REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 157 OF 2010

GEORGE ONYANGO KISERA.....1ST APPELLANT

BENARD OCHIENG OOKO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 562 of 2010 of the Senior Principal Magistrate's Court at Nyando – D. Cheplwony -SPM)

J U D G M E N T

Introduction

1). The appellants herein were charged with the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code. The particulars were that:

Benard Ochieng Ooko, George Onyango Kisera, on the 21st day of March, 2010 at 11.00 p.m at Muhoroni Township in Muhoroni District of the Nyanza Province, jointly being armed with dangerous weapons namely pangas robbed Francis Ochieng Opiyo of one mobile phone make Nokia 1110, one black jacket, one black leather belt, a hat, spectacles and cash Kshs. 4,500 all valued at Kshs. 12,750/= and at or immediately before or immediately after the time of such robbery beat the said Francis Ochieng Opiyo.

2). They were each further charged with the alternative counts of Handling stolen property contrary to section 322 (2) of the Penal Code. The particulars were that:

Benard Ochieng Ooko on the 24th day of March, 2010 at Muhoroni Township in Muhoroni District of the Nyanza Province, otherwise than in the course of stealing dishonestly retained one mobile phone make Nokia 1110 knowing or having reasons to believe it to be stolen property.

At the conclusion of the case both appellants were convicted and sentenced to death. Their co-accused was set free.

Facts and Evidence

The Prosecution Case

3). The prosecution called 3 witnesses who included PW1 the complainant. He told the court that on the material day at around 11 p.m he was heading home from Muhoroni town. Before he reached home he was accosted by four people who were armed with weapons and strong torches. They then assaulted him using a panga and in the process he fell down. They stole from him several assorted items which included his Nokia 1110 mobile phone, cash of Kshs. 4,500, a belt, jacket and eye glasses. They left him and he screamed for help where members of his family came to his aid.

4). On 22-3-2010 he went to Muhoroni sub district hospital where he was treated and discharged. On 24-3-2010 he went to report at Muhoroni police post. He was issued with a P3 form which was later filled by PW2.

He was later called by the police using his wife's phone to go and identify some recovered items at the police station. He identified his phone which had faded key pad and on turning it on he managed to scroll the numbers including those of his customers which were contained in the phone book. The following day he was again called by the police to identify a jacket which had been recovered as well as a belt. He positively identified both items as his. The complainant was categorical that he was able to recognise his assailants even after being shown the arrested persons as the strong flashes from the torches prevented him from identifying them.

5). PW2 Alice Langat a clinical officer produced the P3 form which showed the extent of injuries suffered by the complainant. She classified them as harm.

6). PW3 P.C. Jackson Omariba received the complaint from PW1 on 24-3-2010. Apparently he had a mobile phone which had been booked in as prisoners diary which according to PW1 fitted the description. He then inquired from the 1st appellant where he had gotten the said phone. He told the court that the information which the 1st appellant gave was not satisfactory and this forced him to call PW1 who was able to positively identify the mobile phone.

7). This forced PW3 to pursue the 1st appellant further and he conceded that the phone had been given to him by the 2nd appellant. On going to the 2nd appellant's house, he found his wife and in the process recovered the jacket which again matched the description given earlier on by PW1. He arrested the 2nd appellant's wife for she gave unsatisfactory answer too. At the station PW3 called PW1 who managed to identify the jacket.

8). He then with the other colleagues searched for the 2nd appellant whom they succeed. The 2nd appellant was arrested and found with a belt which again matched with that reported to have been stolen from him by PW1. PW1 was called and he equally identified his belt. Both were then charged and convicted as stated earlier on. The 2nd appellant's wife was set free.

Appellants Case

9). Both appellants denied the charge. The 1st appellant in his defence argued that he was arrested for failing to turn up in court on the material day as his wife had gone to attend a funeral and his child was sick.

According to him the phone which was claimed by PW1 belonged to him and not PW1.

