



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 4 OF 2013

SARUNI LELENGWESI APPELLANT

VERSUS

REPUBLIC OF KENYA RESPONDENT

(being an appeal arising from the conviction and sentence in Maralal Ag.SPM's Court in CMCC 718 of 2012 by Hon. C.N. Ndegwa)

JUDGMENT

1. The Appellant, **Saruni Lelengwesi**, was charged with the offence of Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code**. Particulars of the charge are that on the 27th day of August, 2012, in Milimani Estate, Maralal Township of Samburu County within Rift valley Province, jointly with another, while armed with a Samburu sword and a pistol robbed Zawadi Katana Kshs. 37,000, Nokia Cell phone and a digital camera and at immediately before the said robbery injured Zawadi Katana.
2. There was also an alternative count of Handling stolen property contrary to Section 322 (2) of the Penal Code.
3. The lower Court delivered its judgment on 2nd January, 2013. The presiding magistrate the Honourable C.N.Ndegwa found the Appellant guilty and convicted him to suffer death on the first count of robbery with violence.
4. The appellant being aggrieved by the conviction and sentence preferred this appeal. In his Petition of Appeal, the appellant listed four grounds which can be summarized as follows:

i) That the Learned trial Magistrate erred in law in applying the doctrine of recent possession where description of the property was unclear;

ii) That the Learned trial Magistrate erred in law and fact in applying the doctrine of recent possession yet possession was not proved;

iii) That the Learned trial Magistrate erred in law and fact by failing to consider the Appellant's *alibi*.

5. The brief facts of the case before the lower court are that on the night of the 26th August, 2012, **Zawadi Katana (PW1)** a business lady in Maralal town was rudely awoken from her sleep by the sound of breaking glass. Before she could get up from her bed to ascertain the source of the noise, she was hit with an object. She attempted to scream but was cut on her palm and told to remain silent. Two men who were wearing masks had broken into her house and were demanding money. One of the robbers started ransacking her suit cases as the other stood guard watching her. It was after one threatened her child's life by placing a sword on her neck and a gun on her head that she directed them where she kept her money. They stole it together with a digital camera and a mobile phone and fled into the night.
6. **PW1** escorted by her neighbour reported the robbery at Maralal Police station and was later treated at a nearby District hospital. **P.C. Philip Boro** and **Crpl. Maute** visited the scene and commenced investigations.
7. On 27th August, 2012, **PW4, Moses Mungai Maina**, a boda boda operator in Maralal town met the Appellant who offered him a camera at Kshs. 3,500/-. PW4 however did not have money to purchase it. He later met **P.C. John Masawi** and **Corporal Maute** at a garage and arranged a further meeting at a diner known as Seasons Bar. PW4, admitted that he had seen the camera in possession of the Appellant. They hatched a plan in which PW4 would call the Appellant and express interest in buying the camera and the police would be nearby and ready to apprehend the Appellant. The plan was executed on 5th September, 2012 and the Appellant was arrested in possession of the camera.
8. On 10th September, 2012, PW1 received a call from **P.C. Boro** informing her that they had recovered a camera. She was able to confirm that she was the rightful owner by producing a purchase receipt bearing the same serial number as that of the camera.
9. In his defence, the Appellant denied the robbery and being in possession of the camera. On the 26th August 2012, he visited his brother in Naivasha Prison. He returned to Maralal the following day at about 8.00 p.m. On 28th August, 2012 he returned to work as boda boda operator for a motor cycle owned by PW4. On 5th September, 2012 he met up with PW4 who gave him his motor cycle and informed he would get in touch later to transport some goods. About an hour later, PW4 called him and asked him to transport a sack of maize to a posho mill. He was shortly arrested and charged with the instant offence which he denied having any knowledge.
10. The appeal was canvassed before us on the 15th October, 2013. The Appellant sought to rely on his written submissions while the Learned Prosecuting Counsel for the State, **Mr. Gitonga** made oral submissions on behalf of the State.
11. **Mr. Gitonga**, opposed the appeal. He submitted that the prosecution relied on recent possession in prosecuting its case. The appellant was arrested with the camera seven days after the robbery following a tip off by members of the public. At the time, the Appellant was attempting to sell the said camera; that on his arrest he could not give sufficient explanation as to how he came into possession of the camera. It was his submission, that though the complainant could not identify the Appellant because they were wearing masks, the trial magistrate was right to invoke the doctrine of recent possession in convicting the Appellant.
12. Counsel urged the court to dismiss the appeal in its entirety as the Appellant was properly convicted of being in possession of recently stolen property.
13. We have considered the submissions by both parties and find the following issues for determination;
 - i) Whether the trial magistrate erred in relying on the doctrine of recent possession
 - ii) Whether the prosecution proved its case beyond reasonable doubt;

