



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 498, 499, 500 & 501 of 2002

(From the original conviction and sentence of the Senior Resident Magistrate's court at Narok in Criminal case No.786 of 2002– S. M. GITHINJI – S.R.M)

JOSHUA KOBIA MWITI.....1ST APPELLANT

DENNIS MURIITHI KAREITHI.....2ND APPELLANT

THOMAS IRUNGU KAMAU.....3RD APPELLANT

PATRICK GATHERE MWANGI.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, Joshua Kobia Mwiti (*hereinafter referred to as the 1st appellant*), Dennis Muriithi Kareithi (*hereinafter referred to as the 2nd appellant*), Thomas Irungu Kamau (*hereinafter referred to as the 3rd appellant*) and Patrick Gatherere Mwangi (*hereinafter referred to as the 4th appellant*) were charged with two counts of **Robbery with violence contrary to Section 296 (2) of the Penal Code**. The particulars of the offence were that on the 26th of November, 2002 at Nairagie Enkare Trading Centre, Narok District, the appellants jointly with others not before court, while armed with a dangerous weapon namely one patchet rifle S/No.KR 110516 robbed Caddy Njongi Munyaka and Bernard Kamau Kimani of cash Ksh.23,400/=, one mobile phone make Siemens M30, four jackets, seven caps and eight dresses and at or immediately before or immediately after the time of such robbery used actual violence to the said Caddy Njongi Munyaka and Bernard Kamau Kimani.

The 3rd appellant was further charged with two counts of being in possession of a firearm and ammunition without a firearm certificate contrary to **Section 4(1) of the Firearms Act**. The particulars of the offence were that on the 28th of November, 2002 at Maela area in Nakuru District, the 3rd appellant was found in possession of one patchet rifle S/No.KR 110516 and seven rounds of 9mm caliber ammunition. The appellants pleaded not guilty to the charges. After a full trial, the appellants were

convicted as charged. They were sentenced to death as is mandatorily provided by the law. The 3rd appellant was further sentenced to serve 5 years and 2 years respectively on the firearm charges. The appellants were aggrieved by their convictions and sentences and each of them filed a separate appeal against the said conviction and sentence to this court.

All the appellants raised more or less similar grounds of appeal in their petition of appeal. They were aggrieved that they had been convicted based on unsatisfactory evidence of identification. They were aggrieved that the trial magistrate had relied on the evidence of a retracted confession to convict them. They were further aggrieved that they had been convicted on insufficient and uncorroborated evidence of the arresting officers. They were further aggrieved that the trial magistrate had not taken into account the totality of the evidence adduced and had therefore erroneously convicted them for the offences for which they were charged. They were finally aggrieved that the trial magistrate had shifted the burden of proof from the prosecution to the appellants and therefore erroneously found that the prosecution had established its case against them. They faulted the trial magistrate for arriving at the decision convicting them without taking into account the evidence that they had adduced in their defence.

At the hearing of the appeal, the appellants with the leave of the court, presented to this court written submissions in support of their appeals. They all urged this court to allow the appeals, quash their convictions and set them at liberty. Mr. Koech for the State made submissions urging this court to uphold the conviction and the sentences imposed on the appellants. He submitted that the prosecution had adduced sufficient and overwhelming evidence that connected the appellants to the crimes for which they were convicted. He urged the court not to interfere with the finding of the trial court. We shall consider the grounds put forward by the appellants and the response made thereto by the State after briefly setting out the facts of this case.

On the 26th of November, 2002 PW1 Caddy Njongi Munyaka (*hereinafter referred to as the complainant*), was at his retail shop at Nairagie Enkare Trading Centre. It was about 7.30 p.m. PW2 Nicholas Poro, a teenager then aged 16 years entered the shop with a view to purchasing paraffin. While they were at the shop, PW1 and PW2 testified that five men entered the shop and ordered the complainant to give them money. One of the men was armed with a rifle which the complainant testified appeared like the rifle which was later produced in court as *Prosecution's exhibit No.1*. The complainant testified that he complied with the order which was issued by the robbers and gave them Ksh.8,000/= which was in his pocket. He also told them to take whatever goods that they wanted. He testified that the robbers took seven caps, four jackets, eight dresses, one mobile phone make Siemens M30 S/No.350080804339.

