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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.743 OF 2000

(From Original Conviction and Sentence in Criminal Case No.565 of Principal Magistrate's Court at Naivasha.)

SIMON KURIA KIMANI……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 744 OF 2000

JOSEPH MBUGUA KARANJA ……..……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 745 OF 2000

JOHN NJAU KARIUKI ……..…….. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

J U D G M E N T

The appellants were arraigned in the Senior Principal Magistrate's Court at Naivasha and charged with 2 counts of robbery with violence contrary to Section 296(2) of the Penal Code, 3 counts of kiosk breaking and committing a felony contrary to Section 306(a) of the Penal Code. The 1st appellant faced a further count of stealing from a locked motor vehicle contrary to Section 279(g) of the Penal Code. Following a lengthy trial in which 10 prosecution witnesses testified the appellants were convicted on counts 1 and 2 and subsequently sentenced to suffer death. The appellants were also convicted on counts 3, 4 and 5 relating to kiosk breaking and committing a felony therein. They were each sentenced to 6 years imprisonment. The 1st Appellant was found guilty of the offence of stealing from a locked motor vehicle (count 6) and sentenced to a prison term of 3 years. The sentences were to run concurrently. It is against these convictions that the appellants lodged their appeals separately on the 7th July, 2000. The three appeals 743/2000, 744/2000 and 745/2000

were subsequently consolidated and heard as one.

In their grounds of appeal, the appellants jointly complained that the Learned Magistrate erred in law and fact in convicting them on the charge of robbery with violence in the absence of evidence of identification, that the Learned trial Magistrate applied albeit wrongly the doctrine of recent possession, that the evidence of recovery of the alleged items stolen from the kiosk and the locked motor vehicle motor vehicle was doubtful and unsatisfactory. Finally that the Learned trial Magistrate failed to consider the Alibi defences put forth by the appellants.

At the hearing of this appeal 1st and 3rd appellants who were not represented by counsel put in written submissions in support of their appeals Mr. Gichuki learned counsel who appeared for 2nd appellant preferred oral submissions. However, before he could commence his submissions, Mr. Monda, Learned State Counsel indicated to us that the state was conceding to the appeals in so far as they related to the 2 counts of robbery with violence.

The reasons the state advanced for conceding to the Appeal that, is that there was no Identification Parade carried out the complainants testified that the appellants were strangers to them. Consequently, in the absence of an Identification Parade the Learned trial Magistrate could not have placed the Appellants at the scene of the crime. We may go further and state that even if the identification parade had been conducted we are satisfied that it would not have advanced the prosecution's case as the circumstances obtaining during the commission of the crime did not favour any positive identification. PW1 conceded that when the robbery was in progress the robbers had put a blanket over her face. It is only after she removed the blanket and one of the robbers by sheer coincidence focused the torch light on the 1st appellant that she was in a split second able to identify the 1st Appellant. This is the only evidence of identification. The other appellants were never identified. The evidence on identification was of the poorest type. We therefore agree with the Learned State Counsel that in the absence of any material evidence it was unsafe to convict the Appellants of robbery with violence and we so hold. Mr. Monda Learned State Counsel submitted however that he would be supporting the conviction and sentence on the alternative counts.

The 1st and 2nd appellants in view of the states' position chose to rely on their written submissions. However, counsel for the 2nd appellant submitted that there was no sufficient evidence on record that could have led to the Learned Magistrate to convict the appellant on counts 3, 4 and 5. He submitted that in order to prove these offences it was incumbent upon the prosecution to adduce evidence that the kiosks were broken into and produce as exhibit implements

used. The prosecution also ought to have prepared and produced as exhibit an inventory of the items stolen. Finally he submitted that the nature of the goods were the kind of goods ordinarily found in kiosks so that in order for them to have been positively identified, it was necessary for them to produce receipts for the purchase of the said goods.

