



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL APPEAL 573,574 & 575 OF 2003

[From original conviction and sentence in Criminal Case No. 2388 of 2001 of Chief Magistrate's Court, at Nakuru–N. O. Ateya - (SPM), Esq.]

PETER LOTIMU ISINYONI.....1ST APPELLANT

FRANCIS LOKAI EWATON.....2ND APPELLANT

JAMES EMATHE EWATON.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT OF THE COURT

The three appellants, **Peter Lotimu Isinyoni** [1st Appellant], **Francis Lokai Ewaton** [2nd Appellant], **James Emathe Ewaton** [3rd Appellant] were jointly charged with the offence of robbery with violence contrary to section 296(2) of the penal code.

The particulars of the charge stated that:-

“On the 13th day of November, 2001, at Kilemba Farm Bahati in Nakuru District of the Rift Valley Province, jointly with others not before court, being armed with dangerous weapons namely pangas and rungun robbed Stephen Muthee Mugi of 2 lessos, 3 pairs of slippers, one television set make Great wall, pieces of supermatch cigarette, 5 pieces of sportsman cigarettes, a pair of dry cell batteries, one bicycle, 3 pencils, 1 bottle of nice and lovely lotion, cash Kshs.17,000/= all valued at Kshs.27,111/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Stephen Muthee Mugi.”

After a full trial, the appellants were convicted and sentenced to the mandatory death sentence. The appellants have appealed against the conviction and sentence and during the hearing of this appeal, all the appeals relating to the 1st, 2nd and 3rd appellants were consolidated as one appeal.

The appellants took issue with the conviction which they allege was based on circumstantial evidence. The learned trial magistrate relied on insufficient and contradictory evidence which was not based on any eye witnesses to link the appellants with the offence they were charged with.

The appellants also faulted the trial court for failing to consider their sworn statement of defence which

they argued could have entitled them to an acquittal.

The evidence which was adduced by the prosecution to secure the conviction of the appellant was based on the recovery of stolen goods which were allegedly recovered a short while after the goods were stolen. The complainant did not identify his assailants and therefore the only evidence that led to the conviction of the appellants was recovery of the stolen items in possession of the appellants and the confession by the appellants which was accepted by the trial court. The evidence may be summarized briefly.

On 13th November, 2001 at about 2.00 a.m. the complainant **Stephen Muthee Mugi** was in his house at Kilemba Farm Solai with his wife and children. While they were sleeping his house was violently broken into and people who were armed with pangas, rungas and bright torches ordered him to give them money. He gave them Kshs.17,000/=, which they took and then tied PW1 and his wife around the mouth with pieces of clothes. After a while, PW1 untied himself and looked around the house and saw his T.V. was missing, a hero bicycle, three pairs of slippers, one lessso, one headscarf, a pair of batteries, one nice and lovely, 3 pencils, 6 super match and 5 sportsman, and TV aerial. PW1 summoned the neighbours who grouped themselves, and decided to follow the footsteps, (it had raised). Among the neighbours were **Joseph Mwangi [PW3]** and **Josephat Kinuthia [PW4]**. They followed the footsteps for about 3½ kilometres up to the house of the 1st appellant; PW 1 told the court that he saw a lessso on the bed and the headscarf, the T.V. aerial and the bottle of Nice and lovely. When PW 1 and other neighbours questioned the 1st appellant he took them behind the house where he had hidden the T.V. and the bicycle. They escorted the 1st appellant to the DO's Office at Solai Centre and he agreed to show them the house of the 2nd and 3rd appellants. According to the appellant, he recovered the three pairs of slippers, 3 pencils and the super match and sportsman cigarettes and cash Kshs.2,672/= from the house of the 2nd and 3rd appellant.

The evidence by PW3 is materially similar to that which PW 1 gave during cross-examination by the 3rd appellant. He said that nothing was found in the house of the 3rd appellant while the evidence of PW4 was that the 3rd appellant was found in the house of the 2nd appellant with cigarettes.

