REPULIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 528, 529 & 530 of 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at

Molo in Criminal Case No. 1674 of 2003 -Kirui [S.R.M.]

MORRIS OCHIENG JUMA.....1ST APPELLANT

BENSON SALIM HASSAN.....2ND APPELLANT

JACOB MAUNDA LUSENO.....3RD APPELLANT

SALIM MUIYA.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, Morris Ochieng Juma *(hereinafter referred to as the 1st appellant),* Benson Salim Hassan *(hereinafter referred to as the 2nd appellant),* Jacob Maunda Luseno *(hereinafter referred to as the 3rd appellant)* and Salim Muiya *(hereinafter referred to as the 4th appellant)* were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal code. The particulars of the offence were that on the 13th July 2003 at Saptet Farm Elburgon in Nakuru District, the appellants jointly with others not before court while armed with dangerous weapons namely

pangas, swords and rungus robbed Ann Bor of two batteries, one car radio, one National Star radio, one suit case, one television set make Greatwall, assorted pieces of clothing, household utensils and Kshs 6,000/- cash and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Ann Bor. The 1st, 2nd and 3rd appellants were alternatively charged with handling stolen goods contrary to Section 322(2) of the Penal code. The particulars of the offence as per the charge sheet were that they were found with various items in their possession which they knew were stolen or they had dishonestly received or retained. The appellants pleaded not guilty to the charge. After a full trial each of the appellant was convicted and sentenced to death as is mandatorily provided by the law. The appellants were aggrieved by their conviction and sentence. Each appellant filed a separate appeal challenging his conviction and sentence to this court.

At the hearing of the appeal, the separate appeals filed by the appellants were consolidated and heard as one. In their petitions of appeal, the appellants raised more or less similar grounds of

appeal. They were aggrieved that they had been convicted based on the prosecution evidence that was contradictory and uncorroborated. They were aggrieved that they had been convicted by the trial magistrate yet the victims of the robbery had not identified them. They faulted the trial magistrate for applying the doctrine of recent possession to convict them yet the items which were allegedly recovered in their possession were not positively proved to have been so recovered. They were further aggrieved that the trial magistrate had convicted them yet the prosecution did not adduce any evidence that illuminated the circumstances of their arrest. They were finally aggrieved that the trial magistrate had failed to take into account their defence before convicting them.

At the hearing of the appeal, each appellant presented to this court written submissions in support of their appeals. Other than the 1st appellant, each of the other appellants made further oral submissions in support of their appeal. Mr. Koech for the State urged this court to disallow the appeals because the prosecution had adduced sufficient evidence to link the appellants to the robbery of the complainant. He submitted that the trial magistrate had properly applied the doctrine of recent possession to convict the appellant. He urged this court to dismiss the appeals filed by the appellants.

Before we give reasons for our decision it is imperative that we set out the facts of this case, albeit briefly. On the 13th July 2003, PW1 Ann Bor *(hereinafter referred to as the complainant)* was asleep in her house at Saptet farm, Elburgon. She was in the said house with her daughter PW2 Cynthia Chepkoech Bor. At about 2.00 a.m., her house was broken into by robbers. She testified that the robbers were more than three. They entered into her bedroom and demanded that she gives them money. They threatened her with a sword. She gave them Kshs 6,000/-. They then ordered her to cover herself with a blanket. They ransacked the house and stole a TV set, a video deck, a cassette recorder, a car radio, blankets, sheets, jackets, mugs and clothes. The complainant testified that she was unable to identify any of the robbers because they had worn masks. Similarly PW2 did not identify any of the robbers because she was ordered to cover herself with a blanket when the house was being ransacked. She also testified that the robbers wore masks. After the robbery, the robbers tied the hands of the complainant and PW2 and left the homestead.

After the robbery, the complainant made a report to the police at Elburgon Police Station. The complainant suspected the 4th appellant as the one who was involved in the robbery because the 4th appellant used to buy milk from her everyday. However, after the date of the robbery, the 4th appellant inexplicably stopped to go to purchase the milk. The complainant gave this information to the police. The police acting on the information given looked for the suspects. On the 16th July 2003, the complainant and her husband PW4 Samuel Kiptoo Bor were informed by the police of Elburgon Police Station that some items had been recovered. They were asked to go to the police station to identify if the items recovered were among the ones which were robbed from their house. The complainant and PW4 identified two blankets, three pairs of trousers, one jacket, one shirt, a bag, a suitcase, a solar battery and a car radio cassette as the ones which were robbed from her house on the night of the 13th July 2003. These items were recovered from the appellants by PW5 PC Julius Tiyan and PW6 Ag. IP Ayub Kirui.

