



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 115,116 & 117 of 2006

1. ONESMUS NZOMBO NZAVI
2. JACKSON MUSYOKA KITAKA
3. JAMES KIVUVA MUTHINI.....APPELLANTS

VERSUS

REPUBLIC.....
RESPONDENT

(Appeal from the Conviction and Sentence in Machakos Chief Magistrate's Court Criminal Case 2202/2005 by H.A Omondi, C.M. on 30.8.2006)

JUDGMENT

1. The three Appellants herein, were co-accused in Machakos CM's Court Criminal Case Number 2202/2005. They had been jointly charged with three counts of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and three alternative counts of the offence of handling stolen property contrary to section 322(2) of the Penal Code.

2. The particulars thereof were as follows:-

Count I

“On the night of 26th and 27th day of July 2005 at Muthetheni Location, Yathui Division in Machakos District within Eastern Province while armed with dangerous weapons namely Panga, hammers and rungus jointly with others not before court robbed Annah Makau a mobile phone make Nokia 3310 and a wrist watch make Mishino all valued at Kshs. 6,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Anna Makau.”

Count II

“On the night of 26th and 27th day of July 2005 at Kaliambeu Sub-Location, Muthetheni Location, Yathui Division in Machakos District within Eastern Province while armed with dangerous weapons namely Panga, hammers and rungus jointly with others not before court robbed Agnes Ndunge Munguti of Kshs.

6,894/=, one god father hat, a mobile phone make Nokia 2100, two cameras make Yashika, one pair of North star shoes, one-four battery torch, one wrist watch make – Seiko5, one grey jacket and one school bag, all valued at Kshs. 30,850/= and at or immediately, before or immediately after such robbery used actual violence to the said Agnes Ndunge Munguti.”

Count III

“On the night of 26th and 27th day of July 2005 at Kaliambeu Sub-Location, Muthetheni Location, Yathui Division in Machakos District within Eastern Province while armed with dangerous weapons namely Pangas, hammers and rungas jointly with others not before court robbed Jeremiah Maundu Ngungu cash Kshs 2,800/=, one half coat, one t-shirt, one coat suit and a radio cassette make – Sony all valued at Kshs. 8,700/= and at or immediately, before or immediately after such robbery used actual violence to the said Jeremiah Maundu Ngungu.”

Alternative charge

“On the 27th day of July 2005 at Masii location, in Machakos District within Eastern Province, otherwise than in the course of stealing dishonestly retained two cameras make Yashika, one pair of North star shoes, one half coat, one-four battery torch, one T-shirt, one grey jacket, one school bag, one god father hat, one wrist watch make – Mishino and one mobile phone Nokia 2100 knowing them to be stolen goods.”

3. The evidence tendered before the trial court was that on the night of 26th and 27th July 2005, a gang of robbers struck Yathui area of Machakos District. The victims were PW1, Anna Makau, PW2, Agnes Ndunge Munguti and PW3, Jeremiah Maundu Ngungu. Their evidence was that according to PW1 she was asleep in her house on the material night when at about 1.00 am she was woken up by her dogs barking and then her bedroom window was hit very hard. She woke up and having been assured that she would not be beaten, she opened her door and robbers walked in. One struck her on the neck with a panga and she was ordered to hand over her mobile phone which she did. It was a Nokia 3100. The robbers ransacked the house, took a watch, make Mishino Quartz and then left. PW1 was later called to the Masii Police Station where she identified her watch and wallet.

4. PW1 could not identify any of the robbers as she was too scared. She however noticed that they had pangas and axes.

5. PW2 for her part stated that her house was invaded and the robbers struck at 1.00 am on the material night. The robbers had pangas, rungas and a hammer and proceeded to demand Kshs. 100,000/= from her but she was only able to raise Kshs. 6,894/= which they took and one robber hit her on the waist with a panga. They then searched the house and took her mobile phone Nokia 2100, as well as a grey jacket, hat, shoes, torch, two cameras, school bag, and a black cap. They fled and she made her report to the Police later during the day. She then received information that some suspects had been arrested and she proceeded to Masii Police Station and identified all the items stolen from her house as well as a hammer that she saw one of the robbers using during the robbery. She also identified two of the robbers. She was able to do so, she said, because of the light emitted by the torches that they had. One of the robbers, Onesmus Nzombo Nzavi, also had a large gap in his teeth and the gap was noted by the trial court when PW2 pointed him out. PW3 Jeremiah Maundu Ngungu was attacked on the same night, hit on the shoulders with a panga and robbed of Kshs. 2,800/= . He identified the hammer carried by one robber when it was shown to him in court and he noted that the robbers also took a half coat, a coat suit, a t-shirt and a radio make- Sony. In the cause of the next day, he received information that some suspects had been arrested. He went to the Masii Police Station and saw three suspects, Onesmus Nzombo Nzavi, Jackson Musyoka Kitaka and James Kivuva Muthini whom he stated were part of the gang that had robbed him the previous night. He could see them that night, he said, because he had a hurricane lamp that was on at the time. He also identified the half coat, and t-shirt stolen during the robbery. He thereafter went for treatment for injuries sustained during the robbery.

6. PW4, Isaac Nthei Muthini, Chief Muthetheni Location, received information about the incidents of

robbery and he immediately telephoned the OCS, Masii Police Station. Together they visited the homes of the victims and decided to go to place police road block from the scene and while at Kithangangi road block, a Nissan Matatu was stopped and a tall man with a big gap in the upper teeth and who fitted the description given by all the victims was found inside and wearing a hat which marched that stolen from PW3. A second man had a paper bag with a torch and camera and the two were arrested. Later, other suspects with stolen property were also apprehended and they were later alleged with the offences of robbery with violence.