In response to the appellants' submissions the Learned state counsel submitted that he supported the conviction and sentence on the alternatives counts of handling suspected stolen property; and count 6 where the 1st appellant is charged with stealing from a motor vehicle. The appellants were found in possession of the goods that had been stolen. Indeed the 1st and 2nd appellants assisted the police officers in making the recoveries. They also led the police officers to the house of 3rd appellant where further recoveries were made. The Learned State Counsel further submitted that nowhere in the record did the appellants claim ownership of the recovered items. In the circumstances the only reasonable presumption that can be drawn was that the goods were not owned by the appellants and since they had been allegedly stolen, a fact that was not disapproved, the reasonable presumption drawn by the Magistrate that they were in possession through stealing is reasonable. Consequently they were properly convicted as their defences were mere denials. The Learned State Counsel invited us to alter the charge in respect of the alternative counts and convict them accordingly pursuant to the provisions of Section 354(3)(iii) of the Criminal Procedure Code.

To our mind what calls for determination in this appeal in the light of the position taken by the state is whether the property itemized in the charge sheet were stolen? If so by whom? Did the property belong to the complainants, and was whoever was found in possession of them dishonest in such possession.

The alternative charge to count one relates to John Njau Kariuki the 3rd Appellant. He is alleged to have been found in possession of one wall clock the property of Veronica Wairimu. It is alleged that he dishonestly retained the same knowing or having reason to believe that it had been stolen. In her testimony PW1 stated that thugs who invaded her house stole a television, wall clock, battery, bed cover. bag, kiondo, radio gram and a radio cassette. She made a report to the police the following day. After sometime, the television, radio gram, wall clock, watch and radio cassette were recovered and she identified at the police station. The evidence of recovery of the said items was given by PW6 who testified that appellants 1 and 2 took them to the house of appellant 3 and upon searching the house a wall clock was recovered. One panga, three pairs of sandals, one torch 4 pieces of panga soap, one geisha soap, a hammer, handsaw, 2 sufurias and one master key were also recovered. The evidence of PW6 was further supported by the evidence of PW7 regarding how the property aforesaid were recovered from the house of appellant 3. In

cross-examination of this particular witness by the 3rd Appellant it emerged that he had even approached the police officers to bribe them with a view to having the co-appellants released. The witness confirmed that the wall clock was found in the 3rd Appellants house. The 3rd Appellant in his defence did not deny that the wall clock was found in his house nor did he claim ownership. Indeed in the course of the hearing when the prosecution applied for the property to be released to the Complainant, the 3rd Appellant did not object. Against this evidence all the 3rd Appellant could do is to state in his submissions that his arrest and subsequent search of his house was not supported by any document like the entries in the OB. There was also no independent evidence to confirm what PW6 and PW7 said as they were all police officers, and that the possibility of being framed was not ruled out. On the evidence on record, we do not find the 3rd appellant's contention valid. He did not deny that his house was searched. Neither did he suggest in his evidence why there was a possibility that he was framed up. Nor did he say that the house is occupied by other person or person who could have had the wall clock in that house. On the evidence we find that the wall clock was found in the house of the appellant 3. The wall clock did not belong to him and consequently it must have been stolen from PW1. The 3rd Appellant in the process dishonestly retained it.

As regards the alternative count to the 2nd charge of robbery with violence it is alleged that the appellant 3 was similarly found in possession of a panga, three pairs of sleepers the property of Mary Njeri Mwaura knowing the same to have been stolen or unlawfully obtained. The Complainant herein was PW2. On the night of 14th March, 2000 some men forced themselves into her house and menacingly demanded money from her whilst claiming that they were police. They forcefully took a panga, packet of cigarettes, six torches, three pairs of sandals, 4 bars of soap, one geisha soap. The evidence of how this items were recovered in the possession of the 3rd Appellant was once again given by PW6 and PW7. The 3rd appellant did not claim ownership of the items. The Complainant clearly identified the items as hers. The appellant in his defence did not deny that the items were recovered from his house. Since the house was only occupied by the 3rd Appellant the possibility that the items belonged to someone else and or that they were planted on him is remote. We hold that the circumstances under which the items were recovered on the 3rd appellant were such as to meet the ingredients of the alternative facing the appellant.

