



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 132 & 133 OF 2014.

(CONSOLIDATED)

BETWEEN

BONNIFACE SHITIABAI MAMATI :::::::::::::::::::: 1ST APPELLANT.

ARTHUR ANGUBA MUTHESHI :::::::::::::::::::: 2ND APPELLANT.

AND

REPUBLIC :::::::::::::::::::: RESPONDENT.

(An appeal from the conviction and sentence of Hon. J. Ong'ondo – PM in Kakamega Chief Magistrate's Court Criminal Case No. 2418 of 2013 delivered on 11th September, 2014.)

J U D G M E N T.

1. The appellants, Bonniface Shitiabai Mamati and Arthur Anguba Mutheshi were jointly charged and convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.
2. The particulars of the charge were that on 6th day of November, 2013 at Khayega market in Kakamega County jointly being armed with dangerous weapons namely slashers robbed Adams Anyore cash Ksh. 6,150/= (sic), Radio make Sonitech, an amplifier, a speaker and a mobile phone make Nokia all valued at Ksh. 11,450/= and immediately before the time of such robbery threatened to use actual violence to the said Adams Anyore. After the trial was concluded, they were convicted and sentenced to suffer death as by law prescribed.
3. The appellants being dissatisfied with the said conviction and sentence filed similar grounds of appeal to the effect that:-
 - i. *The trial magistrate erred in both law and facts (sic) by failing to appreciate that the prosecution evidence was insufficient, hence unreliable and discredited;*
 - ii. *The trial magistrate erred in law and facts (sic) by failing to observe that the circumstances prevailing at the purported scene of crime were not conducive enough to warrant a proper identification of the interlopers;*
 - iii. *The trial magistrate erred in law and facts (sic) by failing to take into account that there emerged material discrepancies in the trial process; and*
 - iv. *The trial magistrate erred in both law and facts by disbelieving the appellants' sworn defence without giving some tangible points of determination and disclosing all relevant evidence as*

guaranteed in articles 50 (c) and (j) of the Constitution;

4. At the hearing of the appeals, Kakamega High Court Criminal Appeal No. 132 of 2014 was consolidated with Kakamega High Court appeal No. 133 of 2014. The appeals were heard as Kakamega High Court Criminal Appeal No. 132 of 2014.

The 1st appellant's submissions

5. The 1st appellant relied entirely on his written submissions which we summarize as hereunder:-
 - i. *PW1 did not give a description of his assailants in his first report;*
 - ii. *The light that was flashed was torchlight not electric light;*
 - iii. *There was a variance between PW1's evidence of what was stolen and what is specified in the charge sheet;*
 - iv. *The issue of recovery was fabricated against him as no inventory was prepared of the recovered goods; and*
 - v. *His alibi defence was not considered by the trial court.*

The 2nd appellant's submissions.

6. The 2nd appellant handed in his written submissions in court which were similar to those of the 1st appellant. In addition, he submitted that PW2 did not give out the names or give a physical description of the assailants. He asked for the 1st report but he was not given. No identification parade was carried out. He submitted that although PW1 said that his house had electric light at the same time he said that his assailants were using torch light.

The respondent's submissions

7. Mr. Omwenga, learned counsel for the respondent submitted that the identification of the appellants was done by PW1 and PW2. PW1 was in his house with his wife when the appellants struck. The lights to the house were switched on and off five (5) times by the appellants who left the lights on. They proceeded to PW1's room where they took his phone and cash Ksh. 3,150, Ksh. 50/= from his wife and other items. PW1's wife, PW2, was pulled out of the house. When she returned to the house, she told PW2 that the appellants had raped her. PW2 told the court that she used to see the 1st appellant at Khayega and it is the 1st appellant who dragged her from her room to the sitting room. The appellants had tea, they took their time and the lights in the sitting room were on. This time was sufficient for PW2 to see and identify the appellants. PW3, a Clinical Officer, examined PW2 on 6th November, 2013 and found that PW2 had been raped.
8. Mr. Omwenga further submitted that the 1st appellant was known to PW1 and he led PW4 to his house. The amplifier stolen from PW1's house was recovered. It was identified by PW1. The 1st appellant led the police to the 2nd appellant's house where PW1's speaker was recovered, and identified by PW1. It was produced as exh. 4. In the circumstances, there was no need for an identification parade as PW1 knew the appellants. The appellants did not explain how the recovered goods came to be in their possession.

Mr. Omwenga prayed that the appeals be dismissed.

The duty of the first appellate court

9. This being the first appellate court, we are under duty to re-examine and re-evaluate the evidence tendered before the trial court and arrive at our own decision, taking into account the fact that we neither saw nor heard the witnesses testify. This duty is well spelt out in the case of **Okeno vs. Republic [1972] EA 32**, in the following words:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 finding and draw its own conclusions only then can it decide whether the magistrate’s finding 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.”

10. We will therefore analyze and re-evaluate the evidence adduced at the lower court and reach our own conclusion in the matter.

The prosecution’s case

11. PW1, Adams Anyole adduced evidence of how on 6th November, 2013, he was asleep at 12.00 a.m. in his house with his wife, Millicent, PW2. He realized that there were people in the house. They flashed lights five (5) times. His house has electric lights which they left on. The 1st appellant, Boniface Shitiabai Mamati was wearing a reflector jacket identified in court as MFI-4. He took Ksh. 3,150/= from PW1’s boxer. He also took PW1’s phone from the bed. PW1’s wife was asked for money and she said that she had only 50/=. The assailants pulled her to the sitting room. One of the assailants who had a slasher was wearing a scarf with Rasta colours. He was wearing a T-shirt inscribed No. 10 (for Roonie). The 3rd assailant had a slasher and was wearing a jacket. They robbed PW1 of his radio, an amplifier, an extension, phone and a speaker. The appellants took tea before they left.

12. PW1 reported the robbery to Khayega Police Post and informed Police Officers that one of the robbers was Bonnie, the 1st appellant. The police arrested him and recovered in his house, the amplifier PW1 was robbed of. The 1st appellant led them to Evans’s (2nd accused in the lower court) house where a reflector jacket was recovered. The said jacket was the one the 1st appellant was wearing on the night of the robbery. The 2nd accused was found with a speaker belonging to PW1. A slasher identified as MFI was also recovered in the 2nd accused’s house. We note that the 2nd accused person jumped bail and was not in court at the time the judgment was delivered. The 1st appellant led the police to the 2nd appellant’s house where a T-shirt inscribed No. 10 (for Roonie) was recovered, it was identified as MFI-6 in court by PW1. It was the T-shirt that the 2nd appellant was wearing on the night of the robbery. The scarf that the 2nd appellant wore on the said date was also recovered and identified in court as MFI-7 and a hood that he had worn on the night of the robbery was recovered and identified as MFI-8. It was the evidence of PW1 that the assailant who was wearing the T-shirt that was recovered was the last to leave their house.

13. On cross examination by the 1st appellant, PW1 informed the court that he was able to see and identify him when he removed a torch which spotted well and reflected light. After the robbers left, PW1 raised the alarm, neighbours went to the scene and he told them that the 1st appellant was one of the robbers. PW1 reported the robbery in the morning.

14. PW2’s evidence was to the effect that she was asleep with her husband, PW1, on the night of 16th November, 2013 when they were invaded by thugs. The assailants had torches and pangas. The 1st appellant pulled her and took her to the sitting room. The assailants took tea. They demanded for a phone and money. They switched on and off the light bulb in the room. PW2 identified a recovered amplifier.

15. PW3’s evidence is not relevant to this appeal as the appellants were acquitted of the offence of gang rape.

16. PW4, Corporal Evans Makori from Khayega Administration Police Post in the company of PW1

went to arrest the 1st appellant from his house. The time was 2.00 a.m. on 7th November, 2013. They woke up the 1st appellant. PW1 identified an amplifier which was on the table in the 1st appellant's house. The amplifier was marked as MFI-P2 in court. The 1st appellant led them to the 2nd accused's house where a speaker belonging to PW1, marked as MFI-P4 was recovered. A reflector jacket MFI-P3, a hood MFI-P8 and a slasher MFI-P5 were also recovered. The 2nd accused was arrested.

17. The 1st appellant then led the police to the 2nd appellant's house where a rasta scarf, marked as MFI-7, a blue T-shirt inscribed No. 10, marked as MFI-6 were recovered. The 2nd appellant was arrested. PW4 produced the recovered items as exhibits 2 to 8. On cross examination, PW4 informed the court that he did not prepare an inventory of the recovered goods. On cross examination by the 2nd appellant, PW4 said that they recovered the T-shirt in his house which PW1 identified as the one he had seen one of the robbers wearing on the night of the robbery. It was hanged in the 2nd appellant's house.
18. PW5, Corporal Erick Ng'etich was attached to Mukumu Police Patrol Base performing general duties. On 6th November, 2013 at 11.00 a.m., he was on duty. While at the Administration Police Office at Khayega, he received a report of robbery from PW1 and PW2. On 8th November, 2013 accompanied by PW4 and PW1, they proceeded to the 1st appellant's house. They recovered an amplifier exhibit 2. They then proceeded to the 2nd accused person's house where they recovered a hood, exhibit 4, slasher exhibit 5, and a reflector jacket. They went to the 2nd appellant's house and recovered a rasta scarf exhibit 7. They arrested and charged the appellants. On cross-examination, PW5 informed the court that PW1 and PW2 identified the 1st appellant by name. PW5 visited the scene of crime and observed that there was disturbance and breakage. He recorded this in his diary. He reiterated that they recovered an amplifier from the 1st appellant's house.

The defence case

The 1st appellant's defence

19. The 1st appellant gave a sworn defence statement. He informed the court that he is a charcoal seller. On 7th November, 2013 he went home in the evening after work. At 9.00 p.m. he heard a knock on the door. He opened the door and saw PW4, an Administration Police Officer, whom he knew. There was another person who had reported theft of charcoal. They searched the house and took sacks of charcoal. He was arrested and charged with this offence which he denies. On cross-examination, he said that the amplifier was added later.

The 2nd appellant's defence

20. The 2nd appellant gave a sworn statement in his defence. He informed the court that he is a farmer from Mukumu Village. He was asleep at 10.00 p.m. on 7th November, 2013 when he heard a knock on his door. He opened the door, his house was searched and nothing was found. He was arrested and charged with this offence which he denies.

Determination of the appeal.

21. The issues for identification are:-

1. If the appellants were positively identified at the scene of crime;
2. If the doctrine of recent possession applies; and
3. If the offence of robbery with violence was proved beyond reasonable doubt.

22. The appellants in their twin grounds of appeal and in their submissions, brought up the issue of the conditions prevailing at the time the offence was committed as not being conducive for positive identification. In his judgment the learned trial magistrate found that both PW1 and the 1st appellant were engaged in charcoal selling business at Khayega. Although this is not reflected in the typed proceedings, a perusal of the handwritten proceedings of the lower court indicate that PW1 said as follows:-

“I am Adams Ayole. I am 18 years old from Mukumu, Khayega. I sell charcoal. I see accused 1 (1st appellant) at Khayega. I do not know the other two”

23. In his defence, the 1st appellant informed the court that he is a business man who sells charcoal. PW2 in her evidence testified that she saw and recognized the 1st appellant Bonnie whom she used to see at Khayega. It was the evidence of PW1 and PW2 that there was electric lights in their house which were flashed five (5) times. According to PW1, the robbers then left the lights on. They also had torches. It was the 1st appellant who demanded for money and took PW1’s phone from the bed. He also took Ksh. 3,150/= from PW1’s boxer. The 1st appellant wore a reflector jacket, MFI-4. PW1 observed that one of the robbers was wearing a scarf with rasta colours and wore a T-shirt inscribed No. 10 (for Roonie). The other robber was wearing a jacket and had a slasher.

24. The robbers took tea that had remained in a flask. The detailed description given by PW1 of what the robbers wore on the material night shows that the electric light in PW1 and PW2’s house was adequate for positive identification. It is also evident that the appellants were not in a rush to leave the complainants’ house as they even had time to take tea.

25. It is our finding that the circumstances prevailing in PW1 and PW2’s house were ideal for positive identification. PW1 knew the 1st appellant as a charcoal seller at Khayega. This was the same business that PW1 was carrying out. He knew the 1st appellant as Bonnie. PW2 testified that she used to see the 1st appellant at Khayega. This is therefore a case of identification by recognition.

26. In the case of **Wamunga vs. Republic (1998) KLR 426**, the Court of Appeal stated as follows:-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

27. Having analyzed the circumstances prevailing in PW1 and PW2’s house when the offence was committed and the fact that the 1st appellant was not a stranger to them, we find that the 1st appellant was positively identified. The foregoing is further compounded by the evidence that PW5 received a report from PW1 and PW2 on 6th November, at 11.00 a.m. about the robbery whereby they mentioned the 1st appellant’s name to PW5. We note that this was the first report that was made on the morning after the robbery.

