



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIIAYA
CRIMINAL APPEAL NO. 50 OF 2016
(CONSOLIDATED WITH 51 OF 2016)
(CORAM: J.A. MAKAU – J.)

KEVIN OUMA OLOO 1ST APPELLANT

ERICK OWUOR MOLA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 31.05.2016 in Criminal Case No.457 of 2014 in Ukwala Law Court before Hon. C.N. Wanyama – R.M.)

JUDGMENT

1. The Appellants, **KEVIN OUMA OLOO**, the 1st Appellant and **ERICK OWUOR MOLA**, the 2nd Appellant, (were the 1st and 2nd accused) at the lower Court. They were charged with one count of **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the charge are that on the night of 17th/18th August 2014 at Sega Market in Ugenya Sub-County within Siaya County, jointly with others not before Court while armed with offensive weapons namely pangas and rungas robbed **LUCAS NYANDO OGUDA** of assorted electronics and assorted shop items valued at KShs.2.2 million and immediately at the time of such robbery fatally wounded the **said LUCAS NYANDO OGUDA**.

The Appellants faced two alternative counts being as follows: **Handling stolen goods contrary to Section 322 (1) of the Penal Code**. The particulars of the alternative count are that on the 23rd day of August, 2014 at Sega area in Ugenya sub-county within Siaya county, otherwise then in the course of stealing dishonestly retained one LG TV 32 inches, three iron boxes, a WAHL, shaving machine, Artkenson radio, LG DVD player and a Sony radio cassette knowing or having reasons to believe them to be stolen goods and the final alternative charge of **handling stolen goods contrary to section 322 (1) of the Penal Code**. The particulars of the alternative count are that on the 28th day of August, 2014 at Sega area in Ugenya Sub-County within Siaya County, otherwise than in the course of Stealing Dishonestly retained one carton of Lido laundry bar soap and one carton of Somo cooking fat knowing or having reasons to believe them of be stolen goods.

2. After full trial, the appellants were found guilty of the main count, convicted and sentenced to suffer death.

3. The conviction and sentence has provoked this appeal. The 1st appellant filed his petition of appeal in person setting out the following grounds of appeal:

1. That he did not plead guilty to the charge.

2. That there was no independent witness who could give light on who was the owner of the house was.

3. That there was a lot of contradiction on the time of his arrest between the arresting officer and the investigation officer.

4. That the inventory list was not authenticated and its origin was not clear.

4. Mr. P. Ochieng for the 2nd Appellant filed four grounds of appeal beings as follows:-

1. The Learned Magistrate erred in the law and fact by convicting on the ground of recent possession which evidence was inadmissible.

2. The Learned Magistrate erred in Law by shifting the burden upon the Accused as is obvious from his judgment.

3. The Learned Magistrate erred in Law by allowing the prosecution to proceed on a fatally defective charge sheet.

4. The Learned Magistrate erred in law and fact by convicting on insufficient evidence.

5. At the hearing of the appeal, Mr. Dola Ididis, Learned Advocate appeared for the 1st Appellant whereas Mr. P. Ochieng, Learned Advocate appeared for the 2nd Appellant and Mr. E. Ombati, Learned State Counsel appeared for the State.

6. Mr. Dola Ididis, Learned Advocate, for the 1st Appellant urged that there was no single eye witness in this matter, that no evidence on value of the goods allegedly stolen, that the evidence adduced do not connect the Appellant with the commission of the offence, that nothing was recovered from the 1st Appellant, that this is a serious charge which required to be proved beyond any reasonable doubt, that the evidence is riddled with contradictions and inconsistencies to sustain the conviction and that the defence was ignored.

7. Mr. P. Ochieng, Learned Advocate, for the 2nd Appellant urged that the trial court erred in basing its judgment on doctrine of recent possession where the evidence thereto was inadmissible, that the trial court erred in Law in shifting the burden of proof upon the accused and in allowing the prosecution to proceed with a fatally defective charge and convicting the 2nd Appellant on insufficient evidence.

8. Mr. E. Ombati, Learned State Counsel appearing for the State opposed both appeals urging that PW2 urged the items were his and that the items where recovered from the 1st Appellant that inventory was produced as exhibit 12, that doctrine of recent possession was applied properly through receipts of ownership produced, that defence of the 1st Appellant, though summarized was not evaluated, that on the 2nd Appellant's Appeal he urged that interrogation was carried out which led to the recovery of the stolen items.

9. The facts of the Prosecution case form part of the record of Appeal and I need not reproduce the same, however, I shall very brief summarize the prosecution's case and the defence.

