



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

Criminal Appeal 100 & 101 of 2002

PAUL MURIUKI KAROKI.....1ST APPELLANT

JAMES NDERITU GICHIGO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, Paul Muriuki Karoki (*hereinafter referred to as the 1st appellant*) and James Nderitu Gichigo (*hereinafter referred to as the 2nd appellant*) were charged with the offence of robbery with violence contrary to **Section 296(2) of Penal Code**. The particulars of the charge were that on the 27th of February 2000 at Ngata Farm Nakuru District the appellants jointly with others not before court while armed with dangerous weapons namely pangas, rungas, simis, axes, swords and arrows, broke into the house of John Nganga Wachira and robbed him of his motor vehicle KLU 253 Peugeot 404 Pick-up, kitchen utensils and household goods all valued at Kshs 448,230/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said John Wachira Nganga. The appellants pleaded not guilty to the charge. After a full trial, they were convicted as charged. They were sentenced to death as is mandatorily provided by the law. They were aggrieved by their conviction and sentence and have appealed to this court.

The two appellants filed separate appeals which were however consolidated at the hearing of their appeals. Both the appellants raised more or less similar grounds of appeal. They were aggrieved that they had been sentenced by the trial magistrate who had relied on the evidence of a single identifying witness who had made the said identification in difficult circumstances. The appellants were aggrieved that they had been convicted based on the fact that they had been found in an accident scene involving motor vehicle registration number KLU 253 without the circumstances of their arrest being properly analyzed. The appellants were further aggrieved that the trial magistrate had relied on insufficient, inconsistent and unreliable evidence to convict them for the offence charged. They were aggrieved that the trial magistrate had failed to consider their defence before arriving at the said decision convicting them. They were finally aggrieved that the trial magistrate had relied on the evidence of police identification parades which were conducted contrary to the law, to convict them.

At the hearing of the appeal, the appellants who were unrepresented made submissions urging this court to allow their appeals. Mr Gumo, Learned Assistant Deputy Public Prosecutor submitted that the appeals ought to be dismissed as the prosecution had proved its case against the appellants on the charge of robbery with violence to the required standard of proof beyond reasonable doubt. We shall revert back to the arguments made by the parties to this appeal after briefly setting out the facts of this case.

On the 27th of February 2000 at about 12.30 a.m., PW1 John Nganga Wachira (*hereinafter also referred to as the complainant*) was asleep in his house at Ngata Farm when he was woken up by robbers who were breaking into his house. The dogs were barking. The robbers cut through the window grills of his house. They forced PW1 to open the door for them. According to PW1, the robbers were about eight in number. They demanded money from him. They beat him up with a rungu. They took a watch which the accused was wearing. They also robbed him of windows, blankets, table cloths and kitchen ware. All these items were put in PW1's motor vehicle registration number KLU 253. PW1 testified that he was able to identify the 1st appellant because he had threatened to shoot him with a gun during the robbery and also when he robbed him of his watch. PW1 was later informed by the police that the motor vehicle which had been robbed from him had been involved in an accident and the persons in the said motor vehicle injured and admitted at the Nakuru Provincial General hospital. The two persons who were in the motor vehicle at the time of the accident are the appellants in this case. PW2 Margaret Mukami Mbogo, a daughter of PW1 similarly testified that she was asleep in her house near to that of PW1 when the robbers broke into her house and robbed her of clothes, mattresses and kitchen utensils. These items were put in PW1's motor vehicle registration number KLU 253 which was later involved in an accident.

PW3 Inspector David Otieno then attached to Nakuru Flying Squad testified that on the 27th of February 2000 at 3.30 a.m., he received information to the effect that a robbery had taken place at Ngata Farm and a motor vehicle registration number KLU 253 Peugeot Pick up and household goods stolen. Fifteen minutes later, he received further information that an accident had occurred at a place called Soilo near Nakuru town. He went to the scene. He realised that the motor vehicle involved in the accident was motor vehicle registration number KLU 253. The said motor vehicle had rolled and spilled the household goods that it was carrying. Inside the motor vehicle were two accident victims who were both unconscious.

PW3 took them to hospital and put them under guard. He later took statements from them, which statements were produced in evidence as prosecution exhibits No. 1 and 2. When the appellants were discharged from hospital, PW3 arrested and charged the appellants. PW4 Dr. Victor Otieno examined PW2 on the 29th of February 2000 and formed the opinion that PW2 had been assaulted with a blunt object which caused her to suffer injury which he assessed to as "*harm.*" The P3 form was produced in evidence as prosecution exhibit No. 3. PW5 Cpl. Ronald Kilonzo Ivuti, a C.I.D. Scenes of Crime Officer took the photographs of motor vehicle registration number KLU 253 which had been involved in an accident. The photographs were produced in evidence. PW5 Inspector Abongi conducted an identification parade whereby PW1 was able to identify the 1st appellant as among the people who robbed him on the material night of the robbery.

