



IN THE COURT OF APPEAL

AT KISUMU

Criminal Appeal 40 of 2012

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

Moses Ngura Oluoch 1st Appellant

Yakim Pamba Ali 2nd Appellant

And

Republic RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu (Muchemi & Muchelule, JJ.) dated 7th March, 2012

in

H.C.CRA NO. 46 OF 2008)

JUDGMENT OF THE COURT

1. The appellants were convicted by the Principal Magistrate's Court at Busia for robbery with violence contrary to **section 296 (2)** of the **Penal Code** and sentenced to death as by law provided.
2. The particulars of the charge were that on the night of 4th/5th April, 2007 at Kibsam Estate in Busia Township, jointly with others not before court, while armed with knives and rungu, robbed **Alphonse Mutunga Muia, PW1**, of a mobile phone, a jacket, open shoes and other personal items and at or immediately before or immediately after the time of such robbery used actual violence to PW 1.
3. The appellants' first appeal in the High Court was unsuccessful and so they preferred a second appeal to this Court. Under **section 361** of the **Criminal Procedure Code**, this being a second appeal, the Court's jurisdiction is limited to consideration of matters of law only.
4. The appeal against the 2nd appellant, who was the 1st accused before the trial court, abated because he died in prison before the appeal could be heard. This judgment is therefore in respect of the 1st appellant only.
5. The prosecution evidence before the trial court was that on the material night at about 12.30a.m. PW 1 was walking to his house when he was accosted by someone who ordered him to sit down.

- PW 1 did not know his assailant but saw him clearly because, there were bright security lights. The assailant placed a knife on PW 1's neck and ordered him not to scream. Meanwhile, a second person appeared and removed the shoes of PW 1 while the first person was busy removing PW 1's jacket and T-shirt. The two were acting in concert.
6. The robbers demanded PW 1's mobile phone and PW 1 surrendered it. The robbers then fled and hid in a nearby shamba.
 7. In the morning, PW 1 met a friend and narrated to her what had happened and the friend called the mobile number of PW 1's phone and someone picked it up. The person who picked the call said he was at Sophia Estate and asked PW 1 to go and identify himself. PW 1 proceeded to Sophia Estate where he met **Osinya Richard, PW 4**, who was in possession of the mobile phone, which PW 1 identified as the one that had been stolen from him.
 8. PW 4 told the trial court that on 5th April, 2007 at 5.00a.m. he was in his shop when he was approached by two people, the appellants, who had a mobile phone. It was the 2nd appellant who was carrying the phone. The appellants wanted to sell it to PW 4.
 9. PW 4 scrolled the phone book and saw the photograph of his friend, the complainant, on it. He became suspicious and told the appellants to wait for him to get money from some place and the robbers fell to his trap. When he stepped out, PW 4 called Ugandan Police (also known as Defence Team) who arrested the appellants.
 10. A certain person told the police that he had seen the appellants hide some items somewhere. The Defence Team was led by the appellants to a spot where they recovered open shoes and two knives. PW 1 identified the shoes as his. They were among the items that he had been robbed of.
 11. **PC Ismael Rotich, PW 5**, of Busia Border Post Police Station testified that on 5th April, 2007 at about 10.30a.m., a policeman from Uganda took the appellants to the police station and he re-arrested them. PW 5 also received from the Ugandan Police Officer the mobile phone and the pair of shoes that had been stolen from PW 1 as well as two knives. PW 1 showed PW 5 a receipt for the purchase of the mobile phone.
 12. In his brief defence, the appellant stated that on 5th April, 2007 he went to Busia to buy maize and while there he was arrested by the police.
 13. In convicting the appellants, the trial court held that PW 1 positively identified the 2nd appellant because there were security lights near the scene of the robbery. When PW 1 saw him again at the shop of PW 4 he was able to recognize him as the person who had earlier assaulted and robbed him. The trial court also based the appellants' conviction on the doctrine of recent possession of stolen items, having been found in possession of the complainant's phone that had been stolen from him.
 14. **Mr. Jamsumbah**, learned counsel for the 1st appellant, raised two grounds of appeal which are as follows:
 - “1. The learned judges of the High Court erred in both law and fact in convicting the appellants when the evidence on record clearly shows that the prosecution had failed to prove their case beyond reasonable doubt.***
 - 2. The learned trial judges of the High Court erred in law and fact in failing to find that the conclusion of the trial court and their own conclusion on the doctrine of recent possession did not apply to the appellants.”***
 15. Mr. Jamsumbah submitted that there was insufficient evidence to connect the 1st appellant to the robbery, because PW 1 had only identified the 2nd appellant, now deceased, as the person who robbed him on the material night. He added that it was the 2nd appellant who had the mobile

phone when together with another person they walked to the shop of PW 4.

16. Counsel further contended that the Defence Team from Uganda, who initially arrested the appellants, did not testify before the trial court. Likewise, the person who alleged that he saw the suspects hiding various items somewhere was also not called as a prosecution witness.
17. Lastly, Mr. Jamsumbah submitted that the 1st appellant was wrongly convicted on uncorroborated evidence of a single identifying witness, which, in his view, was insufficient.
18. Opposing the appeal, **Mr. Ogoti**, Assistant Deputy Public Prosecutor, submitted that there was sufficient light at the place where PW 1 was attacked and robbed and that he was able to clearly identify the 2nd appellant. He further submitted that the two appellants went to the shop of PW 4 and attempted to sell to him the mobile phone that they had stolen from PW 1. That was a few hours after the robbery. The appellants were therefore properly convicted under the doctrine of recent possession of stolen items, he stated.
19. Counsel added that the two appellants led the police to the place where they had dumped the shoes that they had robbed from PW 1, as well as the two knives that they used during the robbery.
20. Further and/or in the alternative, Mr. Ogoti urged the Court to invoke the provisions of **section 20** of the **Penal Code** and deem the appellant as a principal offender since he had aided or abetted the 2nd appellant in committing the robbery.
21. We have considered the record of appeal as well as submissions made by counsel. Regarding identification of the appellants, PW 1 said that he was attacked at a place where there was sufficient light and he clearly identified the person who first attacked him, the 2nd appellant. PW 1 described the assailant as **“tall and slim”**. Although he did not identify the 2nd person who joined the 1st assailant in robbing him of his personal items, when PW 1 went to the shop of PW 4 and was shown his recovered mobile phone, he was able to identify the 2nd appellant as one of the two people who had robbed him a few hours there before.
22. The 2nd appellant was together with 1st appellant when they attempted to sell the stolen mobile phone to PW 4. It can therefore be said that the two appellants were in joint possession of the stolen mobile phone.
23. **Section 20** of the **Penal Code** which defines principal offenders states as follows:

“(1). When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence;

and in the last-mentioned case may be charged either with committing the offence or with counseling or procuring its commission.”

24. In our view, the 1st appellant, even though he was not identified by PW 1, was together with

the 2nd appellant, and must have been the two robbers who attacked and robbed PW1. It is instructive that the recovery of the stolen mobile phone was made less than five hours from the time of the robbery. We do not therefore think that in the circumstances there was sufficient time for the mobile phone to change hands such that the 1st appellant could be perceived as a mere handler of stolen property. In **GEDION MEITEKIN KOYIET V REPUBLIC [2013] eKLR** this Court stated that the doctrine of recent possession is applicable where the Court is satisfied that the prosecution has proved the following:

- “(a) that the property was found with the suspect;**
- (b) that the property was positively identified by the complainant;**
- (c) that the property was recently stolen from the complainant”.**

We are satisfied that the above three conditions were satisfied as far as the appellants’ conviction was concerned.

25. In **MALINGA V REPUBLIC [1989] KLR 225**, it was held that by the application of the doctrine of recent possession, upon proof of possession of a recently stolen item by the prosecution, the burden shifts from the prosecution to the accused to explain the possession of the item complained about. PW 4 explained clearly that the two appellants were together when they went to his shop and attempted to sell to him the mobile phone that they had in their joint possession. None of the appellants explained how they had otherwise come into possession of the stolen phone.

26. All in all, we find no merit in this appeal and hereby dismiss it in its entirety.

DATED AT KISUMU THIS 9TH DAY OF OCTOBER, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR