



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 37 OF 2016

GEOFFREY ATEKA NYANGAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Ogembo PMCR NO. 860 of 2013) (Hon. D.O. Ogola Ag. C.M.)

JUDGMENT

1. The appellant, **Geoffrey Ateka Nyangau**, and others appeared before the Chief Magistrate at Ogembo charged with robbery with violence, contrary to **S. 292(2)** of the Penal Code.

It was alleged that on the 16th June 2013, at Ritembu Sub-location, Kenyeny District Kisii County, jointly with others not before court, being armed with dangerous weapons namely iron bars, pangas and runkus, robbed Milka Kemunto Mose of her cash Ksh. 10,055/=, T.V set make Panasonic valued at Kshs. 6,000/=, a pressure lamp valued at Kshs. 1,500/= and twenty six (26) hens valued at Kshs. 13,000/=, all valued at Kshs. 20,500/= and immediately after the time of such robbery threatened to use actual violence to the said Milka Kemunto Mose.

2. There was an alternative count of handling stolen good, contrary to S.322 (2) of the Penal Code, in that on the 24th June 2013 at Mangena Market, Kenyeny District, Kisii County, otherwise than in the cause of stealing, jointly dishonestly received or retained one T.V set make Panasonic knowing it or having reasons to believe it to be stolen property.

3. After a full trial, the appellant and his co-accused were convicted on the main count and sentenced to suffer death.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds in the petition of appeal and/or the supplementary grounds of appeal filed herein on 19th October 2016.

He appeared in person at the hearing of the appeal and fully relied on his grounds of appeal.

Mr. Otieno, learned Prosecution Counsel, appeared for the State/respondent.

4. In his submissions, the learned Prosecution Counsel conceded the appeal on grounds that in a previous appeal by a co-accused, the appeal was allowed on the basis of the evidence of identification. That, the proceedings showed that the co-accused was the only person who was identified and not the appellant.

That, the appellant was linked to the offence after a T.V set was found in a house, yet the alternative offence of handling stolen goods was withdrawn against a co-accused under S.87(a) of the CPC.

5. This court has given due consideration to the grounds of appeal and the submissions by the learned Prosecution Counsel. Its duty is to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Okeno Vs. Republic (1972)EA 32**).

6. Briefly, the prosecution case was that on the material date at about 1.00 am, the complainant, **Milka Kemunto Mose (PW 1)**, was at home in the company of an elderly and sickly lady called Nyamokami. They were asleep but Nyamokami felt the need to go for a call of nature. She then awakened the complainant to assist her but the complainant realized that they could not go outside the house as the door was locked from outside.

7. The complainant peeped through the window and because the outside of the house was lit by electric lights she spotted two people in green uniforms walking towards the kitchen. She could not identify them immediately but when they entered the house she saw and identified one of them as she had already switched on the electricity in the house. He was the appellant's co-accused called Omaiyo.

8. The two intruders on entering the house ordered the complainant to switch off the lights.

They then proceeded to threaten the complainant before locking her in the house from the outside and leaving the scene with her property including a television set. She remained awake up to 6.00 am and later reported the incident to the police at Magena Police Post.

9. After a period of six days, the complainant was called to the police post and shown some suspected stolen property. Among the property, was her stolen television set which she identified and was told that it was found in the house of **Elizabeth Kemunto Mochama (PW 2)**, who lived with the appellant and who indicated that the television set was brought to the house by the appellant.

10. **Zablon Mogoi Onyango (PW 3)**, and others proceeded to the appellant's house on 20th June 2013, and recovered the television set together with several phones. They apprehended the appellant who implicated his co-accused and later pointed out the house of the complainant as the place where the television set had been stolen from.

11. The case was investigated by **Cpl. Joshua Musau (PW 4)**, who later preferred the present charges against the appellant and his accomplices.

He denied the charges and in his defence stated that he was a mason by occupation and on 24th June 2013, he woke up and left home for work at a construction site. At about 1.00 pm, he heard motor cycle taxi operators (boda-boda) screaming that a person had been lynched. He proceeded to the scene to have a look and found many things burnt down.

12. He (appellant) was approached by an old man and asked for his identity card which he produced. He was however, taken to Nyangusu Police Station where many people came but were unable to identify him. He raised a complaint and an old man alleged that he had spoilt his name. The said old man was not called to testify. He (appellant) contended that he knew nothing about the case.

13. All the foregoing evidence was considered by the trial court which arrived at the conclusion that the charges were proper before the court and that the prosecution had discharged its burden of proving beyond reasonable doubt that the appellant and a co-accused were responsible for the offence.

14. In this court's opinion, the evidence revealed that there was no particular dispute that the offence of robbery with violence was committed against the complainant (PW 1) by two people who were armed with offensive weapons including a machete (panga) and who in the process of their criminal transaction made threats against the complainant.

15. It was in the hours of darkness at the time but the complainant stated that her house had electric light both inside and outside. She however, also indicated that the intruders may have concealed their faces by covering their heads. Given that there was no adequate opportunity and perhaps favourable conditions for identification and also that the intruders had covered their heads, it could not be said that the complainant made a positive identification of any of the intruders.

16. In essence, there was no direct evidence of identification against the appellant or his co-accused and if such evidence indeed existed then it was absolutely unreliable for a sound conviction of the accuseds.

As for the appellant, the evidence which led to his conviction on the main count was circumstantial or indirect evidence based on his alleged recent possession of stolen property.

17. In the English case of **R V. Taylor and Others (1928)21 CR.APP 20**, it was stated that:-

“Circumstantial evidence is very often the best evidence, it is evidence of surrounding circumstances which by intensified examination is capable of proving a proportion with the accuracy of mathematics”.

With regard to the doctrine of recent possession, the Court of Appeal in **Isaac Nanga Kahing’a alias Peter Kahing’a Vs. Republic Criminal Appeal No. 272 of 2005**, stated that:-

“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 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”.

18. The evidence herein with regard to the fact that the T.V set (P.Ex 1) belonged to the complainant and that it was stolen from her was not disputed. Indeed, the complainant (PW 1) confirmed that the T.V set was stolen from her house on the material date of the robbery. She produced a purchase receipt (P.Ex 2) which confirmed her ownership of the set.

19. The evidence pertaining to the recovery of the T.V set after its theft was crucial for purposes of establishing the appellant’s alleged possession of the same a few days after it was stolen. Such evidence was availed by Elizabeth Kemunto Mochama (PW 2) and Zablon Mogoi Onyango (PW 3).

20. Zablon, testified that they were led to a house where the appellant lived but did not find him. They instead found Elizabeth who was alleged to be the appellant’s wife. They also found the stolen T.V set in that house. Elizabeth did not deny that the T.V was found in the house in which she lived with the appellant. She however, denied that the appellant was her husband but confirmed that he was her lover.

21. With regard to the presence of the stolen T.V in their house, Elizabeth explained that it was brought to the house by the appellant who alleged that he had purchased it. Both of them were however, treated as suspects and arrested. They were later arraigned in court together with another suspect.

22. The prosecution later withdrew the case against Elizabeth (PW 2) and decided to treat her as a witness in this case which culminated in the impugned conviction of the appellant and another. Her evidence against the appellant was that of an accomplice because she was the actual “owner” of the house in which the T.V was found. However, she gave an explanation of how the T.V “landed” in her house. She said that it was taken there by the appellant. This fact was never disputed by the appellant in his defence and even during his cross examination of Elizabeth.

23. Generally, this court’s view on the evidence of Elizabeth (PW 2) is that it was credible and was somehow corroborated by that of Zablon (PW 3) in establishing that in one way or the other the appellant unlawfully handled the complainant’s T.V set knowing it to be stolen property. Elizabeth (PW 2) it would appear was an innocent bystander in the entire criminal transaction. She became a victim of the

criminal acts of a person masquerading as her true lover if not husband.

24. Ultimately, this court would find that the charge which was proved beyond reasonable doubt against the appellant was the alternative count of handling stolen property rather than the main count of robbery with violence.

Consequently, this appeal is allowed to the extent that the conviction of the appellant on the main count is hereby quashed and replaced with a conviction on the alternative count of handling stolen property contrary to S.322(2) of the Penal Code.

25. Further, the death sentence imposed upon the appellant is hereby set aside and substituted for seven (7) years imprisonment for handling stolen property with effect from the date of the judgment in the lower court i.e 12/2/14.

Ordered accordingly.

[Delivered and signed this 14th day of February, 2017].

J.R. KARANJAH

JUDGE

In the presence of

State Counsel - Mr. Otieno (SPC)

CC Njoroge/Dorothy

Appellant