



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 168 OF 2010

(Coram: Fred A. Ochieng and G. W. Ngenye – Macharia, JJ.)

KELVIN EGESA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an Appeal from the Original Conviction and sentence by Hon. Ann Onginjo (Senior Principal Magistrate) in the Chief Magistrate's Court in Criminal Case No. 3642 of 2010 dated 12th November, 2010)

JUDGMENT

The Appellant Kelvin Egesa was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

Particulars of the offence were that on the 15th day of June, 2010 at Huruma Estate in Uasin Gishu District within Rift Valley Province jointly with others not before court while armed with dangerous or offensive weapons namely pangas and rungus, robbed Francis Omondi of T.V set make Mpaq, DVD player make LG and mobile phone make Nokia 3310 all valued at Ksh. 8500/= and immediately before or after the time of such robbery threatened to use actual violence to the said Francis Omondi.

In the alternative, he was charged with handling stolen property contrary to section 322 (2) of the Penal Code.

Particulars of this offence were that on the 15th day of June, 2010 at Huruma Estate in Uasin Gishu District within Rift Valley Province otherwise than in the course of stealing retained one DVD player make LG knowing or having reason to believe it to be stolen property.

At the close of the prosecution's case, the learned trial Magistrate found that a prima facie against the main charge had been established and accordingly put the Appellant on his defence. She however remained silent on the face of the alternative charge, which issue we shall revisit hereafter in this judgment.

For the main count, the Appellant was sentenced to suffer death.

The Appellant raised four grounds of appeal. The same may be categorized into three sub-headings, namely identification of the Appellant, weight of evidence and, recovery and identification of exhibits.

On identification, the Appellant submitted that he was a victim of mistaken identity. He stated that the complainant (PW1) told court that the robbery took place at night and the three robbers had torches. He stated that the robbers told PW1 and his wife not to wake up or stand on the bed.

According to the Appellant, in the circumstances that PW1 did not rise from the bed or even stand up, it was impossible to identify any of his attackers.

He submitted that PW1 did not tell the court how long the robbers were in the house. For this reason, it was difficult to conclude he (PW1) had sufficient time to identify his attackers.

He said that PW1 did not also tell the court what peculiar physical marks helped him to identify him (Appellant) as one of the attackers.

He stated that the court ought to have acquitted him immediately PW1 confirmed that he rushed to the scene on hearing people screaming 'thief, thief'. That it was after PW1 arrived at the scene he found the Appellant had been arrested and a DVD was recovered. He said that this was a clear indication that people mistook him for a thief after which police arrested him.

It was also his submission that the single identifying evidence of PW1 was not corroborated. He stated that PW1's wife with whom the latter was attacked was not called as a witness to ascertain how he (Appellant) was identified.

On the weight of evidence, the Appellant submitted that the prosecution witnesses gave contradictory evidence, which, if the trial court weighed properly, would not have found a conviction against him. He singled out the evidence on identification which he said that that of PW2, 3 and 4 did not corroborate that of PW1.

According to PW1, he identified the robbers from lighting coming from their torches while PW2, 3 and 4 said they identified the Appellant from a group of robbers who were confronted by members of the public.

As regards the recovered exhibit, the Appellant submitted that the same was not positively identified by PW1 as that stolen from his house during the robbery.

Learned State Counsel, Miss Ruto opposed the appeal. She submitted that PW1's house was broken into at 2.00 a.m. while PW1 was asleep with his wife and children. Three robbers entered the house and ordered them to stand on the bed. They then placed pangas on his neck and that of his wife. The robbers then stole his Television set, mobile phone and a 'jua kali' made amplifier.

After the robbery, two of the attackers left the room while one was left guarding the house. The latter later walked out of the house and locked the house from outside. PW1's wife went outside through the window and notified PW2 who was their neighbour.

According to Miss Ruto, PW1 and PW2 informed their landlord as well as PW3 about the robbery. PW3 who was in charge of community policing then called police. Police officers who were on patrol proceeded to the scene and on their way came across four people who defied an order to stop. Police gave a chase to the four men and arrested the Appellant who was among them. From him a DVD was recovered and the same was positively identified by PW1.

Miss Ruto submitted that, since the recovery of the DVD was only twenty minutes after the robbery, the doctrine of recent possession applied.

She submitted that the evidence of the prosecution was corroborative and that the conviction was sound. She urged the court to dismiss the appeal.

This being the first appellate court, our duty is to re-evaluate the evidence afresh and come up with

our own finding but bear in mind that we have neither seen nor heard the witnesses.

PW1 said that on 15th June, 2010 at 2.30 a.m., while he was asleep with his wife and children, three people entered into his one-roomed house. He said he was able to tell they were three because he saw them with the help of the lighting of torches they had. The three men ordered them not to stand on the bed. They placed pangas on his neck and that of his wife. They then stole speakers, a TV set and Hampaap DVD and then they left in a hurry. One of the attackers was left guarding them but he also left soon after and locked the door from outside.

He said his wife went out through the window and opened the door. PW1 then woke up his neighbour, one Philip Makhokha (PW2), whose house door had also been locked from outside. PW2 then woke up the landlord who in turn called the police.

PW1's evidence was that, after a short while they heard screams of people shouting 'thief, thief'. They proceeded to the direction the screams were coming from. They found the Appellant had been arrested and a DVD recovered. He identified the DVD as the one stolen from his house a few minutes before the arrest of the Appellant. He identified to court two holes on the DVD which he said were marks left behind by fallen buttons. Police re-arrested the Appellant and escorted him to his house where nothing else was recovered.

PW2, Philip Makokha said he was woken up by PW1 at about 2.30 a.m. who informed him that he had been robbed of his amplifier, DVD and a television set. He then informed their landlord who in turn called the police by telephone.