When they were put to their defence, the 1st appellant testified that on the material night as he was walking home at night, he was beaten up by thugs. He was taken to hospital after which the police came to the hospital, arrested him and charged with the present offence. He denied that he was involved in the robbery. The 2nd appellant testified that on the material night he was transporting milk from Njoro to Nakuru town for sale. On the way, he was hit by a motor vehicle and lost consciousness. He regained his consciousness three weeks later and found himself in the hospital. When he recovered, he was arrested by the police and charged with the present offence. He denied that he was involved in the robbery.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced by the witnesses before the trial magistrate's court so as to arrive at an independent decision whether to uphold the conviction of the appellants. In reaching its determination, this court is mandated to put in mind the fact that it neither saw nor heard the witnesses as they testified (*See Okeno -vs- Republic [1972]E.A. 32*). In the instant appeal the issue for determination by this court is to whether the prosecution proved its case against the appellants to the required standards of proof beyond reasonable doubt. We have re-evaluated the evidence adduced before the trial magistrate's court and also considered the submissions made before us by the appellants and by Mr Gumo, on behalf of the State.

The prosecution relied on basically two pieces of evidence in their case against the appellants. As regard the 1st appellant the evidence that the prosecution relied on is that of identification by PW1 and secondly

the evidence relating to the fact that the 1st appellant was found in possession of the stolen motor vehicle so soon after the robbery. In respect of the 2nd appellant the evidence that was adduced by the prosecution against him related to the fact that he was found in possession of the motor vehicle and the stolen goods soon after the robbery. As regard the evidence of identification PW1 testified that he was able to identify the 1st appellant during the night of the robbery. He reinforced his said identification of the appellant by pointing out the 1st appellant in an identification parade which was conducted by PW6 Inspector Abongi. We have re-evaluated this evidence of identification. We are not satisfied that the complainant actually identified the 1st appellant during the night of the robbery. No evidence as to the source of light was adduced neither did the complainant testify as to what distinct features the 1st appellant had to enable him identify him later when the identification parade was conducted by the police. There is no evidence that the complainant had given the description of the robbers when he made the first report to the police. In the absence of such report it would be impossible for this court to reach a determination whether or not the complainant was positive as to his identification of the 1st appellant. The evidence of the complainant thus raises reasonable doubt as to whether PW1 positively identified the 1st appellant. This doubt will of necessity be resolved in favour of the 1st appellant. We therefore find that the prosecution failed to prove that indeed the complainant identified the 1st appellant. We will disallow that evidence of identification.

The two appellants were however both found in possession of the complainant's motor vehicle so soon after the robbery. According to the complainant, he was robbed of his motor vehicle registration number KLU 253 on the 27th of February 2000 at 12.30 a.m. He was also robbed of household goods. The robbers drove off in the said motor vehicle. A few hours later, at 3.30 a.m., PW3 Inspector David Otieno of the Nakuru Flying Squad was informed that a motor vehicle had been involved in an accident at Soilo. PW3 went to the scene of the accident. He saw that the motor vehicle in question was registration number KLU 253 which had been reported robbed from the complainant. The said motor vehicle had rolled and the stolen items scattered at the scene. The two appellants in this case were inside the motor vehicle having been injured in the accident. They were unconscious. They were taken to hospital and after they recovered, were arrested and charged with the present offence of robbery with violence.

Now, the two appellants have denied that they were in the motor vehicle at the time it was involved in the accident. The 1st appellant has given an explanation that he was beaten by thugs when he was going home on the material night and left for the dead. He found himself in hospital and was surprised to be charged with the present offence. The 2nd appellant testified that he was ferrying milk from Njoro to Nakuru when a motor vehicle hit him. He lost consciousness and regained it when he was in hospital.

After re-evaluating the evidence it is clear that the doctrine of recent possession applies in this case. As was held by Bosire J. (*as he was then*) in **Malingi –vs- Republic [1989]KLR 225 at page 227**

“By the application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a presumption of facts is a reputable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”

In this case the appellants were found in possession of motor vehicle registration number KLU 253 so soon after the same had been robbed from the complainant. In fact, the appellants were found in the said motor vehicle about two hours after the robbery. They were found at 3.30 a.m. in the morning at Soilo about five kilometers from Ngata Farm where the robbery took place. From the evidence of PW3, it is clear that the appellants were inside the said motor vehicle when it was involved in an accident. Items which were robbed from the houses of the complainants were found strewn at the scene of the accident.

The two appellants were unconscious having been injured in the accident. They were taken to hospital where they were treated, discharged and later charged with the offence.

The appellants were found in possession of the motor vehicle and the goods robbed from the houses of the complainants two hours earlier. The appellant gave no satisfactory explanation of how they came to be inside the stolen motor vehicle when it was involved in the accident. This was two hours after the said motor vehicle had been stolen from the 1st complainant. This was so soon after the said robbery. The doctrine of recent possession as defined in the Malingi Case (*referred to herein above*) covers all four facts and circumstances of this case. The explanation given by the appellants in their defence is just but an attempt by them to escape criminal liability. We find no merit whatsoever in their appeals.

Having carefully re-evaluated the evidence and considered the submissions made in this appeal, it is clear that the prosecution proved its case against the appellant to the required standards of proof beyond any reasonable doubt. We disallow the appeals. We dismiss them. We confirm the convictions and sentences of the appellants by the trial magistrate. It is so ordered.

DATED at NAKURU this 24th day of February, 2006.

MUGA APONDI

JUDGE

L. KIMARU

JUDGE