



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Criminal Appeal 28 & 29 of 2007

HENRY OKWIRI OPIYO 1ST APPELLANT

ASMAN IBRAHIM NALIANYA 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G E M E N T

The two appellants were charged with the offence of Robbery with Violence contrary to **section 296 (2)** of the Penal Code. They were also charged with handling suspected stolen goods contrary to **section 322 (2)** of the Penal Code. They were found guilty of the alternative charge of handling suspected stolen property and were each sentenced to serve 7 years imprisonment.

The particulars of the alternative charge were that the Appellants on 16th day of November, 2005 at Mumias Township, Ekero sub-location in Mumias District within Western province otherwise than in the cause of stealing dishonestly received or retained two shirts, two long trousers, two pairs of shoes and one bag knowing or having reason to believe them to be stolen goods.

The Appellants filed similar grounds of Appeal. These are that:-

- ***The appellants pleaded NOT GUILTY***
- ***Prosecution evidence was full of inconsistencies***
- ***Investigation officer's evidence is that the exhibits were recovered from unknown people***
- ***The sworn defence was not evaluated***
- ***Sentence is harsh and excessive.***

- *Some witnesses were not called for cross-examination.*

The first appellant, Henry Okwiri also filed written submission

where he contends that the doctrine of recent possession did not apply, the prosecution evidence was contradictory, the Coram was not properly indicated and that in some instances he did not attend the hearing.

Mr. Karuri, learned State Counsel opposed the appeal. He submitted that the complainant, PW1, was attacked at 10.00 p.m. and the appellants were arrested shortly after the robbery. They were found with a bag which had the stolen items and were immediately taken to Mumias Police Station.

The prosecution evidence was that on 16th November, 2005 at about 10.00 p.m. **PW1, EDOW MURIMI MBUNGU** was being carried on a bicycle from Mumias to Ekeru when a gang of three people emerged. He was hit with a rungu and he fell down. He was robbed of his bag, money, phone and clothes. He was left with only socks and underwear. He could not identify the attackers.

PW3, Geoffrey Omiyo was the one carrying PW1 on a bicycle. He testified that they were attacked near Gospel Church. The attackers snatched PW1's bag. He went for his fellow boda boda operators and went back to the scene. They found the two appellants who had PW1's bag and they arrested them.

PW2 Ahmed Hassan who is also a boda boda operator took PW1 to Mumias Police Station while PW1 was wearing socks and underwear.

PW1V, was police officer **ZUHURA YASMIN**. On 16th November 2005 she was at the Mumias police station when PW1 went to report that he had been robbed. She booked the report and took PW1 to St. Mary's Hospital for treatment. On the way they met the appellants who had been arrested. They had the complainant's bag which contained his properties. She re-arrested the appellants and charged them. The complainant was able to identify the recovered properties as his.

In their defence, the 1st appellant Henry Okwiri testified that he used to stay at St. Peters area in Mumias. On 26th November, 2005 he went to Kakamega to see second hand clothes and went back to his place of work at Mumias. He entered Cheers bar in Mumias at about 5.30 p.m. and later decided to go home with a female companion. On the way he met a group of people and he was hit on the head. He lost consciousness and found himself in the police cells. He was taken to Matungu dispensary.

The 2nd Appellant, Asman Ibrahim testified in his defence that he is a hawker. On 16th November, 2005 he boarded a vehicle at Shianda and alighted at Ekeru. He then decided to walk to town when he was arrested by several people who asked him to identify himself. He was beaten until he lost consciousness and recovered at the police station. The police vehicle came to the place where he was being assaulted and arrested him.

The appellants contend that the evidence of PW1 and PW3 was not truthful and was full of inconsistencies. PW1 was the complainant who was robbed. He was being carried on a bicycle by PW3 when he was hit and fell down. PW1 was able to identify his items after they were recovered. PW3 reported to his fellow Boda boda cyclists who went back to the scene and arrested the appellants. The only difference in the testimony is that PW3 referred to the complainant as Okwiri, but that is the name PW3 was given by the complainant. This discrepancy does not vitiate the entire evidence as to how PW1 was robbed while being carried on a bicycle by PW3. The complainant's items were recovered a few minutes after the robbery. Ground two of the Petition of Appeal fails as there is no inconsistencies in the evidence.

The appellants contend that PW4, the Investigating officer testified that she recovered the stolen items from unknown person. That unknown person was not called to testify. I do find this ground of Appeal to be unfounded. The record shows that PW4 testified that when they reached Full Gospel Church they

found the two appellants had been arrested. They had a bag which had the complainant's property. There was also a panga. I do not find anywhere on the record indicating that PW4 stated that the stolen items were recovered from unknown persons. This ground of Appeal also fails.

The appellants further contend that their defences were not considered. In page two (2) of the judgement the trial magistrate considered the defence evidence and found that the accused were arrested with the complainant's goods.

The other grounds of Appeal are that the appellants pleaded not guilty, they were denied their right to cross-examine other vital witnesses and that the sentence is harsh and excessive. The record does not show that the burden of proof was shifted to the appellants. The prosecution called four witnesses in support of its case and the other vital witnesses who were not called to testify are not indicated by the appellants. The maximum sentence for the offence of handling stolen property is fourteen years. The appellants were sentenced to serve seven years. The sentences is within the law.

The 1st appellant also raised the issue of the doctrine of recent possession and defect in the proceedings. I do not find any relevant material that can assist the 1st appellant on the issues raised in his written submissions. The prosecution closed its case on 21st May 2006. Ruling was read on 7th June, 2006 and the appellants were put on their defence. Even if the quorum did not give a breakdown of those present, it is clear that the appellant was present in court as it is the same date when the appellant gave his sworn defence. That is 7th June, 2006.

The magistrate who conducted the trial is not the one who wrote the judgement. However, the appellants did state that the matter could proceed with the judgement. The requirements of section 200 were therefore complied with.

The appellants were arrested on 26th November, 2005. The judgement was delivered on 22nd February, 2007. This was a period of less than two years when the appellants were in custody. When sentencing, the trial court considered the duration the appellants were in custody. I do not find the need to reduce the sentence as the same is within the law and not excessive given the circumstances of the case.

In the end, I do find that this appeal has no merit and the same is disallowed.

Delivered, Dated and Signed at Kakamega this 4th day of November, 2009

SAID J. CHITEMBWE

J U D G E