



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 202 of 2006 & 39 of 2007 (Consolidated)

JAMES MWANGI MAINA APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 39 OF 2007

MOSES GITAH MWANGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's

Court at Karatina in Criminal Case No. 45 of 2005 dated 20th September 2006 by P. C. Tororey – S.R.M.)

J U D G M E N T

At the commencement of the hearing of this appeal we were of the view that perhaps had the learned magistrate invoked and applied the doctrine of Recent Possession to the circumstances of this case, she would perhaps have returned a verdict of guilty in respect of the two appellants with regard to the two capital robbery charges preferred against them. As required of us in those circumstances we did warn the appellants that they may face a risk in the event that they prosecute their appeals and at the end of the day we find no merit in the same, we would be minded to enhance the sentence to one of capital robbery. The appellants having appreciated the risk involved as pointed out by us elected as follows; the 1st appellant, opted to take the risk and prosecute his appeal. On his part, the 2nd appellant opted to abandon the appeal on conviction but prosecute the appeal on sentence only.

However having carefully perused and evaluated the evidence tendered in the trial court, we are satisfied that indeed the learned magistrate was right in not convicting the appellants on the capital robbery charges.

The appellants together with three others were charged before the Senior Resident Magistrate's Court with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The appellants too faced alternative counts of Handling stolen goods contrary to section 322(2) of the Penal. Following a full trial the appellants and three accomplices were all acquitted of the two counts of capital robbery. The appellants were however found guilty of Handling stolen goods contrary to section 322(2) of the Penal Code, convicted and sentenced to seven years imprisonment each. The appellants were aggrieved by the conviction and sentence. They each separately lodged their appeals to this court which at the hearing, we ordered for their consolidation. However as we have already indicated, the appeal by **James Mwangi Maina** (1st appellant) shall proceed on both conviction and sentence whereas that of **Moses Gitahi Mwangi** (2nd appellant) shall proceed on sentence only.

The brief facts of the case are that on the 29th day of December 2004 at Thiu village the complainants **Stephen Muthiga**

Nguina and **Stephen Migwi Munuhe** were all asleep with their families in their respective homes when robbers struck at around 3.00 a.m. The robbers who were armed with pangas, rungas and axes broke into their houses and stole from **Stephen Muthiga Nguina** the complainant in count one, the following items among others:

One radio cassette make Panasonic

One Mobile Phone

One Jacket

One Bicycle

One Knapsack sprayer

An Axe

A panga

Five cushion covers

Three loose seat covers

40 table spoons

Cash Kshs.2000/=

Stephen Muthiga who testified as PW1 was also injured by the robbers. The Complainant in the second count, **Stephen Migwi Munuhe** was robbed off the following items:

Greatwall T.V.

One radio cassette

Two Mobile phones

Assorted clothings

Utensils

Cash Kshs.7,500/=

Reports of incidents were made to the police and investigations commenced leading to the arrest of the appellants and the three co-accused. The investigating officer stated in his evidence that the co-accused were arrested following the statements of the 1st complainant and his son PW3 who allegedly identified them from the robbers who attacked them. The appellants were arrested by officers from police flying squad Unit following a tip off which led to the recovery from them of some exhibits among them sofa set loose covers identified by the complainant in count 1 as belonging to him and 2 bags, a wrist watch and a blanket identified by the complainant in count II as belonging to him. After careful consideration of the evidence as a whole the learned magistrate found that the prosecution had failed to establish the link between the two robberies. Both robberies are said to have been committed on the 29th day of December 2004 at the same time i.e. 3.00 a.m. The first robbery took place at Thiu village and the 2nd robbery took place according to the evidence of PW4 the 2nd complainant at his home in Gituri. The question is therefore how could the robbers commit two robberies at the same time in two different places. The learned magistrate went on further to find that the appellants' co-accused could not have been properly identified considering the circumstances obtaining during the robbery. PW1 stated he identified some of the robbers from the light coming from spotlights. He further tells the court that after the robbers left he informed his son PW3 of the discovery and everyone else around him. On the other hand PW3 in his evidence however stated PW1 did not inform him he had identified any of the robbers. Similarly, PW2, a brother of PW1 who was called to the scene soon after the robbery was also not informed by PW1 that he had identified any of the robbers. PW2 stated that the only time he learnt PW1 had allegedly identified some of the robbers was when he was giving the police his report at the hospital. This information is however not contained in the 1st report to the police.

