



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 239, 240 & 241 OF 2012

(CONSOLIDATED)

(Appeals arising from the conviction and sentence of the Chief Magistrate's

Court at Kakamega in Criminal Case No. 928 of 2011 [M.I.G. MORANGA, PM])

KEVIN SHITAMBASASI AMATI 1ST APPELLANT

FOSTER NAPALI 2ND APPELLANT

BENARD MUYEMBE MANYENYA 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The three appeals were consolidated and heard together as they arose from the same trial in the subordinate court.

The three appellants were jointly charged with two counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The particulars of count I were that on 18th May 2011 at Rosterman village, in Kakamega Central District within Western province jointly with others not before court, while armed with dangerous weapons namely pangas robbed Ronald Misiko Shinaka of a motor cycle make TVS Star registration No. KMCQ 724E, 3 mobile phones make Nokia 1200, 1280 and 1600, a black suitcase, food stuffs, one dark green jacket, a child raincoat, one radio make Sonny 1065, a DVD make LG, three curtains, a small bag all valued at Kshs.113,100/= and at the time of such robbery used actual violence to the said Ronald Misiko shinaka. The particulars of count II were that on the same day and place, jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed Aggrey Mwisukha of one motor cycle helmet, eight assorted mobile phones, three motor cycle batteries, one pair of shoes, 25 kgs of sugar, two shaving machines all valued at kshs.100,000/= and at the time of such robbery threatened to use actual violence to the said Aggrey Mwisukha.

The 1st appellant was separately charged with a 3rd count of burglary contrary to Section 302 (2) and stealing contrary to Section 279 (b) of the Penal Code. The particulars of charge were that on the same day and place jointly with others not before court, broke and entered the dwelling house of Elizabeth Itoyo with intent to steal therein and did steal one set of 5 seater sofa-set brownish in colour, two pieces of sofa-set chair reddish in colour, 9 plates, six cups, one bed, one mattress, two tins of dry maize, one table, one kg of sugar, 2 bottles of milk, three window nets all valued at Kshs.29,150/= the property of

Elizabeth Iteyo. In the alternative, he was charged with handling stolen goods contrary to Section 322 of the Penal Code. The particulars were that on 19th May 2011 at Rosterman village, in Kakamega Central District within Western Province otherwise in the course of stealing dishonestly retained 5 seater sofa-set brown in colour, two pieces of sofa-set chairs, one bed, one mattress, two window nets and nine plates, knowing or having reason to believe them to be stolen property.

After a full trial, all the appellants were convicted of counts I and II of robbery with violence. The 3rd appellant was acquitted of count III and its alternative charge. They were sentenced to suffer death on both counts I and II. Having been dissatisfied with the decision of the trial court, each of the appellants filed an appeal to this court.

The 1st and 2nd appellants also filed written submissions which they relied upon. We have perused the same. The 3rd appellant was represented by Mr. Elungata advocate.

Mr. Elungata, learned counsel for the 3rd appellant submitted that the two charges were not properly proved. With regard to count I, the P3 form produced was for a Mr. Sunaka who was different from PW1. With regard to count II, the complainant PW2 said that he did not seek medical attention. Counsel emphasized that the case was handled by 3 magistrates. In counsel's view, the 3rd magistrate who delivered the judgment did not understand the evidence in the proceedings. The said magistrate also denied the appellants a fair trial by refusing to allow a fresh trial as requested by them. Counsel also submitted that the identification of the 3rd appellant was not proper and free from the possibility of an error. Lastly, that counsel argued that though the charge sheet had no mention of a gun, the evidence tendered referred to guns.

In counsel's view, the benefit of that doubt should have been given to the appellants. Counsel concluded by stating that the trial magistrate shifted the burden of proof and dismissed his client's defence without considering the same.

Mr. Oroni, the learned Prosecuting Counsel, agreed that the trial was conducted by three magistrates. The third magistrate refused to order a fresh trial but allowed some witnesses to be recalled. Counsel argued that at the time that the appellants asked to recall witnesses, they had already tendered their defences. It was therefore improper for the court to recall witnesses to testify afresh. Counsel concluded by stating that he did not support the convictions.

This was a case which was handled by three magistrates. The first was R. Nyakundi, Chief Magistrate. The second was P. O. Ooko, Snr. Resident magistrate. The third was M. I. G. Moranga, Principal magistrate. After the defence case was closed, Mr. Ooko, SRM, was transferred and succeeded by Ms Moranga, PM.

