



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO.251 OF 2001

ALFRED MUMO KIOKOI.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONDENT

(From the Judgment of J. Oseko, S.R.M.

in Mombasa Criminal Case No.517 of 2000)

J U D G M E N T O F C O U R T

The appellant Alfred Mumo Kiokoi was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to death. He appeals against conviction and sentence.

The prosecution case was that on 20th February, 2000 at about 1.30 a.m. the complainant and his wife were sleeping in their house at Akili Mali Village in Kilifi District when they were woken up by a loud repeated banging noise at their front grilled door. Before they would wake up the door gave in and two people entered the room. The two people ordered the complainant and wife to lie down. The intruders had a big torch, pangas and a slasher. One of the attackers later to be identified as the appellant hit the wife of the complainant, PW.1 Leli Nobala Kuoba. He carried the torch and a slasher. He told the victims that unless the latter surrendered their money to them they would be killed. He then again hit the complainant on both cheeks before going straight for the suit case in the cash safe where they kept their matatu collections of 40,000/-. He then carried the music system and the attackers then left. The complainant PW.2 and his wife PW.1 then went to the sitting room and children's rooms where they found that the T.V., video adverter, children's clothing, shoes, watches, m/v log book, passports and all the other items shown in the charge sheet, missing.

PW.1 had also stated in her evidence that during the attack she had recognized the appellant using the hurricane lamp light as the lamp was at the time on. The episode took about 30 minutes. The attackers in the process put off the lamp that was on. The attackers were apparently a big group. No help came from the neighbours. After the attackers put off the hurricane lamp, they continued using the torch which they carried. PW.1 claims that she identified the appellant as at one time he carried the torch across his own face as he stood directly in front of her. The property stolen was valued at 80,000/- and the T.V. and speakers were recovered. The T.V. was colour Model Kerati and its serial No. was 91122607. Its aerials were broken and it had an identifiable scratch which occurred when a repairer was working on it. The aerials had been broken by the complainant's son. The T.V. had been bought overseas. PW.1 identified the recovered speakers because they were yellow and because she saw inside speaker holes some pieces of paper which she had put there to prevent dust entering. The incident was reported to the Police soon thereafter.

The complainant PW.2, Peter Wangai Shuri corroborated his wife's story about the incident. He added that when the attackers entered the house and demanded for money, they told them that they did not have money. He stated that the appellant took the suit case which had money and opened it to find the money which was in envelopes inside it. They had been ordered to lie down but the room was lit with a hurricane lamp. The complainant and his wife saw the appellant using the light. Apparently their neighbours had also been robbed the same night and it would appear the gang of robbers was big. Inside the room also there was one solar lamp on besides the hurricane lamp. It was a solar light which produced green light but it illuminated the room enough for them to use its light. The complainant confirmed that the robbery took a long time. He claimed to have told the Police that he would easily identify the attackers if he saw them again.

PW.2 further stated that after one week they got information that some of their stolen items had been seen in a certain kiosk. The information came from Mohamed, PW.4 who also in company of the Police, guided the complainant to the kiosk. The complainant and his wife identified the T.V. and speakers which were exhibits 1 and 2 in the lower court.

PW.4, Ali Mureithi Mohamed is a boyfriend to complainant's daughter. He had learnt of the robbery. He knew that some of the items stolen included a T.V., Sony music system, an inverter and others. On 26.1.2000 he went to the radio repairer called Musyoka. While he was there two persons came there carrying a T.V. They were the appellant and another person called Maina. He quietly identified the T.V. as the one he had been seeing at the complainant's house which had been stolen. The two successfully sold the T.V. to Musyoka or were convinced to leave it at Musyoka's. He went and reported the incident to the complainant's daughter who accompanied him to Musyoka's house. They found the T.V. on which several people were watching football. Later the matter was reported to Jomvu Police Officers who went to Musyoka's house and arrested Musyoka and another. These two led them to one Maina who in turn led them to the appellant's house where they found the latter absent although his wife was there. A search produced the speakers Exhibit 2 and photo albums which carried appellant's photograph. PW.2 and PW.1 identified the photograph as one belonging to the person who was forefront in robbing them. Maina also identified the photograph as that of the person who had given him the T.V. to sell and who happened to be his brother and the appellant.

Later the appellant was arrested by PW.3, the Assistant Chief. Musyoka gave evidence confirming that the appellant sold to him the T.V. and confirmed PW.4, Ali Mureithi's story as to how the appellant sold the T.V. to him in company of Maina.

In his defence the appellant stated that he understood the case against him. He then proceeded to state how he was arrested about two months after the date of the incident in this case. He accompanied the Assistant Chief to Mariakani Police Station where he ended up being arrested and being questioned about the robbery. He denied the robbery accusation. He alleged that the Police tortured him for two days. The next day they gave him a prepared statement which he signed. He does not claim that he was forced to sign the papers or what the papers carried. He however implied that because he was being tortured when he signed the papers, he did not do so voluntarily.

The trial Magistrate considered the evidence as a whole. She accepted the evidence of identification. She was conscious possible mistakes are likely to be done in relation to identification. She nevertheless accepted the evidence of PW.1 and PW.2 as adequate. She was conscious of the facts favourable or unfavourable to positive identification. She finally felt confident to accept the identification aforesaid under the conditions of light mentioned. We have considered the issue. We find no fault in the facts and the principle of law she relied on. She was quite careful and we see no ground upon which to interfere with her finding especially when the robbery took over 30 minutes and the identification is one of two witnesses.

Then she considered the evidence of recent possession of the T.V. and the speakers. PW.5, Henry Musyoka Mwanzia who had bought the T.V. confirmed in his evidence that the appellant sold it to him. The speakers were undoubtedly recovered from the appellant's house. It behoved the appellant to give an explanation which would prove on the balance of probability that he did not steal the items or that his

possession of them was innocent. The burden which lay on him to satisfy the court was light. His explanation only needed to be reasonable. The items found or presumed to have been found in his possession were unique. The imported T.V. had a hard shell. The model was rare. The speakers had specific marks. The aerials were broken to the knowledge of the owners and PW.1 had put into the speakers papers to stop dust. They identified them by the marks. The trial Magistrate was satisfied that the identification was satisfactory. However, the appellant failed totally to explain the unlawful possession of the T.V. and the speakers. He concentrated only on the manner of his arrest.

It is our view therefore that the trial Magistrate was entitled to make an irresistible conclusion that the appellant was the thief or handler. This she did. She found that the circumstances reflected by the evidence before her were so irresistible that the appellant was guilty that she saw no other possible explanation or logical conclusion. We confirm her finding.

It is our view and we so find the trial Magistrate could convict on the ground that there was sufficient evidence on identification. She could also convict, independently and in the absence of identification evidence by relying on the evidence and the principle of recent possession. She convicted by relying on both although each separately. She was very right in doing so.

We also note that the trial Magistrate considered the ingredients required to be proved under S.296(2) of the Penal Code so as to convict on it. We are also satisfied that the charge of robbery with violence was properly proved beyond a reasonable doubt. She established that the appellant was with another or others. They carried dangerous weapons in the form of a panga and a slasher which were used to cut PW.1 on both cheeks. They used threats of violence to PW.2. She considered the appellant's defence but disbelieved it. She found that the prosecution case was proved beyond a reasonable doubt. We hold that she was entitled to come to that conclusion. We accordingly dismiss this appeal and confirm the conviction and sentence. It is so ordered.

Dated and delivered at Mombasa this 19th day of September, 2002.

D. A. ONYANCHA

J U D G E

J. KHAMINWA

COMMISSIONER OF ASSIZE