



REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI

Criminal Appeal 276 of 2004

JOSPHAT MACHARIA MWANGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Judgment and Conviction in Criminal Case No. 194 of 2004 of the Senior Resident Magistrate's Court at Kangema by Ms R. N. Muriuki – SRM)

J U D G M E N T

The appellant Josephat Macharia Mwangi was jointly charged before the Senior Resident Magistrate's court, Kerugoya, with two others namely Joseph Maina Kinunu (2nd accused) and Benard Mwangi Kinunu (3rd accused) with one count of robbery with violence contrary to section 296(2) of the Penal Code and three counts of assault causing actual bodily harm contrary to section 251 of the Penal Code. The appellant alone faced an alternative count of handling stolen goods contrary to Section 322(1) of the Penal Code. At the close of the prosecution case, the 3rd accused was acquitted of all the charges pursuant to the provisions of section 210 of the Criminal Procedure Code as the learned magistrate found that the said accused person had no case to answer. Similarly at the conclusion of the trial, the 2nd accused was acquitted for want of Evidence.

However, the learned magistrate found that all the charges laid against the appellant save for the alternative count had been proved against him to the required standard. She accordingly convicted him and sentenced him to death as required by law in respect of count one and nine months imprisonment each in respect of counts two, three and four. The sentences in respect of the latter counts was ordered to run concurrently.

In imposing the sentences as aforesaid, the learned magistrate acted in error and violated the hallowed principles of sentencing. The court of appeal has time and again stated that where a person is charged with a number of capital offences it is preferable for the prosecution to proceed on one capital charge only and leave the other capital charges in abeyance, even though the charges appear to be inter-linked. If the prosecution fails to heed that advice then it is a good practice for the trial court to sentence the accused on one capital charge and leave the sentence in the other charges in abeyance. In the event of an accused being convicted on both capital and non-capital offence it is preferable and indeed desirable that the other additional sentences should be suspended pending the execution of the death sentence. A prisoner facing death sentence cannot serve it with another additional non-capital sentence. See generally **Muiruri v/s Republic (1980) KLR 70**, **Abdi Hussein Kaimoi v/s Republic, Criminal appeal number 47 of 2001 (Nyeri) (unreported)** and **Stephen Kimathi Muthunga v/s Republic, HCCRA No. 54 of 2004 at Machakos (unreported)**. We shall revisit this issue later in this judgment.

The appellant was aggrieved by the conviction and sentence, hence he preferred this appeal through **Messrs J.M. Kagwi & Co. Advocates**. In his petition of appeal, the appellant faults his conviction on the grounds that he was not positively identified, that the learned magistrate reached conclusions that were unsupported by evidence, erred by relying on circumstantial evidence to convict the appellant and finally that the learned magistrate erred in law and fact in convicting and sentencing the appellant.

The prosecution case was that the complainants (P.W.2, P.W.3, P.W.4 and P.W.5) were headed for their home at Kanorero from Kangema on 11th April 2004 at about 7 p.m. They were carrying two bags in which the items particularised in the first count were. On reaching a place called Kibango, they were suddenly accosted by four men who emerged from the nearby farm who proceeded to assault them and then took away their two bags. Following the assault they were seriously injured as attested to by P.W.1, a clinical officer at Kangema health centre. Of all the complainants, only P.W.2, the complainant in the 1st count managed to identify one of the thugs during the assault. He identified the said thug as the appellant's Co-accused number two. When the thugs were done with the complainants, they left with the two bags. However the 1st complainant saw accused two enter a certain house after the incident. He went and reported to the police and took them to the home where he had seen accused two enter. Accused two was soon thereafter arrested and upon interrogation by P.W.10 he volunteered to take them to the home where the stolen bags were. He took them to the house of the appellant where the bags were recovered with the items listed in the charge sheet intact. Upon interrogation, the appellant implicated accused three. The three were then arrested and subsequently charged with the instant offences.

Put on his defence, the appellant in his unworn statement denied the charges and stated that on 11th April 2004 he went to work and returned home. He stated that later at about 8 p.m. five men went to his home and arrested him and took him to the police station. He stated further that he was made to remove the clothes he was wearing as it was alleged that the person who had been robbed, had stated that he had identified the clothes the appellant was wearing as the ones worn by one of the robbers. It was then that he was charged with offences that he knew nothing about.

