



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 377 OF 2007

SAMUEL GICHIMU KIRUMWA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(An Appeal arising from the conviction and sentence imposed by Hon. E.J. Osoro,
Senior Resident Magistrate Nyeri in Criminal Case No. 2973 of 2004)*

JUDGMENT

1. The Appellant SAMUEL GICHIMU KIRUMWA was charged together others with the offence of Robbery with violence contrary to section 296(2) of the Penal code. The particulars of which were that on the 25th day of July 2004 at Starehe Bar in Kamakwa market Nyeri District of Central Province while armed with dangerous weapons namely sub-machine guns namely patch and a pistol robbed WINNY WANJIKU cash 31,500/-, one mobile phone make Samsung R220 valued at Kshs.9900/- all valued to the total value of Kshs.41,400/ and at immediately before or immediately after the time of such robbery used actual violence to the said WINNY WANJIKU.
2. On count two he was charged that on 25/7/2004 at Starehe Bar robbed EMERSON NYAGAME NYABANE cash 3000, one mobile phone Nokia 2100 S/No. 353357003056348 valued at Kshs.8000/-. Count three robbed JAMES KARIA GITAHU cash 5000/- and at immediately after the time of such robbery used actual violence to the said JAMES KABIA GITAHU.
3. On count four he was charged with the offence of being in possession of a Firearm without valid Firearm certificate in force issued by Firearm Licencing Officer contrary to Section 4(1) of the Firearm Act Cap 114, the particulars of which were that on 30th day of July 2004 at Ngangarithi village in Nyeri District was found in possession of the sub-machine gun make patchet S/No. S9661 without a valid Firearm certificate in force.
4. On count five he faced the charge of being in possession of suspected stolen property contrary to Section 323 of the Penal code the particulars of which were that on 30/7/2004 at Ngangarithi village in Nyeri District of the Central province having been detained by Corporal JAMES MWANGI and police constable STEPHEN WACHIRA as a result of exercise of power under Section 26 of CPC had in his possession one singer machine and one solar panel he reasonably suspected to have been stolen or unlawfully obtained.
5. He faced an alternative charge of Handling stolen goods contrary to Section 322(2) of the Penal code, the particulars of which were that on 30th day of July 2004 at Ngangarithi village otherwise than in the cause of stealing dishonestly handled one mobile phone Nokia 2100 S/No. 35335700305348 knowing or having the reasons to believe it to have been stolen or unlawfully obtained.
6. He pleaded not guilty. Was tried and convicted on count I, II, III and count IV and sentenced to death on count I with sentence in respect of count II, III and IV being kept in abeyance. Being aggrieved by the said conviction and sentence he filed this appeal.

7. When the appeal came up for hearing before us the appellant who was unrepresented filed an amended petition and written submissions which he relied upon while Miss Kitolo appeared for the state and opposed the appeal.
8. It was submitted by the Appellant that he was not identified as one of the robbers and that PW 1 stated that he never identified the said robbers whereas PW 3 who allegedly identified him and not give the nature, source and intensity of the light he relied on. It was further submitted that he was convicted on the strength of contradictory evidence as regards the value of Nokia mobile phone and that there was no evidence that he was in possession of the said mobile phone and that the evidence on record shows that firearm was found outside his house and no inventory record was produced.
9. On behalf of the prosecution Miss Kitoto submitted that PW 3 and 4 testified that they were able to identify the appellant who had a hat and was shorter amongst the two attackers and had a gun. It was submitted that the contradiction in the value of the mobile phone was not material since the receipts were produced. It was submitted that PW 8's evidence supported the charge of possession since the Nokia mobile phone was recovered from the appellant five days after the robbery and therefore the doctrine of recent possession was applicable.
10. From the proceedings, grounds of appeal and submissions, we have identified the following issues for determination;
 - a) Whether the Appellant was properly identified.
 - b) Whether the doctrine of recent possession was properly applied.
 - c) Whether the prosecution's case against the appellant was proved beyond reasonable doubt.
11. This being a first appeal we are required to reassess and analyse the evidence tendered before the trial court afresh and to come to our own conclusion though taking into account the fact that we did not have the benefit of seeing and hearing the witnesses as the trial court did and shall reassess the evidence as we determine the issues herein.
12. On the issue of identification PW 1 testified that on 25/7/2005 he was at Starehe Bar when two people in police uniform ordered them to lay down facing downwards and therefore was not able to identify them. While PW 3 stated that he was seated behind the counter facing the entrance of the Pub and was able to see the appellant who was wearing a floppy hat. It was his evidence that lights were on. He was able to identify the appellant as the man who was at the front door and the first to have entered the Pub. He was also able to identify the sub-machine gun the appellant had on the material day.
13. Under cross examination by the appellant PW 3 stated that he was able to identify the appellant as the one who was at the door with a gun. PW 4 also testified and stated that she was able to identify the appellant as the short man who opened the door curtain and that electric lights were on. She was able to identify the gun as "a gun with holes". PW 5 PC Hussein Noor testified that PW 3 gave the description of the appellant and the gun he was holding on the material day.
14. PW 7 PC Paul Muchiri the Investigating Officer testified that the 1st accused who was identified by members of the public led to the arrest of the appellant where the sub machine gun was recovered and the Nokia phone on his table.
15. It is therefore clear that the appellant was properly identified and therefore his conviction was safe. From the evidence tendered herein as analyzed above the prosecution's case against the appellant was proved beyond reasonable doubt. We therefore find no merit on the appellant's appeal herein which we hereby dismiss.

Dated and delivered at Nyeri this 4th day of July 2014.

J. WAKIAGA

JUDGE

J. NGAAH

JUDGE