REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 267 OF 2011

REPUBLIC.....RESPONDENT

VERSUS

HARUN ISIAHO.....APPELLANT

[Being an appeal from the original conviction and sentence by Hon. T. Murigi P.M.

dated 5th January, 2011 in Makadara CMCCR Case No. 2391 of 2008]

JUDGMENT

1. The appeal before us has been conceded by the Republic for the reason that the evidence before the trial court was insufficient to lead to a safe conviction of the appellant. At the hearing of the appeal on 22nd October 2013, **Mr. Kadembe** the learned counsel for the Republic submitted that the record did not disclose the offence of robbery with violence for which the appellant was charged.

2. As a first appellate court however, we consider it our duty to re-evaluate the evidence before the trial court in order to make our own findings and draw our own conclusion. As stated by the Court of Appeal in **Mwangi V. Republic [2004] 2 KLR 28:-**

> *"It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusion. 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 had the advantage of hearing and seeing the witness"*

3. From the evidence tendered before the trial court, the brief facts of the case were that the complainant one Peter Ayub (PW1) was attacked by a gang of robbers at his Muthaiga residence on the morning of 12th December 2007. The robbers gained entry into his bedroom wielding guns and pangas and demanded money. They tied him up and ransacked the house for about 3 hours. They made away with his motor vehicle registration number KAP 289X radio, TV Sets, battery chargers, spanners, drilling machines a welding machine, and clothes. The complainant managed to free himself and sought the assistance of a neighbour whom he requested to make a report at the nearby Muthaiga Police Station. He also discovered that the appellant who was his cook of 18 years had disappeared with all his belongings.

4. From the record, there seems to have been no active investigation of the case and that it was only after the complainant raised a complaint with the Deputy Officer Commanding Station (OCS) Muthaiga (PW

3) on 22nd May 2008, that investigations led to the accused's arrest from his rural home on 25th May 2008. That was about 7 months from the date of robbery.

5. The evidence before the trial court was that the accused disappeared immediately after the robbery, and upon his arrest was found in possession of a pair of slacks and a trophy belonging to the complainant. PW1 testified that he had put one pair of slacks in his motor vehicle prior to the robbery and that his trophy was always in the display unit in his house.

6. Corporal Joshua Kiuli (PW 2) testified that he received the report about the robbery on 8th August 2008 and together with a colleague one PC. Catherine Ringera proceeded to the scene where they found the complainant and commenced investigations. It was his testimony that the quarters in which the appellant lived had signs of someone having left in a hurry but was not in a mess. In his own words - 'It appeared someone had gotten out of it in haste'

7. PW3 **No. 230219 Inspector Samuel Kipyegon**, Deputy OCS Muthaiga testified that he took up the investigation of the case on 22nd May 2009 when the complainant visited the station and complained that the station was not taking the robbery case seriously. That together with James Kahara, they travelled to the accused's rural home where they were assisted by the local police post, the chief and the assistant chief to trace and arrest the appellant which task they accomplished on 25th June 2008. They searched his house and recovered a pair of spectacles, a khaki long trouser and a trophy with the complainant's name inscribed on it.

8. PW 4 was **No. 70881 PC James Kaara** who was the arresting officer. He narrated how together with PW 3 they travelled to the appellant's rural home and arrested him there. He testified that the chief and the area assistant chief were present during the arrest. It was his further testimony that the appellant had disappeared after the robbery.

9. The appellant's defence was that he was accosted by the robbers while still in his servants' quarters and tied up before the robbers later came and bundled him into his employer's car before dumping him at Karura Forest. He said that he later went back to the house but his boss threatened him after which he decided to run away to his rural home. He however never reported the robbery to the police. He testified that his employer had given him the slacks and had also given his son the trophy.

10. The trial court found the appellant guilty and convicted him. In the judgment issued on 17th December 2010, the court applied the doctrine of recent possession stating that the appellant was found with two of the stolen items for which he had no reasonable explanation. It dismissed the explanation given by the appellant that the complainant had given his (the appellant's) son the trophy and had also given him (the appellant) the trouser. The court noted that the appellant only offered the explanation as an afterthought since he had not raised it while cross-examining the prosecution witnesses.

11. The doctrine of recent possession has been clearly articulated by this court and the Court of Appeal. Simply put, any person found to be in possession of an item that has recently been stolen is deemed, in the absence of a reasonable explanation, to have stolen it. In **Hassan V. Republic [2005] 2 KLR 11** the Court stated: *"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 the receiver"*

This was further explained in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic - Criminal Appeal No. 272 of 2005 where the court held:-**

"…*It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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 the 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 the 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."

12. In the present case the appellant does not dispute having been in possession of the two items. The question however is whether these two items were stolen at the time of the robbery or at a different time during the employment of the appellant or indeed whether they were lawfully given to the appellant by the complainant. Looking at the evidence before the trial court we agree with the learned trial magistrate that the explanation given by the appellant as to how he came into possession of the items cannot hold.

13. While it is conceivable that the appellant may have been given the trouser by his employer, it is utterly inconceivable that the employer would have given his employee's son a trophy (the complainant's) with his name inscribed on it! Such items are usually personal to the recipient. We find the explanation unreasonable.

14. That said however, the more troublesome issue in this appeal is whether the standard of proof was met by the prosecution. Put another way, the question we ask is whether there was other evidence to strengthen the case other than recent possession of the stolen items. The prosecution presented four witnesses. The totality of the evidence before the court confirms that a robbery took place on 8th December 2007 at the home of the complainant and that the complainant lost property including a car and 2 TV sets. The evidence of PW 1 and PW 2 confirms the robbery. The testimony of PW3 & PW4 confirms that the appellant was arrested with 2 items belonging to the complainant.

15. The inference drawn by the court from this evidence is that the appellant must have been linked to the robbery because he was found with some items and also because he disappeared from the scene soon after the robbery. Other than that, there is no evidence on record which places the appellant in the scene of the robbery. No attempt was made to draw a link between the robbers and the appellant so as to create a common intention with the robbers. He was not seen in the company of the armed robbers. The court drew inference from his disappearing act that he must have been involved in the robbery. We also suspect that he may have been. However, we are alive to the dictates of the law that mere suspicion cannot support a conviction. While his running away from the employer's home at the same time of the robbery raises deep suspicion, it is not conclusive evidence of his guilt.

16. As stated by the court of appeal for Eastern Africa in **Abdallah Bin Wendo & Sheh Bin Mwambere 20 EACA 166**, "suspicion, however strong cannot supply a basis for inferring guilt when proof of guilt cannot be safely inferred beyond reasonable doubt." It was incumbent upon the prosecution to prove the facts it laid before the court. In **Mwaula and Muthoki V. The Republic [1976-80] 1 KLR 1656,** the court explained this principle in the following terms:-

> *"The true position is that, as a general rule, facts which have to be proved to establish the guilt of an accused person in a criminal case must be proved beyond all reasonable doubt by the prosecution on the evidence as a whole. There is no shortcut or "much easier" way, in criminal cases……"*
>
> The court went on to state that silence by an accused person cannot relieve the prosecution of the burden of proving inculpatory facts beyond all reasonable doubt. In our view there wasn't sufficient evidence before the court in this case to convict the appellant. His conviction was not safe.

17. It is apparent to us from both the record and the testimonies of the prosecution witnesses that the police were not diligent in the investigation of this case. They seemed not to have been keen on the investigation as can be demonstrated from their inactivity between the date of robbery until when the complainant raised a complaint with the Deputy OCS on the apparent lack of interest in the case. It was then that they rushed to arrest the appellant and to charge him with the offence of robbery with violence.

18. In our view the evidence before the court could do no more than sustain a charge of theft by servant. It could do no more than raise deep suspicion (which we share with the trial court) that the applicant was

involved in the robbery. The totality of the evidence could not however meet the legal standard of proof to convict the appellant as required by law. The standard required is one beyond reasonable doubt and where gaps which create doubt exist, the benefit of the doubt must go to the accused. We find in this appeal that the evidence before the trial court was not sufficient to sustain a charge of robbery with violence.

19. In the premises, we allow the appeal, quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

Judgment dated and delivered at Nairobi this 14th day of May, 2014.

…… ……

R. LAGAT-KORIR **D.K. NJAGI MARETE**

JUDGE **JUDGE**

In the presence of:

……..: Court clerk

……..: Appellant

……..: For the appellant

……..: For the State/respondent