REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 50 & 54 of 2008

ELIUD MOSES OWINO APWAPO…….…… 1st APPELLANT

BEATRICE ADHIAMBO OWUOR……2nd APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

[From original conviction and sentence in Criminal Case number 718 of 2007 of the Principal Magistrate's Court at Siaya]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellants in person

JUDGMENT

These are two appeals which were consolidated and heard together. They arise from the decision and judgment of the Principal Magistrate in **Siaya PMCC Number 718 of 2007** in which the appellants **Eliud Moses Owino Apwapo** (herein, first appellant) and **Beatrice Adhiambo Owuor** (herein, second appellant) were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the charge were that on the 2nd August 2007 at around 2030 hours at Rabango Estate Siaya District, jointly with others not before court robbed Marshal Tito Abonyo of a mobile phone make Motorola V980, wrist watch make armitron diamond and cash Kshs. 600/= all valued at Kshs. 70,000/= and at or immediately before or immediately after the time of such robbery wounded the said Marshal Tito Abonyo.

There was an alternative count of handling stolen goods contrary to Section 322 (2) of the Penal Code affecting both appellants.

The particulars were that on the 1st October 2007 at Pandi Estate Siaya District, otherwise than in the course of stealing dishonestly retained a mobile phone make Motorola V980 and a wrist watch make armitron diamond knowing or having reason to believe them to be stolen goods or unlawfully obtained.

The first appellant was also charged with a second count of being in possession of narcotic drugs contrary to Section 3 (1) as read with Section 3 (2) (a) of the Narcotic drugs and Psychotropic Substance (Control) Act Number 4 of 1994 in that on the 1st October at Siaya Township Siaya District was found in possession of 90 rolls of bhang which was not in the form of medicinal preparation.

The appellants after pleading not guilty to all the courts were tried, convicted and sentenced to death on the first court of robbery with violence.

In addition, the first appellant was convicted on the second count of possession of narcotic drugs and sentenced to four (4) years imprisonment.

The learned trial magistrate however failed to order that the sentence in count two be held in abeyance (See, **Boru & Another =vs= Republic [2005] KLR 649).**

Be that as it may, the appellants were dissatisfied with the convictions and the sentences and have now appealed to this court on the basis of the grounds contained in the petitions of appeal filed herein on the 20th May 2008 and 26th May 2008 respectively.

The grounds are more or less similar and are essentially complaints that the prosecution evidence of identification was insufficient and contradictory and that the ownership of the alleged stolen property was not established.

The appellants further complain that their constitutional rights under Section 72 (3) (b) of the Constitution were violated.

At the hearing of the appeals the appellants represented themselves.

The first appellant argued that the recovered exhibits i.e. a mobile phone and a wrist watch must have been in possession of the police prior to his arrest on 1st October 2007 because the complainant was not told how the items were recovered. He (first appellant) also argued that an inventory mentioned by PW2 and PW4 was not produced and that the police did not give an explanation for his prolonged stay in police custody. He contended that he was held in police custody after his arrest for a period of eighteen (18) days. He said that the police had a choice to take him for plea before any other magistrate if the trial magistrate was on leave.

He also contended that the data print-out from Safaricom Limited was not produced by an expert or its maker but by PW2. He said that the photographs were also not produced by a scenes of crime officer and that the alleged sim cards were never produced in court.

On count two, the first appellant contended that the production of the Government Analyst report by PW2 was erroneous as he was not its author. He said that the second count was a petty offence for which he would have been taken to court within twenty four (24) hours.

The second appellant supported the first appellant's submissions and added that the complainant said that he was robbed by three men wearing masks yet she is female. She was surprised for being charged with the offence.

Mr. Musau, the learned Senior Principal State Counsel, appeared for the respondent and supported the convictions respecting the first appellant but not respecting the second appellant. He contended that the complainant did not identify any of the robbers as they wore masks. He said that information from the mobile phone company Safaricom led to the arrest of the appellants and in the process the in-criminating

property was recovered from them. He also said that the appellants are man and wife who failed to give a reasonable explanation for that possession of the stolen items.

The learned State Counsel contended that the evidence against the first appellant was sufficient for the offence of robbery with violence.

As to the second count, the learned State Counsel said that the report of the Government Analyst was produced under Section 77 of the Evidence Act and that the first appellant did not object to its production.

As to the alleged violation of Constitutional Rights, the learned State Counsel contended that the issue was raised during the trial and in the process the prosecution gave a plausible and reasonable explanation for the delay.

The Learned State Counsel further contended that all that the prosecution was required to do was to give a reasonable and not necessarily a satisfactory explanation.

If we may add, in our view, a reasonable explanation would always necessarily be a satisfactory explanation and vice verse.

The learned State Counsel readily conceded to the appeal by the second appellant on the basis that the evidence against her was inadequate.

These are first appeals and being the first appellate court we are obliged to reconsider the evidence afresh and make our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses, (See, Okeno =vs= Republic [1972] E. A. 32).

