REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 18 of 2007

VINCENT OUMA OTIENO …….. 1st APPELLANT

ABDALLAH SHABAN DODI ……..2nd APPELLANT

SALIM JUMA MUSA ……..……..3rd APPELLANT

SADAT TWALIP ABDULAI ….……..……..4th APPELLANT

MOHAMED MALIK ……..……...……..5th APPELLANT

VERSUS

REPUBLIC ……....…… RESPONDENT

[From original conviction and sentence in Criminal Case number 46 of 2007 of the Chief Magistrate's Court at Kisumu, dated 23rd January 2007 by Mr. A. El – Kindy – P.M.]

CORAM

Mwera , Karanja J. J.

Mr. Musau, Senior Principal State Counsel for the State

Court Clerk – Raymond/Laban

Appellants present

JUDGMENT

The appellants, Vincent Ouma Otieno, Abdallah Shaban Dodi, Salim Juma Musa, Sadat Twalip Abdulai and Mohamed Malik appeared before the Principal Magistrate at Kisumu charged alongside two others with nine counts of robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the

nights of 14th / 15th January 2006 at Manyatta Estate Kisumu District Nyanza Province, jointly with others not before court while armed with dangerous or offensive weapons namely pangas and iron bars robbed Julius Juma Sangonda (count 1), Johannes Ouma Nyambuga (count 2), Lilian Achieng Nyambuga (count 3), Hilda Awuor Jabiya (count 4), Patricia Awuor Onyango (count 5), Angeline N. Mangle (count 7) Emily Oduor (count 8) and Wilson Ogunde Owiti (count 9) of their respective property and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said persons.

The appellants also faced several alternative counts of handling suspected stolen goods contrary to Section 322 (2) of the Penal Code.

They all pleaded not guilty to all the main and alternative counts and after the trial, they were all convicted of the main counts. Their co-accused (accused six and seven) were found not guilty and acquitted under Section 215 Criminal Procedure Code. The first appellant (Vincent), the third appellant (Salim) and the fourth appellant (Sadat) were each sentenced to death.

The second appellant (Abdallah) and fifth appellant (Mohamed) were found to be minors and spared of any sentence.

The trial court noted that they were tried as adults and therefore it lacked jurisdiction and ordered that the file be placed before a judge for review orders.

We are at a loss as to what exactly a judge was required to review whereas the trial court had the jurisdiction to try and sentence the appellants accordingly.

The second and fifth appellants being minors ought to have been treated in the manner provided by the Children Act No. 8 of 2001 which provides that:-

"**Notwithstanding the provision of any other law, no child shall be subjected to capital punishment or to life imprisonment"**

(See Section 18 (2) of the Act).

The Act also provides that:-

" **No child shall be sentenced to death"**

(See Section 190 (2)).

Therefore, in terms of Section 25 (2) of the Penal Code and the decision by the Court of Appeal in the case of **Kazungu Kasiwa Mkunza & Another =vs= Republic MSA C/APP No. 239 of 2004 (C/A)**, the trial court ought to have ordered that the second and fifth appellants be detained in custody at the pleasure of his Excellency the President of the Republic of Kenya.

Be that as it may, the appellants being dissatisfied with the conviction and sentence preferred the present appeals on the basis of the grounds set out in the petition of appeal filed herein on 1st February 2007 by the firm of Oguso, Onyango & Co Advocates.

The grounds are as follows:-

(i) The trial court erred both in law and fact in totally misunderstanding and/or failing to appreciate the accused persons defence thereby coming to a wrong conviction

(ii) The trial court failed to appreciate the background of the matter and likelihood of fabrication of evidence by complainant and their witnesses

(iii) The learned Magistrate erred in law and fact as the doctrine of recent possession relied on does not

(iv) measure to the required standard and hence the appellants ought to have been acquitted.

(v) **The learned trial magistrate erred in both law and fact in failing to appreciate the glaring contradictions in the evidence by the prosecution witnesses.**

(vi) The trial court erred in both law and fact in capitalizing on the weakness in the defence case to buttres an otherwise weak prosecution case.

(vii) The learned trial magistrate erred in law in lowering to the prejudice of the accused person the standard of proof in a criminal case.

(viii) The learned trial magistrate did not comply with Section 169 of the Criminal procedure Code in writing the judgment herein.

(ix) The judgment of the subordinate court is against the weight of evidence on record

(x) The sentence imposed on the Appellants is manifestly harsh and excessive in the circumstance.

At the hearing of the appeal, the first appellant was represented by Mr. Onsongo while the second, third, forth and fifth appellants were represented by Mr. Oguso.

The respondent was represented by the learned Senior Principal State Counsel, Mr. Musau who started off by saying that the complainants (PW1 to PW7) were robbed of their property and a day thereafter some of the property was recovered by PW9 who prepared an inventory in respect thereof but which inventory was not tendered in evidence as an exhibit due to the objection raised by the defence.

Consequently, the learned State Counsel contended that the recovery of the property was suspect, being the only evidence linking the appellants with the offences. He did not, in the circumstances, support the conviction of the appellants.

Both learned Counsel for the appellants, Mr. Onsongo and Mr. Oguso agreed with the learned State Counsel.

Mr. Onsongo added that the entire proceedings in the lower court were flawed in that the language used was not indicated. He also said that there was no evidence of identification against the appellants and no evidence to show that the items were recovered at a house exclusively occupied by the appellants.

Mr. Oguso on his part added that the fate of the second and fifth appellants is unknown since they were not sentenced or convicted. He also said that the only evidence against the appellants was that of possession. He contended that the evidence was insufficient, poor and incomplete.

Having considered the grounds of the appeals and the arguments advanced by the learned counsel, we now embark on our duty as a first appellate court to re-examine and re-evaluate the evidence with a view to arriving at our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (**See Okeno =vs= Republic [1972] EA 32 and Achira =vs= Republic (2003) KLR 707).**

The prosecution's evidence was that the complainants Julius Juma Sangonda (PW1), Lilian Achieng Nyambuga (PW2), Angeline Mangela (PW3), Wilson Gunde Owiti (PW4), Emilly Oduor (PW5), Hilda Awuor (PW6) and Patricia Awuor (PW7) were at the material time living within one neighbourhood at Manyatta when a group of armed people posing as police officers broke into their respective houses and stole from therein assorted goods including money, mobile phones, clothes sewing machine and

electronic devices.

The group accomplished their unlawful mission without being identified and/or recognized by any of the complainants.

However, on the following day Sgt. Joseph Ngara (PW8) of Kisumu Police Station formerly of Kondele Police Station was on duty at Kondele when he was informed that an Assistant Chief and his Administration Police Officers (APs) from Winam had arrested a total of seven suspects in possession of goods suspected to have been stolen from the complainants on the material date of the offences.

The Assistant Chief Moses Otieno Kudoch (PW9) acted on a tip off and mobilized his youth wingers. They proceeded to a house in an area called Kaloleni where they found the first, third, fourth and fifth appellants testing a radio cassette. The house allegedly belonging to one Abdallah was searched and additional suspected stolen items recovered from therein.

The Chief and his party thereafter went to other nearby houses and recovered more items. They apprehended the first, third, fourth and fifth appellants and handed them over to the police. Another Chief Otis Onana Ochieng (PW10) made additional recoveries and apprehended the appellant's co-accused (i.e. 6th & 7th accused). He was at the time with P. C. Joseph Cheboi (PW11) of the C.I.D. Flying Squad Kisii formerly at Kisumu.

On 16th January 2006 the investigation of the case was handed over to P. C. Johnson Wambulwa (PW12) of the C. I. D. Kisumu.

He was also handed over the arrested suspects who included the five appellants as well as the recovered suspected stolen property (PEX 1 to 9) and (PEX 11 to 17). He eventually charged the appellants with the present offences.

The appellant's defence was a denial of all the charges against them. The first appellant said that he is a water hawker and was arrested on the 15th January 2006 at 6:00 a.m. by the Chief who found him in a house where he had gone to take chang'aa (illicit liquor).

He was taken to Kondele Police Station and charged with the present offences.

The second appellant said that he is a charcoal vendor and was arrested by the Chief on 15th January 2006 at about 5:00 p.m. when he left his place of business in search of medicine. He was thereafter taken to the Chief's house and then to the Kondele Police Station.

The third appellant said that he was a student at Uganda Parent Secondary School and was arrested alone in his home at Kaloleni. He was not found with any of the stolen items.