In support of the appeal, **Mr. Kagwi**, learned counsel for the appellant stated that he would limit his submissions to the question of identification of the appellant. He submitted that all the complainants had stated that they had been assaulted by persons unknown to them in their reports to the clinical officer. That it was only the complainant who claimed to have identified one of the assailants being accused two. However accused two was not the subject of this appeal. That though stolen items were recovered in the appellant's house there was no evidence that the appellant alone had access to the said house. Counsel also took issue with the charge sheet. That the charge sheet in count one talked of the complainant being wounded in the robbery, yet it never talked of the robbers being armed with any offensive weapons. Counsel further submitted that the complainants were unable to mention the weapons used in the robbery or in assaulting them in their testimonies. Finally counsel submitted that the learned magistrate erred in sentencing the appellant to both capital and prison terms.

Mr. Orinda, learned principal state counsel opposed the appeal. Counsel submitted that there was clear evidence to link the appellant to the offence. The items stolen from the complainants were recovered from the appellant's house. To counsel therefore it was not the issue of identification but possession of recently stolen items that the conviction of the appellant turned on. Counsel further submitted that no reasonable explanation was given by the appellant for the possession of the said items. It was his further submission that there was no reason why all the witnesses would have ganged up to falsely implicate the appellant in the crime. The injuries sustained by the complainants could not have been stage managed. With regard to the evidence of P.W.1 which was faulted by counsel for the appellant, **Mr. Orinda** submitted that his evidence did not go to the gist of the matter. It dwelt on evidence of identification. However the appellant was not convicted on that basis. Counsel concluded his submissions by stating that the evidence adduced against the appellant was watertight and the conviction was therefore safe.

This is a first appeal. That being the case, we are duty bound to revisit the evidence that was adduced in the trial court afresh, analyse it and re-evaluate it but always bearing in mind that the trial court had the advantage of hearing the witnesses, and seeing their demeanour and thus we must give allowance for the same. See the case of **Okeno v/s Republic (1972) E.A. 32**.

The conviction of the appellant was predicated upon the doctrine of recent possession and not the identification of the appellant in difficult circumstances. In his submission in support of the appeal, counsel for the appellant dwelt at length on the issue of identification of the appellant at night. Counsel faulted the evidence of identification on the basis that all the complainants in their report to P.W.1, the clinical officer had indicated that they had been assaulted by persons unknown to them. To our mind it was not necessary for the counsel for the appellant to pursue this line of defence as the learned magistrate clearly in her judgment discounted the evidence of identification. At page 6 of her judgment, the learned magistrate reached a finding that:-

“..... from the circumstances on that night, the court finds that it was not conducive or possible for the complainants to positively identify their attackers, since it was dark and it was raining”

Accordingly appellant's counsel lengthy submissions on the question of identification was clearly misplaced and of no assistance to this court and or his client, the appellant.

As already stated, however, the conviction of the appellant was predicated upon the doctrine of recent possession. In convicting the appellant the learned magistrate rendered herself on the issue as follows:

“I am satisfied that it has been established that the two bags belonging to P.W.2 and all the items therein were recovered from the house of accused 1. All these were produced as exhibits by P.W.10 and also identified. This was a few hours from the time P.W.2 was robbed. The 1st accused had been seen with the bags by P.W.7 who even assisted him to carry it. P.W.8 also confirmed that is accused 1 who took the two bags home with two other men she did not know. The accused offered no explanation either at the time of the recovery or in his defence how he came into possession of the two bags. Since they were recovered in his house, it is only him, who could have given an explanation as to how he came by them. No such explanation was forthcoming from him and considering this and also the fact that they were recovered only a few hours from the time they were stolen, I had no reason to doubt that the accused must have been and was the one who jointly with others robbed the complainant on the material night of the items mentioned”.

If a person is found in possession of recently stolen goods and does not account for his possession there is a rebuttal presumption of fact that he is either the thief or a receiver. This is the essence of the doctrine of recent possession. The court of appeal has had occasion to expound on this concept in several decisions such as **Andrea Obonyo v/s Republic (1962) E.A. 542** and **James Mwangi v/s Republic (1983) KLR 327**, **Abdi Hussein Kaimoi (supra)** and **Fannel Makenzie Akoyo v/s Republic, Cr. Appeal. No. 45 of 2006 (unreported)**. The doctrine is not an implication of law from evidence of recent possession of stolen property unaccounted for and whether the doctrine applies is dependent upon the circumstances of each case.

