REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 301 OF 2001

Lesiit Kasango J,J

JOSEPH KIGORWE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence of Hon. A.O. Muchelule Chief Magistrate in Meru

Criminal Case No. 1062 of 2000 delivered on 5th September, 2001)

JUDGMENT

The appellant was charged with 7 others with three counts of robbery with violence contrary to section 296(2) of the Penal Code. He was the only one convicted by the trial court and sentenced to death. He was aggrieved by the conviction entered by the trial court and launched his appeal in 2001. That appeal was heard by two judges who apparently dismissed it but the copy of judgment was never seen. He filed a second appeal to the Court of Appeal which ordered a retrial of his appeal. That is why he appeared before us to argue his appeal.

The appellant relied on amended grounds of appeal. On those grounds he challenges the finding of the learned trial Magistrate on the evidence of the recovery of Exhibits. The appellant contends that the exhibits were not found in his possession, that the recovery was not proved as required and that the exhibits were not identified by the owner PW5.

The second ground which the appellant raises is that the learned trial magistrate erred in law and fact by rejecting his defence without giving it due consideration. He also claims that the learned trial magistrate misdirected himself by relying on irrelevant evidence to convict him for the second and third counts in which PW1 and PW2 were the complainants. The appellant contended that the prosecution failed to summon essential witnesses to prove its case and that the evidence was full of contradictions.

The brief facts of the case is that at about 10p.m. on the 18th of May 2000 some 9 to 10 men descended on a neighbouhood. They first attacked the home of PW2, 5 and 6. They then proceeded to the home of PW1.

In the home of PW2 the thugs robbed PW5 of a bag which had many compact cassette, radio cassettes,

rain coats and a black book. They also injured PW5 and PW6. From PW6 they stole a bag. The thugs moved to the home of PW1 where they stole his property. They took his radio cassette, leather jacket and TV.

Five days after this incident, on the 23rd of May, PC Kimathi PW7 in company of other Police Officers, while acting on information they had received, went to the home of the appellant in this appeal and arrested him. From his house they recovered 51 compact cassettes the cassettes bore the name of Edward Amathi PW5. The police officers observed that PW5's names were erased and another name overwritten on all the cassettes. The overwritten name was Sammy Jane. They also collected other cassettes which were scattered on the floor all belonging to PW5. They also recovered a bag which was later identified by Beatrice PW6 as what was stolen from her during the attack.

The appellant in his defence denied the charge. He admitted that he was arrested on the 23rd of May but denied that it was at his house. The appellant stated that on the material day after work he proceeded to a *changa* den to take *changa*. He claims that the police raided their den and arrested him and others. He claimed that the police visited his house on the 25th of May but is silent as to whether anything was recovered.

The appellant's appeal was opposed by the learned State Counsel Mr. Kimathi. Mr. Kimathi submitted that the appellant had been recognized during the raid by PW1 and PW2, who knew him very well. Counsel submitted that the appellant was found in possession of property belonging to PW5 and that, that was proof he had been involved in the robbery especially because he did not give a reasonable explanation for the possession of the compact cassettes.

We have carefully considered the evidence which was adduced by the prosecution and the defence. We have subjected this evidence to a fresh evaluation and analysis as expected of a first appellant court **OKENO VS REPUBLIC 19(EA) 32.** We have perused the judgment of the learned magistrate. The trial magistrate convicted the appellant on the basis that he was found in possession of the stolen cassettes. The trial court found that the cassettes were proved to be the property of PW5 whose names were clearly rubbed on the cassettes. The trial magistrate found that PW7 who recovered the cassettes from the appellant's house was telling the truth and declared that the appellant lied when he denied that he was in possession of the cassettes.

We have analyzed the evidence and are satisfied that the appellant was recognized by several witnesses. These witnesses included PW1, PW2 and PW3. PW5 did not identify the appellant. However from the evidence of the prosecution witnesses and especially of the Sub-Area PW4, it is clear that the attacks were carried out in the homes of Amathi family PW2, PW3, PW5 and PW6 and in the home of Muratha PW1 and that the raids all carried out by the same group of people.

The learned trial Magistrate did not rely on the evidence of recognition by PW1, PW2, and PW3. According to the learned trial Magistrate the fact that those witnesses did not tell anybody that they had identified the attackers including the Police during the first report means that they had not recognized any of the attacker or was an afterthought.

With due respect to the learned trial Magistrate the witness gave an explanation for their omission to disclose names of those identified. They said they did not trust the police because no proper action was taken when they reported the case. They explained that it was after they reported to the CID that action was taken and the suspects arrested. We accept their explanations. We find failure by the witnesses to tell police that they recognized the appellant was not an afterthought.

We have examined the circumstances under which the appellant was recognized by the 3 witnesses. Each of the witnesses said that there was moonlight at the scene during the attack. PW3 on his part said that he was enabled to see the appellant by light from a lamp inside PW3's house as he stood outside (PW3) door and from the appellant through the moonlight PW1 said that he saw the appellant standing outside the door of his house. PW1 said that he was watching the attackers from outside near the toilet within the compound of his home and that he saw the appellant with the light coming from a lamp in the house through the open door where the appellant was standing.

We agree the circumstances of identification were difficult as the incident took place at night and the only light that was available was moonlight and paraffin lamps. In such a circumstance the evidence of visual identification would be required to be corroborated by some other material evidence. That evidence was available in this case. This material evidence was provided by the evidence of the recovery of the 51 compact cassettes bearing the name of PW5, and the bag belonging to PW6. These two exhibits were, according to PW7 recovered from the house of the appellant.

The learned trial magistrate made a specific observation in regard of the recovery of these exhibits. The

learned magistrate observed that in his assessment of the demenour of PW7 he was satisfied that PW7 was telling the truth that he arrested the appellant in his house and that from that house he recovered the two exhibits.

The learned trial Magistrate also observed in his judgment that from his assessment of the demenour of the appellant he was satisfied the appellant was lying about his arrest and about the recovery of the exhibits. The appellant had denied having been arrested while in his house and also denied that the exhibits were recovered from his house.

As a first appellate court we are mandated to evaluate and analyze the evidence afresh and to make our own conclusions. Regarding assessment as to demenour by a trial court, it is only in very exceptional circumstances that such a finding can be upset which is if the appellate court finds that there was no basis for the assessment arrived at. We find no reason why we should differ with the learned trial Magistrate's assessment of the demenour of PW7 and the appellant.

We find that the appellant was found in possession of 51 compact cassettes and the bag bearing the inscription CAT, five days after they had been stolen from PW5 and PW6 respectively. The recovery of these items five days after they had been stolen was recent possession of stolen property. The appellant did not explain how he came into possession of the items. We have no doubt that they were found in his possession at the time of his arrest. His defence in which he was silent about the recovery as a mere denial.

We find there was overwhelming evidence that the exhibits were found in the appellant's house and specifically scattered on the floor and under his bed. They were properly identified as the property of the two complainants PW5 and 6. There is therefore overwhelming evidence that the appellant had in his possession the cassettes and the bag so soon after they had been stolen. The evidence of possession in our view corroborates that of recognition by PW1 PW2 and PW3.

Having carefully considered this appeal we are satisfied that the learned trial magistrate gave due consideration to the evidence before him including the appellant's defence, and that he arrived at the right conclusion. We find no merit in this appeal and we therefore reject it accordingly. We uphold the conviction entered against the appellant and confirm the sentence.

The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 29TH DAY OF OCTOBER, 2010

Lesiit, J
Judge.

Kasango, M
Judge.