The fourth and fifth appellants reiterated what was said by appellants two and three and had nothing new to add.

From all the foregoing, it is apparent that concurrent acts of robbery with violence were committed against each of the complainants.

The issue that presents itself for determination is whether the appellants were the persons responsible for the said unlawful acts. None of the complainants identified or recognized any of the offenders. With that, the prosecution had no direct evidence of identification against any of the appellants.

However, identification of an offender may also be made indirectly through circumstantial evidence. Herein, the indication by the prosecution is that the appellants were found in possession of some of the goods stolen from the complainants thereby raising the presumption that they were the persons who terrorized and robbed the complainants on that material night. This is basically an application of the rule

relating to circumstantial evidence in that where the evidence is circumstantial, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

It is settled law that evidence of recent possession is circumstantial evidence, which, depending on the facts of each case, may support any charge, however penal **(See Odhiambo =vs= Republic [2002] 1 KLR 241).**

The evidence herein shows that the complainants proceeded to Kondele Police Station where they were shown recovered stolen goods. They did not know how and from whom the goods were recovered. They were simply shown the goods and asked to identify those belonging to them respectively.

Julius (PW1) identified his Philip T. V. (PEX 2), Lilian (PW2) identified a T. V. but she was asked to step down so that the necessary receipt would be produced. She was later re-called to confirm ownership of the T. V. through a receipt which was rejected.

Angeline (PW3) identified her Hatachi Fan (PEX 4), Wilson (PW4) identified his radio (PEX 5) and speaker (PEX 6).

Emily (PW5) identified her sewing machine (PEX 8), Hilda (PW6) identified her T. V. (PEX 12) while Patricia (PW7) identified her Panasonic T. V. (PEX 13) and VCD Player (PEX 16).

The goods were recovered by Assistant Chief Moses (PW9) and his team. He said that he found PEX 16, PEX 13 and PEX 8 in a house in which he found the first, third, fourth and fifth appellants. He said that the owner of the house, one Abdallah was not present at the time. He also recovered additional goods (PEX 17) and (PEX 19) in the same house.

He again recovered extra goods (PEX 12, PEX 6) in another house whose owner was not present. He had to break the door to gain entry (whether or not this act was lawful is another story irrelevant at this juncture).

Chief Otis (PW 10) and P. C. Cheboi (PW11) recovered a T. V. (PEX 11) at a kiosk within the Kisumu Bus Park and arrested the appellants co-accused.

All the recovered items were handed to P. C. Wambulwa (PW12) who tendered them in court as evidential exhibits.

The appellants denied any possession of the recovered goods, it was therefore incumbent upon the prosecution to displace the denial by cogent and credible evidence incompatible with their innocence.

The sole incriminating evidence was that of the Assistant Chief Moses (PW9), it showed that only some items (PEX 8, PEX 13, PEX 16, PEX 17 and PEX 19) were found inside a house where the first, third, fourth and fifth appellants were found.

The Chief (PW9) confirmed that the owner of the house was not present at the time. He said that the owner was said to be one Abdallah who was apprehended later.

The only Abdallah we have herein is the second appellant. However, there was no evidence to show that he was the actual owner of the house and hence in possession of the stolen property.

It may be that the first, third, fourth and fifth appellants were found inside the alleged Abdallah's house but not being the owners thereof there is no evidence to show that they had the necessary knowledge that the goods present in the house were stolen. It may not therefore be said that they were in constructive possession of the suspect goods.

The inculpatory facts adduced by the prosecution are in our view capable of explanation upon any other

reasonable hypothesis than that of guilt.

There being lack of sustainable evidence of possession against the appellants, it would invariably follow that there was lack of cogent evidence indirectly linking them with the material offences of robbery or even those of handling suspected stolen goods.

In the circumstances, we are unable to find that the appellants conviction was based on proper and sound evidence in law.

Consequently, the appeals succeed and are allowed.

The conviction of all the appellants is hereby quashed and the sentence of death meted out against the first, third and fourth appellants is set aside.

There was no sentence passed against the second and fifth appellant and we cannot purport to pass any in order to set it aside.

Otherwise, all the appellants shall be set at liberty forthwith unless lawfully held.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 31st day of October 2008

J. W. MWERA J. R. KARANJA

JUDGE JUDGE

JRK/aao