REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 260 of 2006

FRANCIS NDEGWA MWANGI……..……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From the original decision in Criminal Case No.8033 of 2004 in the Chief Magistrate's Court at Kibera – Mrs. Muchira SRM).

JUDGMENT

FRANCIS NDEGWA **MWANGI**, the appellant, was charged before the subordinate court with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on 3rd October 2004 at 8 pm along Uhuru Highway in Nairobi within Nairobi Area Province, jointly with others not before court while armed with offensive weapons namely knives, robbed Charles Maina Muthuri of one wrist watch make casio, one pair of shoes, 2700/= and at, immediately before or immediately after the time of such robbery used actual violence to the said Charles Maina Muthuri.

After a full trial, he was convicted of the lesser offence of simple robbery contrary to section 296(1) of the Penal Code. He was sentenced to serve 5 years imprisonment. Being aggrieved by the decision of the trial court, he has appealed to this court against both conviction and sentence. In addition to his petition of appeal, the appellant filed written submissions. On the hearing date, he relied on the written submissions.

The learned State Counsel, Mrs. Gakobo, opposed the appeal. Counsel submitted that there was adequate evidence to prove the charge, as the complainant was driving a vehicle when he was blocked by a hand cart at Uhuru Highway. The lights of the vehicle were on and street lights were also on. The vehicle of the complainant hit the handcart and stopped. When the complainant came out of the vehicle, he was attacked by a group of people who robbed him, and when he recovered from the shock he discovered that the handcart and handcart pusher were gone. Shortly thereafter he saw the handcart and pusher pass by. The complainant had, at this time been joined by a colleague (PW3). The appellant was held and in the handcart was found a sweater and bible belonging to the complainant. Counsel contended that the appellant did not give any reasonable explanation for the items. Counsel contended that the doctrine of recent possession applied. Counsel submitted that the defence of the appellant was considered and found to have no merits. Lastly, counsel submitted that the sentence of 5 years imprisonment was neither harsh nor excessive, as the maximum sentence for the offence was 14 years imprisonment.

This is a first appeal and, as a first appellate court, I am duty bound to re-evaluate all the evidence on

record afresh and come to my own conclusions and inferences, taking into account that I did not have an opportunity to see the witnesses testify and determine their demeanour and give an allowance for that – see OKENO –VS- REPUBLIC [1972]EA 32.

The facts in brief are as follows. PW1: CHARLES MAINA MUTHONI was on 2/10/2004 at 8pm driving motor vehicle KAG 062 Nissan Saloon as a employee of Satco Tours. Near the Uhuru Highway/Haile Selassie road roundabout, a hand cart was suddenly pushed on to the road, and he hit it and stopped. Someone asked why he was hit. PW1 came out of his vehicle to check only to be confronted by six people who had knives. They took him to a bend on the road and robbed him of items and money. When he came back to the car, he found the boot open and his sweater, shoes and bible were missing from the boot. At this time, PW1 had called his work colleague PW3 ISAACK NGATIA, who arrived shortly. After the arrival of PW3, they saw a handcart being pushed by. PW1 thought that it was the same handcart and same pusher. They stopped it, searched it and found the bible, sweater and a tie which PW1 claimed to be his items which were taken from the boot of his car. The two took the appellant to Parliament Police Post, where the appellant was arrested and later charged.

In his defence, the appellant gave an unsworn statement. His defence was that he was pushing his handcart from a lawful assignment of delivering goods for a customer, when he was hit by a vehicle around the scene of the alleged robbery. He was injured and thought that he would be taken to hospital, only to be taken to the police and later charged with an offence he did not know. He denied committing the alleged offence.

Being confronted with this evidence, the learned trial magistrate found that the prosecution had proved its case beyond reasonable doubt, but that the offence proved was of simple robbery contrary to section 296(1) of the Penal Code. The learned magistrate convicted the appellant and sentenced him to serve 5 years imprisonment.

I have considered the appeal and submissions on both sides. The first complaint of the appellant was that the charge was defective. The appellant contends that the charge is defective because it alleges robbery of a wrist watch, one pair of shoes, and 2700/= while the evidence of PW1 was that he was robbed of 6,500/=, a bible and sweater, which were not in the charge sheet.

Indeed, in evidence, PW1 stated ?

"**They asked for Nokia phone. They took my Kenya Shillings 6,500/=. Wrist watch casio and sweater, a bible. My sweater was black checked white shoes. They then let me go."**

In my view, the charge was not defective. Some of the items mentioned in the charge sheet, that is wrist watch and pair of shoes and cash were testified to in evidence. In my view, so long as any item alleged to have been robbed was actually proved to have been robbed, the charge could not be said to be defective. Infact the sweater and bible belonging to the complainant PW 1 were produced as exhibits. These items were recovered. However, the other robbed items must have gone with the other robbers. In my view, PW 1's evidence was credible. I dismiss this ground.

The second complaint of the appellant was that there were contradictions in the prosecution case. Having re-evaluated the prosecution case, I find no material contradictions that could disturb the prosecution case. I also dismiss this ground.

The conviction of the appellant was predicated on identification, and recent possession of stolen goods. PW1, the complainant, described the scene. There was light from the street light and the car. PW1 described the handcart as yellow in colour, with grey colour on the side. He also stated that he recognized the pusher. The appellant himself said in his defence that his hand cart was at the scene. He also said that it was hit by a car. There is therefore no dispute that the appellant was at the scene. In my view, his presence there, and especially the fact that some stolen items were found in his handcart, that is the sweater and bible of the appellant, proved that he was one of the robbers.

In my view, the doctrine of recent possession applies in this case. The application of the doctrine of recent possession was clearly stated by the Court of Appeal for Eastern Africa in REX –VS-BAKARI s/o ABDULLA [1949] 16 EACA 84, when the Court stated ?

"**---- cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or breaking and entering but of murder as well, and if, all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal".**

In my view, the fact that some of the items belonging to the complainant were, shortly after the incident, found in the handcart of the appellant, means that he was one of the robbers. I find no other explanation. I find no basis to disagree with the finding of the learned trial magistrate that the complainant was a truthful witness.

The appellant also complains that the trial court did not consider his defence. I find no basis for that complaint. The magistrate did consider the defence and found it to be untruthful, and gave reasons, one of which was that the appellant did not complain to the police that he was hit by the motor vehicle. I dismiss this ground of appeal.

On sentence, the maximum sentence for the offence was 14 years imprisonment. The appellant was imprisoned for 5 years. He had two previous convictions of theft, and shop breaking and theft. I find that the sentence is not harsh or excessive.

After evaluating the evidence on record, I find the appeal to have no merits and I dismiss the same.

For the above reasons, I dismiss the appeal and uphold the conviction and sentence of the subordinate court.

Dated and delivered at Nairobi this 10th day of April, 2008.

George Dulu

Judge

In the presence of:-

Appellant in person

Mrs. Gakobo for State

Mwangi – court clerk