



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO 27 OF 2008
LESIIT & KASANGO, J.J.

REPUBLIC.....RESPONDENT

Versus

JOSEPH MUTWIRI.....APPELLANT

(An appeal against the judgment of Hon. Mr. J.N. Nyaga P.M. in Maua Criminal Case No. 4792 of 2005 delivered on 20th February 2008)

JUDGEMENT

The appellant Joseph Mutwiri was the 3rd accused in the trial before the lower court. He had been charged with two other persons with two counts of robbery with violence contrary to section 296(2) of the Penal Code. A fourth person who was a woman, was charged with two counts of being in possession of firearms and ammunition without a firearms certificate contrary to section 4(1) of the Firearms Act. The appellant was found guilty in both counts of capital robbery and sentenced to suffer death. He was aggrieved by the conviction and sentence and therefore filed this appeal.

The appellant has raised 3 grounds of appeal the first one that the prosecution did not prove that he was in possession of any of the stolen property which had been recovered in the case. Secondly that the learned trial magistrate did not evaluate the evidence that was adduced before the court. And thirdly that he was held for longer period than allowed under the Constitution.

The appeal was opposed by the state. The learned State Counsel Mr. Kimathi submitted that the appellant was found in possession of two cocks stolen from PW4 in the presence of PW1. Mr. Kimathi submitted that the cocks were properly identified and since that the Appellant did not claim ownership of the cocks, and since he did not offer any explanation of how he came by them, the conviction entered was correct.

The facts of the case are that the complainant PW1 Baariu, was walking home at 8.30 p.m. on the material night when he passed a group of 10 people going to the opposite direction. That group ordered him to stop and demanded money from him. When he said that his money was in the house, they frog marched him home where they took Ksh.5000/- from his house. They also demanded to be escorted by the complainant to his father's house PW4. They were escorted there and they robbed PW4 of Ksh. 1000/- and two cocks. None of the two, PW1 and PW4 were able to identify the robbers.

The Assistant Chief of the area PW2 swung into action the same night after receiving the report of the robbery. He was in the company of Sgt. Sakuti PW5 and Administrative Officers. PW2 arrested all four accused persons in the case, including the appellant.

There was contradiction in regard to the persons in whose possession the recovered items were found. It was however clear that a mobile phone, a watch, two cocks and firearms with ammunition were recovered at different houses from different persons.

The appellant denied that anything was recovered from him. His defence was that he was woken up from sleep at his house and arrested.

We have carefully considered the evidence which was adduced by the prosecution and the defence during the trial. We have subjected this evidence to a fresh evaluation and analysis as expected of a first appellant court **OKENO VRS REPUBLIC 19(EA) 32.**

We have considered the judgment of the learned trial magistrate and found that the conviction against the appellant based on the recovery of the two cocks. The learned trial Magistrate in his judgment found the appellant guilty on the grounds that the two cocks were recovered from his house, and that the photographs of the cocks which were produced in evidence were clear and that PW4 had properly identified the cocks as his property.

Before basing a conviction on the evidence of possession of stolen property the court must satisfy itself:-

1. That the accused person was found in possession of the stolen property.
2. That the property was properly identified
3. That the accused person did not offer a reasonable explanation of how he came to be in possession of the stolen item.
4. Where relevant the lapse of time between the theft of the property and its recovery must also be considered because in appropriate cases the lapse of time may determine a conviction or acquittal.

PW2's testimony corroborated the complainant PW1's evidence that the two cocks were recovered from the house where the appellant was found. Those two cocks were not exhibits, but they had been photographed as is appropriate due to the limitation of keeping them until the date of the hearing of the case.

We keenly considered the evidence of PW4 who was the owner of the two cocks. No where in his evidence did he specify why he was able to identify the two cocks as his property. PW1, who was his son, did not also say why he believed that the two cocks were the property of his father.

With due respect to the learned magistrate we do not think that he correctly addressed his mind to the issue of identification of the two cocks. Looking at the two cocks in the photographs which were before the court, we agree with the learned trial magistrate that the photographs are very clear. However, the clearness of the photographs did not satisfy the requirement that the cocks must be proved through cogent evidence that they belonged to the complainant PW4. These cocks were ordinary, they had no special marks on them. The complainant did not disclose why he believed that the two cocks were the same ones stolen from him on the night in question.

Even though we are satisfied that the two cocks were recovered from the house where the appellant was found sleeping on the same night of the robbery, we are not satisfied that there was a proper identification of the two cocks as the property of the complainant PW4. We find that the conviction entered against the appellant was not safe and should not be allowed to stand.

We accordingly allow the Appellant appeal quash the convictions and set aside the sentences. We direct that the Appellant should be set at liberty forthwith unless he is otherwise lawfully held.

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

LESIT, J
JUDGE

KASANGO, M
JUDGE