



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

LESIT, KIMARU, JJ

CRIMINAL APPEAL NO. 284 OF 2012

(Appeal from the original conviction and sentence in Kiambu CM Criminal Case No. 1261 of 2010, Mrs. C. Oluoch, PM)

MICHAEL DAVIS MUNYUI.....APPELLANT

-VERSUS -

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant **MICHAEL DAVIS MUNYUI** was charged with two counts of Robbery with violence contrary to **Section 296(2)** of the **Penal Code** and one alternative count of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**. After the trial the Appellant was convicted of the count of Robbery with violence and sentenced to life imprisonment.

2. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He relies on the Amended Petition of Appeal which raises the following 14 grounds:

1) That the learned trial magistrate made an error in both law and facts and misdirected herself by basing my conviction on the application of the doctrine of recent possession whereas there was no adequate proof established by the prosecution to an extent that the items alleged were in my possession and that there was no independent evidence in support of their claims.

2) That the learned trial magistrate made an error in both law and facts by failing to evaluate and sufficiently scrutinize the evidence of PW3 and PW4 with extreme caution given that they had no report of a stolen motor vehicle yet became suspicious of motor vehicle Reg. No.KBC 706F upon seeing it being driven towards Ngong.

3) That the learned trial magistrate made an error in both law and facts and misdirected herself by relying heavily on the alleged evidence of chase and arrest by PW3 and PW4 whereas the alleged chase and arrest could not stand given that one of the occupants of the

alleged chased motor vehicle escaped in their view hence possibility that even the other occupant had a chance to escape hence police arrested innocent person on the road to fill the gap.

4) That the learned trial magistrate made an error in both law and fact by filing to draw an adverse inference as to the prosecutions' failure to prepare an inventory list plus recovery form of the exhibits alleged to have been in his possession hence the case for the prosecution was not proved beyond reasonable doubt as required by the law.

5) That there was no adequate evidence for the learned trial magistrate to have convicted the Appellant on a charge of robbery with violence contrary to section 296/2 of the Penal Code whereas there was absolutely no evidence as to his participation into the robbery and in that as per the circumstances of his arrest the doctrine of recent possession was not applicable given that no prove was established as to him being in possession of stolen items six hours after robbery as the law demands.

6) That my defence statement was not properly considered as per the provisions of Section 169 (1) of the Criminal Procedure Code.

7) That the learned trial magistrate erred in law and fact by convicting the Appellant when there were material contradictions in the prosecution's case rendering it unreliable and thereby entitling the accused to an acquittal.

8) That the learned trial magistrate erred in law and fact when she failed to find that the evidence adduced by the prosecution created a reasonable doubt as to the guilt of the Appellant entitling him to an acquittal.

9) That the whole proceedings were a nullity there having been no plea and/or proper plea and having plea taken by a court without jurisdiction.

10) That the learned trial magistrate erred in law and fact by convicting the Appellant for the offence of robbery with violence when none of the ingredients required to prove the offence had been established.

11) That the learned trial magistrate erred in law and fact by convicting the Appellant when there was variance between the charge, particulars and the evidence.

12) That the learned trial magistrate erred in law and fact by failing to find that there was doubt as to the identity and involvement of the Appellant in the commission of the offence thus entitling the Appellant to the benefit of the doubt and to an acquittal.

13) That the learned trial magistrate erred in law and fact by failing to make an adverse inference to the prosecution case for failure to call crucial witnesses and produce relevant documents.

14) That the learned trial magistrate erred in law and fact by dismissing the Appellant's defence without any analysis, and for failing to find that the Appellant's defence of an alibi had not been displaced by the prosecution thus occasioning a miscarriage of justice.

3. The facts of the prosecution case are that the two complaints who are a husband and wife (PW1 and 2 respectively) were travelling together in their vehicle registration number KBC 760F driven by PW1. They stopped at the gate to the home of PW2's sister when two men emerged from a bush. It was 10.30 p.m. and the area was dark due to electricity failure.

