



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII Criminal Appeal 211 of 2008

KENNEDY BOGONKO NONYOCHO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From original conviction and sentence in the Chief Magistrate's court

at Kisii Criminal case no.853 of 2008 by Oduor(SRM)

JUDGMENT

The appellant was the 1st accused before the Senior Resident magistrate at Kisii. He was convicted of robbery with violence contrary to *section 296(2) of the Penal Code* in count 2 and sentenced to death. The particulars of the charge were that on 2/5/2008 at Nyandiba village in matongo sub location of Kisii Central District within Nyanza province he jointly with others not before the court, and while armed with bars and arrows, robbed Samwel Onsumu (PW2) of a radio valued at Kshs. 1500/= and one sack of maize valued at Kshs. 3000/= and at the time of such robbery threatened to use violence. He was charged jointly with Kennedy Mokaya Nyachuba (2nd accused), and they faced another charge of robbery with violence contrary to *section 296 (2) of the Penal Code* in count one whose particulars were that on 2/5/2008 at Nyandiba village in matongo sub location in Kisii Central District within Nyanza province they jointly with others before court, and while armed with bows and arrows, robbed Mary Bosibori (PW1) of Kshs. 10,000/= and 4 chickens and at the time of such robbery threatened to use violence. They were acquitted on this charge. Lastly, the appellant was, in the alternative, charged with handling stolen goods contrary to *section 322(2) of the Penal Code*, that on 4/5/2008 at Nyandiba village of matongo sub location in Kisii Central District within Nyanza province, otherwise than in the course of stealing, dishonestly retained one radio make Sonitec knowing it to be stolen goods.

The appellant was aggrieved by the conviction and sentence and preferred this appeal.

The evidence called by the prosecution was briefly as follows. PW2 and PW3 Peris Onsangu are husband and wife and are neighbours of PW1. The couple was woken up at about 1 a.m on 2/5/2008 by people hitting the main door. The door was forced open. PW2 stated two

men entered the house. PW3 stated many people came in and filled the house. Each witness said the appellant was one of them. They knew him as he was a son of PW3's brother. He was armed with bow and arrows. The house had a tin lamp on. PW2 said he was the one who lit it when they heard the attackers. PW3 said she is the one who lit it. The attackers demanded goods from her. At the end of the attack they took a sonitec radio, Kshs. 2000/=, clothes, beans and maize. However, only the radio and the sack of maize were recorded with the police. The attackers were threatening to shoot the couple with a gun which they were not shown. The attackers left. The following morning the couple reported to the area Assistant chief, Samwel Ombui Mecha (PW4).

The same night, after the attack on the couple, there was an attack on PW1. She was found with her children. Her husband was away. She testified that she was woken by someone knocking at her door, who spoke in Kiswahili asking her to open. She recognized the voice to be that of the appellant who even gave his name as Kennedy. He wanted the door to be opened so that they could "work "on her daughter Lynette. PW1 was by now screaming. The door was forced open and the person who entered was one Siro who was armed with a small panga. PW1 had lit a tin lamp which he used to recognize Siro. Siro took Kshs. 10,000/= and 4 chickens. The appellant did not enter the house. The attackers left. Next day PW1 went with PW2 and PW3 to report to PW4.

The appellant was arrested on 4/5/2008 by members of the public and taken to PW4. The public wanted to lynch him, court was told. Out of fear, he led PW4 and the people to a place near his house and, hidden beneath banana leaves, was found the couple's radio (exhibit 2). His house was searched and chicken feathers and chicken bones (exhibit 1) were found. PW1 said they were feathers of her 4 stolen chicken. The prosecution case was that the attackers had slaughtered and eaten the chicken. The applicant led to the arrest of the 2nd accused whom he implicated.

The 2nd appellant made sworn defence denying the allegations and denied he was found with anything. He stated:

"I was not found in possession of anything (incriminating nor a "sonitec'radio).

The radio was found at my home but I did not have it. I don't know where it was found. The radio was not found at my home either."

The trial court did not accept that PW1 had positively recognized the appellant. It also did not believe that the feathers belonged to PW1's chicken. However, the court believed PW2 and PW3 that they had positively recognized the appellant in the attack. It also found that the radio, which belonged to the couple and had been stolen in the attack, had been found hidden by the appellant two days later. On this evidence, the appellant was convicted. Mrs. Asati for the appellant submitted that the evidence was insufficient for positive identification; that the circumstances were not favourable for reliable identification. She also argued that the conviction was against the weight of evidence. Mr. Mutai for the state conceded the appeal.

We accept that the evidence regarding recognition was not reliable. PW2 and PW3 knew the appellant, there is no dispute. However, whereas PW2 stated that the appellant and one more person entered the house, PW3 stated that many people entered the house until it was full. It was a small house. That is material contradiction. Even if there was a tin lamp on, if the small house was crowded, then it was difficult to make a correct and error-free identification or recognition. The situation was made even more difficult by the fact that there was no evidence about the intensity of the light and how long it showed on the appellant's face, or how long this attack took. Even more important, the court did not warn itself of the special need for caution when dealing with evidence of visual identification. (See *Roria .V. Republic [1967] EA 583 and R.V.Turnbull[1976]3 ALL ER 449*). The trial court should have considered that PW2 and PW3 may have been honest but mistaken. In all, the evidence of PW2 and PW3 regarding recognition was not safe.

But there was evidence that when the appellant was arrested he led people to his home where, in banana leaves, the radio belonging to the couple and which had been robbed 2 days earlier was recovered. Where it is proved that the accused was found with recently stolen property, he may be the thief or person who came by it feloniously. (See *Maina & 3 others .V.Republic [1986] KLR 301*). There was no dispute that this radio belonged to the couple and was taken from their house during the robbery that was perpetrated by more than one person. PW2 and PW3 come from the same sub location as the appellant and their area Assistant chief, PW4. PW4 testified how the appellant led to this recovery on 4/5/2008. The attack had been 2 days before. PW3 was not there during the recovery. PW2 stated he was present at the recovery. The appellant in his sworn defence denied that testimony. At first he stated:

“the radio was found at my home but I did not have it.”

He then stated:

“the radio was not found at my home rather.”

It was quite clear that the prosecution evidence on the robbery was consistent and categorical. The appellant was wavering. We have considered this evidence as recorded and have come to our own conclusion that the appellant led to the recovery of the radio at his home two days after it had been robbed in the neighbourhood. He had hidden it beneath banana leaves, outside the house. These circumstances have led us to the irresistible conclusion that he had the radio because he had participated in the robbery at the house of PW2 and PW3. He was consequently properly convicted as charged in count two.

The only sentence provided by the law for robbery with violence is death penalty. The same was passed by the trial court. Consequently, the appeal is dismissed in its entirety.

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

D.K.MUSINGA

A.O.MUCHELULE

JUDGE

JUDGE

