



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL 126B & 127 OF 2007

1. JOSEPH OKEYO AYIEKO

2. CHARLES NJONJO OWAWA..... APPELLANTS

VERSUS

REPUBLIC RESPONDENT

(From original convictions and sentences in the Senior Resident Magistrate's

Court Rongo Criminal Case No.114 of 2007 by D. KEMEI ESQ. AG.S.R.M)

JUDGMENT

Appeals of the 1st appellant, **Joseph Okeyo Ayieko** and the 2nd appellant, **Charles Njonjo Owawa**, were consolidated. The Appellants were 1st accused and 3rd accused, respectively, in the Senior Resident Magistrate's Court at Rongo where they were charged with robbery with violence contrary **section 296 (2)** of the **Penal Code**, that on 25/1/07 at Sony Sugar Company Ltd staff quarters in Migori District within Nyanza Province, jointly with **Judith Adhiambo Opajo** who was the 2nd accused and others not before court, and while armed with dangerous or offensive weapons namely pangas and rungas, robbed **Isaac Mauti Kisoni** of one video deck make Sony, two mobile phones (one Nokia and the other Motorola C 168), one electric iron box make Philips, one portable radio make Smart, one camera make Olympia and cash Kshs.3250/= all valued at Kshs.28,900/= and at or immediately before or immediately after such robbery wounded the said **Isaac Mauti Kisoni**. The 1st appellant and 2nd accused faced the alternative charge of handling stolen property contrary to **section 322(2)** of the **Penal Code**, that on 25/1/07 at Awendo township (Rabolo village) in Migori District within Nyanza Province, otherwise than in the course of stealing, jointly dishonestly undertook the retention of one video deck make sony, two mobile phones (one Nokia 1100 and one Motorola C168), one electric iron box make Philips, one portable radio make Smart and one Camera make Olympia, knowing or having reasons to believe them to be stolen goods or unlawfully obtained. Each denied the charge(s). Following trial, the appellants were jointly convicted of the main charge and each sentenced to death. The 2nd accused was acquitted. Being aggrieved by the conviction and sentence, the appellants preferred the present appeals.

The prosecution case was that the complainant was a driver of South Nyanza Sugar Company at Awendo and was residing in the Company quarters. On 25/1/07 night he was asleep in the house.

His children, **Sarah Kwamboka**, PW2, aged 13, and **John Mayaka Mauti** shared the house with him. At about 1 a.m two strange men broke the back door and entered his bedroom. They had pangas. They demanded money saying they had been sent to finish him. He was ordered to lie down. When he tried to rise one aimed a panga at his head to cut him. He blocked it with the hand. The other man hit him on the waist. He fell down. They took a mosquito net and tied it around his face and stuffed his mouth with a piece of cloth. They took the items in the charge sheet and left. **Sarah** heard these attackers in her father's bedroom. One intruder came and placed panga at her neck and ordered her to keep quiet or she be killed. When the attackers were gone the children went and untied their father who was lying on the floor. They called neighbours who took him to the company medical facility for first aid and then to Hema Hospital where he was admitted for 2 days. A P3 form completed at Awendo sub-district Hospital revealed he fractured the left 12th rib. He suffered grievous harm. Both the complainant and the daughter did not identify the attackers.

Anthony Ngumba, PW5, was a Security Manager of the company. When he was called that night about the robbery he woke up and found the complainant being attended to at their facility. He reported to Awendo Police Station and went to the scene with **P.C. Michael Owiro. Owiro, P. C. Douglas Ongicho** and another followed footmarks from the scene into a nearby maize plantation. Then combed the plantation and reached a house surrounded by it. They heard voices of people talking in the maize plantation. They laid ambush. A few minutes later three people emerged from the maize plantation carrying some luggage. They entered the house and switched on electricity light. One of the people left the house and entered another house. He put off the lights. **Owino** followed him there and found him with his wife. He arrested the man who is the 2nd appellant. **Ongicho** knocked the door of the first house and one of the persons who had entered there ran out, stark naked and disappeared. He found 1st appellant and a woman (2nd accused) both of whom were arrested. A search was conducted and the complainant's property in the alternative charge were recovered. Only the money was missing. The police officers say there was moonlight and saw clearly the men who came from the maize plantation and entered the first house. They were people the officers knew before, except for the man who escaped. They did not include a woman. **Owiro** knew the 1st and the 3rd accused to be brothers.

The 1st appellant tendered unsworn statement in defence while the 2nd accused made a sworn defence. The 2nd appellant gave unsworn defence. The 1st appellant stated that he was a peasant farmer at Awendo and that on this day he had gone for fishing at Mbita and returned late. He took dinner and went to sleep in a neighbour's house. He was woken up at 5 a.m. by police officers who arrested him and took him to his brother's house in which items alleged to be stolen were recovered. He denied being in the attack above. The 2nd appellant denied the charges and stated he was found asleep with his wife. He was arrested. Nothing was recovered in his house. The 2nd accused testified that she was a 15 years old pupil at Langata Primary School in Nairobi and, while at home in Awendo to visit her sick mother, she went to visit her boy friend called **Ouko**. She found the 1st appellant in the house. At 9 p.m. **Ouko** and 1st appellant left. She went to sleep. At about 1 a.m. they returned and opened the main door by themselves and got into the house. The lights were off. She heard **Ouko** talking to his "companions" one of whom said he was tired and was going to sleep. Thereafter the police then entered the house. **Ouko** managed to escape. The 1st appellant was found with her in the house and arrested. The police remained in the house. She did not see if they took anything but at the police station she saw the items.