4. They were robbed of phones, money, bank cards and other properties at gun point. They were then driven for some distance in their vehicle before they were ordered out of the vehicle. Upon alighting

from the vehicle, PW2 walked back to her sister's place as PW1 proceeded to Ruaka AP Post where he reported the incident.

5. At around 5.00 a.m. the following morning PW3 and 4 were on mobile patrol along Ngong Road when they saw the complainant's (PW1's) vehicle being driven in a suspicious manner. They decided to pursue it. However the vehicle was turned suddenly from Ngong Road towards Argwings Kodhek Road in Kilimani area. The one driving was unable to negotiate the roundabout and he hit a tree and landed on a pavement where he stopped.

6. The co-driver of the vehicle came out of the vehicle and escaped. The driver, the Appellant in this case remained in the vehicle. He explained to PW3 and 4 that he panicked when he saw their police car. Inside the vehicle were scattered items including ATM cards, phones and personal effects in different names. The two officers were unaware of the robbery incident.

7. While searching the Appellant, they recovered a mobile phone with socks on the left which rang at that time. On PW3 answering it, the caller who identified himself as PW1 who on learning it is police who answered it informed them that he had been robbed of a vehicle which when he described it matched the one the Appellant was driving. That is when PW3 and 4 arrested the Appellant.

8. In his sworn defence the Appellant stated that he had just alighted from a matatu for route 46 at Hurlingham, in order to go to work in a hotel along Dennis Prit Road when police alighted from a police land rover and took him to a vehicle stuck in a ditch. The Appellant denied being the driver of that vehicle. That when he called his employer they were asked to part with KShs.10,000/= to secure his release.

9. Mr. Saenye for the Appellant urged that the ingredients for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** were not proved. Counsel urged that none of the complainants were injured during the incident, neither was any P3 Form produced which, he urged was necessary to establish the ingredient of injury.

10. Mr. Saenye submitted that the evidence by the two complainants was contradictory as to the number of assailants who robbed them and whether they were armed and also whether they could see their faces.

11. Ms. Aluda, learned Prosecution Counsel opposed the appeal. Counsel urged that the prosecution had proved the main count of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. She argued that the prosecution was relying on the doctrine of recent possession.

12. Regarding contradictions on evidence Ms. Aluda submitted that there was none as it was clear from the two complainants that each saw two assailants. Counsel urged that the vehicle stolen from the complainants was found in the possession of the Appellant early in the morning of the night it was stolen and that inside the vehicle were items belonging to the complainants, scattered everywhere.

13. Counsel cited the Court of Appeal case of **Aaron vs. Republic CA No. 85 of 2005 (Kisumu)** on doctrine of recent possessions. The case was not supplied and so we were unable to consider it. Ms. Aluda, learned Prosecution Counsel urged that the issue before the court was not identification but circumstances under which the stolen items were recovered from the Appellant.

14. We are a first appellate court and are mindful of our responsibility at this stage. We have analyzed and evaluated afresh the entire evidence adduced by the prosecution and the defence in this case and have made our own conclusions while bearing in mind that we neither saw nor heard any of the witnesses. We have given due allowance for same. We were guided by the court appeal case of **OKENO V REPUBLIC 1972 EA 32** where the court gave the duties of a first appellate court in the following terms:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting

evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 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."

15. There are 15 grounds of appeal and having considered them carefully we find that the appeal turns on only one issue which is whether the Appellant was found in possession of recently stolen vehicle and other properties belonging to the two complainants PW1 and PW2.

16. The Appellant in his defence denied being found inside the stolen motor vehicle and contended that it was the police officers who took him to a vehicle in a ditch after arresting him as he alighted from a public service vehicle.

17. PW3 and 4 were the officers who arrested the Appellant. The evidence of both witnesses was clear, consistent and corroborative. They testified that they saw a vehicle make a suspicious turn at around 5 a.m. on material morning, and decided to follow it in their police vehicle. On so doing the same vehicle was unable to take a roundabout as a result of which it hit a tree and landed on a pavement.

18. The passenger of the vehicle ran out of the vehicle and disappeared. The driver was however found still seated in the driver's seat. According to PW3 and 4 the Appellant never left the vehicle at any one time, and the chasing that took place against the Appellant was not on foot but by their police vehicle against the vehicle driven by the Appellant.

19. The learned trial magistrate in her judgment observed that thus:

"The star witnesses on possession are PW3 and PW4 who said they were on patrol at City Mortuary Roundabout when they saw the vehicle been driven towards them before it turned abruptly to join Argwings Kodhek Road. They said the vehicle landed in the pavement. One of the suspects alighted and escaped while the accused person was found in the vehicle. The story given by the accused person in defence is that this was a case of mistaken identity as he was arrested while on his way to work. The defence took issue with the evidence of the police officers citing a number of issues both of fact and law..."

Generally the evidence of the two police officers tallied in various aspects. They were in agreement that the suspect who escaped came out of the front passenger seat and the accused person from the driver's side. They agreed that the Samsung phone was tucked to the socks of his left leg while the orange phones were in the socks of the right leg. They said that PW2's documents were in a brown bag whereas those of PW1 were scattered on the front passenger seat. I have no reason whatsoever to fault their evidence. I do not think an identification parade would have served any useful purpose as the defence argued because the complainants were categorical that they did not see the robbers as it was dark and they were warned against looking at them."

20. The learned trial magistrate concluded:

"In an upshot, the evidence supports a conviction for an offence of robbery with violence and not merely handling. Hardly six hours had lapsed from the time of the robbery to recovery of the vehicle. The property, particularly the car, is of such a nature that it does not change hands very fast. Further the accused person had most of the reported stolen property save for money. All the phones stolen during the robbery were tucked to his socks which creates an impression that he actively participated in the robbery. I proceed to convict the accused person for robbery with violence contrary to Section 292(2) of the Penal Code. I make no findings in the alternative charge."

21. We find that the learned trial magistrate subjected both the prosecution and defence case to sufficient scrutiny before drawing her conclusions. The learned trial magistrate properly weighed the defence case against the prosecution and came to the right conclusion.

22. We are in agreement that the Appellant was found driving the complainant's (PW1) stolen motor vehicle six hours after it was robbed off the complainants. Inside the vehicle were various identification and bank cards in the names of the complainants, which were also stolen at the time of robbery. Most telling however is the fact that the Appellant was found having tucked three mobile phones belonging to the complainant's in his socks, one on left sock and two on the right sock which he was wearing at the time of arrest. All these items and the vehicle were produced in court as exhibits.

23. The Appellant's defence that he had just alighted from a matatu when PW3 and 4 arrested him was considered but dismissed by the learned trial magistrate and in our view she was right to reject that defence. PW3 and 4 were total strangers to the Appellant and there was no reason why they would falsely implicate the Appellant with such a grave matter.

24. We have also had an opportunity to peruse the evidence of PW3 and 4. We noted that during cross examination by the defence no suggestion was made to these two witnesses to the effect that the Appellant was never found inside the exhibit vehicle. We also noted that no suggestion was made to them that PW3 and 4 arrested the Appellant as he alighted from a matatu and took him to where the vehicle was. The Appellant's defence that he was not the one driving the motor vehicle when it landed on a pavement and that he had alighted from another vehicle and that the police are the ones who took him to the exhibit vehicle, was an afterthought.

25. We are satisfied that the Appellant was found in possession of the vehicle and personal cards and mobile phones all belonging to the complainants, hardly six hours after they were robbed off the complainants. The complainants identified the vehicle and the recovered items as their property and therefore their ownership of each of those items was adequately proved. Indeed the Bank cards and identification documents were in their name and there was no denying that these items belonged to the complainants.

26. We have considered the issue whether the prosecution was able to establish that the vehicle was robbed off the complainants. We find that from the evidence on record it is clear that PW1 and 2 were robbed at gun point of the vehicle and their personal properties.

27. In the case of **ERICK OTIENO ARUM VS REPUBLIC, CA NO. 85 OF 2005** (unreported) the Court of Appeal while dealing with the doctrine of recent possession stated:-

“In our view, 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, first, that the property was found with the suspect, secondly that, that 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 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.....”

28. We agree with the learned trial magistrate's assessment of what constitutes recent possession especially of a motor vehicle and agree that the period of hardly six hours after the robbery of the vehicle took place was recent possession of the stolen vehicle. We confirm the learned trial magistrate's finding that from the facts of the case the doctrine of recent possession applies.

29. In the Court of Appeal case of **ODHIAMBO vs. REPUBLIC eKLR 2001** it was held as follows:-

“It is settled law that evidence of recent possession is the circumstantial evidence which depending on the facts of the case may support any charge however penal.”

30. The Appellant was found with recently stolen vehicle and other properties belonging to the complainants in this case. The complainants had been robbed of the items at gun point. The Appellant could not explain how he came by the property except to deny he had possession of the same, which we find was an afterthought to escape liability and which does not exonerate him from the offence. Given all the facts of the case the Appellant must have been one of the group that robbed the complainants on the night in question. We rely on **ODHIAMBO V REP**, supra and find that the circumstantial evidence against the Appellant supports the charge of robbery with violence for which he was charged.

31. We have no doubt that the Appellant was found in possession of a car and other properties violently stolen from the complainants. The Appellant’s denial in defence that he was not in possession of the vehicle was rightfully rejected.

32. We have considered the other issues raised by the Appellant in this appeal. The inconsistency in evidence of whether the Appellant was drunk or not at the time of arrest is immaterial and does not go to the root of the case and we agree with the learned trial magistrate’s conclusion on that.

33. Mr. Saenye in his submission in support of the appeal urged that there was need for the complainants to identify the Appellant as one of their assailants and in regard to the car for dusting to have been done to correct the Appellant’s the vehicle.

34. The operation of the doctrine of recent possession was sufficient to sustain the conviction for the main counts of robbery with violence. The evidence of identification was not given as the complainants were clear that they could not identify anyone. The lack of the evidence of identification does not exonerate the Appellant from the offence, and similarly too the lack of evidence of dusting for finger prints. The prosecution relied on circumstantial evidence of recent possession and in this case that evidence was sufficient to prove the case against the Appellant on the required standard for criminal cases.

35. The learned trial magistrate concluded by convicting the Appellant of the offence of robbery with violence. The magistrate did not however indicate whether the conviction was for one or both counts of robbery with violence. Having read the judgment we find it very clear that the learned trial magistrate was aware that the Appellant faced two counts and that the complainants were two. The learned trial magistrate is also clear that each complainant was robbed of personal items during the robbery and that the items were recovered from the Appellant.

36. Failure to indicate that the conviction was in respect of both counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** was in our view a curable error or reinstate which does not prejudice the Appellant in any way.

37 Regarding the sentence the learned trial magistrate stated:

“The death sentence having been outlawed, I sentence the accused person to life imprisonment.”

38. The offence of **Robbery** with violence contrary to **Section 296(2)** of the **Penal Code** calls for a mandatory death sentence. The learned trial magistrate misdirected herself when she stated that the death sentence was outlawed. No law was cited in support of that sentiment. The sentence imposed was clearly an illegal sentence.

39. We enter a conviction for the offence of robbery with violence in both these counts set aside the sentence of life imprisonment and in substitution thereof order the sentence of death in each count. We suspend the death sentence in respect of count 2.

40. In the result, we find that the Appellant’s appeal has no merits and subject to the corrections we have

made in this judgment, we dismiss it accordingly.

Dated at Nairobi this 13th DAY OF MAY, 2015.

LESIT, J.

JUDGE

L. KIMARU,

JUDGE