In which circumstances of the case should the said doctrine be invoked? The court of appeal in the case of **Erick Oherio Arum v/s Republic, Criminal appeal number 85 of 2005** laid it on the line in the following terms:

“..... In our view, before a court of law can rely on the doctrine of recent possession as 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 property 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 and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses”

How do these principles translate in the circumstances of this case? There is the uncontroverted

evidence of P.W.2, P.W.3, P.W.4 and P.W.5 that they were robbed of two bags with items particularised in the charge sheet therein. They were robbed by four men. This was about 7 p.m. Shortly thereafter P.W.2 reported the incident to the police and since he had seen one of the robbers enter a particular home nearby, he led the police to the home where they found accused two who upon interrogation led the police to the house of the appellant where the two bags and other items were recovered. The bags and the items therein had been robbed of the complainant a few hours ago. The appellant never denied that the house in which he was found with the stolen items was his. He never denied possession of the items. He never claimed ownership of the items either. His meek defence as captured by the submission of his learned counsel during the hearing of the appeal was that the appellant did not have exclusive possession of the house. However according to the testimony of P.W.10, the police officer who was involved in the search, and recovery of the items and also the arrest of the appellant, the only other person in that house was a lady whom they arrested and later released. The lady subsequently testified on behalf of the prosecution as P.W.8 and confirmed that the appellant came to the house with two other men carrying the bags. Further she confirmed that the house belonged to the appellant as she was merely a visitor. From this testimony it is clear that the house belonged to the appellant and it is the appellant and nobody else who came with the two bags containing the items stolen from the complainants. There is also the evidence of **David Irungu** (P.W.7) who testified that on the material day he met the appellant at the Kibango junction who whereupon requested him to assist him to carry a bag. He did so. Under cross-examination by the appellant, the witness reiterated the fact that he had met the appellant who had requested him to assist him carry a bag. From all the foregoing evidence it is clear that it was the appellant who had the bags that were eventually found in his house. This was a few hours after the robbery. There was nobody else who could have had those bags. The bags were positively identified by the P.W.2 and P.W.4. The appellant was duty bound to explain his possession of the two bags. He offered no such explanation. In those circumstances the learned magistrate was right in invoking the doctrine of recent possession so as to find a conviction. Our own evaluation of the evidence leads us irresistibly to the conclusion that the recently stolen property was a few hours after the robbery found in the possession of the appellant in his house. The said property was positively identified by the complainant. In any event the appellant never claimed ownership of the same. The said property had just been stolen from the complainant and accordingly the issue of time and easiness with such stolen property can move from one person to another does not arise. To our mind evidence in relation to the doctrine of recent possession was cogent and watertight. We have no reason to depart from the holding by the learned magistrate. On the issue of failure by the witnesses to state in their testimony the weapons with which they were attacked, we think that, that would have been relevant if the appellant's conviction turned on the issue of violence visited upon the complainants during the robbery. However as we have already stated this conviction turned on the doctrine of recent possession. Further even if this was not the case and the appellant had been properly identified the mere fact that in committing the robbery, the robbers were more than one meant that one of the ingredients of robbery with violence was met and that was sufficient to nail the appellant. See **Johana Ndungu v/s Republic, Criminal appeal number 166 of 1995 (unreported)**.

Finally we would revert to the issue of sentence again. The appellant was sentenced to death on the first count of robbery with violence contrary to section 297(2) of the penal code and jail sentences for non capital offences of 9 months respectively on counts II, III and IV. It has been repeatedly stated that once a person has been sentenced to die, there can be no sense in imposing on him a prison term. See **Abdul Defano Boye and Another v/s Republic Criminal Appeal No. 19 of 2001 (unreported)**. We now rectify that mistake by setting aside those sentences imposed on counts II, III and IV.

In the result, we dismiss this appeal in its entirety. However we do set aside the sentences imposed on counts II, III and IV and uphold the death sentence imposed on count 1. These are our orders.

Dated and delivered at Nyeri this 3rd day of October 2007

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE