



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(*Coram: Ojwang & Azangalala, J J.*)

CRIMINAL APPEAL NOS. 339 & 341 of 2006 (CONSOLIDATED)
- BETWEEN -

PETER KALOKI MULILI.....1ST APPELLANT
KIVILA KING'OO.....2ND APPELLANT

- AND -

REPUBLIC.....RESPONDENT
(*Being an appeal from the Judgment of Senior Resident Magistrate Mr. J. M. Githaiga dated 28th November, 2006 in Criminal Case No. 320 of 2006 at Taveta Law Courts*)

JUDGMENT

The appellants were charged with robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya): it was alleged that the two, on **27th May, 2006** at about 11.00p.m. at Ziwani Estate Farm, in Taita-Taveta District of Coast Province, jointly robbed **Daudi Mulandi Kimatu** of a bicycle, being Diamond by make, a torch, a hand-bag, and a bow and three arrows – all valued at Kshs. 4,100/= ? and at the time of the robbery, wounded the said **Daudi Mulandi Kimatu**.

The prosecution case was that on the material night, **27th – 28th May, 2006**, the complainant was guarding Kiboko “A” area within the said Ziwani Estate when, at around 11.00pm, he heard noises close by. The complainant, **Daudi Mulandi Kimatu** (PW1), was a security officer at the Estate, doing guard duty, and was for that purpose, armed with a bow and arrows, as well as a torch. When PW1 flashed his torch he saw nobody; but he thereafter saw someone standing in front of him: this person flashed a powerful torch at PW1, and hit PW1 on the head with a metallic object, even as a second attacker hit him on the right hip-joint with a club. When PW1 tried to shoot at these attackers with an arrow, the one with the powerful torch cut PW1’s bow-string with a knife, before hitting him again with the metallic object, this time across the left fingers. When PW1 screamed and ran from the **locus in quo**, the first attacker, whom he testified was the 1st appellant herein, ordered him to keep quiet; PW1 escaped into the maize farm leaving his bicycle behind, and raised alarm by blowing a whistle. It was PW1’s testimony that it was the 1st appellant herein who took his bicycle; and that it was 2nd appellant herein who hit him with a club on the hip-joint. PW1 testified that there was at least a third member of the attacking gang; and that 1st appellant was riding away on the said bicycle, while the other members of the gang were following him on foot. It was PW1’s evidence that the attackers had also taken his bow and three arrows, as well as his torch and hand-bag.

PW1 underwent medical attention at an Estate clinic, and on **28th May, 2006** made a report of the incident at Taveta Police Station; his stolen items were recovered, and brought before the Court as exhibits. PW1 went on with medical treatment at Taveta Sub-District Hospital, and the P3 medical-reporting form on his health was duly filled-in, and brought before the Court as an exhibit.

In cross-examination, PW1 testified that he had seen both 1st and 2nd appellants for the first time on the material night and he had taken note of 1st appellant’s deep voice; PW1 said the night attack had lasted about four minutes.

Issa Dame Abashora (PW2), the supervisor of security guards at the said Ziwani Estate Farm, testified that he received a report of the attack on PW1 on the same night at about 1.30a.m.; and he went with the farm manager to Kiboko “A” where PW1 was, injured and with a bleeding head. PW2 and the farm manager, while at the scene, found three sets of shoe-marks, as well as bicycle tyre marks – they followed these in the direction of Lumi Primary School. Beyond the school, the said tread-marks led to a particular house within Lumi; and PW2 and his team kept guard over the said house, as they called the village elder (PW9) and also informed the Assistant Chief (PW8) who sent for three police officers. When the door to the said house was forced open, the stolen items (exhibited in Court) were found: the bicycle; the bow; three arrows; a hand-bag. Nobody was found in the said house. PW2 knew the recovered items to belong to PW1, as he had seen them repeatedly with PW1.

Leonard Maritim (PW3), a security officer at Ziwani Estate, had also teamed up with PW2 and the farm manager on the material night, to see to the robbery incident which had been reported. PW3 expressed familiarity with the items recovered from the house at Lumi; he is the one who had issued the bow and arrows to PW1 for guard duties. PW3 later learned that the house in which the stolen items had been recovered belonged to 2nd appellant herein; and he also learned that one suspect had been arrested, while another had fled to a place called Rombo, but was subsequently arrested in the presence of PW3.

Stanley Chelang’a (PW5), a clinical officer at Taveta Sub-District Hospital, had examined PW1 after PW1 suffered injuries during the robbery: PW1’s jacket was blood-stained; he had a superficial cut on the head; he had a painful right hip – and PW5 concluded that a blunt object could have caused the injury; he assessed the degree of injury as “harm”. PW5 filled in and signed the P3 medical-reporting form in respect of PW1’s medical condition.

APC Joseph Kioko (PW6) was one of the Police officers called to the house at Lumi, to which the tread-marks had led the search-team soon after the robbery incident. PW6’s evidence, for the material part, thus reads:

“We broke the door to the house. Inside the house I recovered this bicycle, this bow, this hand-bag, these three arrows, this tool kit, and this hack-saw blade.”

In the search team following the tread-marks, on the material morning, was PW7, **Corporal Saidi Munga** of Njukini Administration Police Post; and he found that the Assistant Chief (PW8) already had information that the house in question was in the regular possession of **Peter Mulili** (1st appellant) and **Kivila King’oo** (2nd appellant). After some of the stolen items were recovered from the said house, 1st appellant herein was arrested, and PW7 interrogated him before handing him over to Chumvini Police Patrol Base. Two days later (**30th May, 2006**) PW7 received information that 2nd appellant was at Rombo, and he arranged for the arrest of this suspect who was then taken to Taveta Police Station. PW7 had known 2nd appellant before this incident, and said he had no grudge against 2nd appellant.

The Assistant Chief of Njukini Sub-Location, **Joseph Saleli Fundi** (PW8), testified that he was asked by PW7 on **28th May, 2006** to help identify the owner of a house where stolen property had been recovered; and PW8, together with the village elder (PW9), then proceeded to the house in the Lumi area. The village elder informed PW8 that the said house belonged to **Kivila King’oo** (2nd appellant) who was staying therein with **Kaloki Mulili** (1st appellant). PW8 said he had no grudge against either of the appellants.

PW9, **Mwandau Mberi** of Njukini, testified that he is the Village elder in charge of the Lumi area, and that he knew the accused persons: they were his neighbours. On **28th May, 2006** the Assistant Chief had made a request, of PW9: “He said some house had been found within my area and the house was being used as a store for stolen property that had been recovered”. PW8 took PW9 to the house in question, and PW9 recognized the house: it belonged to the appellants herein. Responding to cross-examination, PW9 said the two appellants, who “usually walk together”, are the ones he had seen build the house in question. PW9 also spoke as to the ownership of the plot where the house was standing:

“The father of King’oo [2nd appellant] and who is [1st appellant’s] grandfather was the owner of the plot....”

On re-examination, PW9 gave testimony on **possession** of the house: “The accused [persons] were occupying the house where the stolen items were recovered”.

Police **Constable Zechariah Shitanda** (PW10) is the officer who conducted investigations into this matter, and he was accompanied by one **Corporal Njiru** to Chumvini Patrol Base where 1st appellant was handed over to them. The 2nd appellant was arrested at Rombo, in the Tanzania border-area. PW10

established that the appellants had been occupying the house where the stolen items had been recovered; and he caused the two to be charged.

When put to their defence, both appellants gave unsworn evidence: 1st appellant made no account of the period running from **27th May, 2006** to **30th May, 2006**, but said he met three people at 1.00p.m on **30th May, 2006** who arrested him and took him to the Assistant Chief who was in the company of the chief, and two Administration Police Officers; that he was thereafter taken to Chumvini Patrol Base, and then to Taveta Police Station, being charged in Court on **7th June, 2006**. The 1st appellant said he knew nothing about the robbery in question. The 1st appellant said the house where the stolen goods were found was not his house, and that he had not been identified in connection with the alleged robbery.

The 2nd defendant did not refer to relevant dates, and said he had been arrested without cause as he slept in his house. He said he knew nothing about the offence charged, and that he had never met 1st appellant herein. He wondered why he had not been identified at an identification parade. The 2nd appellant said he was not the owner of the house where the stolen goods had been found.

The learned Magistrate found as a fact that three persons had attacked the complainant on the material night, and that these persons had inflicted “harm” upon the complainant, apart from robbing him of his belongings.

After reviewing the evidence, the trial Court thought there was some uncertainty, since the third attacker of the material night was not arrested: and the Court founded its final verdict on the perceived uncertainty. The relevant passage in the Judgment may be set out here:

“From the evidence adduced, three persons were involved, yet only the accused are mentioned in the particulars of the offence. That creates some question as to why it was not indicated the accused with another not before the Court robbed the complainant of his property. Maybe the police knew more than they disclosed to the Court. Be that as it may, the Court is willing to assume the accused just retained the stolen goods and they had reason to believe the goods were stolen. Their contentions that they knew nothing about the robbery and goods recovered in the house.....are rejected. Though the accused are not charged with handling stolen property c/s. 322(2) of the Penal code....they are found guilty of that offence, which is a lesser offence than the one they are charged with. They are convicted accordingly”.

