



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 523, 524 & 525 of 2001

(From original conviction and sentence in Criminal Case No. 1220 of 2001 of the Chief Magistrate's Court at Nakuru –

S. MUKETI. - S.R.M)

SOLOMON LOKWAWI LOBUNI1ST
APPELLANT

EDWARD ECHAPAN LOKITOI.....2ND APPELLANT

JOSEPH LOMISI ECHUKULE.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT OF THE COURT

The three appellants **Solomon Lokwawi Lobuni**, **Edward Echapan Lokitoi** and **Joseph Lomisi Echukule** were charged with the offence of robbery with violence contrary to section 296 (2) of the penal code.

They also faced an alternative charge of handling stolen property contrary to section 322(2) of the penal code.

The particulars of the offence as stated in the charge were that, on the night of the 28th and 29th day of May, 2001 at Rumwe Farmers Co-operation Society Njoro in Nakuru District of the Rift Valley Province jointly with others not before court, being armed with dangerous weapons namely pangas, rungus and iron bars robbed **Michael Kitara** of one hand bag, 3 metal tea cups, 12 cups, 96 spoons, 2 kg of sugar, 2 tins of milo, packets of tea leaves, 1 packet of omo, 1 lantern lamp, 1 hunting knife, 4 pipewrench No. 24, 1 sugar dish and cash Kshs.67,082/= all valued at Kshs.87,004/= and or immediately before or immediately after the time of such robbery wounded the said Michael Kitara.

The appellants also faced an alternative charge of handling stolen property contrary to section 322 (2) of the penal code. The particulars of the charge in respect of the 1st appellant were that on the 30th day of May, 2001, at Industrial Estate Njoro in Nakuru District of the Rift Valley Province otherwise than in the cause of stealing, dishonestly retained 20 metal tea cups, 1 lantern lamp and 5 spoons knowing or having reasons to believe them to be stolen goods.

Similarly, the **second appellant Edward Echapan Lokitoi** faced the alternative charge of handling stolen property contrary to section 322 (2) of the penal code and the particulars were that on the 30th day of May, 2001 at Industrial Estate Njoro in Nakuru District of the Rift Valley Province jointly, otherwise than in the course of stealing dishonestly retained 5 spoons knowing or having reasons to believe them to be stolen goods.

The **third appellant Joseph Lomisi** faced a similar alternative charge of handling stolen property contrary to section 322 (2) of the penal code.

The particulars are that on 30th day of May, 2001 at Industrial Estate Njoro in Nakuru District of the Rift Valley Province otherwise in the course of stealing dishonestly retained 15 spoons knowing or having reasons to believe them to be stolen goods.

The appellants pleaded not guilty to the charges and after a full trial, were found guilty of the main count of robbery with violence and sentenced to the mandatory death sentence as per the law provided. The second accused person **Jackson Ambolo Akonya** was however discharged by the trial court for lack of evidence.

The three appellants being dissatisfied with their conviction and sentence have appealed to this Court and raised several grounds of appeal which we shall summarise herebelow.

During the hearing of this appeal, Appeal Nos. 523, 524 and 525 of 2001 were consolidated for the purposes of the hearing and determination of this appeal.

The appellants were dissatisfied with the judgement of the trial court for reasons that the magistrate relied on contradictory and uncorroborated evidence by the prosecution witnesses on both identification and recovery of items allegedly stolen. The appellants raised their misgivings over the way the trial court failed to consider their statement of defence. The appellants also attacked the prosecution of the case which left gaps as they contended, that the Investigation Officer was not called as a witness. Moreover the complainant did not record or disclose that the items that were allegedly stolen had been marked “**RF**”. Finally the appellants submitted that the charge sheet was defective as the items therein indicated as stolen items were not supported by the evidence of the PW 2 who was working for Rumwe Farmers Co-operative Society at the material time.

The evidence that led to the conviction and sentence of the appellants was given by a total of seven (7) prosecution witnesses.

Briefly stated, it was the prosecution’s case that on 28th May, 2001 **Michael Kitara (PW1)** who was guarding the offices of Rumwe Farmers Co-operative at about 1.00 a.m. at night was attacked by a gang of eight people, and was seriously injured who while armed with pangas, rungs and hammer, tied him on his hands and legs and gagged his mouth with a piece of clothes. Thereafter, the gang of robbers broke into the offices of Rumwe Farmers which PW 1 was guarding. He testified that he had seen them carrying away cartons. PW 1 managed to call neighbours who took him to hospital. He later recorded a statement with the police and was called at a police identification parade. He was able to identify the 1st appellant. **Paul Kamau Mweha (PW 2)** was the manager of Rumwe Co-operative Society. He confirmed that the offices of Rumwe Farmers were broken into on the 28th May, 2001. A total of Kshs.67,082/= was stolen, a chimney lamp, handbag, clips, about 12 cups, tea leaves and sugar. He reported the matter to the police and on 31st May, 2001 he was called to the police station where he was able to identify 20 cups, 25 spoons which he identified as belonging to Rumwe Farmers Co-operative Society. He also identified a lamp which was bearing the mark of “**RF**” and similarly the spoons and cups bore a similar mark of “**RF**”. This witness said that out of the 96 spoons that were stolen only 25 were recovered.

Joseph Lokolonyei (PW 3) was also guarding the premises of Rumwe Co-operative Farm, on the material date, he narrated to the trial court how a gang of about 9 robbers, who were armed with pangas,

a sword and rungu, they attacked him and took him to the office where they tied him alongside PW 1 and then proceeded to break into the office. PW 3 was taken to the police station and later to the hospital where he was treated. Later on he was called at a police identification parade and managed to identify the four accused persons. He said there was lights at the place, and he held a conversation with the 1st appellant who held him by the hands. As regards the second appellant he said he had unique feature that helped him identify him.