The 1st appellant called his father, **Joseph Ayieko, DW1**, as a witness. **Ayieko** told the court that both 1st and 2nd appellants were his sons and were arrested in the home, as was said by the 2nd accused. He said 1st appellant had gone to fish in Mbita and returned that day. When police arrested them, he said, nothing was recovered. He said the 2nd appellant did not have his own house. The 1st appellant called his wife **Evelyn Waguru**. She said she was asleep in her house with her husband when police came and woke them up before arresting him. Nothing was recovered here but that the items came from the house in which the 2nd accused and 1st appellant were. The house belonged to **Ouko** who was her (**Everlyn's**) brother-in-law and 2nd accused's boy friend. **Everlyn** said the 2nd appellant did not come to the house that night. She told the court **Ouko** escaped that night.

It is on this evidence that the trial court found the prosecution had established the guilt of the appellants beyond doubt and entered a joint conviction. The appellants, in their grounds of appeal, claimed police were looking for their brother and when he escaped they were arrested and yet they had not committed any of the offences alleged, nor were they found with the items. It was submitted the trial court misdirected itself by failing to appreciate that the elements of the offence had not been proved beyond doubt. Further, that it had not been established the items recovered belonged to the complainant. They complained the court had not considered their defence of alibi.

Lastly, they argued the trial court convicted them on speculative evidence.

Mr. Kemo for the Republic opposed the appeal and submitted that the appellants had been properly convicted on strong prosecution case which was based on the doctrine of recent possession.

This is a first appeal. The Appellants are entitled to have this court's own consideration and view of the whole evidence before the trial court and its decision thereon (**Okeno v. Republic [1972] EA 32**). The court has, however, to bear in mind that it did not see or hear the witnesses.

Two men entered the bedroom of the Complainant at 1 a.m. and demanded money. They were armed with pangas. They assaulted the complainant and took away his property. This was a violent robbery. The submission by the appellants that the ingredients of the offence in the main charge did not exist or were not proved beyond doubt is without basis.

There was no dispute, and the trial court appreciated this, that the attackers were not identified by the complainant or his daughter.

The prosecution's case was that during the same night police recovered all the stolen items, except the money, while in the possession of the appellants. The prosecution asked the trial court to find the appellants had this possession because they had taken part in the robbery. The court agreed with it.

The evidence of the **Owiro** and **Ongicho** was that the appellants were brothers and were known to him. **Ayieko, Evelyn** and the 2nd accused confirmed that evidence. The officers told court that after visiting the scene they traced footmarks into the maize plantation until they reached a house. They heard voices in the maize and laid an ambush. The 1st and the 2nd appellants and another appeared from the maize with luggage. They entered the house in which the 2nd accused was. The 2nd appellant left and went to his house where he was found with his wife. The 1st appellant was found in the first house with the 2nd accused after one man escaped from it. The 2nd accused said the man who ran away was her boy friend called **Ouko** in whose house she was. **Everlyn** confirmed that the house belonged to **Ouko** who escaped and that the 2nd accused had gone to visit him. **Evelyn** confirmed the evidence of the police officers that the items came from **Ouko's** house. The police officers testified that one of the three men who came there with luggage escaped. Both 2nd accused and **Evelyn** agree **Ouko** escaped when police came. The evidence of the police officers that they saw three men with luggage enter into **Ouko's** house before the 2nd appellant went to his house where he was found with his wife and the 2nd accused and the 1st appellant found in **Ouko's** house where the items were found is consistent with what **Evelyn** and the 2nd accused stated. The court found the appellants were consequently found with the complainant's property during the same night of attack. Police had walked from the scene to this place of recovery. The recovery was quite recent both in time and place. There was sound evidence on which the trial court based its findings.

The trial court appreciated that:

“the facts implicating the accused persons must be inconsistent with their innocence and irresistibly point to their guilt.”

It appreciated the prosecution had to establish the guilt of the appellants beyond doubt.

Mr. Kemo referred the court to the decision in **Ogembo v. Republic [2003] 1EA 222** in which it was held that:

- a) for the doctrine of recently stolen property to apply possession of the accused of the stolen goods must be proved, and
- b) the doctrine of recent possession of stolen property can be relied on as the only basis of a conviction on a charge carrying a death sentence such as murder and robbery with violence.

In the instant case, there was overwhelming evidence that the appellants had recently stolen property. This was the only connection between them and the violent robbery. In the case of **Maina & 3 others v. Republic [1986] KLR 301**, the court of Appeal cited with approval the following principle in **R. v. Loughin 35 Cr. App. R 69**:

“if it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property that is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker.”

There was sufficient evidence for the trial court to find the appellants were the ones who had broken into the complainant’s house and stolen the property which they were found with.

During his submissions, the 2nd appellant was concerned that according to the complainant the attackers were two when the officers found three with the stolen items. Two people entered the complainant’s bedroom. There was an intruder in **Sarah**’s bedroom. He may have been the third person or one of the two who had been in the complainant’s bedroom. According to the police officers, three men (the two appellants and Ouko), were found with the property after tracking was done to them. The 2nd accused testified that Ouko left the house with the 1st appellant and they returned with another person who went to sleep before police came. It is clear the attackers were Ouko and the two appellants.

The only sentence provided for capital robbery is death. The sentence was therefore legal and proper.

In conclusion, there is no merit in the appeal and the same is dismissed.

Dated, signed and delivered at Kisii this 23rd day of **July, 2009**

D. K. MUSINGA

A. O. MUCHELULE

JUDGE

JUDGE

23/7/2009

Before D. Musinga J

Mr. Mutai for the state.

Appellants for present

Court: Judgment delivered in open court on 23rd July, 2009

D. MUSINGA

JUDGE