



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 181 & 225 of 2002

(From original conviction and sentence of the Principal Magistrate's court at Nyahururu in Criminal Case No. 3332 of 1999 – W. N. Nyarima [S.R.M.]

JOSEPHAT NJOROGI GACHAU.....1ST APPELLANT

GEOFFREY LEMANGARA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, Josephat Njoroge Gachau (*hereinafter referred to as the 1st appellant*) and Geoffrey Lemangara (*hereinafter referred to as the 2nd appellant*) with another (*who was acquitted by the trial magistrate*) were charged with two counts of robbery with violence contrary to **Section 296 (2) of the Penal Code**. The particulars of the charges were that on the 19th of November 1999 at Ol Kalou Township, Nyandarua District, the appellants jointly with others while armed with dangerous weapons namely pangas and rungas robbed Phillip Mutua Musyimi and Kyusia Mutua, watchmen of Corner Shop of shoes, clothes and other items of trade as listed in the charge sheet valued at Kshs 433,410/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Phillip Mutua and Kyusia Mutua.

The appellants were alternatively charged with handling stolen goods contrary to **Section 322(2) of the Penal Code**. The particulars of the offence were that on the 19th of November 1999 at Hillside Academy Junction, Ol Kalou, otherwise than in the course of robbery with violence were dishonestly found in possession of one bag full of clothing and two traveling bags full of clothings valued at Kshs 433,000/=, the property of Beth Nyatoro Murua, knowing or having reason to believe them to be stolen goods or unlawfully obtained. The appellants pleaded not guilty to all the charges. After a full trial, the appellants were found guilty of the main charge of robbery with violence. They were sentenced to death as is mandatorily provided by the law. The appellants were aggrieved by their conviction and sentence and have appealed to this court. At the hearing of the appeals, the two separate appeals filed by the appellants were consolidated and heard as one.

The appellants, in their petitions of appeal, presented more or less similar grounds of appeal. They were aggrieved that they had been convicted based on the evidence of identification that did not stand up to legal scrutiny. They were aggrieved that the trial magistrate had convicted them based on the evidence of identification in the absence of the evidence of the first report made to the police by the complainants giving the description of their assailants. They faulted the trial magistrate for finding that they had been found in possession of the goods which had been robbed from the complainants yet there was evidence

that the said goods were not found in possession of the appellants which therefore raised doubt as to their guilt. At the hearing of the appeal, the appellants with the leave of the court presented to the court written submissions in support of their appeals. They also made oral submissions in further support of their appeals. In summary, they urged this court to find that the prosecution had not proved its case against them on the charge of robbery with violence to the required standard. Mr. Koech learned counsel for the State however disagreed with the argument made by the appellants. He submitted that the prosecution had proved its case against the appellants beyond reasonable doubt. He submitted that the goods which were stolen from the complainants were recovered in possession of the appellants soon after the said robbery. He submitted that the trial magistrate had properly applied the doctrine of recent possession to convict the appellants. He urged this court to dismiss their appeals. Before we address the issues raised by the appellants in their appeals, it is imperative that we set out the brief facts of this case.

PW1 Beth Nyatoro was the owner of a shop called Corner Shop at Ol Kalou Township. She sold school uniforms and children's wear. On the 18th of November 1999, she closed her shop at 6.30 p.m. and left for her residence. The shop was guarded at night by PW2 Phillip Mutua Musyimi and PW4 Kyusia Mutua. PW2 and PW4 testified that at about 3.00 a.m. in the morning, while they were outside the shop, they were attacked by four men who were dressed in clothes which appeared like police uniform. They were beaten and their bows and arrows taken away from them. They were taken some distance from the shop, tied up, and left under the guard of one of the robbers. The shop which they were guarding was then broken into and several items of clothing and shoes were stolen. PW2 and PW4 testified that they were able to identify the appellants as being among the gang of robbers who beat them up, broke into the shop and stole therefrom. After some time (*at about 4.00 a.m.*), PW2 and PW4 managed to untie themselves and immediately reported the robbery to the Police at Ol Kalou Police Station.

The report was made to PW5 Police Constable Francis Kimathi who together with his colleagues immediately went to the road leading to Gilgil from Ol Kalou and mounted a road block. After a short while a Nissan Matatu which was being driven by PW3 James Mureithi came by and was stopped. Upon the said motor vehicle being searched two handbags and a sack were recovered. When PW5 opened the sack, he realized that the sack was full of clothes and shoes. In one of the bags, there were high tension scissors (*calipers*), torches, pliers, two clubs, a simi, a knife, ten arrows, a military jacket and two woolen hats, among other items. PW5 then inquired from PW3 who among the passengers in the said motor vehicle was the owner of the luggage. PW3 pointed out the appellants.

PW5 immediately arrested the appellants and took them to Ol Kalou Police Station where on interrogation, they failed to explain how they came into possession of the said goods. At the police station PW2 and PW4 identified the torches which were found in the bag to be theirs. They also identified the arrows which were found in the same bag. PW5 testified that when PW1 went to the police station and saw the shoes the 2nd appellant was wearing, (*which were new leather shoes*) she identified them as one of the pair of shoes that was stolen from her shop. PW1 testified that when she went to her shop on the following day *i.e.* the 19th of November 1999, she found old shoes which had been abandoned by the robbers when they wore the new shoes which were in the shop. PW1 also identified the goods which were found in the sack that was recovered from the possession of the appellants.