PW5 and PW6 testified that upon receiving information from the complainant that the 4l appellant could have been involved in the robbery, interrogated him. On the 16th July 2003, the 4th appellant led them to the house of the 1st appellant at Kasarani estate where a brief case, car radio and one battery were recovered. These items were positively identified by the complainant and her husband as the ones which were robbed from their house. A sum of Kshs 3,150/- was recovered in the possession of the 1st appellant. The 1st and 4th appellants then led the police to the house of the 3rd appellant where upon a search being conducted, two blankets, one shirt, a jacket, three pairs of long trousers, mugs and a bag were recovered. These items were similarly positively identified by the complainant and her husband as their property which was robbed from their house during the material night of the robbery. The 1st appellant then led the police to the house of the 2nd appellant at Kaptembwa Estate in Nakuru. A blanket was recovered from his house. The 2nd appellant led

the police to the house of his sister where a small battery was recovered. The blanket and the battery were positively identified by the complainant and her husband as the items which were robbed from their house during the robbery. All these items which were recovered in the possession of the appellants were photographed and were produced as exhibits before the trial magistrate.

When the appellants were put on their defence, they each denied that they had been involved in the robbery. The 1st appellant told the court that the items which were found in his house were brought to him by his brother who disappeared when he learnt that the police were looking for him. Similarly the 2nd appellant testified that the items which were found in his house belonged to his brother-in-law called Joseph Temba. He testified that although Joseph Temba was arrested by the police, he was mysteriously released by the said police. He denied that the said items recovered by the police in the house belonged to him. The 3r appellant similarly testified that the items which were recovered in his house belonged to his brother who was however not arrested by the police. He testified that his brother was not traced by the police. The 4th appellant denied that he was involved in the robbery. He testified that he was arrested without any justifiable reason by the police after he had been beaten by the members of the public on suspicion that he was a thief. He denied that the items which were allegedly found in his house belonged to the complainant.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses *(See* Njoroge -vs- Republic [1987] KLR 19). We have carefully considered the submissions made before us by the appellants and the response made thereto by Mr. Koech on behalf of the State. We have also re-evaluated the evidence that was adduced before the trial magistrate as we are required to by the law. The issue for determination by this court is whether the prosecution proved its case on the charge of robbery with violence as against the appellants to the required standard of proof beyond reasonable doubt.

The prosecution's case on this appeal turns on the evidence of the recovery of the items which were robbed from the house of the complainant. According the prosecution's witnesses, the items which were robbed from the house of the complainant on the 13th July 2003 were recovered in the houses or in the possession of the appellants on the 16th July 2003 when the police, acting on information, went to the respective houses of the appellants. The 1st, 2nd and 3rd appellants do not deny that the said items were recovered in their possession. It was however their defence that the said items were brought to their houses by other persons. As regard the 4th appellant, he denied that the said item which was allegedly recovered in his house belonged to the complainant. The complainant did not identify any of the robbers because the robbery took place at night and the fact that the robbers had worn masks. The trial magistrate applied the doctrine of recent possession to convict the appellants on the charge of robbery with violence.

The law as regard the circumstances under which the doctrine of recent possession can be applied is now well settled. The Court of Appeal in Isaac Nganga Kahiga —vs- Republic CA Criminal Appeal No. 272 of 2005 (Nyeri) (*unreported*) held at page 7 that:

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the properly of the complainant; thirdly, that the property was stolen from the complainant; and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, an in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

In the present appeal, the complainant positively identified the items which were recovered in the houses of the appellants as the ones which were robbed from her house on the night of the 13th July 2003. The said items were recovered in the houses of the appellants after the 4th appellant had been interrogated by the police and had led the police to the houses of the 1st, 2nd and 3rd appellants respectively. The said items were recovered from the houses of the appellants on the 16th July 2003. This was barely three days after the said robbery. The said items were therefore positively proved to have been recovered in the possession of the appellants. The 1st,2nd and 3rd appellants did not deny that the said items were found in their possession. They however explained that the said items belonged to other people.

Having carefully re-evaluated the evidence adduced before the trial magistrate, and in light of the submissions made by the appellants on this appeal, we are not satisfied that the said appellants gave a cogent explanation that would persuade this court that the said items were not actually found in their possession. We disregard their explanation as being merely evasive and an attempt to escape criminal liability. We therefore hold that the said items which were robbed from the house of the complainant were positively found in possession of the 1st, 2nd and 3rd appellant. As regard the 4th appellant, we hold that it is the 4th appellant who led the police to the houses of the 1st, 2nd and 3rd appellants. Some of the stolen items were found in his possession. It is therefore clear that the 4th appellant organised the robbery as he was able to lead the police to the houses of his accomplices where the said stolen items were recovered. The said items were recovered in the possession of the appellants three days after the robbery. From the nature of the stolen items, the said possession is recent.

We hold that the trial magistrate rightly applied the doctrine of recent possession. We find no merit with the defences offered by the appellants. The said defences do not give an acceptable explanation of how the appellants came into possession of the said stolen items as to exonerate them from the application of the doctrine of recent possession. The upshot of the above reasons is that we find no merit with the appeals filed by the appellants. The said appeals are hereby dismissed. The convictions and the sentences imposed upon the appellants are hereby confirmed.

It is so ordered.

DATED at NAKURU this 15th day of March 2007

M. KOOME

JUDGE

L. KIMARU

JUDGE