



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 49 OF 2012

(Appeal from the original conviction and sentence by Hon. R. K. Ondiek-SRM in Criminal Case No.1 of 2011 at Kilifi on 2nd May 2012)

KARISA CHENGO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was charged with the offence of Robbery with violence contrary to the provisions of Section 296 (2) of the Penal Code.
2. The particulars of the offence are that on 23rd December 2010 at Palakumi area in Kilifi County, the Appellant robbed Kadzo Kalama Nzaro of seven packets of maize flour, two packets of wheat flour, two kilograms of sugar, two spoons of yeast and immediately before the time of such robbery wounded Kadzo Kalama Nzaro. The trial Magistrate convicted the Appellant and sentenced him to suffer death.
3. The main ground of appeal is that the learned Magistrate convicted the Appellant without noting that the identification parade was not conducted and that the evidence that was adduced by the prosecution witnesses was inconsistent and contradictory.
4. Mr. Obaga, counsel for the Appellant submitted that there is nothing peculiar about the maize flour that was recovered in the Appellant's house on the material day. Counsel further submitted that the complainant did not give the description of the flour that was robbed from her and further that the panga that is said to have been recovered was never dusted for fingerprints.
5. Mr. Nyongesa, the state counsel, submitted that the flour and panga were recovered in the Appellant's house on the day of the robbery. Counsel submitted that the foot prints and spilled flour led the village elder to the Appellant's house. According to counsel, the description that the complainant gave to the village elder fitted that of the Appellant because the village elder had seen the Appellant wearing the clothes on the same day. Counsel urged us to confirm the conviction and sentence that was meted out by the lower court.
6. As the first appellate court, we are required to re-evaluate the evidence that was tendered in the lower court, assess it and make our own conclusion. (**Okeno Vs R (1972) EA 322**).
7. The facts of this case are that on 23rd December 2010, PW1 was on her way from the market when she met the Appellant. The Appellant was armed with a panga and he forced PW1 into a forest. PW1 resisted and that is when the Appellant cut her with the panga on the head and hand. The

- Appellant then took maize flour, wheat flour and fish that PW 1 was carrying. PW1 was assisted by neighbours and was taken to Ganze hospital. PW1 identified the polythene bag, the two packets of maize flour, and the panga that the Appellant used which were recovered from the Appellant's house on the same day.
8. In cross-examination, PW1 stated that the place where she was attacked was bushy but because it was 11:00 AM, she managed to see the Appellant. PW 1 identified the Appellant in the dock as the person who had attacked her on 23rd December 2010.
 9. The village elder, PW2, informed the trial court that on the material day that PW1 was robbed, they visited the scene and managed to follow the foot marks of the assailant. The footmarks led them to the Appellant's house. They found the Appellant's wife in the house who handed to them "Taifa" maize flour and a blood stained panga. The village elder together with other people combed the forest but did not trace the Appellant. PW 2 took the items that they had recovered from the Appellant's house to the police station.
 10. PW4, the Appellant's village mate, stated that him, together with other people spotted the Appellant at Dzitsoni. When the Appellant saw them, he started to flee but the crowd gave chase and arrested him. The Appellant was saved from the wrath of the crowd by the police officers who were in the area.
 11. Dr. Rashida, PW 6, confirmed that he observed the complainant and found that she was assaulted on 23rd December 2010. The witness produced P3 form as exhibit number 4.
 12. The Appellant gave unsworn testimony in his defence after section 211 of the Criminal Procedure Code was explained to him by the Magistrate. The Appellant stated that he was arrested at Kaloleni by some people who beat him up.
 13. In her judgment, the Magistrate was convinced that the Appellant was armed with a panga on the material day and that he used the panga to cut the complainant on the head and on the left thumb before robbing her. According to the Magistrate, the Appellant committed the offence in broad day light and the issue of identification was not in doubt.
 14. The Magistrate also found as a fact that the maize flour and a blood stained panga was found in the Appellant's house on the day of the attack. She proceeded to convict the Appellant for the offence of Robbery with violence.
 15. The evidence on record shows that the complainant was attacked at 11:00 AM by somebody she did not know. However, she gave the description of the person who had attacked her and the clothes the assailant was wearing. The village elder, PW2, had seen the Appellant on the same day with the clothes that PW1 described. In fact, the Appellant was related to PW2. It is on record that PW 2, in the company of other people managed to trace the Appellant's foot prints from the scene of crime to his house.
 16. The packet of maize flour which was taken from PW 1 during the robbery and the blood stained panga which the Appellant used to cut PW 1 was given to PW2 by the Appellant's wife when they traced the footmarks to the Appellant's house. Those items were identified by PW1. The items were recovered on the same day that the robbery occurred. The Appellant did not offer any explanation on the recovered items in his house. There was also no explanation why the appellant did not go to see the village elder after the items which were alleged to have been found in his house were recovered and taken by the village elder. Instead, the Appellant ran when he saw villagers in Dzitsoni.
 17. In the case of **Hassan Vs Republic (2005) KLR 151**, it was held **that where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation, to account for this possession, a presumption of fact arises that he is either the thief or receiver.**
 18. We are therefore in agreement with the Magistrate's findings that the Appellant is the one who robbed and injured the complainant after the stolen packets of flour and the blood stained panga was handed over to PW2 by his wife. We are also in agreement that an identification parade would only have been additional evidence considering that the packets of flour and a blood stained panga, the items which were taken from the complainant, were recovered from the Appellant's house on the same day and produced at the hearing. The complainant had the time to see the Appellant and gave his description to PW 2. PW 2 knew the Appellant who was his relative and the description that the complainant gave him fitted very well with that of the Appellant whom he had seen earlier in the day. PW 1 identified the Appellant in the dock. The trial magistrate in his

own considered view correctly applied the doctrine of possession of recently stolen goods in this case, constructive possession. (See Malingi V R (See [1989] KLR 225.
19.In the circumstances, and for the reasons we have given above, we uphold the conviction and sentence meted out by the learned Magistrate and dismiss the Appeal.

Dated and Delivered in Malindi this 7th day of March, 2014.

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C.W.MEOLI

JUDGE

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O. A. ANGOTE

JUDGE