Put on their defences, the appellants gave sworn statements in defence. They all denied any connection with the robbery. The 1st appellant's defence was that on the material day at about 6.30 a.m. a group of about six people descended on him while accusing him of having been involved in a case of murder. He managed to escape and hid in the toilet while his wife ran to report to the AP camp. The strangers took away his wife's lessso and headscarf and when he went to report the matter at the police station he was arrested and charged together with the 2nd and 3rd appellant. Similarly, the 2nd appellant denied any involvement in the robbery and claimed that the money that was found in his possession kshs.2,670/= was his own money. The 3rd appellant's defence was that he was found drinking changaa when he was arrested and nothing was found in him when he was searched.

On the part of the state, this appeal was opposed, the **learned Senior State Counsel, Mr. Koech** supported the conviction which he submitted was based on the evidence of recoveries of stolen property immediately after they were stolen. This being the first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced and arrive at its own independent determination on the guilt or otherwise of the appellant.

By the doctrine of recent possession, where an accused person 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 the thief or robber.

In this case, the evidence by PW1, PW3 and PW4 clearly set out how these witnesses followed the footprints from the scene of robbery and they led them to the house of the 1st appellant. In the house of the 1st appellant, they found some of the properties that were robbed from PW1 a few hours ago, the 1st appellant also showed them where he had kept the other items namely the T.V. and the bicycle.

The learned trial magistrate visited the scene. The T.V. and the bicycle were found about 4 metres from the appellant's house in a maize plantation. The trial magistrate saw these witnesses when he visited the scene and believed their evidence. Having re-evaluated the entire evidence, we are satisfied that the defence offered by the 1st appellant was not satisfactory and did not otherwise dent the strong case by the prosecution witnesses. We find the conviction of the 1st appellant was based on clear and cogent evidence by the prosecution witnesses and the confession that was accepted by the trial court. We have also noted that the trial court admitted the cautionary statement after a trial within a trial. The trial court had an opportunity of assessing the credibility of the witness.

See (Ogol -Vs- Murithi 1985 KLR 359)

The law on the weight to be given to a repudiated confession is now settled (*See Tuwamoi –Vs- Ugundu 1967 EA 84*). The Court had this to say at page 91 paras. F & g.

“A trial court should accept any confession which has been retracted or repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in the material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.”

In this case we would uphold the conviction of the 1st appellant but as regards the 2nd appellant and 3rd appellants, there are inconsistencies regarding the properties that were found in their possession and more so their identification.

Firstly, it is not in dispute that the 3rd appellant was found in the house of the 2nd appellant. There are no items that were found in the house of the 3rd appellant. While in the house of the 2nd appellant, PW1 alleged that they found three pairs of slippers, three pencils and cash Kshs.2,670/= which he said was stolen from him.

PW2 said that the 3rd appellant was found with cigarettes. We are of the considered view that a conviction of the second and third appellant based on this evidence would be unsafe. It was very difficult for the complainant to identify the money that was recovered from the 2nd appellant, Kshs.2,670/=, whether it is his money or whether it belonged to the 2nd appellant. The complainant said Kshs.17,000/= was stolen from him during the violent robbery. But on his defence the 2nd appellant claimed that the sum of Kshs.2,670/= was his hard earned money and in this regard we hold that the conviction of the 2nd and 3rd appellant was unsafe. Further more, there were discrepancies found in the evidence of PW1, PW3 and PW4 as to the actual items that were found in possession of the 2nd appellant, these would appear to be items that were stolen from a shop, that the three pencils, 3 pairs of slippers and cigarettes were stock in trade and the complainant did not identify these particular items. Moreover, the 3rd appellant claimed in his defence that the cigarettes were his and he explained he had sent a child to purchase for him.

For the above reasons we dismiss the appeal in respect of the 1st appellant whose conviction we uphold. We allow the appeal against conviction and sentence of the 2nd and 3rd appellant, with the result that their conviction is quashed and the sentence is set aside and the 2nd and 3rd appellants are set at liberty unless otherwise lawfully held.

It is so ordered.

Judgement read and signed on 24th day of November 2006

MARTHA KOOME

JUDGE

D. MUSINGA

JUDGE