



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Criminal Appeal No. 778 of 2003

WYCLIFFE ONDUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **WYCLIFFE ONDUNGA** was convicted for **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The Appellant was sentenced to death as by law prescribed. He was aggrieved by the courts' finding and therefore lodged this appeal.

The Appellant challenges his conviction on grounds that there was a single identifying witness whose identification was not made in positive and conducive circumstances and whose evidence the learned trial magistrate relied upon without warning herself. The Appellant also challenged the evidence adduced by the prosecution saying that it was not to the required standard. Finally the Appellant challenged the learned trial magistrates decision to reject his defence without given proper reasons for so doing.

The brief facts of the prosecution case was that the Complainant PW1 went home in his vehicle carrying his wife and child. It was 2.15 a.m. That after entering the compound and his wife and child entering the house, the Complainant walked towards the gate to lock it. That is when five men armed with pistols and other weapons. Confronted him. The Complainant said that the five appeared suddenly and he could not tell from where. That he was told to lie down and was robbed of his shoes, wallet with personal documents, cash, 10,000/-, two mobile phones, Seiko watch and a cap. That as one identified as the Appellant stepped on him, others entered his house and took a TV set and electronic shaver. From the vehicle the radio cassette and speakers were also stolen. The same morning at 10.00 a.m. the Complainant reported to the Police and identified his wallet Exhibit 1, Identity Card exhibit 2, two ATM cards, Exhibit 3, medical scheme card bearing Complainant's photo exhibit 4, amplifier exhibit 5, turn table exhibit 6, equalizer exhibit 7, turner exhibit 8 and audio-turner exhibit 9 all of which were some of things stolen from him. The Complainant also identified the Appellant who was at the Police Station. The Appellant led the Complainant and police to a house where the Complainant's speaker exhibit 10, also stolen that night was recovered. PW2, Complainants wife in her evidence told the court how each of the recovered household items were stolen from their house. She also identified them later at the Police Station. PW2 did not recognize anyone.

PW3, **PC KEVIN** and PW5 **MUGO** recovered all the exhibits from the Appellant and another, who died before the trial commenced in the lower court, the same night. The Appellant and his co-accused were

hiding in a bush within Tena Estate and watchmen had alerted PW3 and his colleagues while on patrol duties the same night.

PW4 accompanied the Complainant and the Appellant to a house where the Appellant identified and recovered one speaker, exhibit 10.

In the Appellant's unsworn defence, he said that he was arrested while sleeping at his house in Savanna Estate, sometimes in July 2002. He said that the Police Officer first woke him up and asked him to accompany them and another person in their company who had the things produced in court as exhibit, to the Police station. That he did and was placed in cells and three days later to his surprise, was charged with the offences.

The appeal was opposed.

MRS. GAKOBO represented the State in the appeal. Learned counsel submitted that even though the incident took place at night, there were street lights and security lights where the incident took place. That the robbery took 10 to 15 minutes which was sufficient time for the Complainant to identify the robbers. That in addition, PW5 a Police Officer who arrested the Appellant recovered a wallet inside the Appellant's pockets in which the Complainant's personal documents were. That the arrest was about half an hour after the robbery, and therefore, proof that the Appellant was in the group which robbed him.

We have carefully analyzed and re-evaluated the entire evidence adduced before the court, bearing in mind that we neither saw nor heard the witnesses and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**. The Appellant was convicted on the basis that the evidence adduced by the prosecution proved that he was one of those who robbed the Complainant while armed and while in the company of others, the items most of which were later recovered from the Appellant.

On the issue of identification, we agree with the Appellant that the circumstances of identification are not very clear from the evidence of PW1. While PW1 said that there was street light outside his gate and security light outside his house, he did not describe the brightness of that light. Most importantly he did not describe any of his assailants or say how they were dressed or appeared to him. That evidence was insufficient to support a finding that the Complainant identified the Appellant during the robbery. The Complainant's evidence that he identified the Appellant is not reliable given the fact that the Appellant was exposed to him at the police station seven hours after the robbery and further because the police chose not to mount an identification parade for the Complainant to identify him. There was however other strong evidence against the Appellant. According to the evidence of PW3 and PW5, the Appellant was found in possession of the Complainant's personal documents, some bearing the names and photographs of the Complainant as well as electrical household goods also identified by the Complainant and his wife as theirs. The recovery was made by PW3 and PW5, Police Officers on patrol that night at 2.30 a.m. within Tena Estate. The Complainant was robbed at Buru Buru Estate at 2.15 a.m. The recovery was made from the Appellant and his co-accused within half an hour of the said robbery.

The Appellant has challenged the evidence of PW3 and PW5 saying they contradicted each other because while PW3 said that he found the wallet and toy pistol near the Appellant, PW5 said he recovered them a distance from the Appellant.

We have carefully considered the evidence of these two witnesses and we find no such inconsistency. Both Police Officers in their evidence are clear that the Appellant had the Complainant's wallet in his pockets and the rest of the exhibits were nearby. The only variation in their evidence concerns the toy pistols which PW3 said it was on the ground while PW5 said it was on the Appellant's waist. That is a mere variation which in our view is immaterial as it does not go to the substance of the charge.

As to the recovery of the exhibits, all of them were found with the Appellant and his co-accused. The Appellant denied being near the exhibits and said he was merely woken up from sleep in his house.

Having considered the line of cross-examination of the witnesses by the Appellants, particularly PW3 and

PW5 we are satisfied that the Appellant's defence was an afterthought. The learned trial magistrate after examining the demeanour of the prosecution witnesses was satisfied that they were truthful and worthy of belief. We find no grounds on which to differ with the learned trial magistrate's opinion.

On the issue of possession, even though the learned trial magistrates did not mention it, we are satisfied that possession of the items in question, half an hour after the robbery was recent possession of the said items. We are satisfied that the doctrine of recent possession applies in this case. The learned trial magistrate was right to find that the Appellant was among those who robbed the Complainant on the night in question. Applying this doctrine, the court, the court was entitled to make an inference, which we hereby do, that the Appellant was found in possession of items recently stolen as to be the thief of the said things.

Having considered this appeal we are satisfied that the evidence of recent possession was sufficient to sustain the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. In addition to the possession of the stolen items, the evidence of the Complainant and PW2 is clear that the offence was committed by more than one person and who were armed with pistols and other undisclosed weapons. A toy pistol was also recovered in the possession of the Appellant and his co-accused. Clearly the ingredients of the offence were fully met

We find no merit in this appeal and consequently we uphold the conviction, confirm the sentence and dismiss the appeal accordingly.

Dated at Nairobi this 4th day of April, 2006.

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant - present

Mrs. Gakobo for State

Huka: Court clerk

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE

