REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 628 OF 2004

(from original conviction and sentence in Criminal case No. 2082 of 1998 of the Senior Magistrate's Court at Naivasha).

ALICANDIOCI MWANGI WAINAINA…….…….. APPELLANT

VERSUS

REPUBLIC ……..……..…..…….. RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 647 OF 2000

ISAAC NJOGU GICHIRI …..……..…… APPELLANT

VERSUS

REPUBLIC ……..……. REPUBLIC

JUDGMENT OF THE COURT

The Appellants *ALICANDIOCI MWANGI WAINAINA* (hereinafter referred to as the 1st Appellant) and *ISSAC NJOGU WAINAINA* (hereinafter referred to as the 2nd Appellant) were with three others charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that on the 8th day of October 1998 at around 8 p. m. at Nyakairu Farm Naivasha in Nakuru District of Rift Valley Province, jointly with others not before Court and being armed with a firearm robbed *MAURICE ONYANGO MBWIRE* of one lister engine, one generator, one PM 500 disintegrator, total gas cylinder, gas cooker, two A1 – D Converter and household items all valued at Kshs.405,400/= and at or immediately before or after the time of such robbery wounded *MAURICE ONYANGO MBWIRE*. The Appellants pleaded not guilty and after a full trial in which the prosecution called 5 witnesses, the Appellants were convicted as charged and sentenced to death as required under the law.

Being aggrieved by the said conviction and sentence the Appellants have appealed to this Court. The Appellants filed their separate Appeals which Appeals were consolidated and heard as one. The two Appellants in their separate Appeals raised more or less similar grounds of Appeal faulting the decision of the trial Magistrate to wit; that she erred in applying the doctrine of recent possession, that the ingredients of a charge of robbery with violence were not met, that she misdirected herself in holding that some of the exhibits were recovered from the Appellants and finally that the prosecution case was not proved beyond

reasonable doubt.

At the hearing of the Appeal, Miss Gateru appeared for the State. The Appellants were unrepresented. However with the permission of the Court, they were allowed to put in written submissions in support of their Appeals. Before we can consider the issues raised in this Appeal, it is imperative that we set out the brief facts of this case.

PW1 Samuel Njoroge owns a farm at Nyakairu although he stays in Nairobi. He has a home on the farm. He also has employees on the farm. On 8/10/98 at about 8 p. m. an employee by the name of Maurice Onyango Mbwire (PW2) was on the farm when he was attacked by a gang of robbers. The robbers were armed with a gun, a panga, a sword and a rungu. They beat him up and tied him with a rope. A coworker by the name Patrick who was also present was treated in a similar manner by the robbers. The robbers then proceeded to the main house and forcefully broke into it using iron bars. Suddenly a motor vehicle drove in to the compound and robbers took off. PW2 managed to extricate himself and found that his radio, make Scenic, wall clock make Roho and Kshs.1600/= had been stolen. He proceeded to his employer's house and found that it had been broken into. He went round the house and noted that a generator belonging to his employer was missing. He reported the incident the following day at Naivasha Police Station. The following day the owner of the farm (PW1) accompanied by the Police came to the farm and found that in addition to the generator, diesel fuel, machine call DP-500 and some spanners were also stolen. From the main house, a gas cooker, gas cylinder, plates, cups and many other household items were stolen. Police commenced investigations. During the month of December, 1998 and acting on a tip off, the Police raided a certain house at Kabati Estate in Naivasha and arrested the and 2nd and 3rd accused. These accused persons then led the Police to a house at Site Estate in Naivasha where they arrested the 1st Appellant and the 4th accused. A revolver with four rounds of ammunition was recovered from the 1st Appellant. The 1st Appellant then led the Police to where the 2nd Appellant had sold the generator that was stolen from the farm. The generator was recovered. Similarly a radio belonging to PW2 was recovered and positively identified by the owner. The 2nd Appellant was positively identified by PW3 as the one who had attempted to sell to him the generator. Those arrested were then charged with the offence. When put on their defence the Appellants in their unsworn statements denied having anything to do with the crime.

It has been held that the Appellant on a first Appeal is entitled to have the evidence as a whole submitted to afresh and exhaustive examination and to the Appellate Court's own decision on the evidence. The first Appellate Court must weigh the evidence and draw its own conclusions. In doing so the first Appellate Court should allow for the fact that the trial Court had the advantage of hearing and seeing witnesses (See *SIMON MWANGI MUCHIRI & ANOR –VS- REPUBLIC CRIMINAL APPEAL NO. 12 AND 13 OF 2000, NYERI (Unreported)*

In the instant case, there is no dispute that the Complainant was robbed on the material night. There is also no dispute at all that a generator which was recovered during the Police investigations and which belonged to PW1 was among the items which were stolen on the material night. There is also no dispute that a radio which Police recovered in the cause of investigations and which belonged to PW2 was also stolen from him during the robbery. The issue that calls for determination is whether the Appellants were involved in the robbery.

The Appellants have in their Appeals stated that the necessary ingredients of robbery with violence were not met in the circumstances of this case. The offence of robbery with violence is deemed to be committed where:-

1. The offender is armed with any dangerous or offensive weapon,

2. If he is in the company of one or more persons or

3. The offender wounds, beats strikes or does any other personal violence to any person. (*See JOTHANA NDUNGE –VS- REPUBLIC, CR. APPL. NO. 116 of 1995 unreported)*

In this case there is no doubt at all that PW2 was attacked by a gang of robbers. In the process they unleashed violence on him and his co-workers. They had a gun, a panga, a sword and a rungu. Having thoroughly beaten PW2 and his co-worker by the name Patrick, they tied them up. They proceeded to rob PW2 of a radio, wall clock and the sum of Kshs.1600/=. They also proceeded to the main house and stole a generator and various other items enumerated in the charge sheet. On the basis of the foregoing we are satisfied, contrary to the submissions of the Appellants that the ingredients of robbery with violence were met.

Were the Appellants part of the gang? The evidence linking the Appellants to the crime is purely circumstantial, for PW2 stated in his testimony thus:-

> *"…. I was checking the record of the farm in the book s and the state of milk. As I was working I was attacked by robbers who I did not identify……."*

We remind ourselves of the fact that circumstantial evidence may sometimes be conclusive but it must always be narrowly examined if only because evidence of this kind may be fabricated. It is also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inferences:

> *"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused an d incapable of explanation upon any other reasonable hypothesis than that of the accused's guilt"*
>
> *(see MOMBASA CR. APPEAL NO. 88 OF 2003, JOHN NDEGWA NJUGUNA & ANOR –VS- REPUBLIC (unreported).*

The evidence linking the 1st Appellant to the crime was given by PW4 and PW5. Having arrested the 2nd and 3rd accused they volunteered information that led to the arrest of the first Appellant. He was arrested from a house at the Site Estate in Naivasha PW4 testified that:

> *"……imme diately I entered the 1 st accused (1 st Appellant herein) tried to remove a pistol which was hidden in the trouser but I managed to grab him and told him to surrender or he would be killed. I got hold of the gun ……."*

He was arrested and taken to the Police Station and on further interrogation, the Appellant led the Police to where the 2nd Appellant had sold the Lister engine stolen from the Complainant's farm. The Lister engine had been sold to PW3. It was recovered from his house and positively identified by the Complainant as his. From the Appellant's mother's house a radio was recovered. The radio was positively identified by PW2 as his and which had been stolen on the material night. The evidence of PW5 was more or less the same with PW4 as they, together, carried out the operation that led to the arrest of the Appellant.

We observe that most of the evidence tendered by these witnesses which appeared to be confessionary in nature ought not to have been allowed to be tendered by the trial Magistrate bearing in mind that these witnesses were Police Officers below the rank of inspector of Police. The Appellant was arrested following information given by a co-accused. It has been held consistently that the evidence of a co-accused is worthless and cannot be relied on to convict the co-accused unless corroborated in material particulars. It was alleged that when the Appellant was arrested he had a gun. There is, however, serious contradiction as to where exactly the pistol was allegedly recovered from the Appellant. Whereas PW4 stated:

> *"I and CPL Omari entered the house immediately. I entered the 1 st accused tried to remove a pistol which was hidden in his trouser but I managed to grab him and told him to surrender or he would be killed. I got hold of the gun"*

PW5 stated:-

"We swiftly entered the house CPL Omari was leading and I followed. The 1 st accused was sitting on a bed. When he saw us he removed a pistol which was hidden inside his shirt at the waist. He removed the pistol and threatened to shoot. CPL Omari bounced on the 1 st accused and grabbed the firearm."

If the same witnesses are testifying to the same facts, why should they contradict themselves so materially. Was the pistol hidden in the trouser? How was it recovered and by whom? We also note that the pistol was taken to the ballistic expert for examination together with the four rounds of ammunition. The exhibit memo that accompanied the same and the ballistics expert's report plus the ammunitions were not produced in Court as exhibits. This was critical evidence as it would have offered corroboration of the evidence of PW1 and PW2 regarding whether the robbers were armed with a pistol or not. In the absence of such evidence, we do not see how the Court would have concluded that the exhibit was a gun.

As stated in *NDUNG'U KIMANYI –VS- REPUBLIC (1979) KLR 282*

"A witness in a Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence"

This is the impression we get regarding these two star witnesses.

The other aspect of this case which has bothered as is the recovery of the radio. First the radio was not included in the indictment. It was not recovered on the person of the Appellant. Rather it was the mother of the Appellant who was alleged to have handed them the radio. The mother of the Appellant was not called to testify.

These same witnesses, testified as to the recovery of the Lister engine. In her Judgment the Learned trial Magistrate stated:-

"I find that the fact t hat 1st accused knew the whereabouts of the lister engine which was stolen during the robbery shows that the 1 st accused was involved in the robbery and that is the only way he could have known the whereabouts of the stolen lister engine. This evidence is corroborated by the fact the PW2 Maurice Mbwire testified that one of the robbers who robbed him was armed with a gun.

This evidence is further corroborated by the fact that PW4 recovered a radio from the house of the 1 st accused."

This was a gross misdirection on the part of the trial Magistrate. The mere fact that one knows where a stolen item is does not necessarily make him a Criminal or suspect. He may have come by the information through other means. After all PW3 testified that he only dealt with 2nd Appellant on the issue. He never saw this Appellant throughout the transaction. How then did the Appellant know the whereabouts of PW3 as to lead the Police to the recovery of the lister engine? This is a pertinent question that the trial Magistrate ought to have asked herself

On our overall assessment of the evidence, we are satisfied that the evidence on record was insufficient to convict the Appellant of the offence. It was not corroborated in material particulars. The mere fact that he somehow managed to lead the Police to the recovery of some exhibits, months after the robbery, was not in itself sufficient nor safe for the Court to rely on, in order to convict the Appellant. We therefore allow his Appeal, quash the conviction and set aside the sentence.

As regards the 2nd Appellant, we are satisfied that he was properly convicted. PW3 positively identified him as the person who approached him with an offer to sell him a machine that allegedly had been left to him by his father for maize milling which he had later converted into an electrical generator. This person disguised his name as Zakaria. He was however the 2nd Appellant. He brought the engine to

the workshop of PW3 and following negotiations agreed to sell it to the witnesses at Kshs.40,000/=. They also agreed that the Appellant would come for the money after a month with the necessary documents of ownership. However before the month was up Police Officers raided his house and carried away the generator. This generator was subsequently and positively identified by PW1 as his. He also pointed out special features and marks on the generator to the Court. He also produced a delivery note issued to him when the generator was sold to him. The generator turned out to be the one that the robbers took away on the 8th October, 1998 during the robbery.

The Appellant submitted that he was convicted on insufficient evidence as none of the items listed in the charge sheet were recovered from him and that the trial magistrate erred in law and fact in basing his conviction solely on circumstantial evidence of PW3. As we have already stated these Complaints are without merit as the evidence against the Appellant was simply overwhelming. Apart from PW3's testimony, there was also the testimony of PW4 that was corroborative. In *PETER KIMARU MAINA VS REPUBLIC, NYERI CR. APEPAL NO. 111 OF 2003*, the Court of Appeal held that:

> *"Where there is evidence that the accused person is found in a ctual possession or has, shortly after a robbery sold one of the items stolen during the robbery, he is deemed to be in recent possession of the stolen item …… Evidence of recent possession of a stolen item alone is sufficient to find a conviction for the offence of robbery with violence."*

The robbery occurred on 8th October 1998. However hardly a month later, in November, 1998 the Appellant approaches PW3 and purports to sell to him the generator which had been stolen during the robbery. In the circumstances the Appellant is deemed to be in recent possession of the stolen item. The trial Magistrate was therefore right in drawing the inference that the Appellant came into possession of the engine by robbing PW2. The trial Magistrate was also right in rejecting the defence of the Appellant in the circumstances. The Appellant's conviction in the light of the circumstantial evidence and doctrine of recent possession was safe and cannot be faulted. Consequently we dismiss his Appeal and confirm the sentence.

In the upshot, we allow the Appeal of the 1st Appellant, quash the conviction and set aside the sentence. However, as for the 2nd Appellant, his Appeal is dismissed and sentence imposed confirmed.

Those are the orders of the Court.

Dated at Nairobi this ……. day of …… 2004.

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FRED. A. OCHIENG

Ag. JUDGE

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M. S. A. MAKHANDIA

Ag. JUDGE