PW6 Police Constable William Sayanga and PW7 Police Constable Dickson Mutemi investigated the case and reached the decision that there was sufficient evidence to prosecute the appellants for the charge of robbery with violence for which they were convicted.

When the appellants were put on their defence, the 1st appellant testified that he was arrested by the police at Ol Kalou when he was traveling in the Nissan Matatu from Nyahururu to Naivasha at 5.20 a.m. on the 19th of November 1999. He denied that he was the owner of the sack and two bags that were found in the said motor vehicle. He further denied that he was involved in the robbery or that he had been identified by PW2 and PW4 at the scene of the robbery. Similarly the 2nd appellant testified that he was arrested by the police at Ol Kalou when he was traveling in a Nissan Matatu from Nyahururu to Gilgil. He denied that the goods which were found in the said motor vehicle belonged to him. He further denied

that he was involved in the robbery or was identified at the scene by the complainants.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (See **Njoroge -vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case against the appellants to the required standard of proof beyond reasonable doubt. We have considered the submissions made by the appellants and that which was made by Mr. Koech on behalf of the State. We have also re-evaluated the evidence that was adduced by the prosecution witnesses and the defences that were offered by the appellants.

The prosecution relied on two pieces of evidence to secure the conviction of the appellants. They relied on the evidence of identification of the appellants by the two watchmen who were guarding the premise that was robbed and the recovery of some of the items which were in the motor vehicle wherein the appellants were passengers. As regard the evidence of identification, PW2 and PW4 testified that while they were outside the said premises warming themselves by the fire, four men came to where they were and pretended that they needed fire to light cigarettes. They then pounced on the two, beat them up and tied them. They took them some distance away from the said shop after which they broke into the said shop and stole therefrom several pieces of clothing and shoes which were items of trade. PW2 and PW4 testified that they were able to positively identify the appellants by the security lights which were illuminating the outside of the shop. They described the clothes which the robbers were wearing. They testified that the robbers wore what appeared to be military clothes. They did not however give the physical description of the robbers.

No evidence was adduced by the prosecution of the first report made by the said witnesses to the police giving a description of the robbers who assaulted them. PW2 and PW4 testified that it was their first time to see the robbers whom they later identified to be the appellants. In such circumstances, it was incumbent upon the police to hold a police identification parade immediately after the arrest of the suspects, in this case the appellants, to enable the witnesses who alleged to have identified the robbers to confirm their said identification of their assailants. In this case the police did not do so. In the hectic circumstances of the robbery and considering the fact that the two watchmen were beaten and injured and taken some distance away from the shop, and further putting into consideration that it was dark and the only light that illuminated outside the shop was a security lights, whose strength and power the trial court was not told by the prosecution witnesses, it is inconceivable that the said watchmen could have positively identified the appellants. In the premises therefore we are inclined to agree with the submissions by the appellants that they were not positively identified by the said two witnesses.

On the second piece of evidence i.e. that of the recovery of the stolen items soon after they were robbed from the complainants, we are of the considered view that the prosecution is on firmer ground. The appellants were arrested about two hours after the robbery incident with items which were positively identified to have been robbed from PW1's shop. PW2 and PW4 identified the torches and the arrows that were found in the bag which PW3 testified belonged to the appellants. Further the 2nd appellant was found wearing new shoes which PW1 recognised as the ones which were robbed from her shop. An old pair of shoes was found abandoned at the shop of PW1.

Although the appellants have put up spirited argument that the two bags and the sack that were recovered in the motor vehicle driven by PW3 did not belong to them, we have re-evaluated the evidence and are convinced that the appellants' assertion cannot possibly be true. This is because there were only four passengers in the said motor vehicle. The appellants were the last passengers to board the said motor vehicle. PW3 unhesitatingly pointed out the appellants as the owners of the three pieces of luggage that were in the said motor vehicle. He could not have been mistaken as to the identity of the appellants as they were the last passengers to board the motor vehicle and presumably he must have assisted them to load the said bags and sack into the motor vehicle.

We are satisfied that the doctrine of recent possession applies in this case. The facts of this case reveal that certain items were stolen from the shop of PW1 at about 3.00 a.m. Torches and arrows were robbed from PW2 and PW4, the watchmen who were guarding the premises during that time. At 5.30 a.m., about 2¹/₂ hours later the said items which were stolen from the shop of PW1 and the torches and arrows which were robbed from the watchmen were found in bags and a sack which were in the possession of the appellants. The only inference that can be gleaned from the above facts is that the appellants were in possession of the said items because they had robbed them from the shop of PW1 and from PW2 and PW4. The appellants did not give an explanation of how they came into possession of the said items which were later confirmed by PW1, PW2 and PW4 to have been robbed from them (See **Malingi –vs- Republic [1989] KLR 225**). The defence offered by the appellants does not in any way displace the presumption that they were in possession of the said stolen items because they robbed them from the complainants.

In the premises therefore, we hold that the prosecution proved its case to the required standard of proof beyond reasonable doubt that the appellants robbed the complainants of their properties and in the course of that robbery injured PW2 and PW4. We therefore find no merit with the appeals filed by the appellants. We dismiss the said appeals. Their conviction and sentence is hereby confirmed. It is so ordered.

DATED at NAKURU this 22nd day of May 2006.

MUGA APONDI

JUDGE

L. KIMARU

JUDGE