10. The Prosecution case is as follows: that on the 17.8.2014, the complainants in this case PW1 George Onyango Otieno, PW2 Camulus Ochieng Oketch, who have hardware shop and M-Pesa business

respectively closed their respective businesses in the evening around 6.30 p.m. PW1 left his shop under guard of his shop watchman, Lukas Nyando. PW1 was called and told his shop had been broken into and his watchman was not there. PW1 rushed to his shop and confirmed his shop had been broken into whereas PW2 was also called while on his way to Busia and told his shop had been broken and things stolen. PW1 found his watchman behind the shop injured, rushed to police and later took the watchman to hospital but he passed on, on the way to the hospital and took his body to the mortuary.

On 29.8.2014, PW1 was called by Police to go and identify some of the things recovered which were soap (Lido) and Somo cooking oil. PW1 stated he did not know from where the items had been recovered. PW2, on 23.8.2014 was called to the Police as Police had arrested a suspect. PW2 saw recovered items which he identified, they were: LG TV 32 inch, Radio (Sony) Model 828, DVD player (LG), Iron boxes (3 pieces), shaving machine, charcoal stove, two mobile phones Nokia 105, Techno 340 phone and Atkinson Radio. PW2 stated that he had also lost KSh.80,000/= during the time of theft and property amounting to KShs.650,000/=.

11. The 1st Appellant denied the commission of the offence stating that on 22.8.2014, he left Busia in the evening for his home at Sega and alighted at the stage at 6.00 p.m. and proceeded to a shop to get credit. That he was stopped by two men who were joined by a Police Officer one Maina and who ordered the duo to handcuff the 1st Appellant. That he was then taken to Sega Patrol Base. That on the way he was assaulted by Maina and put into Police cells upto 8.00p.m. That on 28.3.2014 at 11.00a.m. an identification parade was conducted and the 1st Appellant was not identified. That Police took the 1st Appellant to his house at Busia and nothing was recovered. That the 1st appellant was subsequently taken to Siaya Police Station where another identification parade was conducted and the appellant was not picked. That on 1.9.2014, the 1st Appellant was arraigned before court. He stated that he was arrested because Maina, in March 2010 had arrested him, took him to Busia Court on allegation of being a friend to Mr. Maina's daughter. That after trial he was acquitted. That the daughter died and Mr. Maina threatened the 1st Appellant that he is the one who had killed his daughter and threatened the 1st Appellant with serious consequences. He referred to O.B. No. 8/2014 of (18/8/2014). He then stated Savula said he does not know anything about him and urged the inventory list is forged, stating the things allegedly recovered from him were not produced.

12. The 2nd Appellant denied this offence and stated that on 23.8.2014 at 6.00 p.m. he heard of the arrest of his friend and decided to go to Sega Police Station to report, but on the way he met Boda Boda operators who asked him to sit down and asked him about Reagan. He was beaten up but Police came to his rescue. That they proceeded to his house, carried out a search and recovered nothing. He stated that he does not know the 1st accused. That he was later charged with this offence.

13. I am the First Appellate Court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISAAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 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 finding and conclusion; it must make its own findings 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 has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'

14. The appellant urges that the trial court erred in law and fact by convicting the appellants on the ground of recent possession which evidence was inadmissible. In the instant case, the watchman who was guarding PW1's shop, did not tell PW1 anything regarding the robbery. No eye witness was called in this case and the Prosecution's case is based on the doctrine of recent possession. PW4, No.88502 Cpl. Everline Savula, received the 2nd Appellant while under arrest by *Boda Boda* operators on suspicion of being involved in series of robberies within Segwa Township. PW4 stated during cross-examination, they went to the 2nd Appellant's home and nothing was recovered from the 2nd Appellant. PW5, No. 71763 Cpl Moffat Migwi stated on 23.8.2014, they went to the 1st Appellant's house and found two suspects at 3.00p.m., that they arrested one suspect and recovered 32" LG TV, 3 iron boxes, one Sony Radio cassette, one supper-tipper Shaving Machine, one LG DVD, one charcoal stove, two mobile chargers, *Nokia, Itel*, one small size suit case, one LG DVD remote player and one small video machine *Atkinson*. That PW5 prepared an inventory of the recovered items (exhibit 12) as exhibit P3, P4, P5, P6A, P6B, P6C, P7, P8, P93, P10, P11. He arrested the 1st Appellant and stated that he does not know the 2nd Accused.

15. PW6, No. 67215 Cpl Benson Ndambuki, the Investigating Officer, received recovered items from PC Migwi (PW5) on 23.8.2014 which were recovered from the house of the 1st Appellant. PW6 went to the shop of the complainant recovered two boxes, one for TV and the other for Radio on comparison they both had serial numbers for Sony Radio model No. |C|FS.8285 mk2 and that the radio bears the serial number. Carton from the shop of the complainants produced as exhibit P14. TV box (carton) bore No. 304 SYW412425 and the TV bears the same serial number (exhibitP.15). That the 2nd Appellant was arrested by members of public and while interrogating the 2nd Appellant, he took PW6 and other Police Officers to his house where a carton of Lido Bar Soap and Somo cooking fat was recovered PW6 called the complainant who identified the box which had a mark OGS.

