



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 102 OF 2013

BETWEEN

MOHAMMED SUNDULI SAKWAAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against conviction and sentence of death in Cr. Case No. 772 of 2011 by the SRM'S court at Mumias delivered on 27.05.2013 by Hon L.M. Nafula SPM)

J U D G M E N T

Introduction

1. The appellant herein was tried, found guilty and convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Upon conviction, he was sentenced to suffer death as by law prescribed. It was alleged that on 3rd October, 2011 at Khabakaya village, Eluche Sub-Location, East Wanga Location in Mumias District within Kakamega county jointly with others not before court, while armed with dangerous weapons, namely Pangas, rungus, iron bars robbed one Patrick Were Makokha of one Mobile phone make Nokia 6080 valued at KShs.3800/=, the national identification card No. 11742645, one electors card, serial Number 01878199 one membership card of Shianda Motto(sic) bike youth group and cash kshs.750/- all valued at kshs.5,000/=.

2. In count II the appellant was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code, the particulars being that on 30th October, 2011 at Emanyasi Village, Bumini Sub-Location East Wanga Location in Mumias District within Kakamega County he unlawfully assaulted Edwin Mosolu Echesa thereby occasioning him actual bodily harm. It is to be noted from the record that the learned trial Magistrate made no finding on this Count II.

The Appeal

3. Being dissatisfied with both conviction and sentence, the appellant preferred this appeal on the strength of 7 substantive grounds set out in the petition of appeal dated 04.06.2013 and filed in court on the same date. In the main, the appellant contended that prosecution evidence on identification lacked corroboration and that the items allegedly recovered from him were never produced in evidence as

exhibits. He asked the court to allow the appeal, quash the conviction and set aside the sentence so that he is released.

The Prosecution Case.

4. The prosecution case is as follows;-

On 03.10.2011 at about 9.30 pm, the complainant Patrick Were Makokha who was a bodaboda rider was returning home on foot after he had returned the motor bike to its owner.

5. It was a dark night. Suddenly, two people emerged from the side of the road, pounced on him and ordered him to lie down. When he turned to check who these people were, he was hit on the left ear by one person. The second person hit him on the hand and he fell down and lost consciousness. When he came in morning, he discovered all the items mentioned in the charge sheet had been stolen from him.

6. When the complainant, PW1, came to be found one Wycliffe standing near him. Wycliffe (not called as a witness) helped him to get home. Later PW1 was taken to Makunga Health Centre but because of the gravity of the injuries, he was referred to Kakamega County General Hospital where he was treated and discharged. Before going to the hospital, PW1 reported the incident to the police at Shianda.

7. Then on 31.10.2011, PW1 was summoned to Shianda Police Station where he was informed his elector's card, National Identify Card and the youth membership card had been recovered from somebody. He was able to identify the documents which he confirmed belonged to him. PW1 was thereafter issued with a P3 form. He identified the treatment book (PMFI – 2), card (MFI – 2), P3 form (PMFI – 3) National Identity Card (PMFI – 4) Elector's Card (MFI – 5) and the bodaboda membership card for Shianda (PMFI – 6). PW1 denied suggestions by the appellant that the robbery case against him was a frame-up.

8. The evidence by PW2 Edwin Musolu Echesa shows how at about midnight he was hit on the head and shoulder. When he went out of his house to check on why his dogs were barking. Though he fell down upon being hit, he got up, went after the person who had hit him and caught up with him. He also screamed and with the help of the members of public, they apprehended the appellant and tied him up with ropes and before the village elder came to the scene. The appellant was kept in the kitchen in PW2's homestead until the morning when he was escorted to Shianda Police Post.

9. At the police Post, the appellant was searched and found in possession of a wallet, two identity cards, elector's card and a bodaboda register card belonging to PW1. A metal bar which the appellant allegedly used to hit PW2 was also handed over to the police together with the appellant. PW2 telephoned PW1 and informed him that his (PW1's) documents had been found on the appellant during the search at Shianda Police post.

10. The village elder, Fredrick John Sakulu who testified as PW3 confirmed the testimony given by PW2. PW3 also testified that during a search on the person of the appellant at Shianda Police Post, he was found in possession of documents belonging to PW1. PW4, No. 2007128914 APC Zachary Okila confirmed receiving a report from PW2 and also rearresting the appellant from members of the public who had taken him to the APC camp at around 8.00am on 30.10.2011. PW4 carried out a search on the appellant and recovered the documents belonging to PW1 as mentioned by PW2. The loss of the said documents had been earlier reported by pW1 when PW1 was summoned to the camp, he (PW1) identified the documents recovered from the appellant during the search as belonging to him.

11. Later, PW4 escorted the appellant to Mumias Police Station whereat the appellant was charged. PW4 stated that the appellant could not explain how he had come into possession of PW1's documents, PW4 denied framing the appellant whom he did not know before.