Regarding counts 3, 4 and 5 in the charge sheet, we are satisfied on the evidence on record that the conviction was sound. Although there is no direct evidence linking the appellants to the spate of kiosk breaking and theft therefrom, there is however ample circumstantial evidence linking them to crime, as the Learned State Counsel submitted. Appellants 2 and 3 led the police officers to make the recoveries of the goods that were stolen from these kiosks. There were

recoveries made from the house of the 3rd appellant. The appellants also took the police to Gilgil Township in the house of one Mathenge where some properties stolen as foresaid were recovered – television, battery, crate of empty bottles of soda, one lantern lamp and 2 loudspeakers. Thereafter the appellants then took the police officers to Diatomite where further recoveries were made with respect to assorted kiosk goods – salt, rice, wheat flour, blue band etc. Sometimes later the 2nd appellant took the police officers to Nyahururu town at Chekerena area where the radio gram and Trident radio cassette were recovered respectively. All the items which were recovered as aforesaid were all positively identified by the complainants as being the items that were stolen from the kiosks when they were broken into. All the appellants in their defences never claimed ownership nor deny the mode of recovery.

It is trite law that where there is evidence that the accused person is found in actual possession or has, shortly after robbery sold one of the items stolen during the robbery, he is deemed to be in recent possession of the stolen item and consequently to have committed the crime *(see: CRIMINAL APPEAL NO.111 OF 2002 – PETER KIMARU MAINA V S. REPUBLIC).* The circumstances of this case are on all fours with the aforesaid authority. In the circumstances we are convinced that the appellants were properly convicted on counts III, IV and VI.

We finally come to count IV. This relates to 1st appellant alone. He is alleged to have stolen from a locked motor vehicle. The items stolen were a battery, car speakers all valued at Kshs.6,600/=. PW10 the complainant testified that he had locked his motor vehicle and parked it at a petrol station. The following day he found the bonnet had been forcefully opened. A speaker, car radio and battery were missing. Subsequently the items were recovered. The speakers and the motor vehicle battery were recovered from one Mathenge. The house of Mathenge was pointed to the police by the appellants. Mathenge himself testified and pointed out appellants 2 and 3 as the ones who brought some items in a sack and a crate of soda and requested him to keep them. The battery which was established belonged to the complainant's motor vehicle was subsequently recovered from the said Mathenge in the presence of appellant 2. 2nd Appellant did not claim ownership nor dispute the series of events leading to the recovery of the items. Applying the principles enunciated in the aforesaid decision of Peter Kimani Maina we hold that the learned Magistrate was right in convicting the appellant.

In the result we dismiss the appeals on conviction on counts III, IV, V and VI. The Learned State Counsel has submitted that convictions on the 2 counts of robbery with violence cannot be sustained on the evidence on record. We agree and allow the Appeal to that limited extent. We however, invoke the provisions of Sections 354(3)(iii) and convict 3rd

appellant of the alternative counts of handling stolen property contrary to Section 322(2) of the Penal Code.

As regards sentence, we note that the appellants were sentenced to 6 years imprisonment in respect of the 3rd, 4th and 5th counts. The 1st appellant was further sentenced to a period of 3 years imprisonment on count 6. The sentences were to run concurrently. The appellants have prayed that the above sentences are harsh and excessive. We note that the punishment for the offence of kiosk breaking and committing a felony therein is seven years together with corporal punishment. By the time the sentence was imposed the appellants had been in custody for sometime. If this fact had been taken into account perhaps the learned Magistrate would have imposed a lesser imprisonment term. We would therefore review downwards the imprisonment term imposed on each appellant to the period so far served by each appellant. Having found the 3rd appellant guilty of the two counts of handling stolen property contrary to Section 322(2) of the Penal Code, we impose a sentence equivalent to the time he has so far served in the prison custody on each count. Both terms to run concurrently.

In the result the appellants and each one of them will forthwith be released from prison, unless otherwise lawfully held.

Dated and delivered at Nairobi this……day ……..…2004.

M.S.A. MAKHANDIA
AG. JUDGE

L.K. KIMARU
AG. JUDGE