When the 3rd magistrate took over the conduct of the case, the appellants asked for a fresh trial. The succeeding magistrate rejected the application for a retrial but ordered that some witnesses to be re-called for cross-examination. In our view, this was a fatal irregularity committed by the trial court.

As the succeeding magistrate had taken over the case after the close of prosecution and defence cases, what should have happened was either to prepare and deliver the judgment, or to recommence the hearing afresh. The succeeding magistrate had no power to order the recalling of only some witnesses for further cross-examination. In our view, the above is the meaning of Section 200 of the Criminal Procedure Code (Cap. 75), the relevant part of which provides as follows -

200 (1) Subject to subsection (3), where the magistrate, after

having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has jurisdiction and exercises that jurisdiction, the succeeding magistrate may –

a. Deliver a judgment that has been written and signed but not delivered by his predecessor; or

- b. **Where judgment has not been written and signed by his predecessor, act on the evidence recorded, by that predecessor, or re-summon the witnesses and recommence the trial.**

The underlining is ours.

The present case is one where the previous magistrate Mr. Ooko, SRM had completed taking of evidence both for the prosecution and the defence, but had not written the judgment.

In accordance with the provisions of **Section 200 (1) (a) and (b)** above, the succeeding magistrate had only two options. She had either to act on the evidence recorded and deliver judgment, or to re-summon witnesses and commence the trial afresh. She did not have power to recall some of the witnesses for cross-examination. The action herein by the succeeding magistrate was a fatal error. It meant that the learned magistrate considered statements made by witnesses during proceedings which were not part of the trial, in writing the judgment. The learned Prosecuting Counsel has correctly conceded to the appeal on this account.

In addition to the above, we have perused the evidence on record, and the judgment. We observe that the conviction of the appellants was predicated on the alleged discovery of the stolen items at the house of the 1st appellant, and the 1st appellant mentioning the other two as having been involved in the crime. The 3rd appellant was also said to have been identified at a parade by PW1.

Having reviewed the evidence on record, we find that none of the items belonging to the complainants in the two counts of robbery with violence, were found in the actual possession of the 1st appellant. The sofa sets were found outside the house. The other items were found in a house in the absence of 1st appellant but in the presence of a girl who was not called to testify. No reason was given for the failure to call that girl to testify. There is no independent evidence to show that the house in which those items were allegedly found belonged to the 1st appellant or was under his control. We find that the doctrine of recent possession cannot be applied to connect the 1st appellant with the robberies in both count I and II herein.

With regard to the other two appellants, they were mentioned by the 1st appellant. Though the 3rd appellant was identified at an identification parade by PW1, he was not arrested on the basis of any description given by any witnesses. It follows therefore that the evidential value of the identification parade is very low. It is apparent that the 2nd and 3rd appellants were convicted merely on the basis of accomplice evidence. Accomplice evidence, without any other connecting facts cannot be the basis of a conviction in a criminal case.

In the judgment also, the succeeding magistrate raised many issues regarding the record. The learned magistrate observed as follows –

“Of concern is also the issue taken up by the accused on the proceedings unless well read by the maker may have some errors in spellings

Of course I do appreciate I do not have the benefit of witness earlier testimonies but the length of cross-examination by the 3rd accused person did give me a picture of what really took place.

Generally of concern is the writings of the PM and CM. There are mistakes recorded and 12 p.m at night, that the offence occurred at night is not in question then it means it was 12 a.m.”

Even with the above reservations on the correctness of the record, the learned magistrate went ahead to convict. In our view, the benefit of the above concerns should have been given to the appellants.

It is trite since the decision in the English case of **Woolmington -vs- DPP [1932]AC 462** that the burden is always on the prosecution to prove an accused person guilty beyond reasonable doubt. An

accused person does not have any burden to prove his innocence. If any reasonable doubt is created in the case either by the prosecution or by the defence, the benefit of the same has to be given to the accused. The benefit of the doubt cannot be given to the prosecution the way the learned magistrate purported to do.

In convicting the appellants on the doubtful evidence on record, the learned magistrates erroneously tried to use her imagination to build up a case for the prosecution. It was wrong to do so. We are of the view that the evidence on record as a whole, is such that there is a reasonable doubt as to the involvement of any of the appellants in the commission of the offences.

We would lastly wish to point out that the learned magistrate was wrong in sentencing the appellants to death for count II. The sentence on count II should have just been left in abeyance, since the appellants had already been sentenced to death on count I.

To conclude, we allow the appeals, quash the convictions and set aside the sentences. We order that each of the appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 11th day of February, 2014

GEORGE DULU

HELLEN WASILWA

JUDGE

JUDGE