



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Appeal 121 & 122 of 2005

(Appeals against both conviction and sentence of the Chief Magistrate's court at Kakamega in Criminal Case No. 2369 of 2004. (E. O. OBAGA ESQ. SRM)

LIVINGSTONE WECHULI

JULIUS CHEKOLI KWATA..... APPELLANTS

VERSUS

REPUBLIC.....RESPONDENTS

JUDGEMENT

The Applicants, **LIVINGSTONE WECHULI** and **JULIUS CHEKOLI KWATA** were convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. Each of them was thereafter sentenced to suffer death as by law prescribed.

At the trial, the 1st Appellant, Livingstone Wechuli, was the 3rd Accused, whilst the 2nd Appellant, Julius Chekoli Kwata was the 2nd Accused.

The 1st Accused, Jotham Mutiki, was acquitted.

In the appeals before me, the 1st Appellant was represented by Mr. Musiega advocate, whilst the 2nd appellant represented himself.

The following is a summary of the grounds of appeal, as raised by the appellants;

- (i) The charge was invalid or otherwise defective.
- (ii) The trial court accepted inadmissible or incompetent evidence.
- (iii) The defence was ignored, and so also the submissions made by the appellants.
- (iv) The trial court was influenced by extraneous matters.
- (v) The burden of proof was shifted to the accused persons.
- (vi) There was no basis for applying the doctrine of recent possession in this case.
- (vii) The conviction was founded on wrong principles of law.

- (viii) The sentence was not only harsh but also unauthorized by law.
- (ix) There was insufficient evidence to warrant conviction.
- (x) There was no identification Parade.

As regards the charge sheet, Mr. Musiega, learned advocate for the 1st appellant submitted that the conviction was without any foundation, as the charge sheet was invalid.

It was his contention that all criminal charges originate from section 77 of the Constitution, as read with sections 134 and 137 of the Criminal Procedure Code.

It was his further submission that section 137 of the Criminal Procedure Code provides the form upon which a charge is to be preferred, so that the section of the law under which an accused is charged has to be stipulated. Thereafter, if the charge was altered, there would have to be strict compliance with section 214 of the Criminal Procedure Code.

The 1st appellant submitted that the court records had to show that any amendment to the charge was brought to the attention of the accused person.

In this case, the 1st appellant contends that the charge against him was for robbery with violence contrary to section 2 of the Penal Code. Thereafter, the number 296 was said to have been inserted by hand.

Notwithstanding that alteration, the 1st appellant says that there was nothing in the court records to indicate when the alteration was made.

The second issue raised by the 1st appellant was that the particulars of the charge sheet were fatally defective. The alleged defect was said to stem from the fact that the prosecution did not choose which of the ingredients of section 296 (2) of the Penal Code, was to be proved against the accused persons.

The 1st appellant relied on the authority of **ODHIAMBO & ANOTHER v. REPUBLIC [2005] 2 KLR 176** to support his contention that the failure to indicate that a knife was a dangerous or an offensive weapon was enough to upset a conviction.

As far as the 1st appellant was concerned, that authority did not indicate how the prosecution was to make a choice. However, the said appellant believes that the choice could be made under sections 213 and 300 of the Criminal Procedure Code, so that the prosecution could address the court before leading any evidence on the case.

It was submitted that the authority of **ODHIAMBO & ANOTHER v. REPUBLIC** was on all fours with this appeal, because in both cases the accused person was said to have been in the company of other persons. Notwithstanding that contention, the 1st appellant says that the Court of Appeal allowed **ODHIAMBO's appeal**. We were invited to do the same in this case.

The other issue raised by the 1st appellant was that the trial court appears to have convicted the appellants because the complainant was injured.

If that be the case, the 1st appellant submits that the evidence of PW3, Godfrey Muganda Amalia, who is a clinical officer, was inadmissible. His reason for so saying was that the P3 form was signed by PW3 before the said witness had had occasion to attend to the complainant. Apparently, the clinical officer (PW3) only saw the complainant, during a review of the patient, on 29th September 2004, yet the P3 form was already signed by the same witness on 25th September 2004.

