REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 232 & 468 of 2007

AGNES MUENI MUTUKU ...…….....……1ST APPELLANT

DAVID GITUNDU NGIGI…….....…….2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 12 of 2006 in the Principal Magistrate's Court at Kikuyu – Mr. K. W. Kiarie (Ag. SPM) on 13/04/2007)

JUDGMENT

1. **Agnes Mweni Mutuku** and **David Gitundu Ngugi** the appellants herein, were convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** It had been alleged that on 10th April 2006 at Gitaru in Kiambu District of the Central Province jointly with others not before court, they robbed David Mwangi Waweru of a motor vehicle make Toyota Corolla, Registration No. KAR 784 Q, a Motorolla C113 Mobile phone, a pair of shoes and kshs.650 all valued at Kshs.414,150/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said David Mwangi Waweru.

2. The prosecution case was that the complainant was hired to transport some people who later drugged him and stole the motor vehicle and other property listed in the charge sheet from him. The two appellants were subsequently arrested at Birongo in Kisii area and charged.

3. The appellants filed their appeals relying on numerous grounds which have been amalgamated and compressed as follows:

1. ***That the prosecution had not proved the case beyond reasonable doubt against the appellant****;*

2. ***The conviction was based on a single witness without corroboration;***

3. ***That the appellant's conviction was based on mere speculation and conjecture by making a far fetched inference of his guilt;***

4. ***The learned trial magistrate failed to consider the defence case adequately and to give proper or any reasonable grounds for rejecting the appellant's defence from the evidence adduced;***

5. That there were material contradictions, discrepancies and inconsistencies in the prosecution case;

6. That the learned magistrate acted as a prosecution witness, by putting forward his fanciful theories and reasoning;

7. That the trial court failed to consider the evidence as a whole before making a guilty finding against the appellant;

8. That the learned trial magistrate erred in the manner in which he interpreted the law applicable and the evidence adduced against the appellant in the circumstances of the case;

9. That PW1 was not a credible witness as no robbery had taken place and that he had all reasons of cooking-up this case to cover himself.

10. That his defence was not challenged or investigated by prosecution and yet it offered a candid explanation as to how the said motor vehicle came into his hands;

11. That the trial court judgment does not tally with the evidence adduced therefore his conviction was not safe.

1. When the appeal came up for hearing on 9th October 2012 however, Miss Maina the learned State Counsel conceded the appeal on behalf of the state even before Mr. Nzioka learned counsel for the 1st appellant, and Mr. Ondieki learned counsel for the 2nd appellant urged their respective cases. Her reasons were that the identification of the two appellants was not safe because there were no lights where the robbery took place.

2. For reasons that the appeal had been conceded, the learned counsels for the appellants agreed with the learned state counsel and did not argue their respective appeals. Mr. Nzioka for the 1st appellant however added that the appellant's defences had not been considered in the judgment, while Mr. Ondieki for the 2nd appellant pointed out that the trial had commenced in the lower court, without the arresting officer having recorded his statement. He agreed with the learned state counsel that the identification was not free from error, and that the defence statement had not been mentioned in the learned magistrate's analysis.

3. We have nonetheless scrutinized and reassessed the evidence on record afresh as is required of us, as the first appellate court to make our own findings and draw our own conclusions. In so doing we were alive to the fact that we neither saw nor heard the witnesses as they testified.

4. In our analysis two issues emerge for determination in this appeal. These are whether the doctrine of recent possession is applicable in the circumstances of this case and whether the identification of the appellants was sound, enough to form a basis for conviction.

5. In considering the evidence of identification we recalled the Court of Appeal decision in the case of:

JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212 in which the court stated that:

"***A careful direction regarding the conditions prevailing at the time of identification and the length of time for which the witness had the accused person under observation, together with the***

need to exclude the possibility of error was essential."

We also referred to the case of **WAMUNGA V REP CR. APP. NO. 20 OF 1989[[1989]KLR PG.424,** to which we were referred to by Mr. Ondieki for the 2nd appellant. Therein the Court of Appeal held *inter alia* that:

"***Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

6. In the case before us no evidence was led as to the manner of lighting at Nginyo Towers where the complainant picked up his passengers, or at Gitaru where he was attacked. The record does not indicate how long the appellants were exposed to the witness and whether, while in the taxi enroute to Gitaru he was in any position to observe their faces.

7. The record does indicate that he did not know his assailants before the attack, and that he did not give their descriptions to the police officers when he reported the robbery. For the foregoing reasons we agree with the learned state counsel that identification was not sound.

8. We note from the evidence however, that the two appellants were arrested a day after the complainant was robbed of the car in question, and that at the time of arrest they were in actual possession of the said motor vehicle. We therefore tested the evidence before us to establish whether it supported a finding under the doctrine of recent possession.

9. The central issue here is that the appellants in this case could only have been correctly convicted on the application of the doctrine of recent possession. The way this doctrine applies is that if an accused is proved to have been found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, the Court is entitled to infer that he/she stole them, or, in a proper case, that he/she is guilty of some other offence.... (See **R v GENTLEMAN 1919 CPD 245; THE SOUTH AFRICAN LAW OF EVIDENCE** By Hoffman & Zeffer (4th ed) (Butterworths) at 605-6).

10. Issues that must be considered before a court can rely on the doctrine of recent possession as a basis for conviction in a criminal case were set out in the case of **Arum vs Republic 85 of 2005 KLR [2006] Vol. I Pg 233**. Before a court can rely on the doctrine of recent possession it must be established that:

(a)That the property was found with the suspect;

(b) ***That the property was positively the property of the complainant;***

(c) ***That the property was stolen from the complainant;***

(d) ***That the property was recently stolen from the complainant.***

2. ***The proof as to time will depend on the easiness with which the stolen property can move from one person to another.***

3. In order to prove possession there must be acceptable evidence as search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot suffice, no matter from how many witnesses."

1. In **Abdalla Juma Okengo and another vs. Republic cr. App 50 & 51 of 2009** (unreported), theCourt of Appeal sitting at Kisumu applied the doctrine of recent possession where the complainant was robbed at 10 p.m. and the goods found in the possession of the appellant at 3.00 a.m. the same night. The court held that it was improbable that the goods had changed hands at night.

2. In the case before us CPL Josephat Getari Chacha, **PW5** testified that on 11th April 2006 he was at Birongo in Kisii. At about 8.30 p.m. he and other officers were on patrol, when they intercepted motor vehicle registration No. KAR 784 Q while it was being driven away from where it had been parked the entire day. It was being driven by the second appellant who was in company of the first appellant. Since **PW5** had information that the motor vehicle had been stolen and that a market for its sale was being sought, he arrested the two occupants.

3. He told the court that the appellants said they had come from Nairobi. He denied that the motor vehicle had any goods in it. When he searched it, he found a paper with some phone numbers on it, and when he called one of those numbers, it was answered by the owner of the motor vehicle.

4. The first appellant denied the offence in her defence, and told the court that she was arrested at Birongo in Kisii by police on beat patrol, as she looked for a hotel where she could eat her dinner. The police did not believe her when she said that she was a trader dealing in clothes and that she was waiting for her cargo of clothes.

5. The 2nd appellant told the court that he is a broker who deals in chang'aa and bhang. He admitted that on 10th April 2006 he hired the motor vehicle from the complainant but that contrary to the complainant's testimony, he was not going to Gitaru but needed the car to go to Kisii and bring back a haul of bhang. The 2nd appellant testified further that **PW1** panicked when the motor vehicle developed mechanical problems and he could not return it by 6.00 a.m. the next morning as agreed. **PW1** therefore reported the motor vehicle stolen to save himself, because he did not want his employer to know about his dealings with the 2nd appellant.

6. Upon analysis, the testimonies of the two appellants appear contrived and difficult to believe. It is not clear why police officers who did not know the 1st appellant and who bore her no grudge, should pluck her off the street in Birongo and frame her for an offence as serious as this, for something she did not know anything about.

7. We do respectfully agree with the learned trial magistrate who stated that:

"***This defence is clearly an afterthought as she never challenged the arresting officer with these facts: From the evidence on record, there is no explanation as to why a police officer would implicate her with such a serious offence."***

8. The 2nd appellant testified that indeed he was arrested with the motor vehicle but that he was not driving it. That the driver of the motor vehicle fled on seeing the police. He also testified that he had already loaded his haulof bhang ready for transportation to Nairobi, and that he had hired the motor vehicle from **PW1**.

9. PW5 who arrested him in Birongo and recovered the stolen motor vehicle made no mention of a haul of bhang, found in the motor vehicle at the time of recovery. On cross-examination the officer maintained that the motor vehicle had no goods in it. More importantly, he testified that the 2nd appellant was the one driving the motor vehicle while the 1st appellant was the passenger. There was no third person whom the police failed to arrest because he ran away. **PW2,** the owner of the motor vehicle corroborated the evidence of the complainant that he was his employee as a taxi driver and that he found his driver at the police station at Kikuyu a day after the robbery. According to **PW2, PW1** appeared intoxicated. This would corroborate the testimony of **PW1** that he had been drugged.

10. Holding the circumstances of the case before us to the test in **Arum v Republic** (*supra*), we are satisfied that the motor vehicle registration No. KAR 784 Q was found with the suspects and that it was the property of **PW2** who had put it in the possession of the complainant, his driver. We find that the property had been recently stolen from the complainant, since it was stolen the evening before it was recovered.

11. We also, are of the view that a motor vehicle is a commodity of such nature and value as not to render it capable of being easily passed from person to person.

12. After a careful, analysis and re-evaluation of the evidence on record, we accept the version of facts as tendered by the prosecution, as being the correct and honest version of what transpired. We reject the defence testimonies as being contrived.

13. The upshot of our analysis is that the complainant was robbed of the motor vehicle registration No. KAR 784 Q by a gang of people numbering 4. Robbery with violence under **Section 296(2)** of the **Penal Code** is proved if:

"the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

Since there were four assailants, one of three sets of circumstances upon which the offence of robbery with violence may be proved was satisfied. We find that the conviction was properly entered against each of the two appellants.

For the foregoing reasons we uphold the convictions and dismiss the appeals.

SIGNED DATED and **DELIVERED** in open court this ***6th day*** of ***November*** **2012.**

F. A. OCHIENG
JUDGE

L. A. ACHODE
JUDGE