12. PW5, No. 61701 Police Constable Jackson Langat was the Investigating Officer in the case. He received the appellant from Police Officers at Shianda Ap Camp. After booking the appellant, PW5

recorded witness statements and thereafter charged the appellant with the two offences. PW5 produced the ID Card, elector's card, bodaboda youth card twisted iron bar as PExhibit 4,5,6 and 7 respectively. On that same day, he issued PW1 with a P3 form. PW5 denied drumming up charges against the appellant.

13. At the close of the prosecution case, the appellant was put on his defence.

The Defence Case.

14. The appellant testified under oath stating that on 30.10.2011, while he was transporting some fertilizer to his home, he was escorted by Fred John Sakwa and Edwin Musoli who alleged that the fertilizer he was carrying was stolen. They arrested him and took him to the home of John Sakwa who telephoned one Japheth Wambani to come and identify his (Japheth Wambani's) stolen fertilizer. He was thereafter escorted to the AP Camp at the AP Camp he was asked to pay with Kshs.2580/= if he wanted his freedom. He did not have the money so he was taken to Mumias Police Station and charged with an offence he did not commit. When questioned about the testimonies of the prosecution witnesses, the appellant stated that the whole of that evidence is a pack of lies. He also testified that the exhibits produced in court were in the possession of the witnesses and not in his possession.

Judgment of the learned trial Court

15. After a careful analysis of the evidence on record, the learned trial Magistrate concluded that the prosecution had proved the charge of robbery with violence based on the recovery of PW1's recently stolen items with the appellant. The learned trial Magistrate also made a finding that the appellant completely failed to explain how he had come into possession of the said items, and thus the only inference from such possession in the absence of any explanation was that the appellant was amongst the robbers who attacked and robbed PW1 on 03.10.2013.

The Duty of this Court.

16. As this is a first appeal this court is under a duty to review the evidence as a whole to determine whether the conclusions of the trial Judge should stand. It is however important to note that this jurisdiction has to be exercised with caution; if there is no evidence to support a particular finding or conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the evidence, or has plainly gone wrong, the appellate court will not hesitate to overturn the finding. See **Okeno vs – Republic [1972] EA 32.** It is not the duty of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusion. See **Ngui – vs- Republic [1984]KLR 72.**

The Law

17. From the evidence on record, the only reason why the learned trial Magistrate found the appellant guilty as charged was his having been found in possession of some items which had been stolen from PW1 some three weeks prior to 30.10.2011.

18. The case of **Ruhi- vs- Republic [1985] KLR 373** sets out the applicable principles for presumption of the doctrine of recent passion. In the case, the fourteen appellants were tried found guilty convicted with the offence of unlawfully and jointly converting to their own use a motor vehicle which was the property of the University of Nairobi. They were each sentenced to imprisonment for six months. The appellants, who were students of the university, had been intercepted in the University vehicle sometime after it was forcibly driven off from the University premises by an unidentified group of persons.

19. On appeal for various reasons, the High Court persuasively held, inter alia, that "By the doctrine of recent possession; a strong presumption arose, in this case that the appellants, who had been found with the motor vehicle were the same persons who had earlier forcibly driven it out of the University premises.

Analysis and Determination

20. Upon careful perusal of the appellant's submissions, I find that the appellant contends that the period of about one month between the alleged robbery against PW1 and the recovery of PW1's items on the appellant does not and cannot amount to recent possession. From the evidence, PW1 was attacked and robbed on 03.10.2011 while his stolen items were allegedly found on the appellant on 30.10.2011. It is to be noted that the recovery of the items from the appellant was a spontaneous act which followed his being found home of PW3 at night, after which he was escorted to the police and during the normal search he was found in possession of PW1's items which had been reported stolen by PW1. The appellant in his defence suggested that those items were planted on him, but from the record, I find no evidence to support such an allegation. This being the case, a strong presumption arose in this case that the appellant was one of persons who attacked PW1 on the night of 03.10.2011 as he (PW1) walked to his home. The appellant has complained that one Wycliffe who was said to have found PW1 unconscious on the road was never called to testify. In my considered view such evidence would not have added value to the prosecution case. As correctly submitted by counsel for the respondent. I am satisfied that the learned trial court properly convicted the appellant of the offence of robbery with violence based on the doctrine of recent possession. PW1 testified that he was attacked by more than one person during the robbery thereby satisfying the ingredients of the offence of robbery contrary to Section 296(2) of the Penal Code.

21. Having reached the above conclusion, I find no merit in any of the grounds of appeal set out by the appellant in his petition of appeal dated 04.06.2013. This appeal ought to be dismissed.

Conclusion.

22. For the above reasons, the appellant's appeal on both conviction and sentence be and is hereby dismissed. Right of appeal to the Court of Appeal within 14 days.

Orders accordingly,

Judgment delivered, dated and signed in open court at Kakamega this 9th day of March 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Present in person.....for Appellant

Mr. Ngetich (present) for respondent

Mr. Polycap court assistant.