



IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 244 of 2005

(CORAM: LESIIT, J)

(From original conviction (s) and Sentence(s) in Criminal Case No. 320 of 2004 of the Senior Principal Magistrate’s Court at Kiambu (G.M. Njuguna - PM)

JULIUS KAMAU KAMANDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 245 OF 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 320 of 2004 of the Senior Principal Magistrate’s Court at Kiambu (G.M. Njuguna - PM)

PAUL KARIUKI KIARIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellants **JULIUS KAMAU KAMANDE**, thereafter referred to as the 1st Appellant and **PAUL KARIUKI KIARIE** the 2nd Appellant, were jointly charged together with three others with three counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and with two alternative counts of **HANDLING STOLEN GOODS** contrary to **Section 322(2)** of the **Penal Code**. The two Appellants and one of the other co-accused were found guilty of an alternative count of **HANDLING STOLEN GOODS** contrary to **Section 322(2)** of the **Penal Code** and each sentenced to five years imprisonment. Their co-accused, 1st accused in the case, withdrew his appeal when put on notice that the State would ask for enhancement of charge and sentence if the appeal failed.

The facts of the prosecution case was that the three Complainants in the case were waylaid at the barrier

that the residents of Red Hill Estate had erected as a security measure. The barrier was manned 24 hours. On the material day PW4 arrived at the barrier at 10.00 p.m. and found 2 strangers dressed in uniform worn by their security guards, manning it. They did not open for him. Instead, he was robbed at gun point of Kshs.15,000/-, mobile phone, belt and a bunch of keys. He was then taken to the bush and guarded. PW4 said he could not identify any of those who robbed him. Shortly later PW1 arrived carrying his wife PW2, whom he had picked at the Airport. They too were robbed at gun point of cash, books, suitcase full of personal effects, clothing, 2 golden necklaces, watches, credit cards, ATM cards and other assorted things. They were taken to the bush and tied up. PW1 and PW2 said they identified the 1st and 4th accused in the case while PW1 in addition identified the 2nd Appellant.

PW4 was the Complainant in count 3 while PW1 and PW2 were the Complainants in counts 1 and 2 respectively.

PW5 and PW6 were the watchman meant to man the barrier on the night in question. Each explained how suspicious looking men arrived in a lorry and others on foot. They were then invaded and stripped of their uniform before being taken to the bush and tied up. Only PW6 said he could identify one of the robbers. He identified the 1st Accused in the case.

PW3 PC **Gathugu**, acting on some information arrested the 1st accused in the case together with the two Appellants in this appeal. They were in a house. PW7 **PC Gaitho** & Others later joined him. The 1st accused had possession of a firearm but none of the two Police Officers could identify which one of those recovered. On the whole two revolvers were recovered, one on 1st accused and one under the only bed in the room exhibits 23 and 24. Then one other pistol was recovered in a newly dug hole in the compound of the 4th accused in the case who was later acquitted. Also recovered in the 1st accused house were the suit case, assorted books and clothing belonging to the Complainant in count 2, PW2. Some of them bore her names and others were in the Dutch language, which was her nationality.

The 1st Appellant gave an unsworn statement in which he denied the charge and said he was arrested at a stage as he waited for matatus to travel back to Nairobi. Later two others were joined together with him.

The 2nd Appellant in his sworn defence said he had gone to look for a lady friend but could not get her. That due to transport problems he was given a place to sleep by the brother of the friend. That at night police went and arrested him. Then police also brought another person arrested elsewhere, the 1st Appellant in the appeal.

The Appellants acted in person relying on written submissions which I considered. **Mr. Makura** represented the State and opposed these appeals.

I have analyzed and evaluated afresh all the evidence adduced in the case before the lower court while bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance. See **GABRIEL KAMAU NJOROGE vs. REPUBLIC (1982-88) I KAR 1134.**

I also analyzed the Judgment of the learned trial magistrate and found how he reasoned the evidence to arrive at a conviction against the two Appellants. I will begin by analyzing the same. The learned trial magistrate delivered himself thus: - ***“As for the 2nd accused it would have been very easy to call the manager of the lodging he slept in at Ndenderu before he was arrested and those people who know him as a hawker.”***

The 2nd accused is the 1st Appellant in this appeal. The learned trial magistrate grossly misdirected himself by shifting the burden of proof against the 1st Appellant. The burden of proof lies with the prosecution at all times, to prove its case against an accused person beyond any reasonable doubt. That burden never shifts to the accused person unless the Statute under which he is charged requires it.

