



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 81 OF 2016

JOSEPH MUSYOKA NGUI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

***(From the original conviction and sentence in Criminal Case No. 4676 of 2010 of the Chief Magistrate's court at Thika – L. W. Gicheha
PM***

J U D G M E N T

1. The Appellant **Joseph Musyoka Ngui** was tried before the Chief Magistrate's Court at Thika for the offence of Robbery with violence contrary to section 296(2) of the Penal Code. In that on the night of 7th and 8th October 2009 at Kyangosi village, Mukusu sublocation of Masinga District, jointly with others not before the court, while armed with stones he robbed **Kioko Kyalo** of three bulls valued at KShs.90,000/= and a pair of gum boots valued at KShs.1200/= and at the time of such robbery murdered the said **Kioko Kyalo**. Following a full trial, the Appellant was convicted and sentenced to death.
2. His appeal, first filed in Nairobi in **Criminal Appeal No. 603 of 2010** was transferred to Murang'a where it was designated as **Criminal Appeal No. 313 of 2013** before eventually being sent to this court and registered as **HCRA 81 of 2016**. The hearing of the appeal was delayed by the late submission of the lower court of proceeding from the trial court, and the incompleteness of the same, when eventually submitted.
3. By his amended grounds of appeal filed on 14.6.18 the Appellant complains in ground 1 that he was not accorded a fair trial, and in ground 2 that the existence and ownership of the stolen boots and bulls was not established. In the fourth ground the Appellants complaint is that his defence was improperly rejected. Ground 3 relates to the incomplete nature of the lower court proceedings.
4. In written submissions the Appellant asserts that the witness statements were not availed to him to enable him prepare for his trial, thereby prejudicing his right to a fair trial. Regarding the second ground, he challenges the strength of the evidence called to prove existence and ownership of the stolen bulls by **PW1**, the owner, pointing out that the prosecution failed to adduce photographic evidence in that regard. He cited the case of **Shem Odongo and Another v R** without giving the full citation. Reiterating his defence in the trial court, the Appellant faults the trial court for convicting him on the basis of weak evidence and disregarding his defence.
5. Ms Muthoni for the DPP opposed the appeal. She pointed out regarding the first ground that after the initial requests for statements, the Appellant had subsequently signaled his readiness to proceed with the trial. She stated that the stolen items were properly proved and identified, and that the court correctly applied the doctrine of recent possession. Further, that the failure to produce the photographs was, in light of the evidence by **PW9**, not fatal to the prosecution case. She argued that the Appellant's defence was properly rejected, and moreover, that the trial below was not affected by the fact of the missing page in proceedings.
6. In **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal of Eastern Africa described the duty of the first appellate court as follows:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

7. The prosecution case in the lower court was as follows. The deceased **Kioko Kyalo** was employed by **Michael Musau (PW1)** to take care of his livestock at Mukusu village. **PW1** resided in Nairobi. On 8.10.09, his neighbour at **Mukusu, Kyalo Nzioka (PW2)** noted that the worker had not taken out goats to the pasture and could not be seen. On checking, he noted that 3 bulls were missing from **PW1's**. Presently he learned of announcement on the local radio station concerning 3 bulls recovered at Ekalakala Market. **PW2** called and informed **PW1** of these events.

8. A search was mounted for the deceased. Meanwhile on the morning of 8th October 2009 **APC Nicholas Muthale of Ekalakala (PW4)** Police Station, acting on a tip off from the Masinga Location Chief, proceeded to the Ekalakala Market. When the Appellant came to the market with 3 bulls, he arrested him and on being questioned the Appellant said the bulls were the property of his uncle. He was placed in custody, the bulls photographed by CPL. Reuben Manyara (**PW9**) of scenes of crime Embu alongside a pair of gumboots at the time worn by the Appellant but said to belong to the deceased. **PW1** identified the bulls which were released to him.

9. The body of the deceased which bore head injuries was traced in **PW1's** farm on 9.10.09 lying under twigs and tree branches. The scene was stained with blood. The post mortem revealed that the death was caused by excessive bleeding due to severe head injury.

10. In his sworn defence statement, the Appellant stated that he resided at Masinga and was a trader at Ekalakala market where he sold shoes. That on 8.10.09 while at the market, he was approached by four men who summoned him to the chief's office. He complied. At the chief's office he was questioned briefly before being placed in the cells. He was eventually moved to Matuu Police Station. Nobody told him why he had been arrested. He denied the offence.

11. The court having considered the evidence on record and submissions made on this appeal found that there was no dispute as to the fact that the deceased died from injuries inflicted on his head. Further that there was no dispute regarding the disappearance of the 3 bulls which the deceased was charged with herding, on the night of the 7th and 8th October 2009. Evidently, the murder of the deceased is connected to the disappearance of the 3 bulls which were the property of **PW1**. And there is no dispute that the Appellant was arrested at Ekalakala market on 8.10.09. And that 3 bulls were recovered and restored to the owner.

12. The main issue that required determination was the role of the Appellant in the two events. The prosecution case primarily rested on circumstantial evidence, there being no eye witness to the robbery. Key witnesses for this purpose were **PW1, PW4** and **PW9**. In her judgment, the learned trial magistrate observed that:

"... I have no do doubt that the person who was arrested with the cows is the Accused person. I have also no doubt that after he was arrested the cows were taken to AP post ... There is no reason before me why PW4 would have lied to implicate the Accused. The evidence before me is that they did not know each other before the said incidence. They only arrested him on suspicion that the three bulls he was in possession of, belonged to the Complainant. Further his arrest was not based on investigation but in a report made by chief Masinga. It is only when the Complainant identified the cows that they were able to confirm they were stolen cows."

13. Nonetheless the trial magistrate was alive to the fact that the failure by the prosecution to produce the photographs of the bulls, or indeed the bulls themselves presented difficulties. This is how she resolved the difficulty:

"I have considered the fact that the court did not get to see the photographs of the cows, nor were the cows produced. However PW1 and PW2 confirm that indeed these cows were stolen and they were recovered. PW1 confirms that indeed these cows were recovered and they were released to him. We also have the evidence of the scene of crime officer who confirms that he took photographs of the bulls but they (photographs) were damaged while processing. Therefore even without the said photograph I believe the evidence is well corroborated. And even if I was to find otherwise, we have gum boots received from the Accused person. PW1 identified the gum boots as the ones belonging to his employee. This is confirmed by PW2 who was a neighbour and an uncle to the deceased. The Accused in his defence claims being in possession of the gum boots and again the court asks why PW1 and PW2 (would) want to implicate him about the gum boots yet they had no grudge. Though the Accused was not identified at the robbery, these items were recovered on 8.10.2009 which is one day after the incidence. The court being satisfied they were recovered from his possession, and the Accused having not given an explanation how he came into possession of the same I find the doctrine of recent possession applies".
(sic)

14. The proper application of the stated doctrine is the subject of many pronouncements by superior courts. The Court of Appeal in the case of **Athumani Salim Athumani v R [2016] e KLR** had this to say:

As regards the doctrine of recent possession, we do not think there is any substance in the assertion that it is not applicable if an accused person has been identified. The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See *MALINGI V. REPUBLIC*(1989) KLR 225 H.C and *HASSAN V. REPUBLIC* (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in *ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA V. REPUBLIC, CR. APP. NO. 272 of 2005*, where this Court stated:

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other."

Identification of an accused person therefore may be properly corroborated by the doctrine of recent possession. Indeed in *BOGERE MOSES & ANOTHER V. UGANDA*, CR. APP. No 1 of 1997 the Supreme Court of Uganda suggested that the doctrine of recent possession may be more reliable form of identification evidence, when it stated:

“It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eye witness.”

15. There are several iterations to the doctrine, each of them equally important. While in my considered view the evidence of **PW1**, **PW2**, **PW4** and **9** appeared truthful, the failure by the prosecution to produce the photographs of the recovered bulls allegedly because the negatives were damaged at processing, did not explain why the bulls could not be photographed again or at worst produced physically at the trial which started barely six months from the date of the recovery. No explanation was attempted by the prosecution for this default.

16. This was a major omission, because it is not enough that a Complainant identifies his stolen goods at the point of recovery. The requirement in *Kahiga v R* is that the recovered property is positively identified as the Complainant's property. This means that the Complainant also ought to identify the property to the court's satisfaction during the trial. Without the benefit of photographs and/or the physical bulls being presented at the trial, the requirement is not complied with. It could be said in this regard that the court acted on what was essentially oral evidence of an exhibit not placed before it.

17. Concerning the gum boots [Exh. 2] also alleged to have been recovered from the Appellant upon arrest, it is my view that these being common footwear, the witnesses **PW1**, **PW2** ought to have pointed out any special marks or other evidence that possibly assisted them in identifying the boots as the property of the deceased. Bare statements to the effect that that was so do not suffice in this case. The trial court would have come to a different conclusion had it considered the proper application of the doctrine of recent possession to the evidence before it.

18. In the circumstances I find that the evidence before the court did not fully justify the application of the doctrine of recent possession. Further, that even though the Appellant's defence may not have appeared plausible, the prosecution evidence suffered a deficiency in so far as the identification of the stolen bulls at the trial was concerned. This appeal turns on this issue alone, and the court need not consider the other grounds raised.

19. Save to observe that contrary to what the typed proceedings suggest, this court upon scrutiny of the handwritten record discovered that the full testimony of **PW1** is intact in the handwritten record. What appears to have caused the discrepancy in the typed record is the filing of the trial magistrate's handwritten notes in the wrong order. Resulting in the evidence-in-chief by **PW1** being merged with the latter part of the evidence of **PW3**. Once the handwritten record was reorganized the evidence flowed in a logical manner. It cannot be emphasized enough that the accurate recording, typing and certification of trial records is a duty to be undertaken with great care to obviate the kind of difficulties encountered on this appeal.

20. Based however on the matters considered, the second ground of appeal has merit. In the result the appeal is allowed and the conviction hereby quashed. Unless otherwise lawfully held, the Appellant is to be forthwith set at liberty.

DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF FEBRUARY 2019

C. MEOLI

JUDGE

In the Presence of:

Mr. Ongira – DPP

Appellant – Present

Court Clerk - Kevin