



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NOS. 190 & 198 OF 2012

(Appeal against conviction and sentenced from the judgment of [G. MMASI, PM] dated 27.7.2012 in the Principal Magistrate's Court at Vihiga in Criminal Case No. 6 of 2009)

VICTOR MAKOKHA 1ST APPELLANT

POLLINGTON KAMILA 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The two appellants were convicted of two counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were

Count I – *On the night of 22nd and 23rd of December 2008 at Kisatiru sub-location, West Maragoli location in Vihiga District within Western Province jointly with other not before court while armed with dangerous weapons namely pangas, rungus, an axe and a sword robbed **TOM AMBOGO** of cash KShs.320/=, mobile phone make Nokia 2760 valued at KShs.65,000/=, sweater, heater belt and a pair of shoes all valued at KShs.8,170/= (Eight Thousand one hundred and seventy shillings only). And at or immediately before or immediately after the time of such robbery used personal violence on the said **TOM AMBOGO**.*

Count II - *On the night of 22nd and 23rd of December 2008 at Kisatiru sub-location, West Maragoli location in Vihiga District within Western Province jointly with other not before court while armed with dangerous weapons namely pangas (Machete), rungus (clubs), an axe and a sword robbed **EMMANUEL OTIENO** of cash KShs.60/= (sixty shillings only), mobile phone make Motorola LG valued at KShs.6,800/= (Six Thousand Eight Hundred shillings only), a wrist watch make Ballin Quartz valued at KShs.200/= (Two hundred shillings only), a jeans jacket valued at KShs.250/=, a pair of socks valued at KShs.30/=, a pair of brown leather shoes valued at KShs.1,300/- (One thousand three hundred shillings only) all valued at KShs.8,500/= (Eight thousand five hundred shillings only) and at or immediately after the time of such robbery used personal violence on the said **EMMANUEL OTIENO**.*

The appellants preferred these appeals. The 1st appellant **VICTOR MAKOKHA** relied on his grounds of appeal and written submissions. The grounds of appeal are that the trial court relied on evidence of identification yet the first report did not give the appellant's name, no identification parade was

conducted, essential witnesses were not called and that his sworn statement of defence was not properly considered. The written submissions expounds on those grounds. The 2nd appellant **POLLINGTON KAMULA** also filed written submission and relied on his grounds of appeal. The grounds are similar to those of the 1st appellant but further maintains that the trial court failed to appreciate that poor investigations were done and this made the court not to get the necessary information.

Mr. Orinda, State Counsel opposed the appeals and submitted that the appellants were found with recently stolen items which were positively identified by the victims. No good explanation was given by the appellants.

The prosecution case was based on the evidence of five witnesses. **PW1**, was **EMMANUEL OTIENO ALAO**. His evidence is that on the 22.12.2008 he went with his employer (PW4) to Vihiga at night. He was the one driving pick up registration number KAL 695 C. In the vehicle there was his employer, his employer's mother and step mother. They left the two women at Maragoli where there was a memorial ceremony and left for Khumusalaba. Shortly after leaving the place where there was the ceremony, they were stopped by three people who held something which appeared to be a gun. The attackers switched off the vehicle and took the keys. They stole personal items from PW1 and his employer including a watch, mobile phone, a jacket, a belt and clothes. PW1 and his employer were given back the keys and they went to report at Mbale police station. The following day he got information that someone was trying to unlock a phone and he was called there. Upon reaching the place he found one person wearing his shoes, jacket and socks and his phone. He was arrested and taken to Mbale police station. Further investigations led to the recovery of other items.

PW2, **ALEXANDER KIHODO NUSAVWA** was on the 22.12.2008 at Kisatiru village in Vihiga where the memorial ceremony was. His uncle Tom (PW4) went there at night with PW1 and later left. PW2 got information that his uncle had been attacked. The following day he started conducting investigations and heard that the 1st appellant was having a phone which he could not open. He met the 1st appellant who informed him that he did not have the pin number for the phone. He called PW1 who came and opened the phone using his pin number. The 1st appellant was also found wearing PW1's clothes. PW2 locked up the 1st appellant in his house and called for some people from the chief's camp. The chief went to the scene and arrested the 1st appellant. **PW3**, **AGGREY MUHELI JANDI** is a relative of PW4. His evidence is that there was memorial ceremony at his Kisatiru home and PW4 went there at night. He left at about 11.00 p.m. in his vehicle. The following day he was called to help in arresting the 1st appellant who had a phone, jacket and shoes that belonged to PW1. The chief interrogated the 1st appellant who mentioned other people.

PW4, was **TOM AMBOKO AMUNGAZA**. He is the employer of PW1 and his evidence is similar to that of PW1. On the night of 22.12.2008 they were robbed at night and he was able to identify one of the robbers using the vehicle lights as when they were being robbed the front lights were on. That person was one of the accused but he died before the case started. On the 30th of December 2008 he identified at an identification parade the deceased accused person. He was not present when the items belonging to PW1 were recovered. **PW5 HUDSON SANDAJI MAJANGA**, was the area assistant chief of Kisatiru sub-location. He was present when the 1st appellant was arrested but did not personally see the items that were recovered from him. He left the matter to the police.

The two appellants were put on their defence and in his sworn testimony the 1st appellant testified that he was arrested on the 23.12.2008 at about 5.00 p.m. at his home. He was arrested by 15 young men including PW2 who rained blows and kicks on him. He told them to take him to the police station. He was taken to the chief's office and the chief slapped him. The police went and took him to Vihiga police station. He was later charged in court. The 2nd appellant informed the court that he was arrested in his house on the 23.12.2008 by the assistant chief and he was tied with ropes and taken to Vihiga police station. He stayed there for 9 days until 2.1.2009 when he was charged in court.

The prosecution evidence does prove that PW1 and PW4 were robbed off the items as per the charge

sheet. The main issue is whether the prosecution proved its case beyond reasonable doubt. The two victims did not identify the robbers. The case is built on the aspect of recent possession of the stolen items in that the appellants were found in possession of the stolen items the following day. The record shows that no police officer testified to corroborate the evidence of the complainants. It is not clear whether what PW1 informed the court was indeed correct. There is no evidence as to whether the offence was reported at a police station. The record of the trial court shows that on the 9.4.2010 the 1st appellant asked the court to have PW1 and PW2 recalled for further cross-examination. The court granted that application. From that date no witness testified until 17.8.2011 when PW4 testified. The case was further heard on the 19.10.2011 when PW5 testified. PW1 and PW2 were not recalled. We do find that the provisions of section 200 of the Criminal Procedure Code were not complied with. Although another magistrate took over on the 27.4.2012 and the appellants agreed to have the matter proceed from where it had reached. We do find that the earlier order ought to have been vacated. No single police officer testified in this case. It is not clear whether an inventory of the alleged recoveries from the appellants was made. It is also not clear as to how the appellants were arrested. Although the evidence of PW1 and PW4 is quite elaborate, we do find that the same still leaves doubt in our minds as to whether the case was investigated. The area assistant chief testified that he did not personally see the alleged items that were found with the 1st appellant. This raises doubt as to whether the appellants were found in possession of the stolen items.

In the end, we do find that lack of evidence from the investigating officer leaves doubt in our mind as to the guilty of the appellants. We do agree with the appellants that essential witnesses were not called to testify. Ordinarily the exhibits could only be produced by the investigating officer and is not clear how the court convicted the appellants without the production of the exhibits. In essence, no exhibits were produced and if they were, then that was wrong. The court record shows that the recovered items were only marked for identification. We do find that the appeal is merited and the same is allowed. The conviction and sentence is set aside and the appellants shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 9th day of October 2013

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SAID J. CHITEMBWE

JUDGE

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GEORGE DULU

J U D G E