REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 37 & 38 OF 2011

NICHOLAS KAVOI MUNYOKI.....1ST APPELLANT

JOSPHAT MUTUI MUTHUI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence in Criminal Case No. 1125 of 2009 of the Principal Magistrates Court at Kitui (Hon. B.M Kimemia SRM) dated 16th February 2011)

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J U D G M E N T

These two appeals Nos. 37 of 2011 and 38 of 2011 were consolidated and heard together, as they arose from the same incident and from the same trial in the subordinate court. The 1st appellant Nicholas Kavoi Munyoki, was the 1st accused in the lower court while the 2nd appellant Josphat Mutui Muthui, was the 2nd accused.

The two appellants were jointly charged with three counts of robbery with violence contrary to section 296 (2) of the Penal Code. In the alternative, they were jointly charged with one count of handling stolen goods. In addition the 2nd appellant was separately charged in the alternative with handling stolen goods.

The particulars of count 1 were that on 18th September 2009, at about 3.00 a.m. at Kathiani area along Kitui-Matuu road at Kanyonyo Location, Kitui District, jointly while armed with dangerous weapons namely a panga, a Somali sword, and a home-made explosive detonator, a bunch of sharp iron rods and torches robbed Peter Kyalo Mulwa of one mobile phone make Nokia 1200 valued Kshs.2,700/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Kyalo Mulwa.

In count 2, they were jointly charged that at the same time and place, robbed Patrick Ndunda Wambua of cash Kshs.500/=, one mobile phone make Nokia 1112 valued at Kshs.2,700/=, one black bag valued at Kshs.800/=, one grayish sweater and assorted motor vehicle spanners all valued at Kshs.3,800/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Patrick Ndunda Wambua. In count 3, they were charged jointly that at the same time and place they robbed Mwendwa Kakethe, of one mobile phone Nokia 1200 valued at Kshs.2,500/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Mwendwa Kakethe.

In the alternative, they were charged jointly that on the same date at 10.30 a.m. at Kangonde village, Kanyonyo Location in Kitui District otherwise than in the course of stealing dishonestly had in their possession one mobile phone Nokia 1112, valued at Kshs.2,700/=, one black bag valued at Kshs.800, one greyish sweater, Kshs.800/= and assorted motor vehicle spanners all valued at Kshs.3,300/= the property of Patrick Ndunda Wambua, knowing or having reason to believe them to be stolen goods or unlawfully obtained. The 2nd appellant was charged alone with an alternative count that at the same time and place, he handled one Nokia phone 1200 valued at Kshs.2,700/= the property of Mwendwa Kakethe, knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

They pleaded not guilty to all the charges. At the end of the trial, the learned trial magistrate found as follows:-

"On count one, the complainant Peter Kyalo was never called to testify hence this court (sic) has not been proved beyond reasonable doubt. I therefore find the 2 accused persons guilty on count 1 and count 2 and I consequently convict them both under section 215 CPC."

The learned magistrate went ahead to sentence both of them to death for count 2 and held in obeyance the sentence in count 3. We will observe straightaway, that the learned magistrate, having found that count 1 was not proved, it was an error to convict on the same.

Being dissatisfied with the convictions and sentences, the appellant filed their separate appeals. Before the hearing of their appeals, the court granted them leave to file amended grounds of appeal and submissions, which they did. Their grounds of appeal are similar, and are that the charges were defective, that they were not asked to plead to the charges, that the doctrine of recent possession did not apply, that crucial witnesses were not called to testify, that their defences were dismissed without reason.

At the hearing of the appeals, the appellants relied on their written submissions, which we have perused.

The learned State Counsel, Mr Mwenda, opposed the appeals. Counsel stated that the victims of the robberies were in a vehicle travelling on the Kitui road at 3.45 a.m. at night when the vehicle got two punctures. They were then attacked by unknown assailants who were armed with pangas, simis and metal rods. They were injured and items and money robbed from them. That police were soon called to the scene, but the assailants had already gone. However, merely six (6) hours later the appellants were arrested at a hotel and police recovered the robbed items which were produced in court as exhibits. The metal rods were also recovered and produced in court as exhibits. Counsel emphasized that the learned magistrate relied on the doctrine of recent possession and also the proximity from the scene to the place of arrest to convict the appellants. Counsel lastly, submitted that the appellants did not give a reasonable explanation on how they came to be in possession of the items.

This is a first appeal. As a first appellate court, we are duty bound to re-evaluate the evidence afresh and come to our own conclusions and inferences, giving allowance to the fact that we did not have the opportunity to see the witnesses testify to determine their demeanor. This position has been repeated in several decided court cases. It suffices to cite the case of **Okeno –vs- Republic (1972) EA 32**. We will deal with the technical issues first.

The appellants complain that the charges were defective. The charge they have a complaint with is the alternative charge of handling stolen goods in which the two were charged jointly. Nothing arises from that charge. It was an alternative charge. None of them was convicted on the same. We dismiss this ground.

The appellants complain that their pleas were not taken. In other words, that they did not plead to the charges.

We have perused the record, both original and typed. On 2nd October 2009 each one of them is recorded to have pleaded to the respective main counts and the alternative charges stating **"not true"**. Pleas of not guilty were entered. Thereafter, a full trial was held, to which each of the appellants defended himself. Though what is recorded in the typed record before the pleas is that – **"Both accused warned of the sentence for the charges herein,"** what is in the original file includes a stamped record **"that the substance of the charge and every element has been read and stated by the court to the accused in a language he understands".**

In our view, the pleas were properly taken. However, we will discourage trial courts from using stamps, as such stamps can be misused, and the authenticity of the proceedings could easily become a matter for dispute.

Both the application of the doctrine of recent possession and failure to call essential witnesses, go to the adequacy of evidence to sustain the convictions. The learned trial magistrate relied heavily on the doctrine of recent possession of stolen items to convict both appellants. This was logical, given the fact that the appellants were not identified by any of the victims at the scene of the alleged robbery. They were also not chased and arrested without being lost sight of. They were said to have been found in possession of the items robbed from the victims about 6 hours after the robbery. In **Arum –vs- Republic (2006) 1 KLR 233, at page 237** the Court of Appeal stated as follows with regard to the application of the doctrine of recent possession:-

"In our view, before a court of law can rely on the doctrine of recent possession as a basis for 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, secondly that; that property is positively the property of the complainant; thirdly that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as of time, as has been stated over and over again, will depend of the easiness with which the stolen property can move from one person to the other."

Indeed, the appellants were said to have been found in possession of the items, that is a bag belonging to Kyalo, a Nokia phone 1200 belonging to Patrick Ndunda, and spanners belonging to Patrick Ndunda. PW4 Sgt. AP Hussein Ndiba, was the person who was called to the hotel where he found the appellants lying on the floor, and were said to be in possession of the items. However, none of the members of the public who arrested the appellants and found them in possession of the items, was called to testify in court. In our view, the failure to call at least one of the members of the public who claimed to have arrested the appellants with the stolen items, significantly weakened the prosecution case. The evidence of PW4 Hussein Ndiba, became hearsay evidence and cannot be relied upon to establish possession and found a conviction in a criminal case.

The learned magistrate clearly relied on the doctrine of recent possession when he stated thus in the judgment:-

"However in this case, I find that the 2 accused must have been the thieves because they were found with the stolen items, together with the offensive weapons especially the metal rods which are the cause of the 2 tyre punctures soon after the offence and neither of the 2 accused gave any reasonable explanation of how they had the possession of the items stolen about 6 hours after the robbery."

In our view, because none of the people who restrained the appellants was called to testify, there was no direct evidence regarding the alleged possession. What was there regarding the alleged possession was merely hearsay evidence. The learned magistrate erred in relying on the hearsay evidence to found the convictions.

Though the appellants claim that the learned magistrate did not consider their defences, we do not agree. The appellants gave sworn testimony. The learned magistrate considered the defences and did not believe the same because the appellants were arrested within close proximity of 50 kilometers, 6 hours later, and that they were found in possession of the stolen items. That was the trial court's finding. It cannot therefore be said that the defences of the appellants were not considered by the learned magistrate.

To conclude, we find that the convictions of the appellants were not safe. The convictions cannot stand. We allow the appeals, quash the convictions of both appellants on all counts and set aside the sentences. We order that the appellants be set at liberty unless otherwise lawfully held.

Dated and delivered at Machakos this **17th** day of **July** 2012.

Asike - Makhandia **George Dulu**

Judge **Judge**

In presence of:
Nyalo – Court clerk
Appellant present in person