The complainant testified that as the robbers were robbing the shop, PW3 Bernard Kamau Kimani, his driver, entered the shop. He too was ordered to lie down and Ksh.2000/= was robbed from him. The complainant testified that two days later, he was informed by the police that some items which had been robbed from his shop had been recovered. He was able to identify a jacket and the Siemens mobile phone as the ones which had been stolen from him. He produced a receipt which had the serial S/No.350080804339 on it which was similar to the serial number of the mobile phone which was recovered from the appellants by the police. He testified that he was able to identify a jacket which was recovered by the police as the one which was stolen from his shop because the robbers took the jacket and left its trouser which had been purchased by an administration police officer. PW10 APC William Kidis confirmed that he had purchased a jacket and a trouser from the complainant. He was however unable to pay the total purchase consideration of Ksh.3,200/= at a go. He paid a deposit of Ksh.1000/= and promised to pay the balance at a later date.

PW10 was later informed that the jacket which he had '*booked*' had been robbed from the shop of the complainant. He identified the jacket which was recovered by the police as the one which he had purchased from the complainant. He referred the jacket by its trade name '*Pilma Jacket*'. Apart from the fact that the jacket had blood stains, the complainant confirmed that it was the same jacket which was stolen from his shop. Both the jacket and the mobile phone were produced in evidence by the prosecution. PW1, PW2 and PW3 were not able to identify any of the robbers who robbed them at the shop of the complainant. Although the police and other members of the public arrived at the scene soon thereafter, the complainant warned them not to pursue the robbers because they were armed.

After the robbery at the shop of the complainant, the police circulated to the nearby police stations and police patrol bases the existence of armed robbers in the area. The area residents were instructed to report any suspicious persons to the police. The circulation of this information was confirmed by PW7 and PW8 in their testimony before court. On the 28th of November 2002 at 8.00 a.m. PW7 Njuguna Mburu Kipiko was standing on the verandah of a shop at Ilkiragarie centre Narok District. He saw four men who were all wearing caps which had been worn in such a manner as to conceal their faces, walking past the shop where he was standing. The four men were carrying several paper bags. One of the bags appeared to be having something heavy.

PW7 became suspicious. He recalled that a report had been made two days previous of a robbery which had taken place at the shop of the complainant. He testified that one of the four men appeared to be sick or injured as he was walking very slowly. PW7 informed the elders of the area and a decision was made to make a report to the police who were in the direction where the four men were headed to. PW7 was mandated with the responsibility of making the report to the police. He testified that he walked past the four men and went and made a report to the police who were at Maela Patrol Base. The police who were given this information were PW8 PC Hoseah Koros, PW9 APC John Matiro, PW13 PC Richard Machacho and APC Kitur who did not testify during the trial of the appellants before the trial magistrate's court.

PW8, PW9 and PW13 testified that upon receiving the report from PW7, they immediately followed PW7 who showed them the appellants who were then walking within Maela Trading Centre. PW8, PW9 and PW13 laid an ambush within the centre. They made sure that the appellants were in between them before they ordered them to stop. They ordered the appellant to stop but the appellants attempted to escape. They could not however make good their escape. They were arrested and taken to Maela Patrol Base. PW8 testified that when they ordered the appellants to stop, one of them threw a jacket which was bloodstained on the ground. When the appellants were arrested PW8, picked the jacket and saw that a gun was wrapped inside it. The gun was produced in evidence by the prosecution. PW8, PW9 and PW13 testified that they recovered from the appellants cash in coins and also a wrist watch make Logines. They also recovered a Nokia phone make 6210 and a Siemens phone. All these items were produced in evidence by the prosecution. The jacket which the gun was wrapped with was identified by PW10 APC William Kidis as one which he had purchased from the premises of PW1 and made part payment for it. The appellants were later taken to Narok Police Station where they were interrogated before they were charged with the present offences.

When the appellants were placed to their defence, they denied having participated in the robbery of the complainant's premises. They further denied that they had been arrested with the items which were produced in evidence as exhibits by the prosecution. They further denied that they were arrested while in possession of the gun. Each appellant told the court that he was innocently undertaking his own business at Maela Trading Centre when they were arrested for no apparent reason by the police.

This being a first appeal, this court is required in law to exhaustively subject the evidence that was adduced before the trial magistrate's court to re-evaluation so as to reach an independent determination whether or not the appellants were properly convicted by the trial magistrate. In reaching this determination, this court has 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 comments as regard the demeanour of the witnesses. (*See **Okeno vs Republic [1972] EA 32***). We have considered the submission that was made before us by the appellants and by Mr. Koech on behalf of the State. We have also re-evaluated the evidence that was adduced by the witnesses before the trial magistrate's court.

Two sets of evidence were relied on by the prosecution to secure the conviction of the appellants. The first piece of evidence is on the circumstances under which the appellants were arrested. PW7 and PW12 testified that on the 28th of November, 2002 at about 8.00 a.m., while they were at Kiragare Centre, they saw the appellants emerge from the bush. The 1st appellant appeared to be walking with difficulty because he had an injury. The four appellants were carrying items in paper bags that PW7 and PW12 suspected to be heavy. PW7 and PW12 did not know the appellants. They became suspicious. They had earlier been informed that the shop of PW1 had been robbed on the night of the 26th of November 2002.

PW7 made a report to the police who were at Maela patrol Base. PW7 walked ahead of the appellants and made the report to PW8, PW9 and PW13 who laid an ambush and arrested the appellants.

Although the appellants state that they were innocent persons at Maela Trading Centre and were arrested for no apparent reason, upon re-evaluation of the evidence adduced by the prosecution witnesses, it is clear that PW7 identified the appellants to PW8, PW9 and PW13 who arrested them. The appellants abandoned the gun that was in their possession when they were ordered to stop by the police. They were arrested a few metres thereafter because the police had laid an ambush. Upon searching the appellants, they were found in possession of coins which were suspected to have been stolen from the shop of PW1. They were also found with three caps which PW1 identified to be the ones which were stolen from his shop. When the appellants were arrested, they were taken to Narok Police Station. The 1st appellant was taken to hospital and upon examination he was found to have sustained a gun shot wound.

PW8, PW9 and PW13 recovered the gun from the possession of the appellants. The jacket which the gun was wrapped in was identified by PW1 and PW10 as the jacket which was stolen from the shop of PW1 when the robbers robbed PW1 on the night of the 26th of November 2002.

A critical piece of evidence that connects the appellants to the robbery of the complainant (PW1) is the recovery of a Siemens M30 mobile phone. PW8 testified that when he searched the appellants, he recovered a Siemens M30 mobile phone from the 2nd appellant. This mobile phone was identified by PW1 as the one which he had purchased for his driver PW3 Bernard Kamau Kimani. PW1 produced a receipt which showed the phone number to be No.350080804339 below it was a figure 120. When the phone which was recovered from the 2nd appellant was checked, it was confirmed to be the one that contained the serial number which PW1 possessed its receipt of purchase. It is therefore clear from the evidence adduced by the prosecution witnesses that the trial magistrate properly applied the doctrine of recent possession.

As was held by Bosire J, (*as he was then*) in the case of **Malingi vs Republic [1989] KLR 225** at page 227

“By the application of the doctrine (of recent possession) the burden shifts from the prosecution to the accused to explain his possession of the items complained about. He can only be asked to explain his possession after the prosecution have proved certain basic 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 was found with it, was from the nature of the item and the 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.”

In the circumstances of this case, the doctrine of recent possession can be applied to prove the charge of robbery with violence. In this case, the appellants were found in possession of items which were robbed from the complainant and which items the appellants could not explain satisfactorily how they came into possession of. Further the said items were recovered two days after they were robbed from the complainant (PW1).

The appellants were found armed with a dangerous weapon, namely a gun. The said gun was tested by a ballistic expert whose report was produced by PW17. The said ballistic expert confirmed that the gun which was found in possession of the appellants had been used to fire the cartridge which was recovered in the house of PW4 when a robbery attempt was made in his house. The appellants were thwarted because PW4 raised alarm and managed to call his neighbours who came to his rescue.

Having carefully re-evaluated the evidence, we are satisfied beyond reasonable doubt that the prosecution proved the charge of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. All the ingredients of the charge of robbery with violence were established by the prosecution. The defence offered by the appellants, were in the circumstances of this case, self serving. The appellants were not

innocent bystanders when they were arrested by the police at Maela Trading Centre. We find no merit what- soever with the grounds of appeal which they advanced before us.

The upshot of the above reasons is that each appeal filed by the appellants is hereby dismissed. Their conviction by the trial magistrate is hereby confirmed. The sentences imposed by the trial magistrate are further confirmed.

DATED at NAKURU this 14th day of November 2006

M. KOOME

JUDGE

L. KIMARU

JUDGE