Furthermore, the 1st appellant was of the view that the P3 form ought not to have been admitted in

evidence, as it was signed by a clinical officer who readily admitted having not examined the complainant. The appellant says that PW3 only reviewed the patient after filling-in the form.

The 1st appellant also submitted that the evidence of PW8, CPL. BENJAMIN WECHULI, was inadmissible because he was not the police officer who had taken photographs at the scene of crime. Secondly, PW8 is said to have failed to produce a certificate to satisfy the trial court that he was duly authorized by the Attorney General to be a scenes of crime officer.

It was further submitted that even if the photographs were, in principle, admissible in evidence, they did not support the case put forward by the prosecution because they were printed on 15th November 2003, which was long before the offence was committed (on 13th September 2004)

The 1st appellant pointed out that it was only the complainant (PW1) who witnessed the alleged robbery. Yet, PW1 did not know the number of persons who robbed him. Therefore, the appellant says that the ingredient of robbery with violence was not proved.

It was also submitted that the learned trial magistrate failed to evaluate the evidence on record, in an impartial manner. It was emphasized that the appellant was not questioning the impartiality of the conduct of the trial magistrate, but only the manner in which he evaluated the evidence.

To that end, he is said to have failed to consider the issues as to the defects in the charge sheet, or the standard of proof as against joint offenders, or the fact that the 1st appellant was charged with 4 different cases, arising from one arrest.

As that was not enough, the 1st appellant felt hard done by the trial court because, in his view, the court did introduce extraneous matters into the judgement. For instance, it is said that whereas the trial court held that the various assorted goods were recovered from a sack, PW6, to whom the evidence was attributed, did not say so. Therefore, the appellant submitted that there had been a serious misdirection by the trial court.

Also the trial court is faulted for saying that the goods could not have been planted on the appellant, whereas the issue of planting evidence had not arisen in the trial.

The 1st appellant submitted that the trial court shifted the burden of proof to the accused by requiring them to prove that they did not have the stolen items.

As regards the doctrine of recent possession, the 1st appellant said that it did not apply because possession itself was not proved. He explained that neither the sack in which the items were found, was produced in evidence. Also, the bicycle on which the alleged sack was found, was not produced in evidence. And finally, he said that none of the witnesses said that the items produced in evidence were recovered from the sack.

The 1st appellant did submit that the conviction could not stand because the trial court had failed to specify the statute pursuant to which the conviction was founded. He pointed out that the trial court had simply cited section 296 (2), but without stating the statute from which that section was derived.

The final submission by the 1st appellant was that the learned trial magistrate had failed to indicate, on record, the quorum on three occasions. The 3 occasions were on 4th April 2005. 9th May 2005 and on 3rd August 2005.

Such submissions were said to be fatal.

On his part, the 2nd appellant submitted that there had been no Identification parade.

He also submitted that his conviction was founded on the evidence of a single witness, PW6, who was the arresting officer. Yet, PW6 is said not to have told the court that the stolen items were recovered from the house of the 2nd appellant.

If anything, the 2nd appellant believes that the evidence of the Investigating Officer, (who said that the items were recovered from behind the shop), was inconsistent with the evidence of PW6, who said that the items were on a bicycle.

Then the bicycle was not produced in evidence. Therefore, the 2nd appellant said that he ought not to have been convicted.

Furthermore, the arresting officer failed to give all the 3 names of the 2nd appellant. That too was said to be a ground for upsetting the conviction.

Finally, the 2nd appellant complained that he had been charged in 3 different cases, arising from his arrest by PW6.

In answer to the appeals, the learned Senior State Counsel, Mr. Daniel Karuri, asked this court to dismiss the same. We will be giving consideration to the submission of the state, whilst re-evaluating the evidence which was tendered before the trial court.

In the process of re-evaluation of the evidence on record, we will bear in mind the fact that, unlike the trial magistrate, we did not have the benefit of observing the witnesses as they testified.

PW1, **EDGAR NYONGESA WANJALA**, was the complainant. He was a businessman, who operated a canteen at Chebuyusi village.