PW2 said that police arrived at the scene after 30 minutes. Together with the police, they tried looking around for the attackers but to no avail. He said that 20 minutes after the police had left, they heard people shouting 'thief, thief'. When they proceeded to the scene they found a suspect being beaten. He said that when police officers arrived, the Appellant had a DVD which belonged to PW1.

PW3, Gilbert Kwoba Makokha who was the chairman of community policing within Huruma – Baharini area said he received information of the robbery from his neighbours and tenants and in turn called the Officer Commanding Station (OCS), Baharini. He said police officers arrived at the scene but did not find the robbers. A few minutes later they heard screams of people shouting 'thief, thief'. On going to the scene, they found a suspect being beaten. He said police carried away another suspect and when they returned, the suspect (referring to the Appellant) had a DVD.

PW4, Police Corporal Robert Muti of Baharini Police Post testified that at about 3.00 a.m., he and fellow colleagues were on patrol within Huruma area when the OCPD of Baharini called them and informed them of the robbery. They proceeded to the scene. There they found a group of people including the complainant who reported to them about the robbery in his house.

Police pursued the attackers. They stumbled on four people who defied their order to stop. PW4 caught up with the Appellant. He arrested him and recovered from him a DVD. PW1 identified the DVD as his. He also identified the Appellant as one of the attackers who had robbed him.

PW4 further testified that, after arresting the Appellant, they received information that another suspect had been arrested by members of public and was being subjected to mob justice. He said he went and rescued this suspect and released him.

On analyzing the above evidence, it is clear that it is only PW1 who testified as an identifying witness. According to him, he was only able to tell the number of the robbers who entered his house with the help of the lighting coming from the torches the robbers had. Apparently, he could not see their physical appearances as they were ordered not to rise from bed. He could not therefore describe the general or specific physical appearances of the robbers. In this regard he said:-

“I was able to see three (3) people, because of light from their torches. They ordered us not to stand from bed”

No further evidence was adduced by PW1 with regard to the identification of the Appellant. He came across the Appellant after he found him being beaten by the members of the public. And it is at this moment he said he found the Appellant with a DVD which had been stolen from his house 20 minutes earlier.

As such, his account on description of the robbers only related to their numerical numbers.

The only other person who said PW1 identified the Appellant as one of the robbers was PW4. He said that;

“I pursued suspect herein and he entered a plot He also identified suspect as one of the robbers who went to his house.”

He did not give any evidence as to description given to him by PW1 of the robbers. He did not also state how PW1 was able to pick out the Appellant as one of the robbers. We thus conclude that identification of the Appellant linking him with the robbery was not conclusive.

In the instance, the only link between the Appellant and the robbery was the recovered DVD. We now ask ourselves, to what extent did PW1 identify it as his? He testified as follows:-

“I did identify DVD as one which had just been stolen from me. It had two holes from which buttons got broken – shown to court”

PW2 and 3 on the other hand only stated that the DVD belonged to PW1. They could not however describe how they knew it belonged to him.

But again, from the testimony of PW3, it appears that the Appellant was initially arrested by members of public who subjected him to mob justice. It is at this point that PW1, 2 and 3 stumbled on him. Police then rescued him and took him away. Interestingly, when police returned to the scene with him, he had a DVD. This is what PW3 said;

“..... we heard screams of 'thief thief'. We rushed to the scene and found one suspect was being beaten. Police went with another suspect and when they came back accused had a DVD.”

This demonstrates that at the time the Appellant was being beaten by the members of public, he did not have the DVD with him. It is after the police had taken him away, ostensibly for a search of stolen items, that he returned with the DVD. So where did the DVD come from?

Again, even if this DVD was recovered from the Appellant in the first instance, why was it so difficult for PW4 who recovered it to tell the court how PW1 identified it? All that PW4 said was that after arresting the Appellant he recovered the DVD from him which PW1 identified as his. He did not state that it had two holes which PW1 showed to court.

For these reasons, we are unable to make a positive finding that the recovered DVD belonged to PW1.

We have no doubt that it was recovered within a span of less than one hour after the robbery but from our foregoing observations, it is our view that PW1 was not able to prove that the same belonged to him. As such, the doctrine of recent possession would not apply.

It is also important to note that the said DVD was released to PW1 after the Appellant told court he did not claim it. But this fact alone does not mean that he (Appellant) stole it. Even if the same

belonged to PW1, the burden of proving it was stolen from him by the Appellant during the robbery lay with the prosecution. This burden, we think, was not discharged at all. And again, as we have said, the prosecution did not meet the legal threshold of proving that the DVD belonged to PW1.

We have no doubt that PW1's house was broken into and property stolen from therein. However, upon evaluating all the evidence, it is too scanty to link the Appellant to the robbery. The prosecution did not discharge its burden in proving its case to the required standards. The conviction was therefore unsafe.

It is important to point out that the Appellant having been charged with a main count and an alternative charge, and having pleaded not guilty to both counts, and at the close of the prosecution's case the court having found the evidence linked him only to the main count, the court ought to have acquitted him at that point under Section 210 of Criminal Procedure Code for the alternative count. It was improper and unprocedural for the court to put him on defence in the main count only and remain silent with respect to the alternative charge.

In the alternative, the learned trial Magistrate would have put the Appellant on defence in respect of both counts. And in the judgment convict him only in the main count as she did.

However, since in none of the counts the prosecution proved its case, we find that no prejudice was occasioned to the Appellant by this error.

In the end, we quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless he is otherwise lawfully held.

DATED and DELIVERED at ELDORET this 6th day of June, 2014

FRED A. OCHIENG

JUDGE

G. W. NGENYE - MACHAIRA

JUDGE

In the presence of:-

..... for the Appellant

..... for the State/Respondent