10). The 2nd appellant also denied the charge. He said that he was arrested while drinking changaa and booked in cells as he did not have the cash demanded as a bribe by the police. He further said that he was assaulted by the police officers while in their custody. He denied the knowledge of the jacket and in particular that he does not know in which house the same was recovered. He equally denied knowledge of the belt.

Analysis and Determination

11). Its now a trite law that this being a first appeal we are enjoined to reevaluate the evidence afresh and

came up with a fresh independent decision. The appellants have filed seven grounds of appeal which are similar in nature and substance.

12). Essentially they have attacked the prosecution evidence on the question of identification. They argued that there was no sufficient light permitting PW1 to identify them. However the evidence on record clearly points out the fact that the complainant did not allege that he recognized or identify the assailants. It is our finding therefore that this ground is unsustainable.

13). The other grounds raised by the appellant is the question of identification of the recovered items and whether or not the doctrine of recent possession was properly applied by the trial court.

14). From the evidence on record the items recovered namely the mobile phone, the jacket and the belt were done by PW3 who doubled up as the investigating officer. The phone was already in his custody having arrested the 1st appellant and locked him in for failing to attend court for the hearing of another case which was pending.

Prior to this the complainant had already lodged a report concerning the robbery and the loss of the assorted items. The occurrence book already had the details and we do not find this coincidence of the recovery of the phone and the arrest of the 1st appellant strange. The issue to be determined is whether PW1 was able to identify the recovered items.

From the evidence on record PW1 identified the phone courtesy of the faded key pad and the names in the phone book. We do not therefore think that the phone did not belong to him. Despite the absence of the serial numbers of the phone the presence of the familiar names in his phone book clearly confirms that the phone was his. Further the report he made earlier to PW3 clearly described the lost items. In any case there was no satisfactory explanation by the appellant on the ownership and possession of the phone.

15). The jacket and the belt were recovered from the 2nd appellant's house and although he denies this fact we do not see any reason why PW3 would implicate him. The belt in particular was recovered from him as he wore and PW1 was able to identify it especially the replaced buckle. Equally, he managed to describe the recovered jacket from the torn pockets both inside and outside. We do find the prosecution evidence credible and not shaken by the appellants defences.

16). As a matter of fact the 1st appellant contradicted himself on the date he allegedly purchased the said phone. During his evidence in chief he said that he purchased in 2006 and on being cross examined he said that he bought it in 2005 at Muhoroni. In any event nothing was difficult for the 1st appellant to produce the relevant receipt showing the alleged purchase. Equally, he failed to dislodge the fact that the names in the phone book did not belong to the complainant's friends or customers.

17). The 2nd appellant alleged that he was assaulted by the police when he was arrested at a changaa den. No medical evidence was produced to establish this fact and neither did he raise it during the trial nor did he question PW3 on the same.

As regards the items recovered from him namely the jacket and the belt we do not find any credible explanation on the part of the 2nd appellant to the contrary.

18). Further, for evidence of recent possession to be linked and a conviction founded it must be proved by the prosecution that the appellant had actual physical possession or control of the stolen items. We find that this was proved. The 1st appellants had physical control of the phone till he surrendered it to PW3 who received it as a prisoners' property whereas the jacket and especially the belt were in actual control and custody of the 2nd appellant.

It was held in **Charles Lamamba -VS- Republic Criminal Appeal No. 8 of 1984** that:

> **"The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved".**

We find that this was established by the prosecution.

Conclusion

We do find that this appeal is not meritorious. The appellants we find were among the four people who accosted PW1 on the material day and forcefully stole his items. The injuries sustained are clearly explained in the P3 form produced by PW2. Force was used in robbing PW1. The goods were found in the physical and actual control of the appellants. The items had recently been stolen from the complainant. Their defence in our opinion is unmeritorious and not believable at all. Consequently, we dismiss this appeal.

Dated, signed and delivered at Kisumu this 7th day of July, 2014.

H.K. CHEMITEI **A.O. MUCHELULE**

JUDGE **JUDGE**