REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 502 & 509 of 2003

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE

NO. 7308 OF 2001 OF THE S.P MAGISTRATE'S COURT AT KIBERA)

KARANJA WAMBURA…….. APPELLANT

VERSUS

REPUBLIC ……..……..…RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 509 OF 2002

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE

NO. 7308 OF 2001 OF S. P. MAGISTRATE'S COURT AT KIBERA)

PAUL GICHUKI GIKUNGA ……....……..…APPELLANT

VERSUS

REPUBLIC ……..…….……RESPONDENT

J U D G E M E N T

The appellants KARANJA WAMBURA and PAUL GICHUKI GIKUNGA were charged with ROBBERY WITH VIOLENCE contrary to ***Section 296(2)*** of the Penal Code.

The particulars of the charge were that on the 19th day of November, 2001 at Dagoretti Market within Nairobi Area jointly with others not before the Court while armed with dangerous weapons namely

pangas and simis robbed FRED OWINO of assorted hardware goods valued at K.Shs.296,290/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said FRED OWINO.

The appellants were found guilty and convicted of the offence and sentenced to death as mandatorily provided by the law.

Being aggrieved by the conviction and sentence, they appealed before this court; their appeals being Cr. A Nos. 502 of 2002 and 509 of 2002 from Original Criminal Case No.7308 of 2001 before Senior Resident Magistrate, J. Siganga, at Kibera.

The 1st appellant, KARANJA WAMBURA raised the following grounds in his appeal:

"**1. That the learned trial Magistrate fell into error in both law and facts, to base the conviction in reliance on the doctrine of recent possession of the complainants property, without evidence of inventory list forcoming for such proof.**

2. **That the learned trial Magistrate further erred in**

law and fact by believing the alleged leading

evidence by co-appellant to my arrest, whereas no evidence of out-removal O. B. entries, or leading cautionary statements to prove the cause and its extent.

3. **The learned trial Magistrate similarly erred in**

law and fact, in determining as having provided the requisite corroboration, the co-appellants alleged confession which evidence remained weak in law since its voluntary value upon retraction by the maker was considerably lessened.

4. **That the alibi defence advanced was never duly**

put under thorough consideration, as my fact of my having been indoors throughout, on the night in question, was never challenged, an issue supported by DW3 and DW4, thus rejection, a subject of error in law and fact."

The 1st appellant also raised the point that he was charged under ***Section 296(1)*** not ***296(2***) of the Penal Code.

The facts of the prosecution case were as follows:

PW1 FRED OWINO, the complainant, told the court that on 19/11/01, he was a night duty guard at a hardware shop belonging to Kenneth Kinyanjui Ndaro (PW3). A group of about twelve robbers, armed with rungus, iron bars and axes entered the shop compound after removing five pieces of the off-cut wooden fence. One of the accused, who is appellant 1 herein was armed with a pistol. They assaulted the complainant (PW1) and tied his hands with a rope they had come with. They then broke into the shop by cutting the padlock with a pair of scissors. The robbers then removed a dress from the shop and used it to cover the complainant's head and tied it around his throat. Four of the robbers then escorted the complainant to a nearby forest where they tied his legs, then tied him to a tree. The robbers then returned to the shop and stole all the items which PW2 later listed down. At about 5.00 a.m. the complainant was rescued from the forest by members of the public who heard his shouts for help. He returned to the shop to wait for his employer, PW2. A report of the robbery was made to the police.

The following day, information emerged that some of the stolen items were being sold by one Ndungu (PW3), and one Nyoike (PW9) in Kikuyu.

Upon their arrest, PW3 and PW9 were found in possession of the complainant's stolen property as follows: 1 packet of welding rods, 5 pieces of padlocks No. 265; 20 hacksaw blades; 1 talbot; 11 putty knives.

PW3 and PW9 revealed to the police that appellant No. 1 was their supplier of these items. Appellant No. 1 was arrested on the following day. Later that night, the complainant's stolen delivery book; stamp and stamp pad were recovered from appellant No. 2's house and the appellant was arrested. The delivery book, stamp and pad bore PW2's shop name – Kenpa Hardware.

PW3 Kenneth Paulo Ndungu, who operates a welding shop in Kikuyu, said he was, on 19/11/04 at 11 a.m. in his workshop with his workers who included Nyoike (PW9) when appellant No. 1 took to (PW3) samples of hardware goods like welding rods; padlocks, cutting blade and putty knives. Appellant No. 1 said the samples were for sale and he had a big or huge stock of the items. PW3 offered to take these samples to a nearby hardware shop as PW2 had no use for such goods. Appellant No. 1 left, saying he was in a hurry and that he would return the following day between 10 a.m. and 3.00 p.m.

The following day, PW3 and PW9 were arrested and the samples recovered from the hardware shop. They were told that those samples were stolen property.

PW4, Phyillis Wanjiru Muchoki, an employee at the hardware shop belonging to PW2 said that she securely locked the shop in the evening of 18/11/01. The next morning she found that robbers had broken into the shop and stolen from there.

PW5, Pauline Kinyanjui, who is PW2's wife gave evidence almost similar to PW2's testimony. She produced in court receipts as proof that the shop had stock of items that were stolen during the robbery.

PW6, James Chege Ndaro, a brother of PW2, alerted PW2's wife (PW5) about the robbery, at 9.00 a.m. on 19/11/01 on the same day Ndungu (PW3) and Nyoike (PW9) brought to his (PW6) hardware shop some samples for sale, rods; padlocks and scrappers. PW6 told PW3 and PW9 to return the following day. Then he, PW6, phoned PW2 to alert him of the sale. The next day, PW2 came with police to PW6's shop and arrested Nyoike, PW9, and recovered the padlocks; the rods; and the scrappers.

