



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(NAIROBI LAW COURTS)

Criminal Appeal 737 & 738 of 2003

**(From original conviction (s) and Sentence(s) in Criminal case No. 2877 of 2002 of the
Chief Magistrate’s Court at Nairobi (Injene Indeche – SPM)**

FREDRICK ODUOR OMONDI.....
.....APPELLANT

VERSUS

REPUBLIC.....
.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 738 OF 2003

**(From original conviction (s) and Sentence(s) in Criminal case No. 2877 of 2002 of the Chief
Magistrate’s Court at Nairobi (Injene Indeche – SPM)**

JOSEPH OKOTH NDIEGE.....
.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

FREDRICK ODUOR OMONDI 1st Appellant and JOSEPH OKOTH NDIEGE the 2nd Appellant were the 3rd and 1st accused persons in their trial before the lower court in which both Appellants together with their co-accused were both jointly charged with **ROBBERY WITH VIOLENCE contrary to **section 296(2)** of the Penal Code. The 1st Appellant faced an alternative count of **HANDLING STOLEN GOODS** contrary to **Section 322(2)** of the Penal Code. He also faced a second count of **BEING IN POSSESSION OF A TOY PISTOL** contrary to **section 26(1) (d)** as read with **Section 26(2) of the Firearms Act**. After a full trial the 1st and 2nd Appellant were convicted of the first count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code and were sentenced to**

death as prescribed in the law. On the second count the 1st Appellant was convicted and sentenced to 7 years imprisonment. However the sentence in count II was held in abeyance. It is out of the conviction and the sentences that both Appellants now appeal to this court.

The 1st Appellant challenges his conviction on grounds that the evidence adduced was circumstantial and therefore the weakest form of evidence. That the evidence of PW7 ought not to have been admitted since it was not made on oath, that the evidence adduced did not meet the required standard of proof and finally that the learned trial magistrate erred in rejecting his defence. The 2nd Appellant on his part challenged the conviction on the basis the evidence of PW2 and PW3 was that of accomplices and therefore not credible, that the learned trial magistrate erred in admitting the 2nd appellants repudiated and retracted statements. That the evidence of recovery ought not to have been relied upon that the evidence adduced by the prosecution was insufficient and contradicted and finally that his defence was rejected without any explanation being made.

The brief facts of the case were that on the material day the Complainant left her houseboy, PW2 at home where she had kept shop goods which she had imported not long before then. That on the same day at 2.00 p.m. PW3 **Gitau** a driver employed to drive motor vehicle registration number KRB 896 was approached by the 1st Appellant. The 1st Appellant hired him to carry goods from Mountain View to take to somewhere he did not disclose which he did. PW3 said that they collected 5 cartons and 2 sacks similar to exhibits in court at a house in Mountain View. On the way to the house they carried the 2nd Appellant. At the house in Mountain View he found the 2nd accused. That after doing the job the 1st Appellant promised to pay him Kshs.500/-. That when he never did PW3 went to Kabete Police Station to report. That is when he was arrested.

The next day at 6.30 a.m., PW4 acting on some information got the 2nd Appellant who led him to the house of the 1st Appellant where all the exhibits were recovered. The Complainant identified all of them as hers. Also arrested was the 1st Appellant and the Appellant's co-accused in the lower court.

PW8 and PW9 said that both Appellants and their co-accused had hired their pick-up at 10.30 a.m. on 5th November but on reaching Mountain View where the goods were they told them they had no keys. PW8 and PW9 left them there. PW8 was the driver while PW9 was the turn boy. Eventually the 1st Appellant made a statement under inquiry with PW7 **IP Mukabura** whose production he did not object. In it he implicated the 2nd Appellant as the one who asked him to assist him carry the goods in question. The statement exhibit 18 corroborated the evidence of PW3, PW9 and PW8. The 2nd Appellant's statement under inquiry which was admitted after a trial within a trial was exhibit 17 in the case. It is missing in the record of proceedings. At page J2 and J3 of the judgment the learned trial magistrate observed: -

“While the first statement under inquiry was objected to the second (sic) was omitted in evidence without any fuss”.

The learned trial magistrate has however not referred to it at all in his judgment. This is rather curious. Once a statement made by an accused person during the investigation into a case is admitted in evidence, it ought to be considered alongside other evidence adduced in the case. We shall demonstrate in this case why we think it was very important to evaluate the statements under inquiry.

We have carefully considered this appeal and have evaluated and analyzed the evidence afresh while bearing in mind our duty as a first appellate court as expressed in many cases including **OKENO vs. REPUBLIC 1972 EA 32.**

Mr. Makura learned counsel for the State opposed both the Appellant's appeals. Counsel submitted that the 1st Appellant was positively identified by the Complainant as the one who threatened him as he tried to resist the arrest. Counsel further submitted that the 1st Appellant was found with the Complainant's stolen items one day after the robbery and therefore the doctrine of recent possession

applied. That in regard to the 2nd Appellant he was identified by PW2 as one of those at the scene of crime and also implicated in the 1st Appellant's statement which received corroboration in evidence and was sufficient to justify a conviction.

Learned counsel for the Appellant did not get his facts correct and it appears to us that he did not quite prepare for this appeal. PW1, the Complainant in this case was not present at the time of the robbery. When PW1 identified the 1st Appellant, it was in connection to what PW2 her employee, had told her concerning him. The information was that the 1st Appellant had gone to the Complainant's house some days before the date of this incidence. That identification of the 1st Appellant by the Complainant was worthless as it had no nexus with the evidence of the date in question.

Most of the grounds of appeal raised by both Appellants challenges the evidential value of the evidence of various witness whose evidence formed the basis of their convictions. PW2 and PW3 have been classified as accomplices by the 2nd Appellant, while the 1st Appellant contended that the evidence taken from PW7, **IP Mukabura** was not under oath and ought not to have been admitted. PW7 **IP Mukabura** gave his evidence on oath and all he did was to produce the 1st Appellant's statement under inquiry exhibit 18. The evidence he gave related only to the manner in which he took the 1st Appellant's statement under inquiry which statement was admitted in evidence without any objection by the 1st Appellant. PW7's evidence was good, credible and admissible having been made on oath as required. PW2 in his evidence claimed that six men confronted him at the Complainant's home where he worked after one of them told him to open for his employer who was on the way. PW2 then said that he was escorted to his quarters by the six men and tied up. Later he claimed that the robbers loosened the knots and after they left, he untied himself and asked securicor to call his employer.

PW3 was the man hired to carry the Complainant's goods from her house at Mountain View to a place he did not specify. PW3 said that he was found at his base where he stations himself waiting for customers, which is Kangemi Centre. That he later met police the following day and on being questioned he admitted having carried goods from Mountain View for certain customers.

In **OBIRI vs. REPUBLIC 1981 KLR 493** at 496 **Madan, Miller** and **Potter JJA** found a driver hired to ferry stolen goods was not an accomplice. They stated thus:

“The Appellant made an unsworn statement in which he denied knowing anything about the maize. The third accused (who was acquitted) was the driver of the vehicle who merely said that his vehicle had been hired by the Appellant to transport the maize. He was in no way an accomplice.”

Likewise in the instant case PW3 was merely hired to transport the stolen electronic equipment and goods and was therefore in no way an accomplice. As for PW2, there is no doubt that he was an accomplice and his evidence needed to be taken with caution. In **Nguku vs. Republic 1985 KLR 412 Hancox, JA, Platt and Gachuhi Ag. JJA**, held thus concerning the handling of and the weight to be given to accomplice evidence: -

“Holding 3. In dealing with the evidence of an accomplice, the court should first establish whether the accomplice is a credible witness and then look for some independent evidence as corroboration connecting the accused person with the offence.”

In this case we have found that PW2 was not a credible witness. However we have found other evidence connecting the two Appellants to this offence both in the unretracted confession of the 1st Appellant in his statement under inquiry, the recovery of the exhibits from the 1st Appellant after the 2nd Appellant led police to his house and the evidence of PW3, PW8 and PW9 albeit weakened by lack of identification in properly mounted identification parades. The act of leading police to 1st Appellant's house by the 2nd Appellant was credible evidence against him incriminating him and connecting him to the offence.

PW4 CPL. **Mwatha** who went to the Complainant's house soon after the robbery interviewed PW2. What PW2 told him was that persons had gone to the home pretending to have been sent to collect the goods to take them to town. That he was grabbed when he opened the gates. PW2 did not say so in his evidence in court. In court he gave a totally different story.

PW2 does not impress us as one who was a victim of a crime. His reasoning is quite suspect; for instance circumstances which he opened the gate to strangers. On the material day, PW2 said that he heard a knock on the gate. That he went and opened to a stranger. That he was informed that his employer was on his way. That as he made to close the gate six men pounced on him. One may have allowed that explanation to slip by except when one considers his explanation to PW4 and his explanation concerning his immobilization by the intruders. PW2 said: -

“I was slapped twice and knife pointed on my heard. They tied my hands and legs. They covered me with a vehicle tent. I then heard the sound of a vehicle tend and poured (sic) water on my abdomen. He then loosened the ropes. I struggled and removed the ropes.”