The prosecution case was founded on the evidence of six (6) witnesses inclusive of the Complainant Marshal Tito Abonyo (PW1) who stated that on the material date at about 8:30 p.m he was driving to his house from his shop. He was alone at the time inside his motor – vehicle Registration number KAL 913 P. On arrival at the gate to his house he was attacked by three men who wore facial masks. The three emerged from a nearby bush and without talking to him aimed a gunshot at him. The bullet hit the door, ricocheted and hit his left hand. He was then hit with a blunt object while in the vehicle but following alarm raised by his family and watchmen the robbers ran away. He was injured on the left leg and left arm. His mobile phone and wrist watch were stolen and so was his Kshs. 600/=.

The scene was lighted but the complainant did not identify any of the robbers. He was taken to hospital after the police arrived at the scene and later recorded a statement.

After about a month, the complainant was summoned to the police station where he was shown and identified his stolen mobile phone and wrist watch. He did not know how the police had recovered the items neither did he know how the appellants were arrested. He had previously not known them.

P. C. Dennis Miheso (PW2) of the Criminal Investigations Department (C. I. D.) Siaya was on the material date at 9:00 p.m. in Siaya town when he heard gunshots and rushed towards that direction of the gunshots. He found the complainant's vehicle and learnt that the complainant had been taken to hospital. He was later informed by the complainant that he (complainant) had been robbed of his mobile phone, wrist watch and cash Kshs. 600/=.

P. C. Miheso commenced investigations of the case and in the process contacted the mobile phone service provider Safaricom Limited who informed him through their records that the complainant's stolen mobile phone was used eleven hours after the robbery i.e. on the 3rd August 2007.

Using further information from Safaricom Limited P. C. Miheso traced a mobile phone number which was frequently used after the complainant's phone was stolen. This led him to the house of the appellants at Pandi Estate in Siaya town. He later laid an ambush and arrested the first appellant whom he found in possession of ninety (90) rolls of cannabis – sativa (bhang). Thereafter, the first appellant led him into his

house where the second appellant, his wife was found. The house was searched and the complainant's stolen mobile phone and wrist –watch were recovered.

P. C. Miheso on completion of his investigations charged the two appellants accordingly.

The District Clinical Officer at Siaya Ali Asman (PW3) examined the complainant and confirmed that he had suffered bodily injuries during the robbery.

P. C. Collins Shikuku (PW4) of the C. I. D. Siaya was in the company of P. C. Miheso (PW2) when they ambushed and arrested the first appellant whom they found in possession of ninety rolls of bhang.

P. C. Shikuku was also with P. C. Miheso when they proceeded to the house of the appellants and recovered the complainant's stolen mobile phone and wrist – watch.

P. C. Shikuku in his evidence repeated more or less what was stated by P. C. Miheso.

Cpl. David Ongwenyi (PW5) of the Provincial C. I. D. Office produced photographs of the scene of the crime taken by his colleague Chief Inspector Kemboi who was unavailable at the time.

The complainant's watchman Boniface Musumba (PW6) was on the material date of the robbery on guard duties when the complainant's vehicle approached the gate to his house. He (PW6) suddenly heard gun-shots and on opening the gate saw a group of robbers attacking the complainant. He alerted the complainant's wife who turned on the alarm. The complainant entered the compound but was injured on the head.

He (PW6) never identified the robbers and had not previously known the two appellants.

When put on their defence, both appellants elected to make unsworn statements. The first appellant stated that he had just dropped his daughter at school on the 1st October 2007 when he proceeded to the Jua-kali area of Siaya where he worked. He met police officers near the D. C.'s office. They included P. C. Miheso (PW2) whom he had previously known.

The police officer approached and stopped him. One of them drew out a gun and asked him to surrender. He was then handcuffed and driven to his house at Pandi Estate Siaya Town.

His wife was also arrested and both were taken to the police station. He was tortured and asked to produce a gun which he did not have.

He was held in the police cells four eighteen days during which period he was tortured and not accorded any treatment. He was taken to court and charged on the 1st October 2007. He contended that the complainant did not identify the alleged stolen items and that not all exhibits were recovered in his house.

The second appellant stated that police officers went to their house on the 1st October 2007 and asked her to produce her husband's gun. She did not have any gun. The house was searched and some items taken away. She was thereafter asked to talk to her husband who was inside a police vehicle. Both were taken to the police station and charged in court on 18th October 2007. She denied the charges and contended that she was in her house on the material date of the robbery.

The foregoing evidence was considered by the learned trial magistrate who concluded that the prosecution had proved it case against the two appellants beyond any reasonable doubt. The two were then convicted accordingly.

On review of the evidence in its totality, we are satisfied that with regard to the first count affecting both the appellants, the offence of robbery with violence was proved in terms of the decision in the case of Johana Ndungu =vs= Republic Criminal Appeal No. 116 of 1995 (unreported).

The evidence proved that the complainant was attacked by a group of about three people who were armed with a firearm and who inflicted bodily injuries upon him before escaping with his mobile phone, wrist watch and a sum of Kshs. 600/=.

As to the identification of the assailants, the complainant and his watchman (PW6) were unable to make any positive identification even though the scene was lighted. Significantly, the complainant stated that the assailants wore facial masks thereby concealing their facial appearance.