Further prosecution evidence was led by **Joseph Ndwiga (PW 4)** a police officer attached to Njoro Crime Branch. He received the report of the robbery from PW 1 and PW 3 who were watchmen at Rumwe Farm. He visited the scene and found the office had been broken into and money and other items were stolen. Acting on information about possible suspects he invaded the house of the 1st appellant and recovered 20 cups and 5 spoons, and a lantern, in the house of the second appellant he found 5 spoons. The 2nd accused who was acquitted by the trial court took the police to the house of the 3rd appellant where they recovered 15 spoons. On 31st May, 2001 the company Secretary of Rumwe Farmers identified the items recovered and thus he proceeded to charge the appellants with the offence of robbery with violence.

Inspector Dalmas Ongeri (PW 5) conducted the identification parade where the appellants were identified. He was attached to Likia Police Station at the material time and he was called at Njoro Police Station to conduct the identification parade.

Benard Nyandema (PW 6) is the clinical officer who examined PW 1 and PW 2, he confirmed the injuries that they suffered as a result of the alleged assaults. It is on the basis of the above evidence that the appellants were put on their defence, they all gave a sworn statement of defence. Each of the appellants denied having had any involvement with the robbery. Further defence evidence was given by **Inspector Benson** who produced the Occurrence Book where the incident was recorded on 29th May, 2001.

In the Judgement of the trial court, the learned magistrate acquitted the 2nd accused but convicted the 1st, 2nd and 3rd appellants. Emphasis was attached to the evidence that the appellants were found in possession of items that were robbed from the premises of Rumwe Farmers and such items were positively identified as they bore the mark of “**RF**”.

Mr. Koech, the learned Senior State Counsel supported both the conviction and sentence. He submitted that the conviction was based on the evidence of recovery of the items that were stolen and the identification of the appellants. The first appellant was identified by both PW 1 and PW 3 while PW 3 was able to identify all the appellants. The robbery took place on the night of 28th May, 2001 and several items were recovered on 29th May, 2001 and they were duly identified by PW 2 who was working at Rumwe Farmers and all the items bore the mark “**RF**” and thus the doctrine of recent possession applied.

In considering the appeal, the duty imposed on this court was stated in the case of ***Okeno -Vs - Republic 1972 E.A. 32***, which simply put mandates this court to re-evaluate the entire evidence and subject it to independent scrutiny and arrive at an independent decision on whether or not to allow the appeal.

Having carefully considered the evidence, we have identified four principle issues raised in the appeal, to wit; investigations, identification, contradictory evidence and uncorroborated evidence of recent possession of stolen property and the defence by the appellants on which this appeal turns.

On the issue of investigation, there is evidence by **PW 4**, the Investigating and Arresting officer who give evidence on how, while acting on information, he raided the houses of the appellants and recovered certain items which were **identified by PW 2**. Although an identification parade was also carried out where the appellants were identified, this evidence was not relied on by the trial court. While evaluating the evidence, the trial court sufficiently took caution in relying on the evidence of identification especially where the circumstances can be said to have been difficult. In this case the trial court observed in the judgement as follows:

“The watchmen attacked purported to identify the accused persons and indeed did so at the identification parade. They did not however describe the circumstances under which they were able to identify them in details – though they said there was plenty of light, had this been the only evidence then it would have been unsafe to convict. However, in this case there is some other corroborating evidence.”

In this case, the trial magistrate did not rely on the evidence of identification alone but considered the other evidence of the recovery of stolen items found in possession of the appellants. As it was held in the case of *MAITANYI –VS – REPUBLIC 1986 1 KAR 75*

“Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care in evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence. When it be circumstantial or direct pointing to guilt, from whom a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of single witness can safely be accepted from the possession of error”

Similarly in this case, the trial court did not base the conviction of the appellants on this evidence but on the basis that the appellants were arrested with items that were stolen and while applying the doctrine of recent possession which stems out of the presumption of a fact under section 119 of the evidence Act which provides:-

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of actual events, human conduct and public and private business, in their relation to the facts of the particular case”

See Case of Republic -VS- Hassan S/O Mohammed [1948] 25 EACA 121)

Thus we find the trial court properly established that the items that were found in possession of the appellants had been stolen a few days before they were recovered. The said items were positively identified and there were no co-existing circumstances which point to any other person as having been in possession of the items other than the appellants.

We have carefully considered the defence offered by the appellants and the allegation that there is a possibility that the items that were recovered, were marked with sign of “RF” at the police station. In our own view, this allegation is preposterous, it is inconceivable that the police can go out of their way to place an indelible mark on the property in order to implicate them with a charge of robbery with violence.

Thus we find the defence by the appellants did not shake the otherwise strong prosecution case.

As regards the argument that there was inconsistency in the prosecution evidence, we find no material variance and the minor discrepancy did not affect the weight of the prosecution’s evidence and had not in any way occasioned any miscarriage of justice on the part of the appellants.

Accordingly we are satisfied that the prosecution proved its case against the appellants beyond reasonable doubt and the appellants were properly convicted. We uphold their conviction and order the appeals dismissed. The conviction and the sentence imposed on the appellants is hereby confirmed.

Judgement dated at Nakuru this 13th day of July, 2006.

MARTHA KOOME

JUDGE

L. KIMARU

JUDGE