by the testimony of the 2nd accused and relied, for the appellants' conviction, entirely on the testimony of the prosecution. So, whereas the appellants appear not to have been given an opportunity to cross-examine the 2nd accused, that failure was not fatal to the entire prosecution case since its case was

founded on the identification of the appellants at the time of the commission of the crime and on the doctrine of recent possession which doctrine is discussed above.

The upshot is that the appellants were convicted on sound evidence and the Learned Senior Resident Magistrate, despite the procedural flow she committed, was justified in convicting them for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. We find no valid reason to interfere and hereby uphold the conviction. The appellants were sentenced to death for the offence. The sentence is provided for and was therefore lawful. The same is also upheld. We find this appeal unmerited. It is dismissed in its entirety.

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

F. AZANGALALA
JUDGE

M. ODERO
JUDGE

Read in the presence of:-