There was indeed no direct identification of the assailants at the scene of the offence. However, there was credible and cogent evidence showing that the complainant's stolen mobile phone and wrist watch were recovered in a house belonging to the appellants.

The evidence by P. C. Miheso (PW2) showed that the lead towards the apprehension of the appellants was provided by the mobile phone company Safaricom which released vital data showing that the complainant's stolen mobile phone was in use within eleven hours of its theft. Indeed, on tracing the user of the phone after its theft (i. e. the appellants) the phone was recovered after a search in the appellants' house.

The complainant identified the recovered mobile phone and wrist watch as his stolen property.

P. C. Miheso (PW2) and P. C. Shikuku (PW4) indicated that the recovery was effected one month or so after the offence.

Both appellant stated that certain items were removed by the police from their house and implied that these did not include the material mobile phone and wrist watch. However, the prosecution evidence was rather strong in establishing that even if some items were found in the appellants' house they included the material mobile phone and wrist – watch.

Other than plain denial of their possession of the stolen items, the appellants and more so, the first appellant made no attempt to explain how they came into possession of the stolen items. In any event, they both conceded that the items belonged to the complainant.

We are satisfied that the conviction of the first appellant on the first court was sound and proper in so far as it was based on the doctrine of recent possession. All the elements for the application of the doctrine were duly established (See, Isaac Nanga Kahiga Alias Peter Nganga Kahiga =vs= Republic Criminal Appeal No. 272 of 2005 C/A [unreported]).

There was sufficient circumstantial evidence from which a strong inference emerged that most likely than not, the first appellant having used the complainant's stolen mobile phone a few hours after it had been stolen was one of the three masked men who committed the offence.

By virtue of being female, the possibility that the second appellant was among the trio of robbers was remote and although she was found inside the house in which the complainant's stolen items were recovered her conviction on the basis of recent possession was not safe for the simple reason that we may take judicial notice that in our African way of life the responsibility for a family household lies with a husband and secondly, there was no evidence to show that the items were taken into that house by the second appellant or jointly with the first appellant. She stated in her defence that the police arrived at that house looking for her husband's gun and thereafter asked her to go and talk to her husband who was already inside a police vehicle under arrest. She was also bundled into the vehicle and taken to the police station.

Why would a wife be punished for the sins of her husband which she was not shown to have been aware of ?. She cannot be said to be in joint possession of property which was unlawfully obtained without her knowledge of the fact.

We agree with the learned State Counsel that the evidence against the second appellant was inadequate to

sustain a conviction for the offence of robbery with violence.

With regard to the second count affecting only the first appellant, we are satisfied that the evidence by P. C. Miheso (PW2) and P. C. Shikuku (PW4) sufficiently established that he (first appellant) was indeed found in possession of a narcotic drug i.e. cannabis sativa or bhang at the time of his arrest.

The report by the Government Analyst confirmed that the rolls found with the first appellant contained the said narcotic substances.

The production of the Government Analyst's report by P. C. Miheso (PW2) as the investigating officer was proper and lawful in terms of Section 77 of the Evidence Act. In any event, the first appellant raised no objection to the production of the report by the said investigating officer.

We see no reason to interfere with the conviction of the first appellant on count two.

As we conclude we may as well address the issue of the alleged violation of the appellants' rights under Section 72 (3) (b) of the Constitution of Kenya.

It would undoubtedly appear that the appellants were held in police custody for a period longer than the prescribed fourteen days. There was a delay of about two to three days.

The obligation to explain the delay lay with the prosecution and not the trial court.

With due respect to the learned trial magistrate, we think that he over-stepped his mandate when he purported to give an explanation on behalf of the prosecution for the delay in having the appellants taken to court.

The learned trial magistrate meant well and felt sympathetic to the plight of the police at the material time when he was on leave and there was no other magistrate in the vicinity with jurisdiction to handle capital offences.

He also acknowledged the efforts by the police to avail the appellants at the Maseno Court for plea as that was the nearest court with necessary jurisdiction.

Nonetheless, the learned trial magistrate had no legal authority to give an explanation on behalf of the prosecution.

The burden of proving that the appellants were taken to court as soon as was practicable was placed on the prosecution by dint of Section 72 (3) of the Constitution.

Be that as it may, in the case of Dominic Mutie Mwalimu =vs= Republic criminal Appeal No. 217 of 2005 (unreported), the Court of Appeal said that the mere fact that an accused person is brought to court either after the twenty four hours or fourteen days as the case may be stipulated in the Constitution does not "ipso-facto" prove a breach of the Constitution.

In the case of Paul Mwangi =vs= Republic Criminal Appeal No. 35 of 2006 (unreported), the following was stated by the Court of Appeal:-

"So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the Court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that".

Herein, there was a delay of about two days which we do not consider to be inordinate. We will therefore leave the matter at that.

In the end result, the appeal by the first appellant lacks merit and is dismissed in its entirety. However,

the sentence in count two will be held in abeyance.

The appeal by the second appellant is allowed. Her conviction on count one is quashed and the sentence set aside. She is set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 1st day of December 2009

J. W. MWERA **J. R. KARANJA**

JUDGE **JUDGE**

JRK/aao