



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL 1019 OF 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 1848 of 2001 of the Senior Principal Magistrate’s Court at Kiambu (G.M. Njuguna– S.R.M))

MOSES MAIKU WEPUKHULU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL 148 OF 2005

(From original conviction(s) and Sentence(s) in Criminal Case No. 1848 of 2001 of the Senior Principal Magistrate’s Court at Kiambu (G.M. Njuguna– S.R.M))

PAUL NAMBUYA NABWARE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

MOSES MAIKU WEPUKHULU and PAUL NAMBUYA NABWARE were both charged and convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. It has been alleged that during the night of 22nd and 23rd June 2001 at Raiyani village in Kiambu District jointly with others and while armed with dangerous or offensive weapons namely rungus and iron bars robbed the Complainant **PETER WANJUU MBUGUA** of TV set, radio cassette, video deck, mobile phone, 2 remote controls and a handbag and in the course of the robbery threatened to use personal violence on the Complainant. Both Appellants were sentenced to death as by law prescribed. It is from this conviction and sentence that they have lodged these appeals. We have consolidated them for ease of hearing and disposal.

Both Appellants raised similar grounds of appeal. The first ground challenged their identification by PW1 on grounds that it was made under difficult circumstances. The Appellant also challenged the trial magistrate for relying on the charge and caution statement made by the 1st Appellant. The Appellants also challenged the trial magistrate for relying on the evidence of the recovery of exhibits and also for failing to give due consideration to their defences.

The brief facts of the prosecution case were that on the material night some men broke into the Complainant's house, PW1, while he and his wife were asleep. They had iron bars and rungs. The Complainant switched on the lights in the bedroom. The men relieved them of their properties and then left. It was about 1.30 a.m. Some days later the Complainant was shown some of his recovered property and also the Appellants. In Court the Complainant identified the Appellants as among those who robbed them. PW2, the Complainant's wife, was not able to identify anyone. The arresting officer was PW3. He told the Court that the same morning, 23rd June 2001, he arrested both Appellants inside a matatu in which PW4 was the conductor. The Appellants were carrying a TV and radio cassette, exhibit 1 and 4, inside muddy sacks. PW4 confirmed that the two Appellants had boarded the Matatu at Ngewa stage. Ngewa village is where the Complainant lived.

The two Appellants in their unsworn defence denied the charge. The 1st Appellant told the Court that he had gone to Ruiru to see his brother from Uganda. That on 13.6.01 he was arrested at a plot in Ruiru in a police swoop. The 2nd Appellant on his part said he had come to Ruiru from Uganda to bury his brother. That on 22.6.01 he was intercepted by police and arrested.

The learned counsel for the State, **MISS OKUMU** erroneously believed that the rank of the police officer, **MR. MWATHE**, who conducted the entire prosecution of the case, was not indicated.

We have confirmed from the original record that **MR. MWATHE** was an Inspector of Police. The omission on the typed proceedings was therefore merely topographical. The proceedings were not defective as submitted by the learned counsel on this ground. We have re-evaluated the entire evidence adduced before the trial court as the first appellate court and as we are mandated to do. See **OTIENO vs. REPUBLIC 1972 EA 32**. In doing so we have been alive to the fact that we neither saw nor heard the witnesses and have given due consideration for it.

The conviction of the Appellant was purely grounded on two factors. First, recent possession of the recovered stolen TV set and radio cassette. Secondly the confession statement by the 1st Appellant. The learned trial magistrate observed at J3.

“The Complainant was robbed at 1.30 a.m. by people who broke into his house and who were armed with rungs and iron bars. 4½ hours later, the accused were found in possession of the TV and music system, some of the items stolen from the Complainant. These items have been shown by the prosecution to belong to the Complainant through production of receipts for them and permits. Though the police did not conduct an identification parade I have not the slightest doubt that the accused were part of the robbers who raided the Complainant's house...”

We agree with the learned trial magistrate's evaluation of the evidence. The conviction entered was based on the doctrine of recent possession. That the Appellants had possession of the stolen items so soon after the robbery that they were more the thieves than the handlers of the stolen items. The trial magistrate gave a passing reference to the confession statement made by the 1st Appellant. However, it is clearly shown that the conviction was based on the recovery of the stolen exhibits 4½ hours after the robbery. We are satisfied that the learned trial magistrate duly considered the Appellants' defence and therefore, the Appellants submission that their defences were ignored was not correct.

A person who has recent possession of goods recently stolen can be found guilty of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. In the case of **PETER KIMARU MAINA vs. REPUBLIC CA No. 11 of 2003 (Nyeri)**, it was held:

“We are satisfied like the two courts below that the Appellant was in possession of the video machine that the Complainant was robbed of on 19/2/2000 and that he sold the video machine to PW3. It follows that the Appellant was in recent possession of the stolen video machine 4 days after the robbery. This evidence adds weight to the evidence of identification of Appellant by PW1 and PW2, and even if the evidence of identification was to be ignored, the Appellant could still have been safely convicted on the evidence of his possession of the video machine.”

In this case the Appellants boarded PW4's public service vehicle at Ngemwa stage, within the area where the Complainant lived at 5.00 a.m. The robbery had taken place at 2.00 a.m. Even without the evidence of identification, possession of the stolen items, three hours after they were stolen, is sufficient to sustain a conviction for the Capital offence.

We have considered these two appeals. We find that the evidence of identification was not dependable or reliable for two reasons. One, the Complainant was shown the Appellants by the Police the same day of the incident. Two, no identification parade was conducted. It is therefore difficult to tell whether the Complainant could truly have been able to identify the Appellants had they not been exposed to him. The circumstances of identification were also not too clear. The incident took place at night. The condition of lighting or distance of that lighting from the Complainant and the Appellants at the time the Complainant claims he saw them was not disclosed. That evidence failed the test given in the case of **REPUBLIC vs. TURNBULL & OTHERS (1976) 3 ALL E.R. 559**. However, as we have already observed, the conviction was not based on visual identification by the Complainant but on recent possession of the recovered stolen items.

We find that the conviction was safe and should be sustained. We find that the appeals have no merit and consequently we dismiss them accordingly.

Dated at Nairobi this 18th day of October 2005.

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LESIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE