REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 149 OF 2013

BETWEEN

SEBANA KHAKAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*An appeal from the conviction and sentence of Hon. Ireri B. Nyaga – AG. PM in Vihiga Senior Principal Magistrate's Court Criminal Case No. 1232 of 2011 delivered on 2nd August, 2013.)*

J U D G M E N T

1. The appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were that on the night of 18th day of December, 2011 at Mahanga in Vihiga County within the Western province jointly with others not before court while armed with pangas robbed John Nangabo his (sic) mobile phone make Alkatel (sic), a shirt and trouser all valued at Ksh. 7,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said John Nangabo.

2. The appellant was also charged with an alternative count of handling stolen goods contrary to section 322 (2) of the Penal Code. The particulars were that on the 19th day of December, 2011 at Mahanga in Vihiga County within the Western province otherwise than in the court of stealing retained a shirt and a trouser known or having reasons to believe them to be stolen.

3. The learned trial magistrate found the prosecution case proved beyond reasonable doubt, convicted the appellant and sentenced him to suffer death as by law prescribed.

4. The appellant being dissatisfied with the said conviction and sentence filed a petition of appeal on 22nd July, 2013, raising the following grounds of appeal:-

i. *The trial magistrate erred in law and facts when failed (sic) to summon the prosecution to avail the first report the credibility (sic) or identifying witnesses;*
ii. *The trial magistrate erred in law and facts (sic) by relying on the evidence of PW2 and PW3 who alleged that they got information from the members of public but no one was summoned;*
iii. *That the learned trial magistrate misdirected himself in both law and facts when he failed to see the contradictions and discrepancies consisted by the prosecution side (sic);*
iv. *That the trial magistrate gradually erred himself (sic) in both law and in facts (sic) by shifting the burden of proof to the appellant without knowing that it is always on the prosecution party to proof (sic) their case as charged; and*

v. *The trial magistrate erred in law and facts (sic) when he failed to comply with the provisions of section 324 as read 329 CPC.*

The appellant's submissions

5. The appellant relied on his written submissions which we summarize as follows:-

i. *PW1's assailants were not identified;*
ii. *PW2's evidence contradicts that of PW1;*
iii. *The value of PW1's lost items is not certain;*
iv. *The medical evidence adduced was not consistent with PW1's evidence.*

The respondent's submissions

6. Mr. Omwenga, learned counsel for the respondent submitted that the complainant's shirt and trouser were recovered less than 12 hours after the complainant was attacked. The appellant's green cap was recovered at the scene of crime. This placed the appellant at the scene of crime. The doctrine of recent possession applies. The appellant was therefore involved in the commission of the offence.

7. In addition, Mr. Omwenga submitted that the appellant was under an obligation to offer an explanation of how he came to be in possession of the stolen items. The explanation the appellant gave did not rebut the evidence of how the stolen items were found in his house. The appellant could not explain how his green cap came to found at the scene of crime yet he admitted that the cap was his. Mr. Omwenga urged the court to dismiss the appeal.

8. In response to the respondent's submissions that PW1's goods were recovered in his house, the appellant denied any knowledge of the same. He submitted that the police went to his house at night and beat him up.

The Duty of the 1st appellate court.

9. As the first appellate court we are obligated to re-evaluate and re-consider the evidence tendered before the trial court and make our own decision guided by such evidence and the law. The Court of Appeal in the case of **Collins Akoyo Okwemba & 2 others vs. Republic [2014] eKLR** cited with approval the case of **Gabriel Kamau Njoroge Vs. Republic [1982-1988] 1KAR 1134** at Pg. 1136 which spells out the duty of the first appellate court in the following terms:-

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as well as the question of law to demand a decision of the court of the first appeal and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect."***

10. We are now set to analyze and re-evaluate the evidence adduced at the trial court and arrive at our own decision.

The prosecution's case

11. PW1, John Nangabo adduced evidence of how he went to do some work at the home of George Amwatete on 18th December, 2011. He finished the work at 6.00 p.m. and waited for Mr. Amwatete, who arrived home at 10.00 p.m. and paid PW1 Ksh. 2,800/= for work done. He left and started walking towards his home which was nearby. On the way, he was hit on the side of his head and he fell down. The attacker pricked him using sharp objects. He lost 3 teeth and was left for dead by the roadside. PW1 was rescued by some people who took him to hospital.

12. His mobile phone make Alcatel, a saw, pliers and planes were stolen. He was stripped of the clothes he wore, a brown shirt and a brown trouser which were stolen. His money was also stolen. PW1 did not identify his attackers. The approximate value of what was stolen was Ksh. 7,000/=, not Ksh. 700/= as indicated in the typed proceedings (this is confirmed from the learned trial magistrate's handwritten record of proceedings).

13. PW1 testified that he became unconscious after the attack. When he came to, he was at Nyanza Kisumu hospital. He was issued with a P3 form and a discharge summary from the New Nyanza hospital, which was marked as MFI – 3. It was PW1's evidence that the appellant was his neighbour but he did not see him on the material day. After he was discharged from hospital, he identified his trouser brown in colour, MFI 1 and brown shirt MFI – 2 at the Police Station. He informed the court that those were the clothes he was wearing on the night of the attack.

14. PW2, PC Ambrose Mathenge attached to Vihiga Police Station was the investigating officer. The OCS sent him to Mahanga bus stage to look into a report of a person who had been found naked and injured. On arrival at the scene, PW2 was told that the person had been taken to hospital. He found the injured person at Vihiga District hospital. He had a wound on his head and could not speak.

15. The OCS called PW2 and directed him to go to Mahanga shopping centre where a suspect had been arrested in connection with the injured person. He found that a crowd had gathered which wanted to burn the appellant who was saved by police officers from Mahanga who took him to Emuhaya. The appellant was later handed over to PW2 who took him to Vihiga Police Station.

16. It was the evidence of PW2 that the appellant was found in possession of PW1's clothes. PW2 produced the brown trouser as exhibit 1 and the brown shirt as exhibit 2. PW2 issued PW1 with a P3 form as he was injured. PW1 reported that his phone and Ksh. 800/= were stolen from him. It was PW2's evidence that the appellant signed an inventory of the items that were recovered from his house which was produced by PW2 as exhibit 4.

17. On cross examination, PW2 stated that the value of the lost items was Ksh. 7,000/=. The phone was Ksh. 6,000/= and they approximated the value of PW1's stolen shirt and trouser at Ksh. 1,000/= (reference made to the learned trial magistrate's handwritten record of the proceedings for clarity).

18. PW3, APC Michael Onyiego Achar was attached at Mahanga AP Camp when on 19th December, 2011, members of the public reported that a man had been assaulted and lay along the Majengo – Luanda route. He and two other Administration Police Officers proceeded to the scene. They found PW1 who had several injuries all over the head, blood was oozing out of the injuries. PW1's friend made arrangements and took him to hospital.

19. Members of the public gave the name of the appellant as a suspect. PW3 and others proceeded to the appellant's house and woke him up. They searched his house and recovered a brown shirt and a brown trouser. The appellant said he did not know the owner of the said clothes. On cross examination by the appellant, PW3 said that they found PW1 naked besides the road. The appellant's green cap was found at the scene and PW1's black cap was found at the scene and that the appellant admitted the cap was his. PW3 testified that PW1's clothes were found inside the appellant's house in a basin of water. They took the clothes to the Police Station. The clothes were produced in court by PW2.

20. PW4, Sammy Chelule, a Senior Clinical Officer working at Vihiga District hospital examined PW1 on 19th December, 2011. He was unconscious and half naked with soiled clothing. PW1 had multiple injuries on the head, face and he could not talk. He smelt of alcohol. He was referred to New Nyanza hospital due to his state of unconsciousness. PW1 had a deep cut wound on the temporal region running deep to the skull, it was 12 cm long. There was another deep cut on the front of the head extending to the check and nasal bone and to the base of the lips of the

mouth. The wounds were stitched to arrest bleeding. Two lower teeth had been removed. PW4 testified that PW1 was unconscious for 3 weeks. The probable type of weapon used was a sharp object. PW4 assessed the degree of injuries as grievous harm or maim. He produced the P3 form as exhibit 5 and the discharge summary from New Nyanza hospital as exhibit 3.

The Defence case

21. The appellant gave sworn defence and stated that he was a welder at Mahanga and lives at Ebwali village. He was asleep on 19th December, 2011, when he heard a knock at his door. He opened it and found Administration Police Officers who started attacking him. He was assisted by his neighbours. He was arrested and taken to Ebwali Administration Police Camp. Thereafter he was taken to Emuhaya where the officer-in-charge directed that he be taken to Vihiga Police Station. He was then charged with the current offence which he did not commit. He denied any knowledge of it.

22. The appellant denied signing an inventory of the goods recovered from his house. The appellant stated that he was arrested at home and not at Mahanga stage as PW2 stated. He further informed the court that the cap that was said to be his which was allegedly recovered at the scene of crime was not produced and that no witness went to court to show the items that were recovered from his home.

23. On cross examination, the appellant stated that nothing was recovered from his house and he did not know where the trouser and shirt produced in court came from. He admitted that PC Mathenge wrote an inventory which he gave him but he did not know what it was for or its contents as he knows Kiswahili language. He stated that he had no grudge with PW1 or any person.

Determination of the appeal

24. The issues for determination are:-

i. If the doctrine of recent possession applies in this case; and
ii. If the charge of robbery with violence contrary to section 296 (2) of the Penal Code was proved beyond reasonable doubt.

25. The Court of Appeal in the decision of **David Mugo Kimunye vs. Republic [2015] eKLR** cited with approval the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Cr. App. No. 272 of 2005** (unreported) where the Court of Appeal set out the requisite elements for the doctrine of recent possession in the following terms:-

> ***"It is trite law 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;***

i. ***That the property was found with the suspect;***
ii. ***That the property is positively the property of the complainant;***
iii. ***That the property was stolen from the complainant;***
iv. ***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."***

26. Under Section 4 of the Penal Code, possession is defined to be either actual or constructive in the following terms:-

> ***"(a) Be in possession of or have in possession includes not only having in one's own***

personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in the actual possession or custody of any other person, or having anything in any place whether belonging to or occupied by oneself or not for the use or benefit of oneself or of any other person .....".

27. In the present case, PW1 was viciously attacked and left for dead on the night of 18th December, 2011. He was robbed of his cash, goods of trade and stripped of his shirt and trousers which were brown in colour. These clothes were recovered in the appellant's house on the morning of 19th December, 2011.

28. PW1 was admitted in hospital for 3 months where he lay unconscious following the attack. After discharge from hospital, he found his clothes which he positively identified at Vihiga Police Station as a brown trouser, MFI and brown shirt, MF1- 2. The said clothes were produced in evidence by PW2 as exhibits 1 and 2, respectively.

29. The appellant was not identified as having been PW1's assailant. It is however our finding that the doctrine of recent possession as enunciated in the case of **Isaac Ng'ang'a Kahiga (supra)** applies in this case. PW1's clothes were found in the appellant's house in the morning of 19th December, 2011 whereas the robbery occurred on the night of 18th December, 2011. The recovery was made within a short time span of the robbery. It is our finding and we so hold, that the clothes could not have moved from one person to another within such a short span of time. The only inference that we can draw is that the appellant was the one who robbed PW1 of his goods and money on the night of 18th December, 2011.

30. In his defence, the appellant denied that anything was recovered from his house and did not know what was contained in the inventory that he signed. It is our finding that the defence put forward by the appellant does not displace the evidence adduced by PW3 that he recovered PW1's clothes in the appellant's house.

31. In the decision of **Malinga vs. Republic (1989) KLR 225**, the Court of Appeal said as follows with regard to the doctrine of recent possession:-

> ***"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 has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has 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 the 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 items. The doctrine being a rebuttable presumption of facts 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 or was a guilty receiver."***

32. The appellant failed to rebut the presumption that he is the one who robbed PW1 of his goods as he offered no explanation of how he came to be in possession of the appellant's clothes.

33. We do not see any contradictions in the evidence of PW1 and 2. We also find no contradiction in the evidence of PW1 and PW4, the Clinical Officer, with regard to medical evidence.

34. We find that the charge of robbery with violence contrary to section 296 (2) of the Penal Code was proved beyond reasonable doubt. The evidence on record shows that the appellant used violence thereby inflicting serious injuries on PW1. The provisions of section 296 (2) of the Penal Code were thus satisfied.

35. We find that the learned trial magistrate properly convicted the appellant and sentenced him to death. We uphold the conviction and sentence imposed upon the appellant. The appeal is dismissed in its entirety.

The appellant has 14 days right of appeal.

Orders accordingly.

JUDGMENT DELIVERED, DATED and **SIGNED** in open court at **KAKAMEGA** on this **3RD** day of **MARCH** 2016.

RUTH N. SITATI **NJOKI MWANGI.**

JUDGE **JUDGE**.

In the presence of

..... Appellant.

..... for the Respondent.

.....Court Assistant.