



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 344 of 2003

(From Original Conviction and Sentence in Criminal Case No. 1668 of 2001 of the Senior Resident Magistrate's Court at Molo – R. KIRUI - S.R.M)

JOSEPH KURIA NDUNGU APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT OF THE COURT

Joseph Kuria Ndungu, the appellant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code before the Senior Resident Magistrate's Court at Molo. The appellant was jointly charged with **Pius Mweresi Achebi** (*the 2nd accused*) before the lower court but the 2nd accused person escaped from lawful custody during the trial.

The particulars of the charge were that on the night of 9th and 10th days of August 2001 at Kamwago Farm Njoro in Nakuru District within Rift Valley Province, jointly with others not before court, while being armed with dangerous weapons namely; Somali swords and iron bars robbed of **Joseph Mburu Ndungu** one radio cassette make National Model No.RX4825F, one Seiko five wrist watch serial number 16990, one Panasonic radio, one coat, two jackets, four travelling bags, one towel, one sweater, one blouse, one skirt and cash Kshs.4,600/- all valued at Kshs.27,400/- the property of the said Joseph Mburu and at or immediately before or immediately after the time of such robbery wounded the said **Joseph Mburu Ndungu**.

The appellant also faced an alternative charge of **handling stolen property** contrary to **Section 322 (2) of the Penal Code** and the charge stated that on 14th day of August 2001 at Kasarani Estate Elburgon Nakuru District of the Rift Valley Province, otherwise than in the course of stealing dishonestly retained one radio cassette make National Model number RX4825F, one Seiko five wrist watch serial number 16990, one long trouser, one jacket, one travelling bag, one women sweater, one shirt, one blouse, one skirt and one body lotion heart to heart knowing or having reasons to believe them to be stolen property.

The appellant was tried before the Senior Resident Magistrate's Court at Molo, was convicted of the main charge and sentenced to the mandatory death sentence. The appellant being dissatisfied with the conviction and sentence has appealed and raised several grounds of appeal to wit:

Ø **Firstly, the appellant challenged the conviction which was based on evidence of recovery of**

stolen items which items were not produced as exhibits.

Ø Secondly, the appellant challenged the quality of evidence of recovery of stolen items that were found in a house when there was no evidence to prove the ownership of the house.

Ø Thirdly, the appellant contended the prosecution failed to prove their case to the required standard.

During the hearing of this appeal, the appellant, who was unrepresented, sought to introduce further grounds of appeal which we duly allowed. The further grounds of appeal challenged the reliance of circumstantial evidence by the trial court and failure to consider the defence offered by the appellant.

The evidence that led to the conviction and sentence of the appellant was adduced by five (5) prosecution witnesses. Briefly stated, it was the prosecution's case that on the night of 9th/10th August 2001 at about 3 a.m. **Joseph Mburu (PW 1)** was sleeping in his house when unknown persons broke into his house, beat him up with his wife and stole Kshs.4,000/- from his wife. They ordered them to lie under the bed and then ransacked the house and stole his long trousers, three jackets, one coat, a wrist watch, a cap among other items. They also stole his wife's clothes. **PW 1** was not able to identify the robbers but two weeks later, he learnt that a person was found at the Elburgon trying to sell a radio cassette, one of the stolen items. The matter was reported to the police and the appellant who was found selling the radio was brought to the police station. **PW 1** identified the jacket the appellant was wearing as one of his items that had been stolen and other items that were recovered from the appellant's house which were photographed. The photograph was produced as an exhibit.

Jane Nduta (PW 2) is the wife of the **PW 1**, she gave an account of how they were attacked by unknown people whom she could not identify. She identified the items that were in the photograph as some of the items that were stolen from their house during the attack.

Bernard Nyanderwo (PW 3) is a clinical officer attached to Njoro Health Centre, he examined **PW 1** for injuries sustained on the night of 9/10th August 2001 and filed the P3 form ten days after the incident. In his opinion, the injuries were inflicted by a sharp object, he treated **PW 1** and classified the degree of injury as harm.

P.C Gilbert Cheruiyot (PW 4) recorded the statement from **PW 1** and visited the scene of robbery. **PW 4** received a report on 14th August 2001 about some suspects who had been arrested with stolen items. He called **PW 1** who identified the same items that were photographed.

P.C Jeremiah Munyao, (PW 5) was in the report office when the appellant was brought as a suspect in a robbery case. Upon interrogation, the appellant led **PW 5** to his house where they found several stolen items namely a National radio cassette, a long trouser, one jacket, one small bag, one sweater, one coat, one blouse, one shirt, one Seiko watch. **PW 5** circulated the above items to other police stations, latter a police officer from Njoro Police station came with **PW 1** who identified some of the items which he photographed. The photograph was produced as an exhibit in court.

On the part of the State, the learned Senior State Counsel, **Mr. Koech** opposed the appeal. He supported the conviction and sentence which he submitted was based on recovery of stolen items, namely; a radio cassette which the appellant was found with and a jacket belonging to the complainant which he was wearing. When the appellant was arrested, he led the witnesses to his house where further items which had been stolen. This was merely three days after the robbery. **Mr. Koech** submitted that the appellant was properly convicted on the evidence of possession of recently stolen goods for which he could not give a proper explanation.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial court and 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 bear 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] K.L.R 19**)

We have re-evaluated the evidence by the prosecution which clearly shows the appellant was convicted on the basis of the recovery of items that were found in his possession so soon after the robbery and for which he could not offer any explanation. In this case the trial court based its finding only on the fact that stolen items were found in possession of the appellants. In the case of **Malingi Vs Republic [1989] K.L.R. 227**, the court held as follows;

“By the application of the doctrine the burden shifts from the prosecution to the accused person to explain his possession of the items complained about. He can only be asked to explain his possession after the prosecution proved certain basis facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused found with it was, from the nature of the items and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver. The principal issue to determine is whether the prosecution proved that the appellant was in possession of the items stolen.”

We find serious inconsistencies in the prosecution’s case beginning with the evidence by **PW 1** who told the court that two weeks after the robbery, he was informed that somebody had been found trying to sell a radio cassette at Elburgon. He sent his child who identified the radio, the appellant was arrested and taken to the police station. This was followed by the evidence of **PW 4** who told the court that on 14th August 2001, he received a report from the O.C.S Elburgon regarding some suspects who were arrested with stolen items. The inconsistency in evidence is compounded further by the evidence of **PW 5** who said that on 13th August 2001 the appellant was brought to the police station and on interrogation, he led **PW 5** to his house where they recovered a radio cassette, a long trouser and other items.

It is not clear from the evidence of prosecution witnesses where the radio cassette was found, was it at Elburgon where the appellant is said to have been seen trying to sell or was it in the appellant’s house? There was no direct evidence by the members of the public who saw the appellant trying to sell the radio cassette. As regards the long trouser, the coat and watch, that were found in possession of the appellant, these items were not produced in court as exhibits. The photograph that was produced as an exhibit does not clearly identify these items.

These inconsistencies and poor presentation of evidence that does not even provide the basis upon which the court accepted the production of photographic evidence as opposed to the items that were stolen, leads us to the inescapable conclusion that the case against the appellant was not proved to the required standard. Had the trial court addressed those inconsistencies, the appellant would not have been convicted of the offence of robbery with violence.

Accordingly for the above reasons, we allow the appeal, quash the conviction and set aside the sentence passed against the appellant. The appellant is hereby set at liberty unless otherwise lawfully held.

It is so ordered.

Judgment read and signed at Nakuru on this 14th day of November 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE