



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 75, 76 & 77 OF 2012

ISAACK NDEGWA KIMARU1ST APPELLANT

WILLIAM MUIRURI META2ND APPELLANT

JOSEPH KURIA WANJIKU3RD APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 1717 of 2010 of the Chief Magistrate's Court at Thika by B. J. Ndeda – Senior Resident Magistrate on 17th February 2012)

JUDGMENT

Introduction

1. This is a consolidation of appeals no. 75, 76 and 77 all of 2012, filed by the above appellants. They were charged with the offence of robbery contrary to **Section 296(2)** of the **Penal Code** but were convicted on the lesser charge under **Section 296(1)** of the **Penal Code** following a full trial and sentenced to serve 14 years imprisonment.

Facts of The Case

2. The chief facts of the offence were that on 18th April 2010 at Mchana coffee plantation in Ruiru district within Central Province, jointly with others not before court, while armed with dangerous weapons namely rifle, they robbed Douglas Mwithi Kambuthi of a motor vehicle registration No. KBK 714X Isuzu 4.3 N.K.R., mobile phone make Nokia and cash Kshs.400/= all valued at Kshs.3,500,000/= and at, or immediately before the time of such robbery they used actual violence against the said victim.

Summary of The Prosecution Case

3. The gist of the prosecution's case is that on 18th April 2010 **PW1** the driver of lorry registration No. KBK 714X Isuzu and **PW2** his loader came to Nairobi to ferry cargo for a customer on the instructions of their employer **PW3**. The would be customer led them to Ruiru in the outskirts of Nairobi, where a gang of men of infamy set upon them, roughed them up and robbed them of their personal effects and the lorry. They were bound and forced to ingest an unidentified liquid which

rendered them unconscious, before they were abandoned in the coffee plantation.

4. The following morning they made a report at Ruiru Police and also informed **PW3** through the loader's wife. With the help of Car Track Company the lorry was recovered at the border in Busia. Four persons were found with the lorry and arrested. They were transported to Ruiru in Nairobi and following investigations three were charged while the fourth man was released.

Summary of The Defence Case

5. In their defence all three appellants gave sworn testimonies and maintained their denial of the charges facing them. The first appellant, Isaac Ndegwa Kimaru stated that he was a trader in Ngong town and had travelled by bus from Nairobi to Busia en route to Kampala to buy stock to replenish his clothing business. That the reason for his presence in the stolen lorry was because when he arrived in Busia, he sought a lift from the lorries going into Uganda so that they would carry his goods on their way back. Further that the fourth man arrested with him and released by the police was the person who offered him the lift because he told him he was the owner of the ill-fated lorry.
6. The second appellant stated that he was a farmer in Busia and on the 19th August 2010 at 2.00 p.m. someone approached him and asked him to assist in carrying his goods. He agreed to carry the goods at a fee of Kshs.2000/=. When they got to where the lorry was parked the man inquired from him whether he knew how to drive. He answered in the affirmative and the man produced an interim driving licence and Identity card for him.
7. While still standing besides the lorry the first appellant arrived and they both boarded the lorry. The third appellant came later and requested for lift. After a short while the driver's door was opened and the second appellant was pulled out by police officers who arrested and took them all to the police station. They were later transported to Ruiru Police Station but somewhere along the line the fourth man was released. The second appellant maintained that he did not know the first appellant.
8. The third appellant stated that he was a trader at Muthurwa market in Nairobi and that he travelled to Busia to collect stock for his business from his mother. On arrival he found that his mother was unwell and had not come to meet him. He hitched a lift from one of the lorries to go to Tororo to collect the stock from her. As he was talking to the occupants of one lorry, police officers emerged and arrested him and three others and took them to Busia Police Station. A day later they were taken to Ruiru Police Station. One man was subsequently released while the three appellants were charged in court.

Grounds of Appeal

9. The three appellants filed appeals as was their right, which appeals were consolidated when they came up for hearing. They raised various grounds which in sum were that:
 - a. ***The arrests were based on the circumstantial evidence of PW4, which was marred with lots of contradictions and inconsistencies;***
 - b. ***Their mode of arrest was riddled with doubts and inconsistencies;***
 - c. ***Essential witnesses were not summoned; and***
 - d. ***Their defences were not considered for no reason;***

Respondent's Reply

10. Learned state counsel Miss Ndombi opposed the appeal on behalf of the state. She conceded that

the conviction was based on circumstantial evidence but contended that the trial court properly directed itself with regard to circumstantial evidence. She argued that the clearing agent who was not summoned to testify was not a crucial witness and that since the owner of the motor vehicle positively identified it and there was no dispute that it had been recently stolen, the burden to give a plausible explanation for its possession shifted to the appellants. She urged the court to dismiss the appeal for lack of merit.

Analysis of The Evidence

11. I have subjected the entire evidence to a fresh and exhaustive scrutiny that the appellants are entitled to in their first appeal. In doing so I have remained alive to the fact that I did not have the advantage that the trial court had of hearing and seeing the witnesses as they testified and have given due allowance therefor.
12. The undisputed facts of this case are that the two eye witnesses **PW1** and **PW2**, did not identify their attackers during the attack since it was dark to be able to recognise them later. It is also not in dispute that the lorry which is the subject matter of this case was recovered within hours of being stolen. It was violently robbed from **PW1** and **PW2** at Ruiru on 18th April 2010 at 7 p.m. and recovered at the Kenya Uganda border in Busia on 19th April 2010 at noon. It is further not disputed that at the time of arrest the first and third appellants were found inside the lorry, while the second appellant was found outside with a fourth man who was arrested and later released.
13. The case is therefore predicated on circumstantial evidence and on the doctrine of recent possession. The issue for determination is thus, whether the circumstantial evidence herein was properly evaluated and whether the doctrine of recent possession was properly applied in the circumstances of this case.
14. I am alive to the fact that this being a criminal trial the appellants were under no burden to prove their innocence or to explain themselves at all. Indeed it is settled law that even the burden of proving facts which justify the drawing of an inference of guilt, from circumstantial facts to the exclusion of any other reasonable hypothesis of innocence, always remains on the prosecution. See **Muchene v Republic [2002] 2 KLR page 367**.
15. I tested the circumstantial evidence herein against the test set in the said case of **Muchene v Rep** (supra), in which **Chunga, Tunoi & Owour JJ A** held inter alia that:

“It is trite law that where a conviction is exclusively based on circumstantial evidence, such conviction can only be properly upheld if the Court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant, but also that there exists no co-existing circumstances which would weaken or destroy such inference.”

I therefore assessed the evidence on the circumstances of the arrest of the three appellants to establish whether it pointed irresistibly to their guilt or there were co-existing circumstances which could weaken or destroy the inference of guilt.
16. In my assessment of the evidence I found that it was fortified by the doctrine of recent possession, which I found to be applicable in these circumstances. On the question of recent possession I subjected the evidence to the acid test in the case of **Arum vs Republic 85 of 2005 KLR [2006] Vol. I Pg 233**, which set out what a court must establish before relying on the doctrine of recent possession. As stated elsewhere the subject matter in this case was a lorry which was violently robbed from **PW1** and **PW2** at Ruiru on 18th April 2010 at 7 p.m. it was recovered less than twenty-four hours later at the Kenya-Uganda border in Busia, on 19th April 2010 at noon, in the possession of the appellants.
17. There was acceptable evidence from **PW4** as to the recovery of the stolen lorry. A lorry is a valuable commodity whose property is not easy to pass from one person to another and it is improbable that the property had changed hands in the interceding time. The said lorry was

- positively identified to be the property of **PW3**.
18. **PW4** was the DCIO of Busia at the time in question. His testimony was that he received information on the robbery from Ruiru Police at about 11 a.m. on 19th April 2010. He and his officers tracked the said lorry to no man's land at the Busia border. The second appellant was in the driver's seat and the engine was running. The first appellant was standing at the door. **PW4** frisked all of them and recovered an interim driving licence from the second appellant. From the first appellant he recovered a temporary passage permit for the lorry, and it bore the photograph of the first appellant but was in the name of the second appellant.
19. The second appellant also had in his possession clearance documents from Kenya Revenue Authority and Uganda Revenue Authority together with the receipts thereto, for motor vehicle registration No. KBK 714X. These documents had all been issued on the date of the arrest. The third appellant was seated in the passenger's seat of the lorry.
20. The learned trial magistrate considered their defences and discarded them for not being credible. I considered them afresh in the context of the rest of the evidence on record and found that the statements of the first and second appellants were not credible in light of the rest of the evidence on record. It is not reasonable to believe that the first appellant who purportedly had just hitched a lift and who did not know the second appellant or his so called benefactor Mr. Murira before, just happened to be the one who was holding most of the incriminating documents in his possession. This included the temporary permit for the lorry which bore his photograph but was in the name of the second appellant.
21. It is equally difficult to believe the second appellant's story that a stranger approached him to help carry goods from a lorry, but that when they got to the lorry the stranger inquired as to whether he could drive. When he answered in the affirmative the stranger obtained a temporary driving licence for him. It shall be remembered that the lorry had already been driven into no man's land across the Kenyan boarder and was headed towards Uganda when the police found it. The appellant did not find it odd that there was no mention of goods when they got to the lorry.
22. My conclusion is that their stories were clearly contrived in an attempt to extricate themselves from a sticky situation. The two stories fly in the face of the circumstances in which they were found at the time of arrest. The third appellant's story was equally contrived but in light of the fact that he was found seated in the passenger seat and did not appear to have anything else in his possession to link him to the motor vehicle or the two appellants, it is prudent to accord him benefit of the doubt. After all the duty was on the prosecution to prove their case against him beyond reasonable doubt, and not the appellant to explain his circumstances.
23. All in all therefore, the circumstantial evidence against the first and second appellants leads irresistibly to the inference that the two appellants acting in concert with others not before the court were involved in the robbery in question. I find nothing in the evidence to indicate that the fourth man whom both **PW4** and **PW5** said was a common figure at the town where he worked as a customs agent was involved in the robbery although all three appellants tried to shift all blame to him. I am satisfied that the prosecution proved their case against the first and second appellants beyond reasonable doubt and that the learned trial magistrate was right to enter a verdict of guilt against them.
24. On the sentence I find that the learned trial magistrate misdirected himself when he opted to find the appellants guilty of a lesser offence and convict them under **Section 296(1) Criminal Procedure Code**, for reasons that there was no medical evidence of the assault on **PW1** and **PW2**. The ingredients of robbery with violence as provided under **Section 296(2) Criminal Procedure Code** are that:
1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
 2. **If he is in the company with one or more other person or persons, or**

3. **If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.”**

From the evidence the robbers numbered more than one at the time of the attack and they were armed with a pistol. Even in the absence of medical evidence to prove the assault, two of the three ingredients under **Section 296(2) Penal Code** had been proved. Anyone of the ingredients above if proved will constitute the offence under the subsection.

25. However, since Miss Ndombi did not serve them with notice of intention to enhance sentence, it would be prejudicial to the appellants for the court to reinstate the rightful and lawful sentence now that their appeals were not successful.

26. For the foregoing reasons the appeal in respect of the first and second appellants is found to be lacking in merit and is dismissed. The appeal in respect of the third appellant is allowed and he is ordered to be set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **8th** day of **October 2014**.

L. A. ACHODE

JUDGE