Likewise, the learned trial magistrate also shifted the burden of proof against the 1st accused and the 2nd Appellant herein, by also requiring of them to have called evidence to corroborate their defence. The Appellants were then found guilty of the **HANDLING** charge in which the charge alleged that they were found in possession of PW2's stolen property four days after the theft.

The Appellants have challenged their convictions on the basis that the circumstantial evidence adduced did not conclusively point to their guilt. They challenged the court's finding of guilt on their part on the basis of being in a room where alleged stolen items were recovered without considering the issue of possession to determine whether indeed any of them were in possession of the items.

Mr. Makura on his part submitted that PW2's property was recovered from the Appellants and that the doctrine of recent possession applied to the case. Counsel urged the court to invoke that doctrine to find the Appellants guilty of the **CAPITAL** charge as the court ought to have found and to enhance the sentence to death.

At least one arresting officer, PW7 identified the house in which the stolen items were recovered as belonging to the 1st accused in the case. That evidence was given casually by this witness and was not backed up by cogent evidence to fully establish it. The prosecution should have called evidence to establish who owned the house in which the goods were found. I did note however that the 1st Accused put that issue to rest when he said that the house belonged to him. The 1st accused's defence also corroborated the 2nd Appellant's sworn defence that he gave the 2nd Appellant a place to sleep on the night of their arrest. The 1st accused and the Appellants were not consistent nor clear concerning where the 1st Appellant was found at the time of arrest. However, it is clear that even if he was found inside the house, that house was not his.

Before a court convicts an accused person for "receiving" or "retaining" anything proved to have been stolen the prosecution must prove: -

One, that the accused person had knowledge that the thing was stolen or had reason to believe it had been stolen at the time of receiving.

Two, that the handling was otherwise than in the course of stealing; or

Three, that the accused person undertook or assisted in the retention, removal or disposal or realization of the goods by or for the benefit of another person.

See **RATILAL & ANOTHER vs. REPUBLIC 1971 EA 575** and **MUMBI vs. REPUBLIC 1970 EA 345**.

The prosecution may be unable to bring evidence to establish that the person accused knew or had reason to believe that the goods were stolen and that he handled them otherwise than in the course of stealing. However, these facts may be proved by circumstances from which the court can infer knowledge and decide the matter. For the third element of the charge however, the necessary *mensrea* must exist at the time of the receipt of the stolen goods and it is the duty of the prosecution to establish that the accused person knew, at the time of receipt that the goods were stolen or believed them to be stolen. In the case against the Appellants before this court, the prosecution, through PW7 stated that the 2nd Appellants was found sleeping together with the 1st accused, in the 1st accused's house. Since the house was not theirs, the evidence before court was insufficient to prove that they were aware that the suit case with all the contents, stolen from PW2, were in the 1st accused house and that it had been stolen or that they believed it to have been stolen. PW7 found PW3 and another police officer not called as a witness, already having arrested the Appellants. PW7 could not describe where the stolen suitcase was found. PW3, who should have led evidence in that regard, was not candid. PW3 was not even candid about the recovery of the two firearms. He started by saying the two guns were under the bed then changed to say that the 1st Accused had one of them in his pocket. PW3 tried to describe where the guns were, which were immaterial to the handling charge. However, he failed to describe where the suit case

which was the most important item for the case before the Court, was.

From the evidence adduced on the recovery of the suitcase and other items identified by PW2 as those stolen from her, it is difficult to find that the Appellants were aware of the presence of the items in the house or even to infer that they knew they were stolen or unlawfully obtained. Without evidence on which an inference could be made that the Appellants were aware that the stolen items were in the house, the doctrine of recent possession cannot be invoked as it cannot operate in a vacuum.

The learned trial magistrate did not consider what constitutes the offence of **handling stolen goods** under **Section 322 (2)** of the Penal Code and therefore did not even begin to address the issues of possession, knowledge or belief in the context of the charge. I find that the conviction entered in this case was unsafe and should not be allowed to stand.

I do not find it necessary to consider other issues raised in this appeal such as the failure to dully evaluate the defence cases alongside the evidence of the prosecution. I believe that the issues have been dealt with in the analysis made on the evidence adduced in support of the case on the issues of handling. I must however comment that had there been evidence to establish that the Appellants had possession of the goods four days after they were robbed off PW2, the doctrine of recent possession should definitely have been applicable to the case and the conviction should have been entered for the Capital charge.

I find that on these grounds alone, the appeal can safely be disposed off.

I find merit in this appeals, quash the convictions and set aside the sentences. The Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 14th day of March 2007.

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LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellants present

Mr. Makura for State

Tabitha: CC

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LESIT, J.

JUDGE