PW2 could not have been a honest witness and his evidence that he was tied up to 2 hours and at the end of it the knots were loosened by the thugs before they left is incredible, taken together with his evidence that he opened for a total stranger just before he told him that his employer was on his way and yet the employer was nowhere. The same witness totally gave a different statement to PW4. Both these explanations smacks of dishonesty and the reason is that PW2 was an accomplice to the theft of the Complainant's goods and not a victim of robbery. That is the only plausible explanation for his inconsistency on statements and explanations.

PW3 was different. He was hired from his base. He did not need to make inquiries as to ownership of the house and the goods as no suspicions were raised judging from the evidence on record. PW3's honesty and genuineness comes out explicitly by his admission to the police that he had been hired to carry goods from Mountain View. He made that admission without any hesitation at all. His evidence raises no uneasiness as that of PW2 and therefore PW3's evidence cannot be treated like that of an accomplice.

The 2nd Appellant's complaint that his statement was admitted irregularly has no basis. A retracted and or repudiated statement is admissible provided that this is done after a trial within a trial. The learned trial magistrate conducted a trial within trial before admitting the 2nd Appellant's statement. In the learned trial Magistrate's ruling at the close of the trial within trial, he observed that the 2nd Appellant had made the statement voluntarily since those he alleged beat him were not PW5, the statement recording officer and neither was it done in his presence. The grounds given to admit the statement were sound. We have considered the evidence of PW5 in the trial within trial and we are satisfied that the Judges rules were complied with at the time the statements were made.

On the evidence of recovery of the exhibits not being reliable evidence, the exhibits were recovered by PW4 the night and early hours of the morning following the theft. We do not see why that evidence should not have been relied upon. PW4 had acted on information he received from an undisclosed source. The learned trial magistrate correctly did not admit the information as evidence, PW4 in his evidence clearly and vividly explained how he searched some 3 houses and recovered the exhibits 1 to 16 and arrested six people. Four people including the 2nd Appellant were arrested in the first house and one each in two other houses. After he took them to the station, PW2 who was under arrest and in the cells identified the 2nd Appellant. That is when the 2nd Appellant led PW4 to the 1st Appellant's house where all the exhibits were recovered. The evidence of recovery of these exhibits was good and admissible and the learned trial magistrate was right to consider and rely on it in his judgment.

On the sufficiency of the evidence we find that the learned trial magistrate misapplied the law when he failed to take into account the repudiated statement of the 2nd Appellant. That statement, produced as exhibit 17 is now not on record and is missing in the original file. It was important to summarize what the 2nd Appellant said in that statement in order to see whether there was any evidence from the

prosecution which could support or corroborate it. It was a very important piece of evidence. The statement of the 1st Appellant was considered and analyzed at page J5 of the Judgment before it was rejected for being untrue. The same way that of the 2nd Appellant ought to have been considered.

We have considered the 1st Appellant's confession in his statement under inquiry, exhibit 18 and find that the content of the events of that day are consistent with the prosecution evidence and therefore there was some corroboration. In the statement the 1st Appellant describes how they hired the first car to take them to Mountain View but that they did not use it to ferry the goods. That piece of evidence tallies with the evidence of PW8 and PW9, the driver and turn boy who said that the two Appellants and their co-accused in the lower court hired them but on reaching where the goods were to be ferried from at Mountain View, they informed them that they did not have the keys. It was 10.30 a.m.

The 1st Appellant continued to state how he went later the same day and hired another vehicle which he rode back to Mountain View with and on the way they carried the 2nd Appellant. He stated that they used the vehicle to ferry the goods from Mountain View to his house. The 1st Appellant stated that he rode with the hired vehicle to Kangemi where he alighted and promised to pay the hire charges later. PW3's evidence is in tandem with that piece of evidence to the minute details of how the 2nd Appellant was found on the way to Mountain View and carried and how PW3 was not paid after dropping the 1st Appellant to Kangemi.

