



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 29 OF 2015**

**MICHAEL WANYONYI WANGILA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in original Kimilili SRMCR 208/2011 delivered on 12.2.2016 by M.A. NANZUSHI Ag. SRM)*

**JUDGMENT.**

The Appellant Michael Wanyonyi Wangila was charged with 2 counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of count 1 were that on the 23<sup>rd</sup> day of September, 2010 at around 0830 hours, at Nasianda village, Chebukwabi location in Kimilili Bungoma District of Bungoma County, jointly with others not before the court while armed with a crude weapon namely a jembe robbed Charles Nasibinda Makokha off one TV set make Philips M/NO 14pp3506 and a radio make Panasonic all valued at Kshs.24,500/= and at or immediately after the time of such robbery used actual violence to the said Charles Nasibinda Makokha.

Particulars of the 2<sup>nd</sup> count were that on the 23<sup>rd</sup> day of September, 2010 at around 0830 hours, at Nasianda village, Chebukwabi location in Kimilili Bungoma District of Bungoma County, jointly with others not before the court while armed with a crude weapon namely a jembe robbed Elizabeth Namarome Makokha off gas cooker valued at Kshs.6,000/= and at or immediately after the time of such robbery used actual violence to the said Elizabeth Namarome Makokha.

After full trial the learned Trial Magistrate found the appellant guilty of the two counts of robbery with violence contrary to section 296(2) of the Penal Code and after considering the mitigation sentenced him to suffer death as per the law. Dissatisfied with the conviction and sentence the appellant preferred this appeal on the following grounds;

*(1) THAT the learned trial magistrate erred in law and facts by failing to appreciate that the prosecution case was not only insufficient but contradictory, unreliable, fabricated, inconsistent in material particulars and totally inadequate to sustain a conviction.*

*(2) THAT the learned trial magistrate erred in law and facts by failing to take proper account of credibility of the prosecution witness before him and thereby convicting me basing on the same in which I have suffered prejudice.*

*(3) THAT the learned trial magistrate mis-directed himself in arriving at the decision based on belief and anticipations which were not supported by any evidence.*

*(4) THAT the learned trial magistrate erred in law by failing to take into account that there was medical evidence proof from a medical officer to establish any act of violence against the complainant that could support section 296(2) of the penal code stand and this was assumed by the learned trial magistrate.*

Briefly the evidence before the trial court was PW1 Adams Matisi Makokha testified that on 11.9.2010 he was at home when he received a telephone call, from one Scholastic Sarah Simiyu who had found him a worker to go assist his parents Charles Nasimba Makokha and Elizabeth Makokha (both deceased) at home. Pw1 went and picked up the worker whom he referred to as Michael Wangila Wanyonyi-herein the appellant-from Mayanja and employed him to work and stay with his parents. The appellant worked very well till 23.9.2011 when he came to pw1's house in the morning when pw1 was in the process of going to the farm with Peter Biketi. Pw1 instructed Michael to prepare tea and give some to his parents and take some to the shamba where they were ploughing.

It took long for them to be served tea and he went to see what was going on. On reaching his parents' home he found the door to the sitting room had been closed he opened it and found a thermos and a cup on the table. He called the appellant but he did not respond. He went to his father's bedroom and did not see his cooker. He called out on his parents and there was no response. He went to another room and found his father under the bed with injuries. He called for help from neighbour Martin Wanjala Khaoya who came and saw Pw1's father lying down in a pool of blood. He had been stabbed on the head and also hit on the jaw which was fractured and had two cuts on the head. The gas cooker,

radio Panasonic and Kshs.12,000/= were also missing. They found the mother in the kitchen with the help of Grace Mayundo. She had been in hit on the head with a blunt object and was already dead. The appellant was nowhere to be found.

They took the father to Kimilili hospital. But he died while being transferred to Bungoma hospital. The police from Kakamega also came to crime scene took photos of the scene and took the pw1's mother to the mortuary. They recorded statements at Kimilili Police station on 25.9.2010. After 5 months on 21.02.2011 Pw1 received a call from a police officer that some persons had been arrested in Bungoma and they suspected the appellant to be one of them. That Pw1 and his sister proceeded there and identified the appellant who led the police to Sango bar in Bungoma where the TV was recovered. They identified it as among those stolen. Appellant was then charged with the present 2 counts of robbery with violence.

Pw2 Scolastic Sarah Simiyu testified that on 11.9.2010 she was at home when the appellant came to her asking for a job. She enquired from her father in law and sisters but they did not need one. Then she called pw1 who had also wanted a worker. That later after 10 days the chief called her and informed her that the appellant had killed Pw1's parents. That she went to record her statement at Kimilili police station and identified the appellant.

Pw3 Martin Wanjala Khaoya testified that on 23.9.2010 he was at his shamba with Timona Wekesa supervising people who had come to harvest maize when he heard someone call his name. He looked and saw Pw1 his cousin who told him to follow him. That he found Charles lying down in a pool of blood. The TV set, gas cooker and Kshs.12,000/- were missing. He had never seen the appellant but saw him for the 1<sup>st</sup> time in Bungoma.

Pw4 Benedict Munialo Khaoya testified that on 23.9.2010 he had taken money to Charles Makokha. That he found the herdsboy- Michael-Wanyonyi the appellant tethering cows outside. The Appellant came and took keys and opened the front door and that at 8.30 am pw4 saw him enter Pw1's house. After a short while when Pw4 arrived at his house he heard noise and they were saying that thugs had killed Charles and his wife. He went to the scene and found Charles in a pool of blood with a lady who was dead in the kitchen. They also found the TV set, gas cooker and radio missing. They took Charles to the hospital and his wife to the mortuary. The appellant disappeared for about 6 months. At home he saw a jembe that was blood stained.

Pw5 Rebecca Naliaka Makokha testified that on 23.11.11 she was at her home when she heard that her parents had been murdered. She went home and found her father in a bad condition and the mother already dead. She called her brothers who took the father to the hospital and the mother to the mortuary. That the appellant used to come to her home for vegetables. That they discovered that the TV set, gas cooker and radio missing. On 21.2.2011 Pw1 called her that they were needed by the OCS Kimilili who told them that there was a suspect at Bungoma. That in Bungoma they saw the appellant who tried to escape but they arrested him. He took them to where he had hid the Television set.

Pw6 Hadija Nafula Marangai testified that she worked at lodging at Sango. That on 28.9.2010 at 6 pm she was at work when the appellant came and asked for a room. That he was given one but when he left the following day he did not carry the TV. That he checked out in her absence. That she took the TV to the office where it stayed for 2 months. The appellant later came for it in the company of the police officers.

Pw7 Paavis Khaemba Kimongoi testified that on 23.9.2010 he was at home headed for work on his bicycle when he met a person standing with two sacks who asked him to help him carry his luggage. That he helped him carry it upto where there was a rock. That inside the sack was a gas cooker and the other sack was a TV. That later he got a call from a neighbour that some elders had been murdered and the killer had escaped. They described the culprit and he told them he had helped a person who resembled him. That they started to look for the accused to no avail but he was later arrested in 2011. That he went to the police and identified him.

Pw8 Alex Munyendo a clinical officer from Webuye District hospital testified that on 30.9.2014 he was required at Kimilili police station to perform a post mortem on the body of Charles Makokha. It was escorted by PC Nyanga. James Makokha and John Nyongesa identified the body. The post mortem was conducted at Webuye Hospital on 30.9.2010 at 11.30 am and he made the following observations: male African, adult 90 years, 5' 10' height and had died a week prior to post mortem. He had cuts on the head, and announced bleeding into the brain. He formed the opinion that the cause of the death was severe head injury specifically compressed fracture with intracerebral hemorrhage caused by trauma inflicted by heavy sharp object.

With regard to Elizabeth Makokha he made the following observations: female adult, aged about 90 years, 5' feet, she died a week prior to post mortem, she had laceration wound on the head and on the right side, had ragged margins, under largely the wound was a skull fracture 1 cm long with right side of the head, internal skull fracture right side, bleeding into the blood epidermal haematoma, increased intracranial pressure. He came to the conclusion that the cause of death was severe head injury skull fracture with epidermal haemorrhage inflicted by blunt object.

Pw6 No. 63147 PC Johnson Nyaga testified that on 23.9.2010 he was on duty at Kimilili police station when he got information about robbery with violence in Nasianda village. He left for the village and when he got there he found the deceased Elizabeth Makokha at the kitchen to the main house. There was a lot of blood in the sitting room and bedroom of Charles Makokha but he did not find him since he had been taken to Kimilili hospital. They tried looking for any weapons and found a jembe. They escorted the body of Elizabeth to the hospital and while on their way they were also informed that Charles had passed on. They got information that the following items were missing 14 black and white TV. Serial No. 66501168, gas cooker, Panasonic radio and Kshs.12,000/=. He recorded statements of witnesses and conducted investigation. On 21.2.2011 got information that the suspect had been arrested in Bungoma. They arrested him and he directed them to where he had kept the TV which was recovered.

In his defence the appellant told court that on 21.2.2011 he left home at Kibabii to Bungoma at about 8.00 am. At 3.00 pm he saw 2 people who were dressed in plain clothes who arrested him and interrogated him. That he was taken to the police and charged with the current offence. That what the prosecution is saying are lies.

The appellant filed written submissions in support of this appeal. He submitted that the first report of the incident was made in 21.2. 2011 and wondered why it was not made on the very day when the offence was committed on 23.09.2011. That the serial number of the TV set that

was indicated on the charge sheet was 14pp3506 but the one given by pw9 while testifying in court was 66501168 that the evidence of the charge sheet and that of pw9 differed. That pw1 testified that all items were recovered but the said items were not produced in court.

He further submitted that the jembe that was the alleged weapon of offence was not finger dusted to ascertain the person who used it. That the place of recovery was contradictory. That pw1 stated that it was recovered in Kanduyi- Makutano in a home but pw9 testified that the TV set were recovered at Sango bar. That there were people mentioned in the evidence but were never called to testify like Sarah Simiyu. That court relied largely on circumstantial evidence to convict him whereas there was no witnesses who saw him kill Pw1's parents.

Mr. Oimbo for the state opposed the appeal. In his submissions in court he stated that there was no difference in the serial number of the Television set, that there was proof that the TV stolen belonged to the deceased son, that the key witness Sarah Simiyu testified. That there was no contradiction between the evidence of pw1 and pw9 because they both stated that the television set was recovered at Sango bar. That contradiction with regard to the age of the deceased is immaterial. That the OB numbers are for date of arrest and when the offence was committed. That pw1 indicated the amount that was stolen to be Kshs.12,000/=.

This is a first appeal. The duty of this court is well stated in the case of **Okeno v Republic 1972 EA**.

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings, and conclusions. It must make its own finding and draw its own conclusions. Only then can it decide whether*

*the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.”*

From the evidence and submissions the issue that lends itself for determination is whether from the evidence the appellant committed the offence of robbery with violence.

The ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

**“296. Punishment of robbery**

*(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*

*(2) If the offender is armed with any **dangerous or offensive weapon or instrument**, or is **in company with one or more other person or persons**, or if, at or immediately before or immediately after the time of the robbery, **he wounds, beats, strikes or uses any other personal violence to any person**, he shall be sentenced to death.”*

The Court of Appeal in the case of **Odhiambo & Another v Republic** (Omolo, Githinji & Deverell JJA) (2005) 2 KLR 176 explained the ingredients of the offence of robbery with violence as follows:

*“The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295.”*

The evidence in this case is circumstantial evidence premised on two main areas; opportunity to commit the offence and possession of the property stolen during robbery.

In the case of **Abanga alias Onyango vs Republic** (supra), the Court of Appeal stated a follows in regard to circumstantial evidence:-

*“It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”*

In the instant case the appellant was an employee of pw1's deceased parents and he was the one working in that compound. On that very day he went to Pw'1 house and who instructed him to go prepare tea and give some to his parents and the rest take it to him at the shamba. He did not come back and when pw1 went to see why he was taking long he did not find the appellant. They found the deceased in count 1 and 2 lying in a pool of blood. The appellant who had gone into the house where the deceased were found was missing. He had been seen going into the house. They also found some things missing in the house to wit a television set and a gas cooker.

It was the evidence of Pw7 that when he was heading to work he met the appellant with sacks carrying these items. There is clear evidence that there was an opportunity for the appellant to commit the offence being the only person that was seen going to the deceased victims house. He immediately after commission of the offence disappeared.

The items that were missing in the deceased house were also recovered through the help of the appellant who led them to where the TV was recovered.

Possession in law includes not only having in ones personal possession but also knowingly having anything in the actual possession or custody of another person or having anything in any place whether occupied by oneself or not for the benefit of oneself or another person. The appellant upon arrest and interrogation led the police to Sango Bar where he had kept the TV and was identified by Pw6 as the person who slept there and left the TV in the room. This therefore brings into play the doctrine of recent possession of stolen property.

The principles of the doctrine of recent possession, are as in **ISAAC Nganga Kahiga Alias Peter Kahiga V. Republic** – Criminal Appeal No. 272 of 2005 (U/R) which was cited, with approval in **Richard Oduor Adera V. Republic**, [2010] eKLR-

*“It is trite law 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, and secondly that, the property is positively the property of the complainant, thirdly 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 properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses.”*

In the instant case the property was not found with the suspect but when the suspect was arrested he easily led the police officers to where the stolen property was situated. The stolen property was positively identified by pw1 as belonging to his parents. The arrest of the appellant was just 5 months after the incident. The act of leading the police to where the stolen TV was kept clearly shows that it was the appellant who stole the television and had the same in his possession. He did not tender any explanation as to how he came to be in possession of the stolen property.

The trial magistrate in her Judgment considered all the evidence and addressed herself to opportunity of the appellant as the only person who was last with the two deceased in count 1 and 2; the deceased were found having been killed; property in the house stolen, appellant seen carrying the property away and leaving the TV at Sango Bar where he led police to and it was recovered, and positively identified as belonging to the deceased. I am satisfied that the prosecution proved its case beyond reasonable doubt against the appellant on the two counts of robbery with violence contrary to Sec. 296(2). I find the conviction was proper and uphold the same. I note that the appellant was given an opportunity to mitigate and he was a first offender. The offence committed is serious. I affirm the sentence of death imposed. The appeal is therefore dismissed.

**Dated and Signed at Bungoma this 3<sup>rd</sup> day of October, 2018.**

**S.N. RIECHI**

**JUDGE.**