On the night of 13/9/2004 PW1 was asleep in his house, which was behind his shop. He was awoken at about 1.00 a.m., by thugs who had gained entry into his house.

The thugs, whose number PW1 was unable to establish, but who were many, hit PW1 on his head. They used the blunt side of a panga, to hit him. They then carried away many items from the shop or canteen.

Later PW1 was assisted to hospital, where he was treated. Later still, PW1 reported the incident at the Navakholo Police Station.

After about one week, PW1 was asked to go back to the police station, where he was able to identify some items which had been stolen from his shop. Amongst the items PW1 identified were 8 headscarves which bore the mark of P.A.G. He also identified a torch which had one switch knob missing.

Significantly, PW1 did not identify any of the persons who had attacked him and who had also robbed his shop.

PW2, **BERNADETTE NANJALA**, is the mother to PW1. She recalled that on the night of 13/9/2004, PW1 was attacked by thugs.

PW2 testified that she had bought some headscarves when she had attended a conference at Nyangori. She had then given the said scarves to PW1, for sale.

When the scarves were recovered by the police, PW2 was able to identify them because they bore a quotation from Proverbs 14:1.

PW3, **GODFREY MUGANDA AMALIA**, was a Clinical Officer at Navakholo Health Centre. He testified having attended to PW1, who told him that he had been assaulted by persons unknown to him.

According to PW3, the complainant was in acute pain and he was bleeding from a cut wound on the nose. PW1 is also said to have had a swelling on the right side to his head.

PW3 testified that he signed the P3 form on 25th September 2004.

However, during cross-examination, PW3 said that he did not examine PW1 on 13/9/2004. He only saw and examined PW1 when the patient went back for review. But PW3 could not recall the date when the review was done.

PW4, **JOSEPH WECHULI**, was a watchman at Chebuyusi Secondary School. He recalled having assisted PW1 to the Navakholo Health Centre, for treatment, at around 2.00 a.m. on 13/9/2004.

According to PW4, the complainant had been assaulted by thugs, and he had a cut on the nose. However, PW4 did not see any of the thugs.

PW5, **MARY JUZEI OKUMU**, was a neighbour to PW1. At about 1.00 a.m. on 13/9/2004, PW5 heard a knock at her door. When she heard the voice of PW1, she lit a lamp and tried to open the door. But she found the door locked from outside. PW1 opened the door from outside.

Later PW5 accompanied PW1 to Chebuyusi Secondary School, where they sought the assistance of PW4, in taking PW1 to hospital.

PW5 identified the headscarves which were recovered, as those that PW1 had displayed for sale, at his shop, PW5 was able to identify the headscarves because she had been told about them by PW2, and also because PW5 used to operate a tailoring business on the verandah of the shop at which the headscarves were displayed for sale.

PW6, **SAMSON JUMA SHIAMBILI**, was the Assistant Chief of Shiligoi Sub-location.

On 20/9/2004, PW6 was at Nambacha market, where he was carrying out investigations on a theft which had occurred in his area. Whilst in the course of the said investigations, PW6 saw 2 people pushing a bicycle which had a big sack on its carrier. The said 2 people were the appellants herein.

When PW6 stopped them, the 2nd appellant caused a commotion, resulting in the Assistant Chief being injured. Nonetheless, PW6 arrested the appellants and confiscated the sack which contained amongst others, headscarves bearing the inscription "***National Women Conference.***"

During cross-examination by the 1st appellant, PW6 said that the said appellant was his cousin. He arrested both appellants at Nambacha, on a market day.

Although PW6 said that he saw the items recovered from the sack on 20/9/2004, he was not present when PW1 identified the stolen items.

However, when he testified in court, PW6 identified the headscarves as those that had been in the sack on 20/9/2004.

PW7, CPL **FRANCIS WANYONYI**, received a report on the night of 13th/14th September 2004, that the shop of PW1 had been robbed, and that the robbers had cut PW1 with pangas.

PW7 visited the scene, with other officers, where he recorded witness statements and also commenced investigations.