16. In **Raphael Isolo Echakara & Another V. Republic CRA No. 44 of 2013[2014] eKLR** the court of appeal stated:

“On the allegation that the first appellant led the senior sergeant Benson to the recovery of a jacket which was tainted with human blood, the law is now well settled that as Section 31 of the Evidence Act chapter 80 Laws of Kenya was repealed, the court can no longer act on the evidence related to items recovered as a result of a confession extracted from an accused person. In this case Senior Sergeant Benson could not take an inquiry statement or even charge and caution statement from the first appellant because he was below the rank allowed to do so even before the entire repeal of these provisions. Court could not in law act on the evidence obtained as related to what was recovered through such evidence. What happened here was not in law proper. The evidence leading to the recovery of the alleged jacket was not admissible in law and evidence obtained through such a confession was not admissible. Further it was alleged that it had slight blood stains of a human being. That blood was compared to blood samples allegedly obtained from the first appellant. First appellant denied having given his blood to anybody or that anybody took his blood. The prosecution said through Senior Sergeant Benson that;”

17. In view of the above, the allegation that PW5 Corporal Moffat Migwi got information from an informer that the 1st Appellant was suspected to have participated in robbery and that he proceeded to recovering several items as per inventory exhibit P.12 and that PW6 Corporal Benson Ndambuki recovered a carton of Lido Bar Soap and Somo cooking fat and by virtue of **Section 31 of the Evidence Act Cap 80 Law of Kenya** having been repealed, the trial court erred on relying on that evidence related to items recovered as a result of a confession extracted from an accused person, as in this case both corporals of police could not take an inquiry statement or even charge or cautionary statement from the 1st and the 2nd appellants because both of them were below the rank allowed to do so and even deal and even before the section was repealed, they could not do so, the court could not in law act on the evidence obtained related to what was received through unlawful means. What the corporals did in this matter was

contrary to the law and evidence obtained as was held in **Raphael Isolo Echakara & Others V R (Supra)** through confession was not admissible. Further PW1 and PW2 who were said to be owners of the items recovered, it is not clear from the evidence about their ownership of the items as none of them claimed ownership of any of the items and none could prove ownership of any of those items. PW1 did not produce any receipt or identified the claimed items nor produced certificate of ownership nor did he state any special mark to claim ownership of the soap (Lido) or the Somo Cooking Oil. PW2 stated as follows:-

“ I saw recovered items which I identified.”

18. The trial court did not record how PW2 identified the items as his own, either by a mark or production of any receipt. I have very carefully examined the items listed in the inventory exhibit 12 and none of the items serial numbers are recorded nor, their description nor, their model type, nor receipt of ownership were displayed before the trial court. In view of the above the ownership of the items recovered from the 1st Appellant and the 2nd Appellant has not been proved to be property of the complainants

19. In this case the 1st and 2nd Appellants were suspected to be behind the robbery of the night of 17th /18th August 2014. Mere suspicion cannot justify the conviction of the Appellants In **Mary Wanjiku Gichira V R Criminal Appeal No. 17 of 1998**, the Court of Appeal held that suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

20. The trial court based the Appellant’s conviction on the doctrine of recent possession. The trial Court found the Appellants were found in possession of stolen items. In **Isaac Ng’ang’a Kahiga alias Peter Nganga Kahiga V R Criminal Appeal No. 272 of 2005** the Court of Appeal held:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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”.

21. In this case it was incumbent upon the prosecution to prove that the shop items and electrical appliances which were found within the 2nd Appellant and the 1st Appellant respectively belonged to the complainants (PW1 and PW2). The shop goods and electronics are merchandize which are readily available in shops and at homes. Anyone can have such items as they are available in open markets. The ownership of items such as electronic, as in this case, can easily be proved through production of receipt of purchase or certificate of ownership. In this case the prosecution did not prove that the soap (Lido) Somo Cooking Oil and various electronics found in the Appellants possession belonged to the complainants. Consequently, I find the circumstantial evidence adduced before the trial court was not sufficient to warrant conviction of the Appellants.

22. The upshot is that the appeals are merited and I hereby allow the appeals. Accordingly, I quash the conviction and set aside the sentence meted out against the appellants. I direct the appellants be hereby set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 16TH DAY OF MARCH, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 16TH DAY OF MARCH, 2017.

In The Presence of: -

Mr. Dola Ididis: For 1st Appellant

Mr. P. Ochieng: For 2nd Appellant

Mr. Ombati: For the State

1st Appellant: Present

2nd Appellant: Present

COURT ASSISTANTS:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J. A. MAKAU

JUDGE