REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 72 of 2006

ELIUD NKUNJA ……..... APPLICANT

VERSUS

REPUBLIC …… ACCUSED

(An Appeal from a judgment of J. Nyaga P.M. at Maua, delivered on 31st May 2006)

JUDGMENT

The appellant, Eliud Nkunja Kaberia was initially charged jointly with another, who was acquitted for lack of evidence. They faced two counts of robbery with violence contrary to section 296(2) of the Penal Code. In the first count they were alleged to have robbed Charles Githinji Muthine of cash in the sum of Kshs. 50,000/= and used actual violence on the said Charles Githinji Muthine. In the second count they were charged with robbing Jerusha Mukokinya of Kshs. 13,000/= in cash and a "god-father" hat valued at Kshs. 2,000/=.

The two robberies took place on the same night of 10th July 2003 at Ithanje Village. It was the prosecution case that the two were in the company of others who were not before court at the trial. That they were armed with dangerous or offensive weapons, namely, guns, rungus and axes. It is also alleged that in the course of the robbery the complainants were injured.

After the trial the learned trial magistrate found no evidence to link the 1st accused before him with the offence and acquitted him while the appellant was found guilty, convicted and sentenced to death, in accordance with the law, in the two counts.

We pause at this stage to point out, as has been pointed out time and again, that where an accused has been convicted in more than one capital offence in the same trial, he should be sentenced in one count only as a person cannot be hanged more than once.

This appeal therefore only relates to the second accused at the trial. It should also be noted that the initial trial was conducted by Mr. N. Kimani, PM who heard the two complainants before the trial commenced *de novo,* after several mentions, before Mr. J. Nyaga, P.M. It is not clear to us what necessitated the order of 12th March 2004 for the hearing to commence a fresh.

We can only guess that it may have been as a result of a transfer. It will be clear shortly why we have raised the issue of the earlier trial before Mr. Kimani. In the trial before Mr. Nyaga the prosecution called eight (8) witnesses. Of the eight (8) witnesses two (2) were the complainants. The first complainant, who we shall refer to as Charles testified that on the night material to this case at about 11pm while in his house with his wife, PW4, Tabitha Mukethi (Tabitha) they were attacked by a gang of three (3) who broke into their house demanding to be given money. The three (3) were armed with a gun, iron bar and panga. They attacked the couple occasioning them injuries for which they were treated.

After collecting Kshs. 50,000/= from Charles and Tabitha the gang moved to their son's house where they also harassed Jerusha Mukokinya, PW2 – the second complainant (Jerusha), the daughter-in-law to Charles. From her house they stole Kshs. 13,000/= and a "god-father" hat, belonging to her husband, PW5, Elias Kailikia (Elias).

Investigations were commenced and the appellant and his co-accused in the court below were arrested and charged with this offence. Put on his defence, the appellant denied involvement in the commission of the crime, contending that while coming from the shamba a group of people confronted him alleging that he had stolen from their home. Following his conviction and sentence, he now prefers this appeal relying on five grounds which to our mind amount only to one, namely, that the conviction was against the weight of the evidence.

Learned counsel for the respondent conceded the appeal, and in our opinion rightly so. Even though there is concession, this court, being the first appellate court, is duty bound to re-evaluate the evidence on record in order to come to its own independent conclusion, bearing in mind that we have neither heard nor seen the witnesses. See **Achira V. R.** (2003) KLR 707.

Both complainants (Charles and Jerusha) testified that the robbers had torches. Jerusha added that a hurricane lamp was on in her house during the robbery, yet both were categorical that they did not identify any of the members of the gang. Tabitha, on the other hand, maintained that she was only able to identify the appellant's co-accused. PW3, Veronica Kariuki, the daughter to Charles who was also in the house during the robbery similarly did not identify the robbers.

Elias was not at home when the robbers struck. It should be clear from the foregoing evidence that the appellant was not identified at the scene or anywhere else. The only evidence that was found by the learned trial magistrate to link the appellant with the crime is the evidence of Elias that four (4) days after the robbery he spotted the appellant at Maili Tatu wearing his "god-father" hat which had been stolen. The learned trial magistrate, relying on the doctrine of recent possession, found that the appellant had failed to explain how he came by the stolen hat, and on that ground alone he proceeded to convict. By so doing the learned trial magistrate fell into error, for the following reasons.

Both Jerusha and Elias purported to identify the hat with a sewing which Jerusha confirmed was done by her. It is interesting to note that in her earlier testimony before Mr. Kimani, she made no mention of the mark. It would appear to us, therefore, that this aspect was introduced as an afterthought. Secondly, according to the charge sheet the hat is categorized as one of the items stolen from Jerusha, making it appear like it belonged to her, yet from the evidence it is clear that the stolen hat belonged to Elias.

In **Duncan Muhoro Wachira V. R**. Cr. Appeal No. NAI 256/2002 the Court of Appeal recently said the following in a similar situation:-

"***Given that the owner of the cash box was one of the witnesses and not the complainant, we feel it was an error on the part of the trial magistrate to enter a conviction against the appellant on the main charge on the basis that the complainant was its special owner."***

See also **David Ndiritu & Ano. V. R.** Cr. App. No. 37 and 62 of 2004. We say no more on that issue.

It is trite that before a court can rely on the doctrine of recent possession as a basis of a conviction in a criminal trial, the possession must be positively proved. That is, there must be positive proof that the property was found with the suspect; that the property is positively the property of the complainant; that the property was stolen from the complainant and; that the theft was recent. See **Isaac Ng'ang'a Kalinga alias Peter Ng'ang'a Kahinga V. R.** Criminal Appl. No. 272 of 2005.

The foregoing conditions have not been satisfied in this case. We find that the evidence relied on to link the appellant with the crime is flawed. The appeal is allowed, the conviction quashed and the sentence of death is set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Meru this 29th day of July 2008.

M.A. EMUKULE

JUDGE

W. OUKO

JUDGE

29.7.2008

Coram: M.A. Emukule, J

W. Ouko, J

Mr. Kimathi for state

Gacheri C/clerk

Appellant present in person

Judgment delivered