



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal No. 136 & 137 of 2002

GEORGE SIMIYU WANYONYI.....1ST APPELLANT

JAPHETH MULEI ISHIVA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants, George Simiyu Wanyonyi (hereinafter referred to as “*the first appellant*”) and Japheth Mulei Ishiva (hereinafter referred to as “*the second appellant*”) were charged and convicted of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and were sentenced to death. The second appellant also faced an alternative charge of handling suspected stolen goods contrary to **Section 322(2)** of the **Penal Code**. However, the trial magistrate did not make any determination on the alternative charge.

This being the first appellate court, we are mandated to submit the entire evidence that was tendered in the lower court to a fresh re-evaluation and reach our own conclusion as to whether the appellants were guilty as charged or not.

The prosecution case was as follows:-

Richard Kingore Musau (PW1) was a mason residing at London area of Nakuru and working at Milimani. On the night of 12th and 13th May 2001 at about 4.00 a.m. he heard the sound of breaking glass and he left his bedroom and opened the sitting room door. He realised that some people had broken the door and entered the house. They had hit the door with a stone and they had a torch. They threatened to kill him and told him to go back. He was forced to lie on a chair in the sitting room and one of them put a pillow on his head and sat on him. He was facing the direction on which they were taking some house hold goods from. He saw them take two television sets, a Panasonic by make and a Greatwall and thereafter the one who was sitting on him took a drawer with video cassettes. The robbers then took the sitting room keys and locked the door from outside. When they left, PW1 took a screw driver and opened

the lock and called neighbours who came. In the morning he telephoned the police and informed them about the robbery. PW1 was not able to identify the robbers. Later, he learnt that some three people had been arrested and he was able to identify the two television sets and the 21 video cassettes.

Mutuku Musau (PW2) was the owner of the house which had been broken into and the said items stolen. He was a driver and was on duty on the material night and went back home at 4.30 a.m. He found the house had been broken into and the said items stolen. After recovery of some of the stolen items, he identified the two television sets by their serial numbers and produced their purchase receipts. The things had been recovered from Ronda Estate from an old man and a young child. The old man said that some people had taken them to him. The old man led the police to Nakuru West and pointed out to them some three people who included the two appellants.

Sammy Koech (PW3) was a police officer. He testified that on 14/5/2001 he was at Central Police Station when he got a report from an informer that there were things that had been seen at Kaptembwa and were suspected to have been stolen. He went there with two other police officers and got 3 television sets, one radio and 21 video cassettes. They arrested the owner of the house, the second appellant who said that one of the people who took the said items to his house was the first appellant. The police were taken to the house of the first appellant and they arrested him. They also arrested a Mr. Samson Wafula Wanyonyi. They took the appellants and the recovered items to the police station. The items were later identified by PW2 as being his.

PW5, a police constable Patrick Chirchir, stated that he was attached to Nakuru Police Station and on 13/5/2001 at 10.15 a.m. he received a report regarding the said robbery and he went to the complainant's house and saw the broken doors. He went back to the station and continued with investigations. Later the appellants were arrested and the said items were recovered.

The first appellant gave a sworn statement of defence. He said that he used to sell water on a handcart and carry luggages at Soko Mjinga within Nakuru Town. On 13/5/2001 at about 7.00 a.m. he was approached by two men and a woman to carry for them some luggage. They took him to a plot of a lady called Chemkuria. The luggage was in boxes, sacks and one sofa set. He carried for them the goods upto Kaptembwa where he left his hirers and the goods and they paid him Kshs.150/-.

On 14/4/2001 at about 9.00 p.m. two police officers approached him and asked him if he was George Simiyu. He agreed that he was and the police asked him where he had taken the things that he had carried that morning. He led the police to the place where he had offloaded the goods. He did not get the people who had hired him but the second appellant agreed that it was his house. He therefore said he did not steal the said goods, he only carried them in the ordinary course of his work.

The second appellant gave an unsworn statement of defence. He said that he was an Electrician and was staying at Kaptembwa. He further stated that on 12th and 13th of May 2001 he had gone to work in Milimani where he was staying and he left there on 14/5/2001 at 6.30 p.m. and went back to his house at Kaptembwa. He said that he had left his house to his brother-in-law to take care of. After he entered the house, he heard people knocking and he realised they were police officers. They searched the house and got a television and some other things under the bed and chairs. He said that his child told him that his brother-in-law and the first appellant took the things there. The police took the said items and the second appellant took the police to the house of the first appellant. The police searched the house of the first appellant but did not recover any of the stolen items.

The trial magistrate did not believe the defence of the two appellants and on the doctrine of recent possession, she concluded that the appellants were the robbers and convicted them accordingly.

We have carefully considered all the evidence that was adduced before the trial court together with all the submissions, oral and written that were made before us.

It is not in dispute that there was no direct evidence to suggest that the appellants were the ones who broke into the house of the complainant. The appellants were convicted under the doctrine of recent

possession. Each one of them gave an explanation as to how the stolen goods were found in their possession. What we have to determine is whether their possession of the said items could reasonably lead to only one inference – that they were the ones who broke into the complainant’s house and stole the said items.

In **R. VS HASSAN S/O MOHAMED [1948] EACA 121** it was held as follows:-

“On a finding that an accused was in possession of property recently stolen, in the absence of any explanation by him to account for his possession a presumption arises that he was either the thief or the receiver”.

In determining whether possession of recently stolen property connects an accused person to a theft, a court has to make its own assessment of the evidence and weigh it against any explanation that may have been given by an accused.

In our view, the first appellant gave a reasonable explanation as to how he transported the said goods to the place where they were found. He had been hired to do so and there was no suggestion that he knew that the same had been stolen. The second appellant’s explanation was equally plausible and perhaps the only charge that he should have been tried for was the one of handling suspected stolen goods. Unfortunately the trial magistrate seems to have overlooked the alternative charge all together.

In the circumstances, we are of the view that the appellants’ conviction was unsafe and therefore allow the appeal, quash the conviction and set aside the sentence that was pronounced by the trial court.

The appellants should be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru 28th day of February, 2006.

MUGA APONDI

JUDGE

D. MUSINGA

JUDGE