7. PW5, Dr. Ruth Muthama is the one who treated PW3 and issued him with a P3 form. The injured man had soft tissue injuries on the left shoulder and left thigh.

8. PW6, C.I.P Beatrice Gachago, OCS, Masii Police Station was woken up at 3.00 am and informed of robberies within Muthetheni area. She visited the victims' homes together with PW4 and then arranged for police checks on all roads leading away from the area. At the Kithangani road block, she stopped one motor vehicle and on searching it, recovered items that matched the description given by the complainants. The persons with them were arrested. In a second motor – vehicle, other stolen items were recovered and the persons with them were also arrested.

9. The suspects were the persons elsewhere named above and the items were identified by the complainants. None of the suspects could explain why they had those items and they were locked up in police cells.

10. PW7, C.I.P Benson Mutungi, received information of the robberies at 3.00 a.m. on the material night and was with PW4 and PW6 when the suspects were arrested at the Kithangani road block. It was his evidence that Onesmus Nzombo Nzavi had a jacket, Kshs. 2,350/=, a hat, a mobile phone, a camera and a torch. Jackson Musyoka Kitaka had a paper bag containing a half coat, t-shirt and shoes. James Kivuva Muthiani had a camera. All the items were later identified as belonging to the complainants and since the suspects did not claim them, they were all arrested and charged with the offences of robbery with violence.

11. In his defence, Onesmus Nzombo Nzavi stated that on 25.7.2005, he had traveled to his home from Nairobi and on 27.7.2005 as he returned to Nairobi in a matatu, the police stopped the motor-vehicle and as he had no identity card, he was arrested and when he failed to bribe the police officers, he was charged with other persons who were all strangers to him. The same defence was tendered by Jackson Musyoka Kitaka and James Kivuva Muthini.

12. In her judgment, the learned trial magistrate found that the offences in respect of counts 2 and 3 had been proved and sentenced all the persons named above to death. The Appeal is against both the conviction and sentence and in evaluating, analysing and reaching a decision on the evidence before us, we submit as follows:-

13. Firstly, from the evidence of PW1, PW2 and PW3 robbers struck the Muthetheni area on the material night and stole items that are elsewhere above listed and injured the complainants in the course of the robberies. We are not in doubt about that fact and the fact that the robbers were more than one and had offensive and dangerous weapons meant that an offence under section 296(2) of the Criminal Procedure Code was clearly committed.

14. Secondly, regarding the role of the Appellants in the offences, although there was evidence of identification during the robbery, that evidence was not foolproof because neither PW1 nor PW2 could categorically confirm that they were able to identify the robbers. In fact PW1 was emphatic that she was too scared to identify them. PW3 on the other hand stated that he had a hurricane lamp on at the time but the intensity of the light was not given and although he said that he could identify the 1st Appellant by a gap in his teeth, the truth is that he saw all the Appellants upon their arrest and in court had obviously previously seen him and was familiar with his physical appearance. Since he did not previously know all the Appellants, and since no identification parade was conducted to test the veracity of his purported identification, no conviction based on that evidence alone can be sustained. We shall borrow the words of *Sir Clement de Lestang VP* in

Roria vs Republic [1967] E.A. 58 and express out uneasiness regarding that evidence and dismiss it as inconclusive.

15.Thirdly, the Appellants were arrested by PW5, PW6 and PW7 in circumstances that raised suspicion about them because they had items which marched the description of the items stolen from the complainants, PW1, PW2 and PW3. We agree with the learned trial magistrate that as regards PW1, she lost a Nokia 3100 mobile phone and a Mishino Quartz watch. It is unclear from the evidence on record, which suspect was found in possession of any of those items and since she was too scared to identify any of them, no conviction in respect of count 1 could have been properly sustained.

16. On counts 2 and 3, we have the unchallenged evidence of PW5, PW6 and PW7. Upon receipt of the report of the robberies and having interviewed the complainants and received a description of the stolen items they mounted road blocks and at Kithangani road block, all the Appellants were arrested, a fact that none of them denied. The issue of who was arrested with what is also a non-issue because PW5, PW6 and PW7 properly corroborated each other on the fact and we have above described each of the items that each of the Appellants was found with and which PW2 and PW3 properly identified, hours later, as belonging to them. In Simon Mwangangi vs Republic Cr. Appeal No. 330/2006, the Court of Appeal stated that where a suspect is found with recently stolen property and he offers no explanation why he has them in his possession, then he is considered to be either the thief or a guilty receiver thereof. Earlier in Peter Kariuki Kibue vs Republic Cr. Appeal No. 21/2001 the court held as follows:-

“The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. Since he did not offer any explanation the rebuttable presumption in law raised, based on the provisions of Section 119 of the Evidence Act, is that he was one of the people who robbed Damaris of the items together with her car and also robbed Irungu of his car. It is a presumption of fact which courts often refer to as the doctrine of possession of recently stolen property. As we stated earlier, it is a doctrine which raises a rebuttable presumption of fact which may be displaced by an accused person giving a reasonable explanation as to how he came to be in possession...” thereof.

17. In this case, none of the Appellants offered any explanation at all why each of them was in possession of items stolen a few hours earlier and why they were all moving away from the scenes of the robbery with those items. The doctrine of recent possession properly applies to this case and their guilt is affirmed. In their defences they said nothing that would change that presumption.

18.Lastly therefore, we find that the appeals have no merit and are dismissed with the result that the death sentences in respect of count 2 is affirmed and that in respect of count 3 is suspended until execution of the first or orders on any appeal are made.

19.Orders accordingly.

Dated and delivered at Machakos this 20th day of July 2009.

Isaac Lenaola

Judge

M .Warsame

Judge