REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 271 of 2006 & 272 of 2006

JOHN NDEREBA MWANGI……..1ST APPELLANT

LUCAS NDUNGU LEYAN ……..……2ND APPELLANT

V E R S U S

REPUBLIC……..……..……RESPONDENT

J U D G M E N T

JOHN NDEREBA MWANGI (*1st appellant***) and LUCAS NDUNGU LEYAN** (2nd appellant) were charged before the subordinate court with robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of offence were that on 14th of December, 2004 at 11 pm at Mississippi bar, Gatuanya Location in Thika District within the Central Province jointly with others not before court being armed with dangerous weapons namely pistols and other crude weapons robbed **MICHAEL WAITHAKA NJOKI** of cash Kshs.24,726/- Sanyo Television set 14 inches serial No. 26101189, one small TV set, one video deck make Panasonic, one mobile phone make Sagem, various brands of cigarettes and 42 matchboxes all valued at Kshs.77,227/- and immediately before the time of such robbery used actual violence to the said **MICHAEL WAITHAKA NJOKI**. In the alternative they were jointly charged with handling stolen goods contrary to Section 322 (2) of the Penal Code. The particulars of offence were that on 15th December, 2004 along Thika/Nairobi road at Thika Police roadblock in Thika District within Central Province, otherwise than in the course of stealing dishonestly retained one Television set make Sanyo Serial Number 26101189, cash Kshs.760, one remote control, 39 matchboxes, ten packets of supermatch cigarettes, four packets of sportsman cigarettes knowing or having reasons to believe them to be stolen goods. After a full trial, they were both convicted of robbery with violence and sentenced to death as provided by law. Being aggrieved by the decision of the subordinate court, they have appealed to this court against both conviction and sentence. Each filed a separate appeal.

At the hearing of the appeals, the two appeals were consolidated and heard together as they arose from the same proceedings before the subordinate court. Mr. Kangahi appeared for the 1st appellant **JOHN NDEREBA MWANGI**, while the 2nd appellant **LUCAS NDUNGU LEYAN** appeared in person. In addition to the grounds of appeal, the 2nd appellant filed written submissions.

Mr. Kangahi for the 1st appellant submitted that he was abandoning grounds 1, 4 and 5 of the grounds of appeal. He submitted that he would argue grounds 2 and 3 together. The two grounds, from the petition of appeal filed by the appellant, were-

2. The learned trial magistrate erred in both law and fact by basing my (his) conviction on the doctrine of recent possession of the exhibit stolen goods without considering that the evidence in support of the same is not complete without at least a single witness from the matatu scene of the arrest and recovery.

3. The evidence in totality fell short of the required standard to justify a conviction as in the present case.

Mr. Kangahi submitted that the conviction of the 1st appellant for the offence of robbery with violence was based on the doctrine of recent possession of stolen goods, as the magistrate found that the identification parade was a nullity. Counsel submitted that P.W.1 was not able to positively identify the items allegedly recovered from the appellants. There was no evidence of a receipt or specific evidence that he was the owner of the items. There was also no positive identification of the items. Counsel further submitted that the arresting officer, P.W.3, stated that he was informed by the conductor of the matatu that the items recovered were in possession or belonged to the appellants. However, neither the driver nor the conductor were called as witnesses to testify. In addition, since even the magistrate stated in judgement that the failure to call the conductor as a witness was a mistake, there was a presumption that the evidence of the uncalled witness would be prejudiced to the prosecution case. Counsel therefore emphasized that the prosecution case fell far short of the standard of proof required in criminal cases. Counsel urged us to find in favour of the 1st appellant.

The 2nd appellant, on the other had, relied on his written submissions.

The learned State Counsel Ms. Gateru, opposed the appeals and supported both the convictions and sentences. Counsel submitted that the robbery occurred at Mississippi bar where P.W.1 was accosted by more than one person and robbed. P.W.1 and P.W.2 were eye witnesses. They said that some of the robbers were armed with pistols which were used to threaten the victims. Though the identification parade was declared a nullity, it was clear that P.W.1 and P.W.2 were able to identify the appellant at the scene of the robbery. In addition, counsel submitted, the magistrate relied on the doctrine of recent possession of stolen items, a few hours from the occurrence of the robbery. The appellants did not give an explanation regarding their possession of those items. Counsel contended that there was sufficient evidence to sustain the convictions. On contradictions and consideration of the defences, the learned State Counsel submitted that any contradictions were minor and that the defences of the appellants were considered.

In response to the State Counsel's submissions, the 2nd appellant submitted that P.W.1 and P.W.2 did not give a description of any of the robbers. He submitted that he was merely removed from the matatu, and was not found in possession of any exhibit. The 2nd appellant also submitted that P.W.3 who participated in removing them from the matatu did not see where the exhibits were removed from. He also submitted that the conductor and the person who sat next to him in the matatu should have been called to testify. He lastly, submitted that the rank of the prosecutor during the judgment was not indicated.

We have evaluated the evidence on record. The incident occurred at night in a bar. P.W.1 and P.W.2 stated that they were able to see the two appellants clearly on that night as part of the group of robbers. The incident took a length of 1 ½ hours and there was electricity light at the Mississipi bar.

The two witnesses appear to have been the only people at the scene who claimed to have been able to identify the appellants, though there were patrons in the bar who were actually ordered to drink the beverages there by the robbers during the duration of the incident. It is instructive to note that none of these two witnesses is recorded as having described any of the robbers to the police during the first report. P.W.1 also stated that he saw the appellant before the identifications parade was conducted by the police. The identification parade officer was not called to testify. In our view, the magistrate was correct in deciding that the identification parade could not be relied upon, as it was not proper and therefore was a nullity, as the identifying witness appear to have seen the suspects before the parade.

The learned magistrate found that the appellants were guilty of the main count of robbery with violence due to the application of the doctrine of recent possession of the stolen items.

Possession is defined under Section 4 of the Penal Code as follows-

"*Possession*"

(a) ***be in possession of or have in possession includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person.***

(b) ***If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them***.

In our present case, it was important to prove that the appellants were actually in possession of the alleged stolen items. The alleged possession was actually less than 12 hours from the time of the alleged robbery. It was at about 6 am. P.W.3 stated that the 1st appellant was carrying the T.V. in the matatu. The same witness stated that the 2nd appellant was carrying a green paper bag, which appeared to have contained some explosives. Other items said to have belonged to the appellants and a third person in the matatu who was not traced, were found under the seat. The conductor who claimed that the appellants were the owners or the persons who came into the matatu with the said items, was not called to testify. It is apparent that no statement was taken from him, as the police let him go with the matatu because, according to P.W.3 – "***there was no need to inconvenience other road users."***

P.W.4, who was together with P.W.3 during recovery of the items from the matatu, could not say who was actually in possession of the items. In our view, the evidence of P.W.3 is clear that the 1st appellant was found in possession of a Sony TV. The 2nd appellant was found with a bag containing explosives. We cannot say that they were found with the other items. Also the conductor who said that the appellants came into the matatu with the other items which were found near them was not called to testify. Therefore reference to the conductor's story is hearsay evidence which is not admissible.

Having evaluated all the evidence on record, we will allow this appeal because the prosecution did not prove that the appellants were found in possession of the alleged stolen items. As we have stated earlier, some of the items recovered were not proved to be in the possession of the appellants. Even the identity of the TV set is doubtful. The charge sheet, and evidence of the complainant P.W.1, clearly talks of a Sanyo TV. However, the TV produced as an exhibit by P.W.3 was a Sony TV. Those are clearly different makes of TV. Therefore, we cannot say that the TV which was produced in court as an exhibit, was the one which was allegedly stolen or robbed. Even if the TV produced was a Sanyo TV, there is no tangible proof that it was the TV which was robbed from P.W.1.

In our view, the prosecution failed to prove the case against any of the two appellants for the charge of robbery with violence. We will allow the appeal, quash the convictions and set aside the sentences. Perhaps the 2nd appellant should have been charged with possession of explosives and toy pistols. He was not, and it is not for us to make any decision on that at this time.

On our part, we allow the appeals, quash the convictions and set aside the sentences. We order that both the appellants be set at liberty unless otherwise lawfully held.

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

J.B. OJWANG **G.A. DULU**

JUDGE. **JUDGE.**

In the presence of-

1st appellant

2nd appellant

Mr. Kangahi for 1st appellant

Ms. Gateru for State

Huka/Mwangi Court Clerk.