REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 41/42 OF 2010

ANTHONY JUMA OSUNDWA ….....}

ISAAC NYONGESA .....} APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. D. M. Ochenja, PM in Kitale Chief Magistrate's Court in Criminal Case No. 3072 of 2006 delivered on 9th April, 2010)

J U D G M E N T

This appeal arises from the decision and judgment of the Principal Magistrate at Kitale in Criminal Case No. 3072 of 2006 in which the appellants **Anthony Juma Osundwa** (appellant one) and **Isaac Nyongesa Abdul** (appellant two) were convicted and sentenced to death for robbery with violence contrary to Section 296 (2) of the Penal Code.

It was alleged that on the night of 13th September 2006 at Kabolet village Trans-Nzoia District, jointly with others while armed with dangerous weapons namely iron-bars, a stone and pangas robbed Teresina Mary Irene Masaba of assorted items valued at Kshs. 120,000 and immediately before such robbery used actual violence to the said Teresina Mary Irene Masaba.

Being dissatisfied with the conviction and sentence, the appellants filed separate appeals which were herein consolidated and heard together.

The grounds of appeal are contained in the petitions of appeal filed herein by the two appellants respectively. These are more or less similar and centered on the fact that the appellants were convicted on the basis of evidence which was insufficient and devoid of credibility.

Additional grounds were included in the second appellant's written submissions.

The appellants appeared in person at the hearing of the appeals and relied on their written submissions in support of their case.

The Learned Prosecution Counsel, **Mr. Chelashaw,** appeared for the State/Respondent and opposed the appeals by submitting that although the appellants were not identified, the second appellant was found in possession of property which was stolen during the robbery and which belonged to Pw 1. Further, Pw 2 and Pw 3 saw the second appellant with a bicycle while in the company of another person who entered a maize plantation and emerged from there carrying a bag containing stolen items. Pw 2 and Pw 3 became suspicious and questioned the second appellant who did not give proper explanation. He was apprehended and in the process led to the recovery of additional stolen items and the arrest of the first appellant who was found with a stolen panga (machete).

The Learned Prosecution Counsel contended that the Learned Trial Magistrate rightly found that the appellants were in recent possession of stolen property without proper explanation of their possession thereof. They were then convicted.

The Learned Prosecution Counsel further contended that it was not a mere coincidence that the second appellant led to the arrest of the first appellant and the recovery of additional stolen items. That, the ingredients of the charge were established against the two appellants.

Our duty after considering the submissions by both sides is to re-visit the evidence and draw our own conclusions having in mind that the trial Court had the advantage of seeing and hearing the witnesses.

Briefly, the prosecution case was that on the material night, the complainant **Mary Teresa Masaba (Pw 1),** was asleep at her home when she was awakened by her barking dogs. Thereafter, she noted torch flashes and movements outside her house. She then heard noises and knew that she was under attack. Immediately thereafter, her house door was forced open and a group of four people entered therein armed with pangas. They tied her hands and forced her to sit down. They demanded her mobile phone and money before terrorizing and tying her to a bed. They left the house after stealing assorted items including a mobile phone, a pair of spectacles, utensils, a briefcase, clothes, radio cassettes, electric irons, a panga and a paraffin stove among others.

The complainant testified that with the help of light from the torches used by the attackers, she was able to see and identify them. She said that the two appellants were part of the robbers.

After the matter was reported to the Police, the second appellant was arrested while in possession of some of the items stolen from the complainant including a stove, a sufuria (cooking pot), two shirts and dress, a packet of candles and a radio.

The second appellant implicated the first appellant who was also arrested and found with additional items allegedly stolen from the complainant. These included a panga, an iron bar and a pair of shoes.

The clothes, radio and candles were recovered by **James Mogaka Ogise (Pw 2)** and **George Wanjala (Pw 3)** from the second appellant after they had became suspicious of him and another when they saw them enter a farm (shamba) and remove from therein a sack. They (Pw 2 and Pw 3) insisted on inspecting the sack and it was then that they found the aforementioned stolen items. This was on 15th September 2006, a day or two after the material robbery.

A Clinical Officer at Kitale District Hospital **Nicholas Jimmy Peter Simiyu (Pw 4),** examined the complainant after the robbery and confirmed that she suffered injuries which were classified as harm. Thereafter, he compiled and signed the necessary P3 form.

P. C. Josephat Mwaura (Pw 5) of C. I. D. Kitale investigated the case and in the process was handed over the second appellant and the items found in his possession. He (Pw 5) questioned the second appellant who implicated the first appellant. He (Pw 5) went in search for and arrested the first appellant who was found in possession of a panga stolen from the complainant and a pair of shoes whose sole marks resembled those found in the complainant's homestead. Also recovered from the first appellant was an iron bar said to have been used in the robbery.

After completing his investigations, P. C. Mwaura (Pw 5) preferred the present charge against the appellants.

Both appellants denied the offence and in his defence, the first appellant indicated that he was asleep at his home on the material night of the robbery. On the following day, he learnt that the complainant had been attacked and robbed. He then proceeded to the complainant's home together with others. She was his neighbour and she said that she was attacked by people she could not identify and had already reported to the Police. He was later approached by Police Officers in his home. He was arrested together with his wife for being in possession of 10 litres of chang'aa. His panga and pair of shoes were taken away. He was later charged with the present offence while his wife was set at liberty.

As for the second appellant, he stated in defence that he had been sent by his employer one Peter Macharia to take money to his wife at a place called Maili Nane. On the way, his bicycle developed a puncture and he decided to take tea in a nearby hotel. While there, he was approached and questioned by two men who slapped and arrested him. He was taken to a Police Station where he was interrogated and thereafter bundled into a Police vehicle with luggage he knew nothing about. He was assaulted by a Police Officer and his mobile phone taken away including his money. He was taken to the complainant who did not know him. Later, the present charge was preferred against him.

The Learned Trial Magistrate considered the foregoing evidence and concluded that the offence of robbery with violence had been established against the two appellants beyond reasonable doubt. In so doing, the Learned Trial Magistrate heavily relied on the doctrine of recent possession as there was no proper and reliable direct evidence of identification against the appellants.

After reviewing the evidence, we agree that there was insufficient and unreliable evidence of identification against the appellants and therefore, the trial Court had to rely on the circumstantial evidence based on the doctrine of recent possession to convict the appellants. Indeed, the ingredients of robbery with violence were duly established by the prosecution and all that remained was the identification of the appellants as the offenders. From the evidence adduced by the complainant (Pw 1) it was apparent that the conditions favourable for identification were non-existent at the scene such that any purported identification of the appellant by the complainant with the aid of light from the torches in the possession of the offenders was not free from the possibility of error or mistaken identity. Their linkage to the offence was the alleged possession of some of the items stolen from the complainant thereby raising the presumptions that they were involved in the offence. They however, denied their involvement and indicted that they were at their respective homes at the material time of the offence.The second appellant further indicated that he was never found in possession of the complainant's stolen items and the first appellant further indicated that what was found in his house belonged to him and not the complainant.

As was held by the Court of Appeal in the case of **Isaac Wanga Kahiga Alias Peter Nganga Kahiga Vs Republic Criminal Appeal No. 272 of 2005**, the doctrine of recent possession presupposes that the alleged possession must be positively proved by proving that the stolen property was found with the suspect and that it was positively identified by the complainant and was recently stolen from him or her. Further, there must be acceptable evidence with regard to the recovery of the alleged stolen property from the suspect.

In this case, the property found in the possession of the first appellant after being implicated by the second appellant was a pair of shoes, a panga and an iron bar. Other than the panga, the complainant did not lay claim on the other items. The first appellant contended that the panga belonged to him. The complainant also indicated that the panga belonged to her.

The burden of proof in the circumstances lay with the complainant and not the first appellant as implied by the Learned Trial Magistrate in his judgment.

The complainant, did not in our view, discharge that burden. She did not prove beyond reasonable doubt that the panga belonged to her and only her especially if consideration is given to the fact that a panga is a common item found in almost all households in rural areas of this country.

The element of ownership necessary for the application of the doctrine of recent possession was not established by the prosecution in favour of the complainant and against the first appellant. Therefore, we must find that the conviction of the first appellant was not sound and proper.

However, with regard to the second appellant, his possession of items recently stolen from the complainant was credibly and sufficiently established by the complainant (Pw 1) as well as Pw 2 and Pw 3 who apprehended and recovered the said items from the second appellant after being aroused by his suspicious behaviour. At that time, the second appellant was not alone. He was with an accomplice who managed to talk himself to freedom. The items were positively identified as belonging to the complainant. The second appellant failed to give a satisfactory explanation of his possession thereof. In his defence, he denied possession and implied that the items were "planted" on him by the Police. The said defence was however discredited by the very strong prosecution evidence of his possession of the items. His conviction by the Learned Trial Magistrate was therefore sound and proper.

In the end result, the appeal by the first appellant is hereby allowed to the extent that his conviction by the Learned Trial Magistrate is quashed and the sentence imposed upon him set aside. He shall be set at liberty unless otherwise lawfully held.

The appeal by the second appellant is devoid of merit and is hereby dismissed.

Ordered accordingly.

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

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellants: ….....

….....

Respondent: ….....