Omusugu v Republic (Criminal Appeal 194 of 2000)
[2006] KEHC 3581 (KLR) (3 March 2006) (Assessment)

Dismus Ouma Omusugu v Republic [2006] eKLR

Neutral citation: [2006] KEHC 3581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 194 OF 2000

MK KOOME & DK MUSINGA, JJ

MARCH 3, 2006

BETWEEN

DISMUS OUMA OMUSUGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

ASSESSMENT

1. The appellant was charged with 10 Counts of Robbery with Violence contrary to Section 296(2) of the *Penal Code*. After a full hearing he was found guilty as charged in Counts 1,2,4,5,7 & 9 and was convicted accordingly and thereafter given the mandatory death sentence.

2. The Appellant being dissatisfied with the conviction and sentence appealed before this court and put forward the following grounds of appeal:-

3. That the Learned Magistrate erred and misdirected herself when she made a finding that the Appellant was found in possession of stolen goods and in;

4. Finding that the sweater the Appellant was wearing linked him with the robbery.

5. That there was insufficient evidence upon which the conviction was based and the identification parade was not carried out in accordance with the law.

6. The Prosecution case was that the Appellant who was in the company of others not before the court on the night of 22nd/23rd day of October, 1999, at Kabazi Trading Centre in Nakuru District of the Rift Valley Province while armed with dangerous weapons namely pangas and rungus, broke into several houses, beat up the several complainants and stole from them several items as stated in the charge Sheet.

7. Evidence was adduced by the prosecution witnesses who were mainly the complainants and the arresting Police Officers. After the spate of robberies was reported to the Police station PW.10 gave evidence of how they arrested the Appellant who was travelling in a public vehicle on the morning of 23/10/99, at 6.00 a.m. Following the reports of robberies, they mounted road patrols and were stopping and inspecting the vehicles along Nyahururu to Nakuru road. They stopped a matatu Pickup and when they searched it they found the Appellant and two other suspects who later tried to escape from lawful custody and were shot dead. They were carrying big bags and when they searched them they found radios, albums, and many materials. The Appellants were arrested and when the complainants went to the Police Station they were able to identify the items as those which were stolen on the material night. The Appellant and the other two suspects attempted to escape from the police custody and the other two were shot dead and thus the Appellant was also charged with the offence of attempting to escape from lawful custody. When put on his defence, the Appellant stated that he lived in Nakuru Bondeni Estate and on the material day he said had boarded a passenger vehicle and when it got on the road-block he was arrested alongside other people who were found with the stolen items. He testified that later he and two others were shot by Police in cold blood. He denied having any knowledge of the offence.

8. In convicting the Appellant the learned trial Magistrate stated inter-alia:-

> " The 100% recovery of the stolen items in the opinion of the Court shows that the accused and the two others were the actual robbers. Had they been harmless then the actual robbers would have retained some of the stolen items. The doctrine of recent possession applies in this case. The red sweater exhibit No.3 was identified by PW9, Leah Wangina as belonging to her. All the witnesses were emphatic as to how the Accused was seen wearing this apparentlyfemale sweater. He had it even at the time of the arrest. In the opinion of the Court this was evidence linking the accused to the offence.

9. The Court is of the opinion that the Accused was not an innocent passenger and if he was an innocent passenger then what business did he have wearing a sweater that had been stolen? If he was innocent too, he would not have made an attempt to escape from lawful custody. His conduct was therefore not consistent with innocence.

10. Though under no obligation to prove anything his defence did not cast any doubt on the prosecution evidence. His confession had it been the only evidence would not have been a basis of a conviction since it is not detailed. In the light of the corroboratory evidence like that of recovery the Court is of the opinion that the offence has been proved. The assailants were more than 2 and they were armed. The court is of the opinion that all the ingredients of the offence have been proved."

On the issue of identification, several complainants namely, PW4,

11. PW5, PW7 who were the victims of the robbery on the material day were able to identify the Appellant as one of the robbers who was wearing a red-sweater. Leah Wangina, PW9 was able to identify the sweater the Appellant was wearing as her own. She had taken it to the tailor for repair and it was stolen on the same night.

12. We are satisfied that the Magistrate properly considered the principles of the doctrine of recent possession and admitted the evidence of identification properly. When the Appellant was seen in possession of a red-sweater which was stolen the same night, a strong presumption arose which in our considered opinion linked the Appellant to the robbery.

13. Thus as was decided in the case of Mwachanje & 2 Others Vs Republic, High Court Mombasa [2002] 2KLR page 341.

> " where an accused is found in recent possession of goods alleged to have been stolen, he is under an obligation to explain how he came into such possession and that such possession is innocent. Failure to do so leads to the inescapable conclusion that he is a thief or robber."

14. Besides being in possession of the stolen items, the Appellant was positively identified by three complainants as being one of the three robbers who had terrorised them and robbed them of their items. They identified him at the police station. The Appellant was in the company of two or more others during the robbery and we are satisfied that the Learned Magistrate properly accepted evidence of PW4, PW5 and PW7 on identification The Appellant was easily identified as he was wearing a red female sweater.

15. We have considered all the grounds of appeal as against the totality of the evidence. We are of the opinion that the Learned Magistrate came to the correct conclusion in respect of the evidence on record.

We find no merit in this appeal and the same is dismissed.

JUDGMENT READ AND SIGNED ON 3RD MARCH, 2006.

MARTHA KOOME

JUDGE

3RD MARCH, 2006.

D.K. MUSINGA

JUDGE

3RD MARCH, 2006