28. In the case of **Terikali & Another vs. Republic [1952] EACA**, it was stated that:-

“Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others”

29. In the present case, PW1 and PW2 reported to PW5 that they had identified the 1st appellant at the scene of crime. The 2nd appellant was however not known to PW1 and PW2. The evidence on record shows that PW1 led PW4 and PW5 to the 1st appellant's house on the night of 7th & 8th November, 2013 whereby they recovered an amplifier, exhibit 2, that was positively identified by PW1 as the one he was robbed of. The 1st appellant led PW4, PW5 and PW1 to the 2nd accused's house where PW1's speaker, a hood, reflector jacket and a slasher were recovered.
30. The 1st appellant also led the said witnesses to the 2nd appellant's house where they recovered a rasta scarf, exhibit 7 and a blue T-shirt inscribed No. 10, exhibit 6. PW1 further stated that a hat (hood) worn by the 2nd appellant at the scene of robbery was recovered in the said house.
31. In order to determine if the doctrine of recent possession applies in this case, we make reference to the decision of **Isaac Ng'ang'a Kahiga, alias Peter Ng'ang'a Kahiga vs. Republic, Criminal Appeal No. 272 of 2005 (UR)** where the elements necessary for application of the doctrine of recent possession were enunciated in the following words:-
- “...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.”*
32. The amplifier that PW1 was robbed of was recovered from the 1st appellant's house barely two days after the robbery. The only presumption that this court can arrive at is that the 1st appellant was one of the robbers who invaded PW1 and PW2's house on the night of 6th November, 2013. The evidence of recovery solidifies PW1 and PW2's evidence of recognition of the 1st appellant at the scene of crime.
33. The 2nd appellant was convicted on the evidence of PW1 based on the manner of dress of one of the robbers who had worn a rasta scarf, a hat (hood) and wore a T-shirt inscribed No. 10 (for Rooney). This assailant was armed with a slasher.
34. It is our considered finding that the description given by PW1 of how one of the robbers was dressed and the recovery of the same attire from the 2nd appellant's house was not by sheer coincidence. We are satisfied beyond reasonable doubt that the 2nd appellant was part of the gang that raided PW1 and PW2's house on the night of the robbery. We are satisfied that the 2nd appellant, just as the 1st appellant was convicted on sound evidence. In addition, it was the 1st appellant who identified the 2nd appellant's house. The discrepancy in PW2's evidence as to the date when the robbery occurred does not vitiate the fact that it happened. PW1 was consistent that the robbery happened on 6th November, 2013 and the recoveries made on the night of 7th and 8th November, 2013.
35. The appellants in their grounds of appeal indicated that the court did not comply with articles 50 (c) and 50 (j) of the Constitution of Kenya. A perusal of the lower court record shows that the 1st appellant on 2nd January, 2014 requested for witness statements. On 30th January, 2014, the 2nd appellant requested to be supplied with the first report and the P3 form. The hearing of the case commenced on 4th March, 2014 when both the appellants said that they were ready to proceed. They did not raise the said issues with the court again. The only presumption that we can arrive at is that the appellants were supplied with the witness statements and documentary exhibits that they required.

36. The only variance that we see in the charge sheet is in respect to the amount of money that was stolen. It is given as Ksh. 6,150/= whereas in PW1's evidence, he said he was robbed of Ksh. 3,150/=. The error in the charge is curable under the provisions of section 382 of the Criminal procedure Code.
37. Failure on the part of PW5 to prepare an inventory of the recovered goods does not weaken the prosecution case as PW1 and PW4 were present when the recoveries were made.
38. The appellants did not raise alibi defence as they contend in their petitions of appeal. We find that the defence the appellants tendered was properly rejected in view of the overwhelming evidence adduced by the prosecution connecting them to the commission of the offence.
39. The appellants were 3 and they were armed with offensive weapons and robbed PW1 of money and goods which satisfied the requirements of a conviction for the offence of robbery with violence.
40. We therefore uphold the conviction of the 1st and 2nd appellants and the death sentence meted out against each of them by the trial court. The appeals are hereby dismissed.

The appellants have 14 days right of appeal.

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this ..**8TH** day of**MARCH**, ... 2016.

RUTH N. SITATI

NJOKI MWANGI.

JUDGE

JUDGE.

In the presence of

..... for the 1st and 2nd Appellants.

..... for the Respondent.

.....Court Assistant