PW3 on the other hand stated that he identified two of the co-accused when they came into his house allegedly through the light from torches. He similarly however did not give the information to PW1 or PW2 to whom he had gone to for assistance. It is not contained in the first report to the police either. It was therefore doubtful that if indeed he had recognised the appellant's co-accused immediately he would have kept such information to himself until the time he wrote his statement. This was the basis upon which the appellants' co-accused were acquitted. How about the appellants?

According to the learned magistrate there was evidence that the exhibits recovered from appellants' homes were positively identified by PW1 and PW3 the complainant in count II with the help of his wife PW5. Although there was not sufficient proof of their involvement in the actual capital robbery, the learned magistrate was convinced that the two Alternative counts of handling stolen goods had been proved beyond reasonable doubt as against the appellants and proceeded to convict them as aforesaid.

Though the alternative counts state that the "3 loose covers", two handbags, wrist watches and a blanket" were recovered, the charges as preferred do not state where the items were recovered from and to whom they belonged. No names of the complainants are given. PW1 & PW5 were not shown or told from whom the items had been recovered as they all said "I do not know who was found with these loose covers" meaning the appellants were not present during the alleged recovery. PW1 said he had identified his items by their appearance and a burn mark. The burn mark had not been put in evidence by PW1 but only appeared in cross-examination by the appellants. The same had not been included in their first reports to the police nor did they appear in their 1st statements at police. They only appeared in their subsequent statements We believe that this was after the complainants had been shown the recovered items by the police which was in the absence of the appellants. It behoved the learned magistrate to investigate this issue further. He should have sought to find out why the police and PW1 did not try to avail the appellants during the alleged recoveries of the stolen items. The appellants may be justified in their contention that police might have made or fixed the burn mark on one of the loose covers while at the police station since they were shown to the complainants without in the presence of the appellants. In any event the burn mark was of little evidential value as the court was not told the circumstances under which the loose covers acquired the burn mark.

The questioned whether the appearance and or such loose covers could not be found with any other person and PW1 more or less agreed with him when he answered thus: "Yes other people can have loose covers like this but" meaning the same were common articles and the appellant as one of the other people referred to by PW1 would easily own them.

The appellants did not deny possession of the items. The appellants indeed claimed ownership possession of the same. Their ownership was corroborated by the evidence by PW5 who said he had found the items from the homes of the appellants. He did not state any action by the appellants that was inconsistent with the innocence. We think that the police officer ought to have stated how the alleged items had been stored or kept by the appellants so as to raise any suspicion as to whether they were part of stolen items from the complainants.

The appellants gave sworn defence and explained how they were arrested and later taken to the police. Later their houses were searched and certain items including those in charge sheet taken away. They explained how they had come by the items. In the light of the fact that the identification of these items by the complainants was made in appellants' absence, the learned magistrate ought to have been cautious in accepting such evidence. The contention by prosecution that the complainants receipts for the intention applies equally to the complainants. They never produced receipts nor did they state the date they bought them or how they came to have such loose covers or the date the burn mark was made and by whom.

To our mind, the evidence tendered fell short of the required standard in a criminal trial. It was tenuous and at best speculative. There was nothing to show that the items recovered as aforesaid belonged to the complainants. The items recovered were simple items that change hands very often. So that if as the 1st appellant stated in his defence that he bought the seat covers from women hawkers at Karatina, we think the court had no other alternative but to believe him, more so, where there was no believable evidence of ownership by the complainants. We think that the appellants were convicted on mere suspicion. As has been stated severally, suspicion merely remains suspicion and cannot form the basis of a conviction.

We think that we have said enough to show that the appellants' conviction was unsafe. Accordingly, we allow the two appeals, quash the convictions and set aside the sentence of seven years imposed on each appellant. Each appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of January 2009

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE