



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 99 OF 2010

ANTHONY BWAYO *Alias* JUMA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. D. M. Ochenja, PM in Kitale Chief Magistrate's Court in Criminal Case No. 1922 of 2008 delivered on 24th August, 2010)

J U D G M E N T

Anthony Bwayo Alias Juma (herein, the Appellant), was convicted and sentenced to suffer death by the Learned Principal Magistrate at Kitale in Criminal Case No. 1922 of 2008 in which the Appellant and four others were charged with six counts (counts 1, 2, 4, 6, 7 and 9) of robbery with violence contrary to Section 296 (2) of the Penal Code, two counts (counts 3 and 5) of gang rape contrary to Section 10 of the Sexual Offences Act and one count (count 8) of stock theft contrary to Section 278 of the Penal Code.

The Appellant was acquitted on all the counts save count six of robbery with violence in which it was alleged that during the night of 18th/19th August 2008 at [particulars withheld] Village Trans-Nzoia East District, jointly with others before Court and being armed with guns, pangas and rungas robbed H W of a mobile phone make Nokia 3410, a radio make Sonitec, a bag and a wallet containing personal identification card and a voters card all valued at Kshs. 4,650 and at the time of such robbery threatened to sue actual violence to the said H W.

The Appellant's co-accused were acquitted on all the nine counts.

Being aggrieved by this conviction and sentence on count six (6), the Appellant preferred this appeal on the basis of the grounds contained in his petition of appeal filed herein on 31st August 2010 which appeal is restricted to the said count six only thereby rendering it unnecessary for this Court to consider the rest of the counts on which the Appellant was acquitted.

The Appellant's grounds of appeal are essentially complaints relating to his conviction on the basis of the Prosecution evidence of identification which in his view was insufficient and contradictory. He also complains of the Prosecution failure to call as witnesses members of the public to support the exaggerated evidence of Pw 1 and the failure by the Learned Trial Magistrate to consider his defence thereby shifting the burden of proof to himself.

The Appellant appeared in person at the hearing of the appeal and argued his case by way of written submissions.

The Learned Prosecution Counsel, **Mr. Kimanzi**, opposed the appeal on behalf of the State/Respondent.

In his submissions, the Learned Prosecution Counsel relied on the evidence on record and contended that the Appellant's conviction on count six was based on proper evidence of identification by Pw 4 and Pw 5 and that the Appellant was pursued after the offence and arrested too soon thereafter.

The Learned Prosecution Counsel submitted that the Appellant was found in possession of a national identity card and a voters(elector's) card belonging to Pw 5 which were part of the stolen items. That, the recovery of the said items soon after the offence raised no inference other than that the Appellant was involved in the offence.

The Learned Prosecution Counsel urged this Court to find that the appeal has no merit and dismiss it accordingly.

Having considered the rival submissions by the Appellant and the Respondent, this Court, as a first appellate Court, is called upon to re-consider the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses (see, **Okeno Vs Republic [1972] EA 32** and **Achira Vs Republic [2003] KLR 707**).

In that regard, the Prosecution case was briefly that on the material night of 18th/19th August 2008, a group of about twenty (20) people armed with firearms, pangas (machete), whips and rungas (clubs) invaded[particulars withheld] village and forcefully entered the homes of the villagers who included E W (**Pw 1**), P W (**Pw 2**), J C (**Pw 3**), E S (**Pw 4**), H W (**Pw 5**), R M (**Pw 6**), M K (**Pw 7**), J W (**Pw 8**) and H C (**Pw 9**).

The group ransacked the homes and using threats and intimidations took away assorted items belonging to the respective villagers.

A Police Reservist, Thomas Kiptoo (**Pw 10**) was asleep in his house when he was awakened and informed of the robbery. He fired three gunshots from his firearm to scare away the invaders and returned to his house until the following morning when he saw a group of angry villagers on the way to the home of the Appellant whom they suspected of having been one of the robbers. He (Pw 10) joined the villagers and went to the Appellant's home where they found the Appellant. He (Pw 10) arrested the Appellant and prevented the villagers from assaulting him.

Kirwa Labat (**Pw 11**), a Clinical Officer based at the Kitale District Hospital examined R M (Pw 6) and E (Pw 4) and compiled the necessary P3 forms which indicated that the two suffered injuries during the robbery.

APC Robert Rono (**Pw 12**), received the robbery report from some of the affected villagers and was in the process given the names of some suspects who included the Appellant. Later, together with his colleague P. C. Idd Salim (**Pw 13**), were handed over suspected stolen items including a national identity card and a voters card belonging to H W (Pw 5) allegedly recovered from the Appellant's home.

Eventually, the Appellant and his co-accused were charged with the present offence among others.

In his defence, the Appellant denied the offence and stated that he was at home on the 19th February 2008 (sic) when he was confronted and beaten by a group of people who said that he was required at the local Police Station. His house was searched in the presence of a Police Reservist before he was taken to Kaptaret Police Post then Kabolet Police Post and finally Kachibora Police Station. He was later arraigned in Court for offences he did not commit.

After considering the evidence in its totality, the Learned Trial Magistrate concluded that the sixth count had been proved beyond reasonable doubt against the Appellant. In so doing, the Learned Trial Magistrate heavily relied on the evidence of H W (Pw 5) to find that the Appellant was identified at the scene of the offence as one of the robbers and that the national identity card and voters card stolen from the said W (Pw 5) were recovered in his house thereby rendering him guilty on account of the doctrine of recent possession. However, in our own assessment of the evidence we hold the view that the offence

was committed in circumstances which were difficult for a positive identification or recognition of any of the offenders. The alleged identification of the Appellant by W (Pw 5) or any other person could not be said to have been free from the possibility of error or mistaken identity.

W (Pw 5) simply stated that the robbers flashed around their spotlights and in the process he saw the Appellant. There was no indication as to the intensity of the spotlights and whether or not flashes of the spotlights were directed at the Appellant to allow a positive and unmistakable identification of him. The situation was stressful. It was highly unlikely in the circumstances for the witness (Pw 5) to have been in a position to see a group of people and positively identify one of them when there existed unfavorable conditions for proper identification.

E S (Pw 4) said that she identified five of the robbers including the Appellant with the help of a lantern lamp. Again, the intensity of the light from the lamp was not indicated and neither was it indicated how the witness was able to see and pick out the Appellant from a group of about twenty people in very stressing circumstances.

We do not think that the alleged identification of the Appellant by the aforementioned witnesses and in particular W (Pw 5) was credible and proper as found by the Learned Trial Magistrate.

The other aspect which led to the conviction of the Appellant was his alleged possession of some of the items stolen during the robbery. These items were a national identity card and a voters card belonging to W (Pw 5).

He (Pw 5) said that he recovered the said items from the Appellant's house but did not say exactly where in the house. He also said that nothing else was recovered in that house. His evidence was completely in contradiction with that of the Police Reservist (Pw 10) who was with him and others when the Appellant was found in his house and arrested.

The Police Reservist was very categorical that nothing was recovered in the Appellant's house. This meant that W (Pw 5) was not credible witness and most likely than not may have "planted" his identity card and voters card on the Appellant with a clear intention of implicating him with the offence. His evidence of the recovery of the said items while in the possession of the Appellant was clearly doubtful.

In the circumstances, there was no room for the application of the doctrine of recent possession against the Appellant. While commenting on this doctrine, the Court of Appeal in the case of **Isaac Nganga Kahiga alias Peter Nganga Kahiga Vs. Republic Criminal Appeal No. 272 of 2005 (unreported)**, held that:-

"It is trite law that before a Court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses."

It is clear from the aforementioned observation that it was erroneous for the Learned Trial Magistrate to rely on the discredited evidence of W (Pw 5) to hold that the Appellant was found in recent possession of a national identity card and voters card stolen from the said W. There was no credible proof of possession of the said items by the Appellant.

In sum, we must and hereby do find that the conviction of the Appellant by the Learned Trial Magistrate on the basis of all the evidence availed by the Prosecution was not sound and proper. Consequently, we allow the appeal by quashing the conviction and setting aside the sentence imposed upon the Appellant

who shall therefore be set at liberty unless otherwise lawfully held.

Ordered accordingly.

(Delivered & signed this 5th day of November, 2013).

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellant:

Respondent: