REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Appeal 62 of 2003
(From original conviction(s) and Sentence(s) in Criminal case No. 3549 of 2002 of the Chief Magistrate's Court at Kibera (Ms. Mwangi – RM)

PETER MWANGI NJENGA……...……………….…………..APPELLANT

VERSUS

REPUBLIC………………………………………..……....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 65 of 2003

(From original conviction(s) and Sentence(s) in Criminal case No. 3549 of 2002 of the Chief Magistrate's Court at Kibera (Ms. Mwangi – RM)

GEOFFREY AMBANI MAKAMU.……………….…………..APPELLANT

VERSUS

REPUBLIC……………………………..………..……....RESPONDENT

J U D G M E N T

PETER MWANGI NJENGA and **GEOFFREY AMBANI MAKAMU** were jointly charged with **ROBBERY WITH VIOLENCE** contrary to **Section 296(2**) of the **Penal Code**. It was alleged that both Appellants jointly while armed with dangerous weapons robbed the Complainant of cash Kshs.950/- and other personal items listed in the charge sheet at Ngong in Kajiado District. The 2nd Appellant was charged alone with an alternative count of **HANDLING STOLEN GOODS** contrary to **Section 322(2)** of the **Penal Code t**hat he handled various identification cards and documents on the 24th April 2002 at Ngong Town. Both were convicted and sentenced to death

Being aggrieved by the judgment of the Court, the Appellants lodged separate appeals which we have now consolidated.

The Appellants have raised similar grounds of appeal in their petitions. They challenge the conviction on the basis of identification which they claim was made under difficult circumstances. That the Appellants defences were not given due consideration and that the evidence of the prosecution was inconsistent and weak.

The appeal was opposed. **MR. MAKURA** learned counsel for the State submitted that the Complainant's evidence showed that both Appellants had robbed her on the night in question. Her

evidence was corroborated by PW2. Counsel further submitted that both Appellants were arrested by PW3 and that the Complainant's property recovered from them.The Counsel submitted that the conviction was therefore safe.

We have carefully evaluated the evidence adduced before the trial court afresh as required of us as a first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32**. We shall deal first with the issue of identification. As opposed to what learned state counsel submitted before us, the Complainant was not able to identify any of the Appellants as those who robbed her on the material day. PW1's evidence was that she was walking home at about 8.00 p.m. with another lady. The lady reached her gate and they parted company. She walked onto her gate where, before the watchman who was PW2 opened, she was hit with an iron bar. The one who hit her was in company with another. They took her handbag whose straps they cut with a knife, and ran off. She said she could not identify anyone. PW2 alleged he was able to see the two who attacked the Complainant by lights at the gate. He said the gate was 10 metres from the spot where the Complainant was attacked. PW3 arrested both Appellants at Ngong Town following some information he had received. In the 2nd Appellant's house, PW3 recovered all the Complainant's identification cards and documents. These were later identified by the Complainant, PW1, at the station. The arrest took place on 24th April 2002, one week after the offence. From that summary it is very clear to us that the learned State counsel could not have prepared himself sufficiently to submit in this appeal. The facts that he gave in his submission contradict the record of the proceedings.

On the issue of identification we have no doubt that the identification by PW2 was made under difficult circumstances which were not conducive to positive identification. In the circumstances the evidence of PW2 could not stand alone to support a finding of guilt. What is needed is other evidence whether circumstantial or direct, which implicates the Appellant with the offence.

In the learned trial magistrate's judgment at J2, she observed:-

> ***"Upon arrest by PW3, the 1st accused was found in possession of PW1's property. They would not say how they came by the same and I have no doubt that the two had robbed PW1. Upon arrest they were found armed. The accused could not say why PW2 could have lied against him and I don't believe he did."***

the learned trial magistrate proceeded to convict both Appellants for the capital offence.

The basis of the conviction was the identification by PW2 and the fact the 1st accused, who is the 2nd Appellant herein had in his possession the Complainant's stolen property. The learned trial magistrate also found correctly too, that the 2nd Appellant gave no explanation for his possession.

We do not agree with the learned trial magistrate's conclusion that the evidence of identification by PW2 was positive. It needed corroboration as we have already stated. The corroboration that was available was the recovery of the Complainant's property with the 2nd Appellant a week after they had been stolen. While the Court did not expressly say so in its judgment it is well established principle that a Court may presume that a man in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. See **KANTILAL JIVRAJ & ANOTHER vs. REPUBLIC [1961] EA 6.**

The 2nd Appellant did not even make reference to the recovery of the Complainant's property from his house in the explanation or account for his possession. In **ANDREA OBONYO & OTHERS vs. REPUBLIC 1962 EA 542**, it was held by the Court of Appeal of

Eastern Africa thus: -

> "***(ii) Where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen certain articles, the theft must be proved beyond reasonable doubt; and if a finding that he stole the articles depends on the presumption arising from his recent possession of the stolen articles, such a finding would***

not be justified unless the possibility that he received the articles has been excluded.

(iii) as to the first and third appellants, while the trial judge's inference may well have been true, the court, with some hesitation, considered that other possibilities had not been sufficiently excluded, particularly in view of the lapse of time; the absence of any explanation was not sufficient to negative a reasonable possibility that the appellants might have been only receivers."

The cited case seems to put pre-conditions before a presumption of guilt on possession of stolen property can be inferred. It suggests that an inference that a person in possession of recently stolen property stole them cannot be justified unless the possibility that he received the article has been excluded. Secondly it further suggests that where there has been a lapse of time since the theft of the articles, other possibilities other than theft cannot be excluded even where no explanation is given. In this case, the lapse of time involved is one week. In our view one week is recent enough to justify drawing an inference that the possessor of the recently stolen times was the thief. The nature of the items involved were the Complainant's identity card, her bank, ATM cards, her employment cards, two title deeds and other properties, many of which bore her name. These are not the kind of items that easily pass hands. The 2nd Appellant did not give any account of how he came to possess them. The possession was so soon after the robbery. In the circumstances of this case we are fully satisfied that the Court would be justified to draw an inference that the 2nd Appellant was the thief of the Complainant's property.

Such inference could be justifiably drawn against the 2nd Appellant who had actual possession of the property. However no such an inference could be drawn against the 1st Appellant. As against the 2nd Appellant, we are satisfied that for the reasons we have given in this judgment that the conviction entered against him was safe.

For the 1st Appellant the evidence of identification by PW2 did not receive any corroboration from any other evidence. The fact that PW3 arrested the 1st Appellant in the company of 2nd Appellant would not offer the corroboration required to convict. PW3 did not recover anything from the 1st Appellant. He merely arrested him on the basis of information received from a person not called as a witness. We find that the conviction against him was weak and should not be allowed to stand.

We have considered all the issues raised by the Appellant in their petitions of appeal. We find that the 1st Appellant's appeal has merit. Consequently we allow his appeal, quash the conviction and set aside the sentence. The 2nd Appellant's conviction was safe and consequently we dismiss his appeal, uphold the conviction and confirm the sentence.

The 1st Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 17th day of November 2005.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE