REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HIGH COURT CRIMINAL APPEAL NO.29 OF 2015

(CONSOLIDATED WITH CRIMINAL APPEAL NO 30 OF 2015)

EDWIN ESARIA TAI……..1ST APPELLANT

ERIC AUSTIN ESOYA……2ND APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

(From Original Conviction and Sentence in Kericho Criminal Case No.1449 of 2012 by Hon. L. Kiniale)

JUDGMENT

Introduction

1. This judgment pertains to **Criminal Appeal No. 29 of 2015-Edwin Esaria Tai vs Republic** and **Criminal Appeal No.30 of 2015-Erick Austin Esoya vs Republic**. The appeals arose out of the conviction and sentence of the appellants in Kericho Criminal Case No. 1449 of 2012.

2. The appellants were 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 24th day of August 2012, at about 1.00 a.m at Kabalswa village in Kericho West District within the Rift Valley Province, they jointly robbed Richard Kipyegon Terer of cash kshs.5,600/-, one vell-cum (China) mobile phone, one techno mobile phone both valued at 5,500/- and one Somali sword, and that immediately before the time of such robbery used actual violence on the said Richard Kipyegon Terer.

3. They also faced an alternative charge of handling suspected stolen goods contrary to section 322 (2) of the Penal Code. The particulars of this charge were that on the 24th day of August 2012 at about 1100 hours at Kabalswa village, in Kericho West District within the Rift Valley Province, jointly dishonestly and unlawfully retained two somali swords, one vell-com (China) mobile phone, one techno mobile phone both valued at kshs.5,500/= and cash kshs.4,400/= the property of Richard Kipyegon Tere knowing or having reasons to believe them to be stolen property.

4. They were tried before the Kericho Chief Magistrate's Court in Criminal Case No.1449 of 2012 by Hon. L. Kiniale SRM and sentenced to death in the judgment of the court delivered on 17th June 2015.

5. Dissatisfied with both the conviction and sentence, the appellants filed separate appeals, being **High**

Court Criminal Appeal No.29 of 2015 – Edwin Esaria Tai vs Republic and **Criminal Appeal No.30 of 2015- Erick Austin Esoya vs Republic**. Upon application by counsel for the appellants, the appeals were consolidated at the hearing on 8th November 2015.

6. The appellants appeal against both their conviction and sentence. They set out the following as their grounds of appeal in their respective petitions of appeal:

> ***a. That the learned trial magistrate erred both in law and fact by convicting me the appellant but failed to note that vital witnesses were not called to shade light how they arrested me and how he connected me with the purported recovered exhibit.***
>
> ***b. That the learned trial magistrate erred both in law and fact not allowing me the appellant to give my defence in a language I understand instead I was forced to give in a language that I was not fluent and conversant.***
>
> ***c. That the learned trial magistrate erred both in law and fact by not considering my sworn defence that was true and never gave reason for not considering it as law entails.***
>
> ***d) That the learned trial magistrate erred both in law and fact in convicting me the appellant in relying on evidence that was inconsistent and uncorroborative in all aspect it was miscarriage of justice.***
>
> ***e) That for I cannot remember all that went on in court, I pray to be supplied with true copy of court proceedings to enable me raise more grounds at the time of hearing of this appeal***.
>
> ***f) That I wish to be present during the hearing of this appeal***.

7. The appeal was canvassed before me by counsel for the appellants, Mr. Motanya and counsel for the state, Ms Keli. Mr.Motanya indicated that he had filed submissions only in respect of Criminal Appeal No. 29 of 2015, but that he would rely on the same submissions in respect of both appeals. Ms. Keli for the state also relied on submissions filed in respect of Criminal Appeal No. 29 of 2015.

8. In his submissions, Mr. Motanya raised three substantive grounds of appeal, the ground of identification, circumstantial evidence and recent possession.

The Facts

9. As the first appellate court, I am under an obligation to re-evaluate the facts and reach my own conclusions. In so doing, I must be mindful of the fact that I have neither heard nor seen the witnesses, as has the trial court – see the decision in **Kiilu & Another vs R. (2005) 1 KLR 174.**

10. The prosecution case was built on the evidence of 4 witnesses. PW1 was the complainant. His evidence was that he was asleep in his house on the night of 24th August 2012 when he heard a loud noise at the gate. He went outside and two torches were shone in his eyes. Two people had already gained entry into his house and they forced him back into the bedroom and ordered him to sit on the floor. He was then ordered to get back into bed and cover himself with a blanket, which he did. He was asked for money and he told them where to find kshs.5,000/- which was at the head of the bed. He also told them where to find his two phones, a techno 3307 and vell-cum 2656. They took the phones and two Somali swords which were in the head board of the bed and left. He stated that he saw only two people.

11. It was his testimony further that he telephoned a village elder, one Wilson Rugut (PW2), and after about an hour, the said Rugut came with neighbours and his sons. According to PW1, they then went up to Sondu Police Station and police officers accompanied them to a house where one Cheruiyot, a watchman at Sondu, had told Wilson Rugut that he had seen certain people enter.

12. PW1 testified that the police ordered the occupants of the house to open and he saw the two accused

persons in the house. They had been asleep. PW1 stated that the police carried out a search of the house, which was a single room, but did not recover the items stolen from him. The accused were then told to get out and lock their door which they locked with their padlock.

13. At about 4.00 p.m the following day, PW1 was telephoned by a police officer who informed him that something had been recovered. He went to the police station and was shown two mobile phones and two Somali swords which he identified as his and cash (kshs.4,400/-) was also recovered. In cross-examination, PW1 stated that the house where the accused were was one roomed with a bed and a pool table. The police had only found one torch when they searched the house.

14. PW2 was Wilson Kipkorir Rugut. His evidence was that he had received a phone call from the complainant who informed him that he had been robbed of two mobile phones and money. PW2 had telephoned a watchman in Sondu called Cheruiyot and informed him to be on the look out for people coming from their area towards Sondu. Cheruiyot later called and informed him that he had seen two people enter a certain house.

15. PW2 stated that he and PW1 were given police officers from Sondu and went to the house that Cheruiyot had indicated. The police entered the house and came out with two suspects and a torch. PW2 and the others were then told to go home and return the following day. He identified the two persons found in the house as the suspects in the dock. In cross-examination, he stated that he did not go inside the house but stood outside while the police did a search.

16. The investigating officer, PW3, was no.75775 P.C. Nathan Huro attached to Kericho CID office. His evidence was that he had received a report of a robbery within the outskirts of Sondu town. He narrated the facts relating to the robbery as narrated by the complainant, on the basis of which he was asked to investigate the robbery after the appellants had been arrested and were already in the cells.

17. His testimony was that he visited the scene of the robbery, then returned to the station and took the 1st accused, the 1st appellant in this case, to his house, where the 1st appellant opened the door and PW3 carried out a thorough search of the house. According to PW3, he was looking for any evidence to link the appellants with the robbery. His evidence was that he came across a jacket which was a bit wet and after searching the pockets of the jacket, he recovered two mobile phones, a vell-cum and techno in make.

18. It was his evidence further that he also recovered two swords beneath the mattress, a big one and a small one, both of which were in their sheaths and tied up with a leather belt. These items were identified at the station by the complainant and his wife as the items that had been stolen from their house. PW3 further testified that he did a second search on the 2nd accused, the 2nd appellant in this case, and recovered kshs.4,400/- hidden inside the socks accused 2 was wearing.

19. In cross-examination, PW3 confirmed that before suspects are put in the cells, a search of their bodies is done. He also confirmed that there were no personal receipts to show that any property had been recovered from the two accused persons. He confirmed further that one Geoffrey Sonsorino had been found in the 2nd accused's house as indicated in OB No.46 of 24/8/12 at about 17.00 hours, and he could not account for what the said Geoffrey Sonsorino was doing in that house, though it was his evidence on cross- examination that the 2nd accused, who was being housed by the 1st accused, was then in the cells. It was also his evidence in cross-examination that the house to which the 1st accused led PW3 and his colleague is the same house in which the said Geoffrey Sonsorino was found.

20. The fourth prosecution witness was Margaret Terer, the wife of the complainant. Her evidence was that on 24th August 2012 they were asleep when they heard noises outside at around midnight. The door of their house was hit with a stone. Two people who had torches entered. She did not see them as they blinded them with torches. She gave them ksh.2,500/- while her husband gave them kshs.3,500/-. They also took two phones and knives.

21. At the close of the prosecution case, the court found that the accused persons had a case to answer and

placed them on their defence. The 1st appellant elected to give a sworn statement. He stated that he had come to harvest maize with his father and wife. He was asleep on 24th August 2012 when at around 3.30 a.m, he heard a knock at the door. He was with the 2nd appellant. When he opened the door, he found four police officers and the complainant, as well as a watchman, outside. They searched the house and did not find anything, and then went away. However, they came back about 20 minutes later and ordered them to lock the door and accompany the police to Sondu Police Station. He locked the door and gave the keys to a police officer, and they accompanied the police to Sondu Police Station where they were locked in the cells. He alleged that he was beaten and forced to sign a statement. He denied committing the offence charged. On cross-examination, he stated that he was with the 2nd appellant who was his father's shamba boy, and that he knew the officer to whom he gave the house keys.

22. The 2nd appellant gave an unsworn statement. His evidence was that he worked for the 1st accused's father and had travelled from Nyamira with his boss to harvest maize in Sondu. The 1st accused's father, mother and wife had returned to Nyamira while he and the 1st appellant spent the night in Sondu. At 3.00 a.m they were woken up by police officers. The police officers searched the home but could not recover anything so they left. Later, they went back to the house and arrested the appellants. He denied committing the offence and testified that nothing was recovered from him.

23. In her judgment, the trial magistrate set out the evidence of the prosecution witnesses and the defence, as well as the issues arising for determination. She found that a robbery with violence incident had occurred, the prosecution having proved that the complainant was robbed, that force was used immediately before and at the time of the offence, and that more than one person was involved.

24. The court was also satisfied that recovery of the stolen items had been done, from the house of the 1st accused who slept with the 2nd accused, and that the accused persons had been in recent possession of the stolen goods. She relied on the decision in **John Kioko Mwau vs R [2012] eKLR** with regard to what amounts in law to recent possession.

25. The court further found that as the witnesses had not seen the accused, there was no need for an identification parade, in her words, *"the only incriminating factor is the circumstances that the robbers were 2, and that the stolen goods were recovered within a short span in a house which had 2 men sleeping in it"*. She found the evidence tendered sufficient to sustain a conviction and that the prosecution had proved its case beyond reasonable doubt. She therefore convicted the accused and sentenced them to death as mandated by law.

26. It is against these findings that the appellants appeal to this court, and I now turn to consider these facts and findings against the grounds of appeal relied on by the appellants.

Identification

27. In the written submissions dated 11th October 2016, the appellants argue that the trial court failed to connect the all important issue of positive identification of the appellants. They submit that the person said to have identified the appellants did not testify in court and in such circumstances, the hearsay evidence of PW2 would not suffice to identify the appellants as the perpetrators of the offence. The appellants relied on the case of **Abdulla Bin Wendo vs R [1953] 20 EACA 166** with regard to the need for other evidence, circumstantial or direct, to support the evidence of a single identifying witness.

28. In response, the state argues that there was no need for an identification parade as PW1 and PW4 did not see nor identify the appellants. The State distinguished the cases relied on by the appellants, noting that in the case of **Abdulla Bin Wendo & Another vs R (supra)**, the issue was the evidence of a single witness in respect of identification. In their view, the issue of identification did not arise in this case as none of the witnesses clearly saw the appellants.

29. I note from the evidence adduced before the court that none of the prosecution witnesses testified at the trial that they saw the accused persons during the robbery. While it was established from the evidence

that a robbery did take place at the home of the complainant, and that the robbery was committed by two people who entered the complainant's house, neither PW1 nor PW4 who were inside the house saw the perpetrators.

30. Further, the alleged watchman who PW2 testified told him he saw two people enter the house in Sondu was not called as a witness. Indeed, there was no evidence before the court that the appellants were identified by any of the prosecution witnesses as the perpetrators of the offence. In the circumstances, the issue of identification or an identification parade, as submitted by the state, did not arise.

Circumstantial Evidence and the Doctrine of Recent Possession

31. The appellants further submit that the doctrine of recent possession had not been sufficiently proven as required by law. They rely on the decision in **George Gikundi Munyi vs R Criminal Appl. No.101 of 2011** which restated the holding in **Isaac Nganja Kahiga alias Peter Nganja Kahiga vs R CA No.272 of 2005** for the proposition that for the doctrine of recent possession to be relied on, there must be positive proof of possession, that the property was found with the accused, and that it was stolen from the complainant.

32. The appellants point out that in his evidence on cross-examination, PW3 stated that when a search was carried out in the appellants' house at 3.00 a.m, nothing was found. However in a second search, the items allegedly stolen from the complainant were recovered. The submissions of counsel for the appellant's was that this raised the possibility of a frame up, and should have cast doubt on the prosecution case.

33. The state's response which combines the absence of identification with the doctrine of recent possession and circumstantial evidence is that the absence of positive identification is not fatal to a prosecution case in a robbery with violence case.

34. According to the state, on the authority of **Kisumu Court of Appeal Criminal Appeal No.606 of 2010 Reuben Nyakango Mose & Another vs R,** the case before the trial court did not proceed on the basis of identification but circumstantial evidence. The state's position was that PW2 had received information from a guard that he had seen two people who had a torch enter a house. PW1 and PW2, in the company of police officers went to the house at 3.00 a.m where a search was hurriedly conducted. The appellants locked the house with their padlock. On the 24th of August 2012, PW3 took the 1st appellant to his house, which he opened. PW3 then carried out a search and recovered the items stolen from the complainant.

35. The State relied on the decision in **Daniel Njihia Njuguna & 3 Others vs R Nairobi Criminal Appeal No.122 of 2004** with respect to reliance on circumstantial evidence in which the holding in the case of **R vs Kipkering Arap Koske** was cited with approval. The state also relied on **Joshua Bundi Nganatha vs R, Nyeri High Court Criminal Appeal No.70 of 2014** with regard to what the state must show for one to be convicted of the offence of robbery with violence.

36. I have considered the law with respect to the situations in which the court can properly convict an accused person on the basis of circumstantial evidence. I have also considered the applicable law with respect to the doctrine of recent possession.

37. With regard to circumstantial evidence the court in **Simon Musoke vs R [1958] EA 717** stated as follows:

> ***"… in a case depending exclusively upon circumstantial evidence he(the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

38. Similarly, in **Okeno vs R [1972] EA 32** it was held that:

"In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

39. In the case of **Peter Mote Obero & Another vs Republic [2011] eKLR**, the Court of Appeal sitting in Mombasa held as follows with respect to circumstantial evidence:

"It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V R [1952] AC 480."

40. In **Reuben Nyakango Mose & Another vs Republic (supra)**, the court cited the decision in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs R Criminal Appeal No. 82 of 2004** and **Christopher Rabut Opaka vs R Kisumu Criminal Appeal No. 82 of 2004** with respect to the application of the doctrine of recent possession and stated as follows::

"... 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 person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses."

41. The court also relied on the decision in **Malinga v R [1989] KLR 225** in which Bosire, J (as he then was) stated at page 227:

"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."

42. I consider the facts of the case against the principles set out in the cases above. The prosecution evidence is that a robbery took place at the home of the complainant. From the evidence, it was perpetrated by two people, but no-one saw them. About an hour later, the complainant accompanied by PW2 and police officers go to a house in Sondu where PW2 had been told by a watchman that he had seen two people enter. There is no evidence from this watchman, identified only as Cheruiyot, with regard to the two people he is alleged to have seen enter the house as he did not testify before the court. The police enter the house where the appellants were sleeping, search it, and find nothing. According to the appellants, and this has not been disputed, the police leave, then come back later and arrest the appellants. According to the state, the 1st appellant had been told to lock the house, and he had done so with his own padlock. The 1st appellant testified in his defence that after locking the house, he gave the keys to a police officer.

43. The following day, according to PW3, the investigating officer, he returns to the house with the 1st appellant and a colleague, searches the house, and finds the two phones inside the pockets of a wet jacket he finds on the bed. He also testified that he found Kshs 4,400/- hidden in the socks of the 2nd appellant when he searched him the day after the arrest.

44. In cross examination, he admits that there was a Geoffrey Sonsorino who had been found in the 2nd accused's house. This was indicated in OB No.46 of 24/8/12 at about 17.00 hours. PW3 could not account for what the said Geoffrey Sonsorino was doing in that house when the two appellants were in custody.

45. Given this evidence, can it be said that the doctrine of recent possession was established in relation to the two appellants? The only thing that is certain, in my view, is that there had been a robbery in the house of the complainant, which had been perpetrated by at least two people. No-one had seen the perpetrators, so their identity was unknown.

46. The doctrine of recent possession, in my view, does not assist the prosecution in this case. The premises in which the appellants were sleeping is a one room house. It was searched the previous night, and nothing found. However, the next day, the phones and swords stolen from the complainant were found there. The phones were found in the pockets of a wet jacket that was on the bed. The swords were under the bed. There was, however, also Mr. Geoffrey Sonsorino in the house. Who he was and how he got there, given the prosecution evidence that the 1st appellant had locked the premises with his padlock, was not explained. His presence, however, casts doubt on the prosecution case which should have been resolved in favour of the appellants.

47. Further, the 1st appellant testified that after locking the house, he gave the keys to a police officer. The prosecution allege that they carried out a search hurriedly the previous night before they arrested the appellants. However, it seems strange that, however hurriedly they carried out the search, they could have failed to find a wet jacket on the bed, and the swords under the bed, in a single room. All these factors, in my view, make a conviction of the appellants on the basis of circumstantial evidence and recent possession unsafe.

48. It is also difficult to credit the evidence of PW3 that a sum of Ksh.4400/- was found inside the socks worn by the 2nd appellant in a search by PW3, more than twelve hours after the arrest of the appellant. As conceded by the investigating officer in cross-examination, an arrested person is searched before being placed in the cells, and an inventory of his property taken. There was nothing of this sort done in relation to the 2nd appellant.

49. All in all, and taking into account the evidence of PW3 in relation to the presence of a third person in the premises where the appellants had been sleeping the night of their arrest, the fact that these premises had been searched the night before and nothing found, only for the stolen items to be found twelve hours later, and the allegation that the keys to the house had been given to a police officer, I am not satisfied that the prosecution established a case against the appellants to the required standard. There are gaps in the prosecution case which, in my view, raise serious doubts about the prosecution case against the appellants.

50. In the circumstances, it is my finding that the conviction of the appellants was not safe, and the appeal succeeds. I therefore set aside both the conviction and sentence. The appellants shall both be released forthwith unless otherwise lawfully held.

Dated Delivered and Signed at Kericho this 15th day of February 2017.

MUMBI NGUGI

JUDGE