



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 3 OF 2014

ERICK WAWERU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 1534 of 2012 delivered by Hon. Ndwiga, Ag SPM on 29th November 2013).

JUDGMENT

Background

1. The Appellant was charged with a main count of robbery with violence contrary to Section 296(2) of the Penal Code. In the alternative count he was charged with handling stolen goods contrary to Section 322 (1) (2) of the Penal Code.
2. In the main count, the particulars were that on the 3rd October 2012 along Haile Selassie Avenue in Nairobi within Nairobi County, jointly with another not before court while armed with dangerous weapons namely knives robbed Julius Ogutu Okongo cash Ksh 1200/-, a pair of safari boots valued Ksh 2000/, Mobile Phone make Nokia 1110 valued at Kshs 2000/-, a brown cap valued at Kshs 800/ all valued at Ksh.6000/- and at or immediately before or immediately after such robbery threatened to use actual violence against the said Julius Ogutu Okongo. In the alternative count, it was alleged that on the 3rd day of October, 2012 along Haile Selassie Avenue in Nairobi within Nairobi County, otherwise than in the course of stealing dishonestly handled a pair of safari boots valued at Kshs 2000/-, mobile phone make Nokia valued at Kshs 2000/-, a brown cap valued at Kshs 800/- all valued at Kshs 4800/- having reason to believe them to be stolen goods or unlawfully obtained.
3. At conclusion of trial, he was convicted of the main charge and sentenced to suffer death. Dissatisfied with the both the conviction and sentence he preferred the present appeal. His appeal was on the grounds that the trial magistrate erred in failing to finding that the 1st report made by the complaint did not give a description of his appearance, that the evidence of identification by one witness in difficult circumstances was unreliable, that the evidence of possession of stolen items was not proved, that the evidence of the prosecution was founded on mere suspicion, that there were contradictions in the case of the prosecution and that the standard of proof was not discharged.

Submissions

4. The appellant submitted by way of written arguments. He argues that the visual identification was not proper, accurate and was unreliable. He argued that the doctrine of recent possession was misapplied in this case. He noted that the complainant did not positively prove ownership of the stolen goods. The appellant also argued that there was contradiction in the evidence of PW2 and PW1 on the manner of identification of the Safari Boot shoes and that of the color of the cap that was allegedly stolen. He argued therefore that the doctrine of recent possession was inapplicable in the present situation. The Appellant concluded by stating that the prosecution failed to discharge its burden of proof and urged that the appeal be allowed.
5. The respondent was represented by Ms Sigei. She argued that the appellant was properly convicted on circumstantial evidence on application of the doctrine of recent possession. She argues that the accused was described in the initial report as having a blue and red t-shirt. As well that the PW1 was able to identify the safari Boots shoes by the round stitchery done on them. She noted that the recovery was done in a short time. She noted that the evidence was consistent, corroborative and hence the conviction was safe. She added that the sentence was legal and that the appellant in threatening PW1 using a knife meant that he is a danger to society. She urged the court to uphold the same.

Evidence

6. The prosecution called four witnesses. Their case was that PW1, the complainant was accosted by two men who wielded knives. The men dragged him into a bush where they proceeded to rob him and threatened to kill him. The assailants took a cap, Kenya Shillings one thousand two hundred, a mobile phone make Nokia 1110 and a pair of safari Boot shoes. PW1 testified that he could identify the perpetrators as there was sufficient lighting from the street lights. PW2 who was the arresting officer testified that he was in the company of PW3 patrolling Uhuru Highway, the area around Railways Club at around 8.00 pm on the 3rd day of October 2012. He heard screams of a person pleading for his life. He then saw a man running and they gave a chase until he arrested the suspect. PW3 testified that the appellant refused to walk and they had to call a Police Station vehicle to escort him. PW4 testified that the complainant reported the incident at 8.30 pm and the appellant was booked in at 9.26 pm.

7. After the close of the prosecution case the court ruled that a prima facie case had been established and accordingly put the Appellant on his defence. In his unsworn defence, he stated that he was arrested while walking from his workplace.

Determination

8. After an analysis of the evidence and a consideration of the respective rival submissions I have isolated the issues for determination to be whether the Appellant was properly identified and whether the case was proved beyond a reasonable doubt.

9. The Appellant in this case was convicted on the basis that he was properly identified and described by the complainant, PW1. A look at the record clearly shows that PW1 reported the incident almost immediately after that robbery at Parliament Police Station. At the report he said that he was robbed by two young men dressed in red and blue T-shirts. He also said that he was enabled to see the attackers when he made the report with the help of some street lights. As it were, the police took action immediately and headed to the scene in a police car in the company of PW1. They were soon recalled to the police station where, according to PW1, the Appellant had been arrested. He was wearing his(PW1) Safari Boot shoes which had just been robbed from PW1. His earlier evidence was that the robbers forced him to wear their dirty shoes whereas one of them wore his Safari Boot shoes. The arrested suspect who was the Appellant was also wearing PW1's cap. Additionally, the Appellant had in his possession PW1's mobile phone Make Nokia 1110 which the latter positively identified as his. The money was not recovered.

10. From this analysis, it is difficult to state that the arrest of the Appellant was occasioned by a positive identification. This is because PW1 physically described the Appellant after seeing him in the police station. Undoubtedly though, he was arrested in possession of recently stolen goods and therefore his conviction could only be founded upon the application of the doctrine of recent passion.

11. The threshold of the application of the doctrine of recent possession was clearly set out in the case of **Malingi Katana Malingi v Republic[1989] Eklr thus;**

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”

12. In the instant case, PW1 reported of the robbery and the theft of his mobile phone, Safari Boot shoes, Cap and money. This was vindicated by the confirmation of the report by PW2, 3 and 4. The evidence does also reveal that the robbery took place only a few minutes after the robbery. According to PW4, the report was booked at 8.30 pm and the Appellant was booked into the police station at 9.26 pm. The recovery was within what can be described as a short time within the time of the robbery. The stolen goods were positively identified by PW1. More interesting is the fact that the Appellant was arrested whilst wearing the cap and the shoes of PW1 which squarely demonstrated he was one of the robbers. This fact fitted very well with PW1's evidence that one of the robbers wore his shoes and forced him to wear his dirty shoes.

13. In the circumstances therefore, there is no doubt that the Appellant was linked to the robbery by the application of the doctrine of recent possession.

14. On proof of the ingredients of the offence of robbery with violence as defined under Section 296(2) of the Penal Code, it is trite that the robbers confronted PW1 and dragged him into a bush where they forced him to undress his shoes and give away his money. They succeeded in their mission by threatening him with a knife. Under Section 296(2), a proof of any of the elements of the offence of robbery with robbery with violence is sufficient to establish the offence. The prosecution duly discharged this burden.

15. The Appellant's defence that he was walking home from his place of work and had not committed the offence was untrue. It was a defence unfounded in evidence and the facts of the case. I dismiss it as an afterthought. In sum, I find that the prosecution proved their beyond all doubt. The appeal lacks merit and I uphold the conviction.

16. On sentence, the Appellant took plea on 4th October, 2012 and was throughout the trial in remand where he spent one year 25 days until 29th November, 2013. To date he has cumulatively been in custody for a period of five years three months and five days. Taking into account that no one was injured, the Appellant was a first offender and all the stolen goods were recovered, it is the view of this court that the Appellant has served sufficient punishment. I accordingly order that he be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 5th day of March, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant in person.*
- 2. Mr. Momanyi for the Respondent.*