- iii) Substitution to a lesser charge

ANALYSIS

14. This being the first appellate Court, it is duty bound to re-assess and re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to the case of **Okeno v Republic, 1972 EA 32**.
15. The evidence of **PW1** was that the robbery took place at mid-night of 26th going to 27th August, 2012. She was not able to see the faces of the robbers as they wore masks.
16. The robbery also took place at night and under such circumstances the issue of identification of the robbers by PW1 was difficult.
17. This witness narrated that a camera was stolen on that night and she was able to positively identify the camera and prove to the trial court that the camera was her property and she produced the receipt as documentary evidence in support of purchase.
18. The evidence of **Moses Mungai Maina (PW4)** was that the appellant attempted to sell a camera to him. He shared this information with the police who then requested **PW4** to continue to play the role of an interested purchaser.
19. The evidence on the circumstances of arrest of the appellant was tendered in court by **P.C John Masawi, (PW6)** who testified that he arrested the Appellant on the 5th September, 2012 when the appellant came to sell the camera to **PW4**.
20. The appellant was arrested whilst in possession of the said camera.
21. The evidence of the Appellant was that on the night of the robbery that is the 26th going to 27th August, 2012 he had travelled to Naivasha to visit his brother at Naivasha prison and that he had spent the night at a lodging there and had travelled back to Maralal the next day and that he had arrived in Maralal at 8.00pm.
22. The trial magistrate however found no merit in the appellant's line of defence and relied on the evidence of recent possession and used this evidence to convict the appellant.
23. Basically the conviction of the appellant on Count 1, that is robbery with violence was not based on identification but was based on the evidence of being found in possession of recently stolen items.
24. The Court Of Appeal in the case of **Isaac Nganga Kahia V. Republic** Court of Appeal Cr. Appeal No.272 of 2005 (Nyeri) unreported held that;

‘.....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.’

25. This court after re-evaluating the evidence of **PW4** and **PW6** finds that the appellant was arrested with the camera as he attempted to sell it off to **PW4**. This court further finds that there was positive proof of possession as the recently stolen camera was found in the possession of the appellant.
26. The Court of Appeal in the same case of **Isaac Nganga (ibid)** held that it must be proved that the property is the Complainant's, that the property was stolen from the Complainant and that it was also recently stolen.
27. In this instant case, this court notes that **PW1** was able to positively identify the camera as her property. She also produced a receipt to prove purchase. The robbery took place on the night of 26th August, 2012 going to 27th August, 2012 and **PW1** made a report to the Maralal Police Station as to the items that she was robbed of, the camera being one of the items. This court is satisfied that there was evidence that proved that the property was stolen from the Complainant
28. The element of time of recovery of the stolen property is a very crucial element that must also be proved. In this case the robbery took place on the 26th to 27th August, 2012 and within seven days thereafter the camera was recovered. This court concurs with the trial court's view that a period of seven days is an adequate period to impute guilt on the basis of recent possession.
29. Even though there are strong pointers to the guilt of the appellant based on the doctrine of recent possession, the Court of Appeal in the very same case of **Isaac Nganga (ibid)** held that there must exist no other evidence to discredit that of recent possession.

30. In our view the defence put forward by the appellant of alibi goes to discredit the evidence of recent possession. We opine that the trial magistrate ought to have taken into consideration the defence of alibi, that the appellant stated in his statement of defence that he was in effect elsewhere when the offence took place. It is trite law that where an accused person puts forth an alibi as an answer to a criminal charge the burden still rests with the prosecution to disprove it. Nothing on the record shows that this was done.
31. At this stage we shall move to the third and last issue which relates to substitution of the charge.
32. We have had occasion to peruse the court record and re-assess the evidence and find no evidence on identification of the appellant.
33. We reiterate that the evidence on recent possession has been discredited, there is therefore no evidence on record to support the fact that the Appellant was a robber.
34. Nevertheless, we find no reasonable explanation tendered by the appellant as to how he came into possession of the camera.
35. We are satisfied that there is sufficient evidence on record to support a conviction on a lesser and alternative charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code** and we hereby invoke the provision of **Section 354(3)(a)(ii)** of the **Criminal Procedure Code**.

FINDINGS

36. We find that the trial magistrate erred in fact and law in applying the doctrine of recent possession.
37. We find that the trial magistrate erred in fact and law by failing to consider the defence of *alibi* which then discredited the evidence of recent possession.
38. We find that the appeal on conviction and sentence on the charge of robbery with violence has merit and it is hereby allowed.
39. We find that the facts and findings of the trial court relate to and support the alternative charge of handling stolen property.

CONCLUSION

40. The conviction for the offence of **robbery with violence** contrary to **Section 296(2)** is hereby quashed and substituted with a conviction for the offence of **handling stolen property** contrary to **Section 322(2)** of the **Penal Code**.
41. The sentence for robbery with violence is hereby set aside and substituted with a term of seven years with effect from 2nd January, 2013.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 3rd day of February, 2014

A. MABEYA

JUDGE

A. MSHILA

JUDGE