



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 428 OF 2001

(AS CONSOLIDATED WITH)

CRIMINAL APPEAL NO. 451 OF 2001

(From original conviction and sentence of the Chief

Magistrate's Court at Nakuru in Criminal Case No. 1922 of

1999 – N. M. KIRIBA (S.R.M.)

KENNEDY OCHIENG MASANJA.....1ST APPELLANT

JOHN KILONZO KIOKO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, Kennedy Ochieng Masanja and John Kilonzo Kioko were charged with two others who were acquitted by the lower court with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the nights of the 15th and 16th of October 1999 at Melvin Jones Academy, Nakuru jointly with others not before court, while armed with dangerous weapons namely pangas, rungas, axes, iron bars and steel cutters, the appellants robbed Onyango Hunga of Kshs 154,000/= cash and various other items enumerated in the charge sheet all valued at Kshs 496,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Onyango Hunga. The appellants pleaded not guilty to the charge. After full trial, the appellants were convicted as charged. They were sentenced to death as is mandatorily provided by the law. The appellants were aggrieved by their conviction and sentence and have appealed to this court.

At the hearing of the appeals, the two separate appeals filed by the appellants were consolidated and heard as one. Kennedy Ochieng Masanja henceforth shall be referred to as the 1st appellant while John Kilonzo Kioko shall be referred to as the 2nd appellant. In his petition of appeal, the 1st appellant faulted the trial magistrate for convicting him on uncorroborated dock identification. He was further aggrieved that he had been convicted on contradictory evidence as regards the recovery of the stolen items. He further faulted the trial magistrate for convicting him based on a repudiated confession of a co-accused.

Finally the 1st appellant faulted the trial magistrate for not considering his defence before arriving at the said decision convicting him. On his part the 2nd appellant was aggrieved that he had been convicted based on the contradictory evidence of the prosecution witnesses. He was further aggrieved that he was convicted whilst the police officer who arrested him had not been called to testify before court. The 2nd appellant was further aggrieved that his defence was not considered by the trial magistrate before arriving on the decision to convict him. At the hearing of the appeal, the appellants, with leave of the court presented to this court written submissions in support of their respective appeals. They also made oral submissions before court urging the court to allow their appeals. Mr Koech, Learned State Counsel opposed the appeals. He submitted that the prosecution had proved beyond any reasonable doubt the charge of robbery with violence that faced the appellants. He urged the court to dismiss the appeals. We shall consider the submissions made on the appeals after briefly setting out the facts of this case.

On the night of the 15th of October 1999 PW9 Onyango Ogunga and PW5 John Okelo Obamba were guarding Melvin Jones Academy, a school within the Municipality of Nakuru. At about 2.00 a.m. they were attacked by robbers. According to PW5, the robbers were three in number. They were armed with clubs and iron bars. They succeeded in subduing the two watchmen. They bound their hands. PW5 testified that he was hit on the leg as a result of which his leg was fractured. PW5 testified that he was hit on the mouth. One of the robbers urinated on him. PW5 testified that he was able to identify the 1st appellant as being a member of the gang of robbers.

PW9 identified another person who was acquitted after trial. After the two watchmen were subdued, the robbers broke into the school offices. According to PW1, Mrs Cynthia D'cunha the robbers stole two Panasonic tape recorders, one television set, one video recorder, a public address system with two speakers. The school safe was removed and taken away. In the safe was Kshs 147,000/= and motor vehicle logbooks. The school bicycle was also stolen.

After the robbery a report was made to the police. Investigations commenced. On the 26th of October 1999, PW10 Corporal Jeremiah Musyoki in the company of other police officers went to the house of the 1st appellant at Wanyororo, Nakuru. They were able to recover one sony television, one video recorder, two speakers, one microphone, one dove sewing machine and one remote control. PW10 testified that the 1st appellant led the police to his house after he was arrested a day earlier i.e. on the 25th of October 1999. PW3 Abraham Lukeya Amaliati, a senior teacher at Melvin Jones Academy was able to identify the above items which were recovered from the house of the 1st appellant. He confirmed that the said items belonged to Melvin Jones Academy. The items which were stolen and recovered were produced in court as evidence by PW4 Police Constable Joseph Ngugi.

Meanwhile, PW11 Peter Mwangi testified that sometime in October 1999, the 2nd appellant offered to sell to him a bicycle. PW11 testified that the price for the bicycle was negotiated and agreed at Kshs 2,000/=. PW11 paid Kshs 1,500/=. The balance of Kshs 500/= was to be paid later. When he went to pay the balance of the purchase consideration he was arrested by the police. PW12 Corporal Frederick Kowour, a police officer attached to the C.I.D. Nakuru testified that upon arresting the 2nd appellant, the 2nd appellant offered to take him to Engashura Farm Nakuru, where the bicycle which was identified as having been stolen from Melvin Jones Academy was recovered from PW11. PW8 Inspector Daniel Langat testified that on the 28th of March 2000, he took a charge and cautionary statement from the 2nd appellant. The 2nd appellant confessed to having participated in the robbery. The statement was produced as an exhibit in the trial. The 2nd appellant did not object to the production of the statement.

After the close of the prosecution's case, the appellants were put on their defence. The 1st appellant denied that he participated in the robbery. He confirmed that he was arrested on the 25th of October 1999 by the police who also searched his house. The 1st appellant denied that he had a girlfriend called Mama Ciru. He denied that the stolen items were recovered from his house. He further denied that he knew any of the watchmen guarding Melvin Jones Academy prior to the robbery incident. The 2nd appellant on his part testified that he was arrested by the police on the 22nd of March 2000 after he had quarrelled with a colleague. He testified that he was told to sign documents which he was not aware of its contents. In essence, the 2nd appellant denied that he participated in the robbery.

This is a first appeal. As was held in **Njoroge –versus- Republic [1987]KLR 19** it is the duty of the first appellate court to remember that the parties are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions. The court should however bear in mind that it has neither seen nor heard the witnesses and it should make due allowance in that respect. In the instant appeal, the appellants were convicted by the trial court based on the evidence of the stolen items which were allegedly recovered in their possession.

According to the evidence of PW10, Corporal Jeremiah Musyoki, several items including one sony television set, one video recorder, two speakers, one microphone, one dove sewing machine and one remote control were recovered from the house of the 1st appellant at Wanyororo on the 26th of October 1999. PW10 testified that it was the 1st appellant who took them to his house at Wanyororo, one day after he had been arrested on the 25th of October 1999. The said items which were recovered were produced in evidence as exhibits by PW4 Police Constable Ngugi. The recovered items were identified as belonging to Melvin Jones academy by PW3 Abraham Lubeya Amaliati. When the 1st appellant was put on his defence, he admitted that a search had been conducted in his house. From the submission made by the 1st appellant he denied that the said items were recovered from his house. It was his evidence that he resided at KITI plot number 36. He denied that he knew a lady called Mama Ciru. He denied that the lady in question was his girlfriend. According to PW13 Corporal Geoffrey Manjeli, the items in question were recovered from the house of the 1st appellants' girlfriend at Wanyororo.

As regards the 2nd appellant, the evidence that connects him to the crime is the bicycle which was identified as belonging to Melvin Jones Academy and was stolen during the night of the robbery. According to PW11, the bicycle in issue was sold to him by the 2nd appellant in October 1999. We are not told which date of October 1999 was the bicycle sold to PW11 by the 2nd appellant. According to PW11, the bicycle was sold to him by the mother of the 2nd appellant in the presence of the 2nd appellant. PW8 testified that he took a charge and cautionary statement from the 2nd appellant. In the said statement the 2nd appellant admitted participating in the robbery and further getting a bicycle and Kshs 1,000/= as spoils of the robbery. When he was put on his defence, the 2nd appellant testified that he was arrested on the 22nd of March 2000, about five months after the robbery incident. He testified that he was arrested after he had quarrelled with a colleague. He denied that he had anything to do with the robbery. In the submission made before court, the 2nd appellant stated that the prosecution ought to have called the police officer who arrested him so as to establish the circumstances of his arrest.

We have re-evaluated the evidence adduced by the prosecution. The prosecution has relied on the doctrine of recent possession to prove its case against the appellants. The evidence of identification by PW5 and PW9 cannot be relied on. The evidence of the two watchmen on identification is shaky to say the least. There is conflict and contradiction between their evidence on how they were able to identify the 1st appellant. They did not give a description of what clothing the 1st appellant was allegedly wearing during the night of the robbery. Neither did they tell what distinct physical features enabled them to be positive as to the identity of the 1st appellant. The trial magistrate, rightly in our view, disregarded the evidence of identification.

As was held in **Malingi –versus- Republic [1989] KLR 225** at page 227 in applying the doctrine of recent possession,

“the trial court has a duty to decide whether from the facts and the circumstances of the particular case under consideration the accused person either stole the item or was guilty or innocent receiver. By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item 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 coexisting circumstances which point to any other person 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 Wandue –versus- Republic [2003]KLR 26 at page 29, The Court of Appeal stated as follows:-

“Secondly, Mr Mogikoyo argued that in order for the doctrine of recent possession of stolen property to be invoked and a conviction founded, the prosecution must prove that the appellant had physical possession or control of the stolen items. We entirely agree with him. See Charles Lamamba versus Republic (Criminal Appeal No. 8 of 1984) where this court held that:-

“The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved.”

In the instant appeal, PW10 Corporal Jeremiah Musyoki testified that he recovered the stolen items from a house belonging to the 1st appellant at Wanyororo. PW10 testified that the items were recovered from the said house after the 1st appellant had led them to the said house. PW13 Corporal Geoffrey Manjeli testified that the items were recovered from the house of the 1st appellants’ girlfriend known as Mama Ciru. On our re-evaluation of the evidence adduced both by the prosecution and the defence, it is our finding that the prosecution proved that the said stolen items were found in actual possession of the 1st appellant. It is the 1st appellant who led the police to the house at Wanyororo where the stolen items were recovered. The police could not have known that the said items were in the house at Wanyororo if the 1st appellant had not led them to the said house. In the circumstances of this case, it is a moot point whether the said stolen items were recovered from the house of the 1st appellant or from the house of 1st appellant’s girlfriend’s house. It suffices that the prosecution established that the said stolen items were within the actual control of the 1st appellant. The said stolen items were recovered eleven days after they had been stolen from the Melvin Jones Academy. The 1st appellant did not displace the presumption placed upon him to explain the circumstances upon which he came to know that the said stolen items were stored at a house in Wanyororo.

We have considered the defence offered by the 1st appellant and we find no merit whatsoever in the said defence. The said defence was evasive and self serving. We do hold that the doctrine of recent possession is applicable in this case. It is our finding that the prosecution proved beyond any reasonable doubt that the 1st appellant came into possession of the said stolen items having participated in the robbery from Melvin Jones Academy; in the course of the said robbery, the 1st appellant, together with others not before court injured PW5 and PW6 using crude weapons namely clubs and iron bars. The essential ingredients of robbery with violence were proved. We find no merit in the appeal filed by the 1st appellant and we consequently dismiss the same. We confirm the conviction and the sentence imposed by the trial magistrate. As regards the 2nd appellant, we have re-evaluated the evidence and find that the same does not stand up to legal scrutiny. The evidence of PW11 is not categorical on who sold the bicycle in question to him. PW11 testified that the bicycle was sold to him by the mother of the 2nd appellant in the presence of the 2nd appellant. The prosecution did not sufficiently connect the 2nd appellant to the bicycle. It was not proved beyond any reasonable doubt that the said bicycle was in sole and actual control of the 2nd appellant. Reasonable doubt was raised as to who actually sold the bicycle to PW11. Further PW11 could not remember the specific date that the said bicycle was sold to him. We are not certain if the bicycle was sold to him prior to or after the robbery incident.

In any event, the circumstance of the arrest of the 2nd appellant by the police raises doubt that the bicycle was actually in his possession. According to the 2nd appellant, when he gave his testimony in his defence, he was arrested on the 22nd of March 2000 after he had quarrelled with a colleague. This was five months after the robbery incident. No evidence was adduced by the arresting officer to explain the circumstances of the arrest of the 2nd appellant. In the absence of the evidence of the arresting officer, we are only left with the evidence of the 2nd appellant which indicates that he was arrested in connection with another incident unconnected with the robbery at Melvin Jones Academy. We are further not told when PW11 pointed out the 2nd appellant to the police as the person who sold him the bicycle. From our reevaluation of the evidence, it is our finding that the 2nd appellant raised reasonable doubt as to the prosecution’s

case on the charge of robbery with violence facing him. The prosecution did not establish beyond any reasonable doubt that the bicycle which was stolen from Melvin Jones Academy during the robbery was found in actual possession or control of the 2nd appellant soon after the robbery in question to enable this court apply the doctrine of recent possession. In the premises therefore, we hold that the appeal filed by the 2nd appellant has merit.

The appeal by the 2nd appellant is consequently allowed. The conviction of the 2nd appellant, John Kilonzo Kioko, is quashed and the sentence set aside. The 2nd appellant is set at liberty unless otherwise lawfully held. The appeal of the 1st appellant, Kennedy Ochieng Masanja, having been dismissed, the conviction and the sentence imposed thereto is confirmed. He shall serve his sentence.

DATED at NAKURU this 1st day of April, 2005.

MUGA APONDI

JUDGE

L. KIMARU

JUDGE