Later, on the night of 18th/19th September 2004, another robbery was committed at Shiligoi Sub-location. PW6 notified PW7 that he had received information about possible suspects. PW6 therefore went to Nambacha market, where he laid an ambush, as he had been tipped-off that the stolen items might be sold

at that market.

PW7 testified that the appellants herein were arrested by PW6, when they were pushing a bicycle which had a sackful of goods on its carrier. The stolen goods were recovered from the said sack.

During the cross-examination, PW7 confirmed that none of the stolen goods were recovered from the 2nd appellant's home.

PW7 also explained that it is he who later released the bicycle on which the stolen goods were being ferried. He said that the bicycle was released to a brother of the 1st appellant.

PW8, CPL BENJAMIN WECHULIL, testified that he was a police officer attached to the scenes of crime.

PW8 did not visit the scene of crime relating to this case. He therefore only produced in evidence, photographs which had been taken at the scene, by his colleague PC Samson Too.

According to PW8, the photographs were printed on 15/11/2003.

Finally, PW8 testified that he was duly gazetted as a scenes of crime officer, through gazette notice No. 5853 of 30th August 2001.

In his defence, the 1st Appellant said that he was a businessman, operating a butchery at Nambacha. He produced receipts and a licence to verify the fact that he was licenced to carry on the business, and that he leased a premises from Mzee Alfayo.

He said that he was arrested on 20/9/2004, whilst he was selling meat at the butchery at Nambacha market.

According to the appellant, he was only arrested and charged because PW6 had operated the butchery business before becoming an assistant chief; and after that PW6 wanted to give the business to his brother. Instead, the landlord gave the premises to the 1st appellant, which fact led to a quarrel between PW6 and the 1st appellant.

The 1st appellant also attributes his arrest to the fact that he won over the heart of Judith Auma, a teacher at Nambacha High School, and married her, even though PW6 had had a desire to marry that lady.

The 1st appellant denied being in possession of the alleged stolen items. He also denied assaulting PW6. However, he conceded that one of the four cases he was charged with was in relation to an alleged assault on PW6.

On his part, the 2nd appellant's defence was that on 20/9/2004 he was at Nambacha Market. He had gone to buy medicine for his sick child.

He denied having been arrested with any stolen items.

And, as regards the nights of 13/9/2004, the 2nd appellant could not recall where he was.

In his judgement, the learned trial magistrate held that the appellants were in possession of some of the stolen items, and that the appellants did not offer any explanation on how they came into the possession of the said items.

As the goods were recovered within one week of the robbery, the trial court held that the doctrine of recent possession was applicable to this case.

Reverting to the grounds of appeal, we find that pursuant to section 134 of the Criminal Procedure Code;

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with the particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

In this instance, the deficiency complained about is not that the specific nature of the offence or the particulars thereof were not specified in such manner as would enable the appellants to know what offence they were charged with.

The offence was “Robbery with violence.” The particulars were that jointly with others not before the court, they robbed Edgar Nyongesa Wanjala of certain specified goods, and that they wounded the said complainant at or immediately before or immediately after the time of the robbery.

To our minds, if those particulars were proved, the offence of robbery with violence would have been proved.

However, the difficulty, as we understand the 1st appellant to be saying is that that offence was not stipulated under section 2 of the Penal Code. It is spelt out in section 296 (2).

In the charge sheet only sub-section (2) was typed. Then section 296 was inserted by hand.

The 1st appellant contends that the said hand-written insertion was made at an unknown time. However, there is nothing in the record of the proceedings before the trial court which assist this court to verify the exact stage when the insertion was made.

The learned state counsel did submit that the amendment was made by the trial court because the signature at the bottom portion of the charge sheet, within the part headed “Particulars of Offence”, is the same as that of the trial magistrate.

We have compared the signature of the learned magistrate on the record of the proceedings on the date when the plea was taken (on 24/9/2004) and formed the opinion that it resembles the signature on the charge sheet.

However, even assuming that it was the magistrate who made the said insertion on the charge sheet, there is nothing on the records to explain why the insertion was made, and when exactly it was made. In other words, the question remains whether it was before or after the plea was taken.

If the court felt that there was need to make that amendment or insertion to the charge sheet, the court ought to have spelt out the reasons for doing so, in the record.

The magistrates’ courts and the High Court are both courts of record. Therefore, it is not proper for the said courts to leave things out of their records, as that leads to a situation where, thereafter, any person giving consideration to the record is compelled to make presumptions or guess-work.

In this case, the learned senior state counsel tried to persuade us that the trial magistrate is the person who effected the amendment, and that that was done prior to the plea being taken.

Yet, it is not lost on us that on 16th June 2005 the court prosecutor, Inspector Bushuru, had told the learned trial magistrate that;

“The charges before this court were amended by the prosecution before they were registered in the criminal registry.”

In the light of the inconsistency between the information given by Inspector Bushuru and that given by

the learned senior state counsel, Mr. Daniel Karuri, this court is unable to ascertain the time when the amendment was effected, the reason for the amendment or the person who effected the amendment.

We cannot therefore accept the contention by the state, that there had been compliance with section 214 of the Criminal Procedure Code, on the steps to be taken when amending a charge sheet.

The next question we ask ourselves is whether or not the particulars of the charge sheet were fatally defective.

In the case of **JOHANA NDUNG VS. REPUBLIC, CRIMINAL APPEAL NO. 116 OF 1995 (Unreported)**, at page 180, the Court of Appeal held as follows:-

“The charge of robbery brought against the appellants was, with respect, defective as it failed to allege a vital ingredient thereof, namely that the knife was a dangerous or offensive weapon.”

In this case, the charge did not seek to prove that the panga was a dangerous or offensive weapon. In our understanding, the ingredients which the prosecution sought to prove were that the appellants were more than one in number, and that they occasioned actual injury to the complainant.

In the circumstances, it was not necessary that the panga be described as a dangerous or offensive weapon.

It is true that the complainant, who was the only eye witness to the incident, was unable to ascertain the exact number of the robbers. However, he was sure that they were many in number.

Contrary to the 1st appellant’s contention, the inability to ascertain the exact number of the robbers could not diminish the fact that robbery with violence had been committed, as the robbers were many and also because they used personal violence on the complainant.

But then, the 1st appellant said that the evidence of the clinical officer was inadmissible.

Even assuming that that was right, that would not change the fact that the robbers were many in number.

PW3 said that he only examined the complainant during review. He said that the complainant was sent to him on 29/9/04. But he failed to explain how he was able to sign the P3 form on 25/9/04. But he failed to explain how he was able to sign the P3 form on 25/9/04, before he had examined the complainant. In the event, the efficacy of the P3 form is in doubt.

Meanwhile, PW8 stated, very categorically that he was a duly gazetted scenes of crime officer. The fact that he did not produce in court, the certificate to verify that he was duly gazetted vide gazette notice No. 5853 dated 30/8/2001, would not vitiate the authority vested in him.

PW8 produced photographs which were taken by his colleague, PC Samson Too. He also produced a certificate dated 11/10/2004, which was signed by the said PC Samson Too.

By virtue of section 78 (1) of the Evidence Act;

“In criminal proceedings a certificate in the form in the Schedule to this act, given under the hand of an officer appointed by order of the Attorney General for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.”

In the circumstances, the learned trial magistrate cannot be faulted for admitting the photographs in evidence, through PW8.

Furthermore, the date when the photographs were printed is indicated as 15/11/2004, which was after the date when the robbery took place.

But in his evidence, PW8 said that the photographs were taken on 14/11/2003, which was a year before the incident giving rise to the charges against the appellants. Surely, it cannot be possible that photographs were taken of an incident before the said incident took place.

As regards the evaluation of the evidence, we hold the view that issues as to alleged defects in the charge sheet or the standard of proof of joint offenders or the multiple cases facing the appellants were not issues of fact per se. Those are issues of law.

We have perused the ruling after the close of the prosecution case, as well as the judgement, but failed did not find anything to indicate that the learned trial magistrate addressed his mind to those issues.

Pursuant to section 169 (1) of the Criminal Procedure Code, every judgement is supposed to contain the point or points for determination, the decision thereon and the reasons for determination.

As the 1st appellant had raised issues about alleged defects in the charge sheet, and also about the standard of proof as against joint offenders, the learned trial magistrate ought to have determined the said issues. The failure to do so is a deficiency in the judgement.

On the question of extraneous matters being taken into account by the trial court, we found none. To our minds, the finding that the 1st appellant could not have been framed was a reasonable one, in the light of the fact that hinted that his arrest was due to the fact that he and PW6 had disagreed over the said appellant's wife.

Contrary to the 1st appellant's contention, PW6 actually testified that the stolen items were recovered from the sack which PW6 confiscated from the appellants. Therefore, the learned trial magistrate cannot be faulted for so holding.

We have also not found any justification in the 1st appellant's criticism of the trial court, for allegedly shifting the burden of proof to the said appellant. In our considered opinion, once the trial court had made a finding that the appellants were in possession of the goods which had been stolen from the complainant, the law required the appellants to explain how they came into the possession of the goods.

As regards the issue of possession, it is noted that both the appellants were pushing the bicycle upon which there was the sack from which the stolen goods were recovered. Consequently, possession was indeed proved.

Furthermore, as soon as the trial court formed the considered opinion that PW6 was a witness of truth, it followed that the defences of the appellants could not also be truthful, as the same were wholly inconsistent with the evidence of PW6. In those circumstances, the rejection of the defences was the right step to take.

As regards the complaint that the learned trial magistrate did not specify the statute under which the appellants were convicted, the learned state counsel drew the court's attention to the fact that at the outset, the judgement indicated that the appellants had been charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

Notwithstanding the fact that the statute was specified at the start of the judgment, the 1st appellant insists that that is not sufficient. His reasoning is that, pursuant to the provisions of section 169 (2) of the Criminal Procedure Code, the court should have specified the decision to convict the appellants. The said section read:-

“In the case of a conviction, the judgement shall specify the offence of which, and the section of

the Penal Code or other law under which the accused person is convicted, and the punishment to which he is sentenced.”

In our considered view, it is important to note that by virtue of section 169 (3) of the Criminal Procedure Code, when an accused person is acquitted, the offence of which he is acquitted is supposed to be stated in the judgement.

The statute does not specify the stage at which the offence, the section under which it is founded, and the statute is to be stated, in the judgement. And, in this case, the judgement did specify, at the beginning, that the offence was contrary to section 296 (2) of the Penal Code.

Although it would have been more complete to specify the statute when the section was cited towards the end of the judgement, we find that the failure to do so did not render the judgement fatally defective.

As regards the failure to specify the coram on the three dates stated, we have noted that the learned trial magistrate had clearly indicated that the coram was as before.

A perusal of the record reveals that in all the instances, the court had noted the coram earlier on the same date. Therefore, when the proceedings resumed, later on the same date, the court was perfectly entitled to indicate that the coram was as it had been earlier on the same date.

On the question of an Identification Parade, we hold that the same was totally unnecessary because none of the robbers had been identified by the complainant.

We also find that even though the stolen items were not recovered from the house of the 2nd appellant, that would not be reason enough to upset the conviction herein. We say so because the fact of being in possession of stolen items does not connote that the said items must be at the home of an accused person.

It, as in this case, possession is proved, regardless of the fact that the same was not at the home of an accused person, the court would be entitled to convict the accused, provided that there was recent possession.

We also hold that the failure by PW7 to give all the three names of the 2nd appellant cannot be a ground for reversing the conviction.

Similarly, the fact that the appellants were charged with different offences, is not a basis for allowing an appeal.

In conclusion, we hold that there was non-compliance with section 214 of the Criminal Procedure Code, when amending the charge sheet. As the said provision is in mandatory terms, the failure to comply with it renders the trial fatally defective.

Accordingly, the appeal herein is allowed, the conviction is quashed and the sentences are set aside. Unless the appellants are otherwise lawfully held, it is ordered that they should be set at liberty forthwith.

Dated and Delivered at Kakamega, this 7th day of October, 2008.

A. MBOGHOLI-MSAGHA

FRED A. OCHIENG

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