The appellants appealed on the following grounds:

- (i) Since the trial Court had convicted for a lesser offence than robbery-with-violence, it follows that the factual basis of the charge was “not true”;**
- (ii) The evidence of PW8 and PW9 should have been discounted;**
- (iii) The evidence given by PW1, PW2, PW3, PW4 and PW5 was insufficient, for the purpose of arriving at a conviction;**
- (iv) The evidence of PW10 was insufficient to lead to a finding of guilt;**
- (v) The charge sheet was defective.**

When this matter came up for hearing, on **20th July, 2010** learned counsel **Mr. Muteti** sought leave to give notice to the appellants that he would ask the Court, if it had an opportunity to hear the appeal, to make a finding that the trial Court was wrong in convicting for a lesser offence, and to impose the right sentence including an enhanced one. The Court duly explained to the appellants the implications of such a notice, if the Court heard the appeal and determined it. The 1st appellant thus responded: “I will proceed with the appeal”; and 2nd appellant said the same – and these responses were duly recorded.

Learned counsel **Mr. Muteti** asked that the finding and sentence of the trial Court be reversed, and that the appeal be freely considered in relation to the original charge of robbery with violence.

Counsel urged that the trial Magistrate had not exercised his jurisdiction judicially under s. 179 of the Penal Code, when he convicted for a lesser offence than that contained in the charge; for the conviction entered for handling stolen property was a confirmation that the Court did, indeed, believe the evidence as to the recovery of the stolen goods from a house that was in the possession of the appellants herein; but their being involved with the possession of the stolen goods, in the light of all the evidence, shows them to have violently robbed the complainant of those effects –hence establishing the prosecution case and the charge as laid. Counsel submitted that the evidence showed (just as the learned Magistrate also held) that the attackers were more than one in number; these attackers did violence to the complainant at the time of theft; there was cogent medical evidence of “harm” inflicted upon the complainant; the complainant positively identified the effects stolen from him, and carted into the house occupied by the appellants;

neither of the appellants claimed those effects as belonging to him; recovery of the stolen items took place only a few hours since the material incident; 2nd appellant sought safety in a distant place as soon as the **locus** of the stolen property had been found out.

The appellants opted to make no verbal response to **Mr. Muteti's** submissions, contenting themselves with pre-written submissions which they had filed.

In their written submissions, the appellants urged that the charge brought against them were defective and so they should not have been found guilty of the charge of robbery with violence: the charge sheet did not make any reference to “dangerous or offensive” weapons in their charge, at the material moment; it was not shown that the house wherein the stolen goods were found, was theirs; they were not identified as the suspects at the **locus in quo**; the prosecution’s investigations “were shoddy as they failed to bring in documents to prove the ownership of the exhibits”.

We find the evidence in this case to have been preponderantly consistent. Some three persons attacked the complainant on the material night, violently assaulted and injured him while robbing him of his belongings. Only a few hours later, evidence of concealment of stolen goods was found, in the shape of well-perceived tread-marks (of shoes and of a bicycle) leading to one particular house. So, there was a link between that house and those who had stolen the goods, and with the process of concealment of the goods: those who occupy the house either stole the goods and did violence to the owner, or received them from the person who did the robbery. But we believe those who brought the stolen goods into the house to have been the robbers – firstly by the doctrine of **recent possession**; secondly because there is evidence that the appellants herein were known to be the current occupants of the said house; thirdly because one of the occupants of the said house sought refuge at Rombo as soon as he knew the crime of the material night was under investigation; fourthly because there was a substantial **proximity in time** between the robbery-incident, and the storing of the stolen goods in the house in question; fifthly because the house in question was kept under lock-and-key, so soon after the robbery, and with the stolen goods stored inside; sixthly because of the substantial consistency in the evidence; seventhly because the trial Court had no doubts as to the truthfulness of the witnesses.

As regards the accuracy of the framing of the charge, we found nothing therein which was prejudicial to the appellants herein; the essential ingredients of a charge of robbery with violence were well incorporated in the charge: suspects being in numbers; being armed; then stealing as they subject the complainant to violence. The appellants cannot complain that a certain element in the charge – which probably would only have enhanced the case against them – was not expressed in the charge sheet.

We dismiss the appeal against conviction; set aside the finding and sentence of the trial Court; substitute a conviction on the original charge; find each of the appellants guilty; and sentence each one of them to death as provided by s. 296(2) of the Penal Code.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 16th day of November, 2010.

J. B. OJWANG
JUDGE

F. AZANGALALA
JUDGE