That statement by the 1st Appellant also brings out a very important fact which is supported in the evidence of PW3. The fact that no threats were used on anyone at the gate to the house; in fact the statement shows that things had already been packed ready for loading onto the vehicle. PW3 likewise did not testify of any violence or threat to violence having been visited on any one. That brings out a new angle and an important one at that to this case, was there any robbery with violence committed against PW2? We do not think that the evidence adduced in this case supports a finding of **ROBBERY WITH VIOLENCE**. We agree with the interpretations given by the learned trial magistrate in considering what constitutes an offence under **Section 296(2)** of the **Penal Code**. However, the learned trial magistrate misdirected himself as to certain important aspects of the case and certain facts and therefore fell into great error. PW2 was an accomplice and therefore his evidence needed to be treated with great care. The learned trial magistrate did not treat it with caution. We have already analyzed the evidence of this witness and have shown why we concluded that he was an accomplice. The only reasonable conclusion one can arrive at in the circumstances of this case is that the Appellants and their co-accused together with PW2 were all co-conspirators to the theft of the Complainant's goods. PW2 was not a victim and therefore robbery with violence contrary to **Section 296(2)** of the Penal Code as known in law could not have been committed against him. He was a co-thief, a principle offender to the crime. So, no violence could have been visited on him and further neither could any dangerous or offensive weapon could have been used on him. The offence committed could not have been under Section 296(2) of the Penal Code. The learned trial magistrate misapprehended the facts of the case and therefore fell into grave error.

Just for completion sake we wish to mention that PW2 needed not identify the 1st Appellant in an identification parade as he knew him before. PW8 and PW9 ought to have identified the Appellants and their co-accused and PW3 the 1st Appellant and his co-accused in identification parades. This witness had not seen the respective Appellants and their co-accused before. However no identification parades were conducted leaving only the statement under inquiry of the 1st Appellant which was corroborated by the evidence of PW3. The statement exhibit 18 gave a true account of what happened and could safely be used in evidence to sustain a conviction. The other evidence left standing was that of the recovery of exhibits in the 1st Appellant's house which was one day after the incident and was proof that the 1st Appellant was more of the thief than the handler. The other surviving evidence was that of PW4 as against the 2nd Appellant that indeed he led to the 1st Appellant and to the recovery of the stolen exhibits.

We now wish to examine the Appellant's defences. The 1st Appellant denied that any exhibits were recovered in his house and denied involvement in the crime. The 2nd Appellant denied that he led police

to arrest the 1st Appellant and recovery the exhibits.

Certainly analyzing this evidence against that of PW4 the arresting officer, both Appellants were not telling the truth and their denials are merely self-serving statements. PW4's evidence was clear that the 2nd Appellant led him to the 1st Appellant's house where the exhibits were recovered. The 1st Appellant statement reveals the same thing.

Having considered this appeal at length we find evidence adduced was strong to sustain a conviction for the lesser offence of stealing from a dwelling house contrary to Section 279(b) of the Penal Code. That offence is committed in one of two circumstances and in the instant case we find it was committed in that exhibits 1 – 16 were removed from the Complainant's house at Mountain View where she had stored them. Under powers conferred to this Court under **Section 354(3) (ii)** of the Criminal Procedure Code, we alter the finding of the trial court by setting aside a conviction for **ROBBERY WITH VIOLENCE** contrary to **section 296(2)** of the Penal Code and in substitution thereof find the two Appellants guilty and convict them accordingly for the offence of stealing from a dwelling house contrary to **Section 279(b)** of the Penal Code. We set aside the sentence of death and deter sentence until we hear the Appellants in mitigation.

The 1st Appellant faced counts 2 and 3 of possession of toy pistol contrary to **Section 26(1) (d)** of **Firearms Act. Section 26(1)** of the Act provides: -

“Section 26(1) no person other than a person in the service of the Government acting in his capacity as such and authorized in writing in that behalf by the Minister or a person of a class for the time being authorized in that behalf by the Minister by notice in the Gazette, shall sell, transfer, purchase, acquire or have in his possession.

(d) any firearm or ammunition specified, or of a class or type specified, by the minister by notice in the Gazette; or..”

No evidence was adduced by the prosecution in that case to bring the alleged toy pistol within the provisions of Section 26 of the Act, specifically of a class or type specified in a Gazette. The prosecution should have produced the gazette to prove that the toy pistol found with the 1st Appellant fell within that Section of the Act. The offence was not proved. We quash the conviction entered in counts 2 and 3 and set aside the sentences.

The upshot of these appeals is that the appeal by the 1st Appellant against conviction and sentence in counts 2 and 3 is allowed, conviction quashed and sentences set aside.

The appeals of both Appellants in count 1 succeed in part. The conviction for the offence of **ROBBERY WITH VIOLENCE** contrary to **section 296(2)** of the Penal Code is set aside and substituted with one of **STEALING FROM A DWELLING HOUSE** contrary to **section 279(b)** of the Penal Code under powers of this Court provided under **Section 354 (3) (ii)** of the Criminal Procedure Code. Sentence is differed pending mitigation by both appellants.

Those are the orders of this court.

Dated at Nairobi this 31st day of July 2006.

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LESIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant(s) present

Mr. Makura for the State

Huka/Erick – Court clerks

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE