REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
CRIMINAL APPEAL NO. 170 OF 2002

(AS CONSOLIDATED WITH)

CRIMINAL APPEAL NO. 171 OF 2002

(From original conviction and sentence of the Senior Resident Magistrate's Court at Naivasha in Criminal Case

No. 235 of 2002 – M. M. Muya (SPM)

VINCENT OMONDI OMBETO..... 1ST APPELLANT

STEPHEN MOTUA MASILA..... 2No APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT OF THE COURT

The appellants, Vincent Omondi Ombeto and Stephen Motua Masila werecharged with nine counts of robbery with violence contrary to **Section 296(2) of the Penal Code.** The appellants were further alternatively charged with handling stolen property contrary to **Section 322(2) of the Penal Code.** The appellants were also charged with the offence of having suspected stolen property contrary to **Section 323 of the Penal Code.** The appellants were charged with the above offences following their arrest in connection with the robberies that took place on the 8th and the 19th of January 2002 at County Council Estate, Naivasha whereby several houses were broken into and the owners thereof robbed of various amounts of cash, household and other personal items. After a full trial the appellants were convicted of two counts of robbery with violence. The appellants were also convicted on the alternative charge of being found in possession of suspected stolen property. The appellants were sentenced to serve two years imprisonment on the alternative charge. They were however sentenced to serve the mandatory death sentence in respect of the conviction for the offence of robbery with violence. The appellants were aggrieved by the said conviction and sentences imposed and have appealed to this court against the same.

In their Petitions of Appeal, the appellants raised more or less similar grounds of appeal faulting the decision of the trial magistrate in convicting them. The appellants were aggrieved that they were convicted on the evidence of a single identifying witness when the said purported identification was made in circumstances that were not favourable to positive identification. The appellants were further aggrieved that the trial magistrate convicted them whilst there was no sufficient evidence to connect them with the robberies which they are alleged to have committed. They were also aggrieved that the trial magistrate

had relied on the evidence of the police identification parade to convict them yet they allege the said identification parade was not conducted according to the law. The appellants were finally aggrieved that the trial magistrate had rejected their alibi defence and consequently therefore unlawfully convicted them. At the hearing of the appeals, the two separate appeals filed by the appellants were consolidated and heard as one. The appellants, with the leave of the court, presented their written submissions in support of their appeals. They further made oral presentations to the court urging this court to allow their appeal. Mr Koech, Learned State Counsel submitted that the conviction and the sentences imposed by the trial court on the appellants ought to be upheld and the appeals dismissed. We will revert to the arguments made after briefly setting out the facts of this case.

On the 8th of January 2002 at about 4.00 a.m., PW2 Irene Wairimu Maina was sleeping in her house at Council Estate, Naivasha. PW2 was in the house with her husband and children. She was woken up when the door to their house was broken and a gang of robbers entered their house. PW2 went to hide in the children's room. The robbers had torches. They then robbed the husband of PW2. The robbers took her husband's jacket. They also took their bed sheets and household utensils. PW2 testified that she was able to identify the appellants. She testified that the robbers were armed with an axe. The robbers then left. On the following day, PW2 reported the robbery incident to the police. Two days later, PW2 was called to the police station. She was told that some items had been recovered. She went to the police station and was able to identify her husband's jacket which had been stolen during the night of the robbery. She was also able to identify the household utensils which had been stolen from her house. PW2 was emphatic that she had identified the appellants from the vantage point of her children's bedroom. She was also able to point out the 1st appellant, Vincent Omondi Ombeto, in the identification parade which was mounted by the police.

Meanwhile on the night of the 9th and 10th of January 2002, PW4 Jane Wanjiku, then a standard six student at Naivasha D.E.B. school was asleep in her mother's house. At about 2.00 a.m., the door of the house was broken into. She woke up. The electric light in the house which had been put on was put off but the security lights were on. PW4 testified that a gang of about eight robbers entered the house. They ordered her to give them money. She had none. One of the robbers, whom PW4 identified as the 1st appellant, Vincent Omondi Ombeto, assaulted her. He then took a jacket which had been hung on the wall. The jacket belonged to PW4's mother. PW4 was later called to attend a police identification parade which was conducted by PW 13 Inspector Doris Akinyi. PW4 was able to identify the 1st appellant in the said identification parade.

On the 10th of January 2002, PW1 Lucy Njeri Nganga, the mother of PW4 was at Naivasha town. He saw someone wearing her jacket. PW1 was able to identify her jacket because some buttons were missing on the said jacket in question. She went and reported the incident to KANU youth wingers. They arrested the Ist appellant. The 1st appellant was wearing the jacket. PW1 positively identified the jacket as hers. She pointed out a secret pocket on the jacket where she used to keep her money. In the presence of the KANU youth wingers, PW 1 was able to retrieve Kshs 200/= which she had kept in the secret pocket. PWI admitted that she knew the 1st appellant as a taxi driver. The jacket and the Kshs 200/= retrieved from the secret pocket were produced in evidence. The evidence of PW 1 was corroborated by the evidence of PW10 Joseph Muturi Mbugua. He testified that on the material day, he was approached by PW1 who informed him that he had seen someone wearing a jacket which had been robbed from her house. PW 10 accompanied by one Patrick Ngungu went to where the 1 st appellant was. They found him wearing the jacket which PW I claimed was hers. They effected a citizen's arrest. They arrested the 1st appellant. In his presence, PW1 was able to retrieve Kshs 200/= which she had kept in a secret pocket in the jacket. PW10 further testified that PWl had told them that a button of the said jacket was missing. PW10 testified that the 1st appellant explained that the jacket had been left at his taxi by a customer.

PW6 Josephat Maina Wanjohi testified that on the 9th of January 2002 at about 2.00 a.m while he was asleep in his house within Naivasha Municipality, robbers broke into his house and stole from him Kshs 3000/=. They also stole a black and white television. Later he was called to the police station. He was able to identify his black and white television set which had been recovered by the police. He produced a receipt proving that he had purchased a television set serial number S/No. 31401029. The receipt tallied with that of the television set which had been recovered by the police.

PW7 Margaret Wanjiku Kariuki testified that on the 18th of January 2002 at about 4.00 am she was asleep at her house within Naivasha Municipality. Robbers knocked at the door to their house and ordered her to open it. Her husband opened the door. PW7 testified that she was able to identify the two appellants by the light of the torches. The security lights of the neighbouring house were on. The robbers ordered them to surrender the money that were possessed by PW7 and her husband. PW7 gave Kshs 6,000/= while her husband gave Kshs 4,000/=. PW7 testified that the 1st appellant picked up their infant child and threatened to take away the child if PW7 did not give him more money. The robbers later took her television set, utensils and clothes. PW7 admitted that she had not known the appellants prior to the robbery incident, but she was able to identify the two in an identification parade conducted by PW12 Inspector Maurice Nzioka and PW13 Inspector Doris Akinyi. PW7 was emphatic that she positively identified the two appellants by the security lights from the neighbouring plots. She also testified that she negotiated with the 1st appellant, who had taken her child aged two and a half years hostage, with a view of having the said child released back to her. She testified that the child was released to her after she paid money to the 1st appellant. youth wingers that a suspect had been arrested wearing a jacket which had been stolen in a robbery. PWI l re-arrested the suspect, who is the 1st appellant in this case. He interrogated the 1st appellant.

The 1st appellant led PW11 and his fellow police officers to the house of the 2nd appellant. Several items which were suspected to have been stolen were recovered from the house of the 2"d appellant. The items recovered which were later identified by their owners were a black and white television set belonging to PW6 Josphat Maina Wanjohi, and six cups and six spoons which were identified by PW2 Irene Wairimu Maina. A black jacket belonging to the husband of PW2 was also recovered. All these items which were recovered were produced as exhibits in court.

At the close of the prosecution's case, the appellants were put to their defence. The 1st appellant, Vincent Omondi Ombeto denied that he was involved in the robbery. He narrated the circumstances of his arrest. He denied that he was wearing the jacket which the prosecution witnesses testified that he had worn at the time of his arrest. It was his evidence that the jacket in question was planted on him by the KANU youth wingers at the time of his arrest. He attributed the animosity between him and the KANU youth wingers to the fact that they had warned him to stop his taxi business at Naivasha. The 1st appellant testified that he had been told to go back to Kisumu. He further testified that none of the stolen items were recovered from his house when the police conducted a search at his house. The 1st appellant further testified that the identification parade conducted by the police was irregular because some of the identifying witnesses saw him before the said identification parade was conducted. He therefore urged the court to acquit him.

The 2nd appellant, Stephen Mutua Masila denied that he was involved in the said robberies. He testified that the police identification parade which had been conducted by the police was irregularly conducted because some of the identifying witnesses saw him before the said identification parade was conducted. He denied that the items which were produced in evidence by PW11 were recovered from his house. It was his testimony that he could account for every item that was allegedly recovered from his house as belonging to him. He urged the court to find that the prosecution had not proved its case against him.

This is a first appeal.

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya -vs- R. [1957JEA 336) and to the**
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> **appellate court's own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwalla vs- Republic [1957JEA 570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own finding and draw its own conclusion" per Sir William Duffus P in Okeno -versus- Republic [19721 EA 32 at page 36 para B.**

In the instant appeals, the appellants were charged with nine counts of robbery with violence contrary to **Section 296(2)** of the Penal Code. They were however convicted of two counts of robbery with violence. The appellants were convicted of one count each of handling stolen property contrary to **Section 322(2)** of the Penal Code. The 2nd appellant was further convicted of being found with suspected stolen property contrary to **Section 323 of the Penal Code.** All the above counts arose from the events that took place in the early part of January 2002 at Naivasha Municipality. There were a spate of robberies which resulted in properties being robbed from several residents of Naivasha. The robberies were carried out by a gang of robbers numbering more than eight. The robberies took place at night. According to the evidence which was adduced by the prosecution, the appellants were identified as being members of the gang of robbers which had terrorised the residents of Naivasha Township. The appellants were identified by at least two witnesses who were able to point them out in an identification parade. The other piece of evidence that the prosecution relied on is the evidence of the recovery of the stolen items soon after the said robberies in question. In respect of the 1st appellant, he was found with a jacket which was positivelyidentified by PWl as belonging to her. Several items which were stolen during the robberies in question were recovered from the house which was identified to belong to the 2nd appellant. The recovered items were positively identified by PW2 and PW6.

We have re-evaluated the evidence which was adduced by the prosecution and the defence offered by the appellants. We have put in mind the fact that we neither saw nor heard the witnesses as they testified. We are also aware that the burden of proof of a criminal case always rests on the prosecution. This burden does not shift to the appellants. In the instant case, PW2, PW4 and PW7 testified that they were able to identify the appellants during the different nights that the robberies were carried out. They all said that they were able to identify the appellants by the light of the torches that were in possession of the robbers. They also said that the lights from the security lights which from the neighbouring houses, enabled them to identify the appellants. Apart from PW4, who appeared to have known the 1st appellant as a taxi driver prior to the robbery incident, the other witnesses saw the persons whom they later identified as the appellants for the first time during the robbery incident. The poignant evidence of PW7 notwithstanding, it is clear that the circumstances which the said identifications were made can be said to have been difficult. PW4 did not testify that she recognised the 1st appellant.

From the evidence on record, it is clear that although the said witnesses indicated to the police that they could identify the robbers if they saw them again, the description of the said robbers was not made to the police when the first report was made. It is important that evidence touching on identification, especially on the description of the alleged offender, should be recorded at the first opportunity by the police when the report is being made. This is due to the fact that a comparison must be made between the description of the person identified in the first report and that made during the identification parade conducted later when a suspect is arrested. In the instant case, the subsequent identification by the said witnesses of the appellants in an identification parade mounted by the police was thus rendered doubtful. This court cannot be certain, beyond any reasonable doubt that the identification of the appellants by the said witnesses could not have been mistaken. This is in view of the fact that the said identification was made in circumstances that were difficult. All the witnesses who testified that they identified the appellants appeared to have been frightened and therefore their identification of the appellants could not possibly be said to have been without the possibility of error.

In the circumstances of this case, we are not prepared to find that the appellants were positively identified by the said witnesses. The subsequent identification parade conducted by the police was thus deficient in view of the fact that the description of the robbers was not made to the police when the initial report of the robberies were made.

We therefore find that the prosecution did not establish beyond reasonable doubt that the said witnesses positively identified the appellants.

As to the evidence of the recovered items, we are satisfied that the prosecution proved its case beyond reasonable doubt against the appellants. PW4 testified that on the night of the robbery, a jacket belonging to PW1 was stolen by one of the robbers. Two days later, as PW1 was walking within

Naivasha town, she saw the 1st appellant wearing her jacket. She was able to identify the jacket from a button which was missing. She informed PW10, a KANU youth winger. PW10 assisted by other KANU youth wingers arrested the 1st appellant. PW10 testified that upon the jacket being recovered from the 1st appellant, PW 1 retrieved Kshs 200/= which she had kept in a secret pocket in the said jacket. PW 10 was satisfied that PWI had proved that she was the owner of the jacket. The evidence of PW1, and PW10 was corroborated by the evidence of PWI 1 who testified that PW 1 was the only one who could have known the where about of the secret pocket in the said jacket. When the 1st appellant was asked where he got the jacket from, he explained that a customer had left the jacket in his taxi. When he testified in his defence, the 1st appellant denied that he was in possession of the said jacket. It was his evidence that the said jacket was planted on him when he was taken to the KANU office by PW10 due to some prior animosity.

We have re-evaluated the evidence adduced. It is our finding that the evidence of PW4 clearly proved that the said jacket was stolen during the night of the robbery. The evidence of PW 1, PW 10 and PW 11 corroborated each other on the circumstances under which the said jacket was recovered from the 1st appellant. PWI was able to positively identify the jacket as belonging to her. It was only PWI who could have been aware of the secret pocket and the fact that she was able to retrieve the sum of Kshs 200/= from the said secret pocket is conclusive as to the ownership of the said jacket. The fact that the said jacket was recovered so soon after the robbery, in the absence of any other explanation, proves that the 1st appellant robbed the said jacket from the house of PW 1. The doctrine of recent possession applied in this case.

As regard the evidence against the 2nd appellant, PW11 testified that on the l8th of January 2002 upon interrogating the 1st appellant, he and other police officers

were led to the house of the 2"d appellant whereby certain items which were suspected to be stolen were recovered. The items which included utensils and a black and white television set were later identified by PW2 and PW6. A black jacket which PW2 also identified as belonging to her husband was also recovered from the house of the 2"d appellant. The 2d appellant when put on his defence admitted that a search was conducted in his house by the police and several items taken away. He however testified that the said items which were produced in evidence and which were identified by the said witnesses were not recovered from his house.

We have re-evaluated the evidence adduced by the prosecution, especially the evidence of PW2, PW6 and PW1. We find that the said evidence was credible, consistent and corroborated each other. The prosecution proved that the said items, i.e the utensils, the black jacket and the black and white television set belonged to PW2 and PW6. The said items were stolen during the night of the robbery. Soon thereafter, they were recovered from the house of the 2d appellant. No cogent explanation was given by the 2d appellant to disprove the presumption that he dishonestly came into possession of the said items or that he robbed the same from the houses of the complainants (i.e PW2 and PW6). The doctrine of recent possession applied in the instant case.

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 thedoctrine 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 co-existing circumstances which pointed 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 ther stole it or was a guilty receiver." In Wandue versus- Republic 120031KLR 26 at page 29, The Court of Appeal***

stated as follows:-

> ***"Secondly, Mr Mogikoyo argued that inorder 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:-***
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> ***"The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved."***

In the instant appeal, the prosecution proved all the required ingredients to establish that the appellants were found in recent possession of items which were stolen in robbery incidences. The prosecution proved that the appellants were in actual possession of the said items. The appellants failed to give explanation of how they came into possession of the said items to prove that they innocently came into possession of the said items. We have considered the defence offered by the appellants and find that the said evidence offered in their defence does not exonerate them from the presumption that they stole the said items in a robbery involving the complainants in this case.

We therefore find that the prosecution proved its case against the appellants on the charge of robbery with violence contrary to Section 296(2) of the Penal Code in counts 2, 3, 8 and 9. They are accordingly convicted.

We find no merit whatsoever in their appeals. The appeals are consequently dismissed. The conviction and the sentences imposed is hereby confirmed.

DATED at NAKURU this 9th day of May 2005.

DANIEL MUSINGA

JUDGE

L. KIMARU

JUDGE