PW7, PC Naftali Chege was one of the Police Officers who arrested appellant No.1 in PW6's shop after an ambush was laid for accused No.1 on 20/11/01 at 1.30 p.m.

PW8, PC Abdul Bor, with other Police Officers from Karen Police Station were led by appellant No. 1 to Appellant No. 2's house on 20/11/01 at 11.00 p.m. The Police Officers recovered from the 2nd appellant house; a delivery book; a stamp and a pad all bearing PW 2's shop names. Appellant No.2 was arrested. As the group walked back to the police vehicle, appellant No. 1 escaped but was pursued by the Police Officers and a police dog, which tracked down and found appellant No.1 hiding in a maize plantation, and he was re-arrested and together with appellant No. 2 were taken to the Police Station.

PW9, Stephen Nyoike Muthoni, who was an employee of PW 2 at the material time, gave evidence similar to PW3. PW 9, PC Henry Makokha was the investigating officer in this case; while PW II, CIP Albert Muviani recorded Appellant No.1's statement under inquiry at Karen Police Station on 21/11/01 at 11.40 a.m.

Having been consolidated, the appeal by the 2nd Appellant, PAUL GICHUKI GIGAND CR. A. NO. 509 of 2002, raises similar grounds as those of the 1st appellant apart from two issues which are that he challenged his identification and the alleged confession which he argued was a confusion caused by breakdown in the language used in the interrogation.

The appeals were opposed by the learned State Counsel, Ms. Gakobo who submitted that the prosecution's evidence met all the requisite legal provisions, and that the lower court took into account the defences of the appellants before arriving at the conviction and sentence.

We have carefully considered the appeals herein, perused the record of the lower court and analyzed the submissions made before us and have reached the following findings and conclusions.

On the issue as to whether or not the appellants were charged under the correct provisions of the Penal code, this is really a matter of record and the charge sheet clearly shows that the appellants were charged with Robbery with Violence contrary to Section 292(2) of the Penal Code, Cap. 63 of the Laws of Kenya. Further, it is on record that on the day of the pleas, the appellants were clearly told that they were so charged and hence bond/bail were not available to them.

Accordingly, we reject this ground of appeal.

On the identification of the 2nd appellant at the scene of the crime, we are satisfied with the evidence on record that there was sufficient electric light from the adjacent building which enabled the complainant to properly identify the appellant, even though it was during the early hours of the morning – 3.00 a.m. – as the person who brandished the pistol. This was also corroborated by the arrest of the 2nd appellant when he went to collect the proceeds of the sale of the stolen property, a fact which the appellant did not challenge.

The record shows also that the 1st appellant was arrested through the Police Officers being led to his house by the 2nd appellant, where a delivery book, a stamp and a pad, all bearing the names of PW2's shop, were recovered. Whereas the recovery occurred slightly more that 24 hours after the robbery, we have no doubt that this fell squarely within the doctrine of recent possession of stolen property. The appellant did not challenge the finding that items were recovered from his house, nor that the items were on the list of the goods recently purchased by PW2 and on the inventory list of the said complainant.

The 1st Appellant raised the issue of the evidentiary value of his retracted confession, which he alleged was extracted from him through torture by Police Officers, including having a police dog released at, and biting, him. We have re-evaluated the record on this line of defence and are satisfied that the dog bite displayed by the appellant occurred when he tried to escape and the police dog was used in his recapture. Further, the lower court which had the opportunity to assess the demeanor of all the witnesses and appellant, concluded that there was no evidence to controvert the evidence that the appellant voluntarily signed the confession he made. The confession was admitted after the trial within a trial.

Accordingly, we reject that ground of appeal as lacking in merit and indeed an after thought.

The last ground of appeal is the 1st appellant's alibi that he stayed in doors throughout the night in question, and that this was not given its due weight by the trial Magistrate.

Our review of the record at the lower court shows that this defence of alibi was carefully considered but rejected by the learned Magistrate on the grounds that the prosecution evidence showed that, even though it was at night when the robbers struck, there was sufficient light at the robbed shop from the adjacent building which enabled the complainant to clearly identify the 1st appellant at the scene of the robbery at the material time.

The above prosecution evidence was corroborated by the appellants confession during the statement under inquiry that the appellant, together with other people, broke into the complainants shop. This is further corroborated by the finding by the lower court that the appellant sold some of the stolen property to other people, who gave evidence and that the appellant was arrested as he went to collect payments for such sale.

Accordingly, we are convinced and satisfied that the applicant's defence was fully and carefully considered by the learned Magistrate but such defence could not controvert the prosecution's evidence.

We have carefully considered the grounds of appeal by the 2nd appellant and since the appeals were consolidated and heard together, we have noted that the 2nd appellant was mentioned by the 1st appellant

as having been at the scene of the robbery with 1st appellant; that the 2nd appellant was arrested after the police were led to his house by the 1st appellant; and that at the 2nd appellants house, goods recently stolen during the robbery were recovered.

For the reasons we have set out in this judgment we find and conclude that the conviction in this case was safe and confirm the same, and the sentence imposed on the two appellants, as mandatorily provided by the law.

The appeals are accordingly dismissed.

DATED at Nairobi this 15th day of March, 2005.

O. K. MUTUNGI

JUDGE

FRED OCHIENG

JUDGE

Read, signed and delivered in the presence of

O. K. MUTUNGI

JUDGE

FRED OCHIENG

JUDGE