



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII Criminal Appeal 194B & 196B of 2008

RICHARD OMARI NYACHOTI.....1ST APPLICANT

HARUN OMBATI NYAMWARO.....2ND APPLICANT

-VERSUS-

REPUBLICRESPONDENT

J U D G M E N T

The appellants were convicted of robbery with violence contrary to *section 296(2) of the Penal Code* in Counts 1 and 2 and assault causing actual bodily harm contrary to *section 251 of the Penal Code* in Count 3 by the Senior Resident Magistrate Keroka who sentenced them to death. The particulars of Count 1 were that on 9/7/2008 at Matutu sub location in Masaba District within Nyanza Province, while armed with dangerous weapons namely panga and knife, they jointly robbed Richard Simanto Nyabayo (PW1) of his two mobile phones make Nokia 1110, generator make tiger, clothings, bicycle and cash Kshs. 7500/= all valued at Kshs. 34,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said PW1. In Count 2 it was alleged that during the same incidence the appellants robbed Evaline Bonareri Simanto (PW3) of Kshs. 450/= and at or immediately before or immediately after the robbery used actual violence on PW3. In Count 3 the particulars were that during the incident they unlawfully assaulted Fela Simanto Gesare (PW2) and occasioned her actual bodily harm. The appellants faced the alternative charge of handling stolen goods contrary to *section 322(2) of the Penal Code*, that on 11/7/2008 at Keroka township in Masaba District within Nyanza province otherwise that in the course of stealing they jointly dishonestly received or retained one generator make tiger worth Kshs. 8000/= the property of PW1 knowing or having reason to believe it to be stolen or unlawfully obtained.

The appellants were aggrieved by the convictions and sentence and preferred this appeal which they presented in person. Mr. Kemo for the Republic opposed the entire appeal.

The facts of this case were that PW1 and PW3 are husband and wife and PW2 is their class eight daughter. They were at home on 9/7/2008 at 9.p.m. PW2 was watching T.V. in the sitting room and PW3 and PW2 wanted to go and sleep. One had to apparently go outside to get to the bedroom. From the sitting room PW3 tried to open the door to go outside to the bedroom but was met with resistance. Two men, both strangers, came in with pangas, knife and metal rod. The house was lit by electricity which was on. The attackers remained in the house until about 3 a.m, leaving the family each tied. They had assaulted PW1, PW2 and PW3 and taken a lot of items which included mobile phones, money, radio, bed sheets, bicycle and generator make tiger. The witnesses said they saw and identified each attacker well as there was light and the incident took a long time. After the attackers left PW2 untied herself and untied PW1 and PW3. They made noise and neighbours came. The incident was reported to Keroka police station next day after the complainants had received treatment at Borabu District Hospital. On

11/7/2008 the appellants were arrested by police Constable Ahmed Rashid (PW4) of Keroka Police Station who stated he found them wanting to sell the tiger generator. He took them to the police station where they refused to take part in identification parade that had been arranged by Chief Inspector Mwenda Meme (PW5). The complainants testified that when they saw the appellants at the police station they were able to tell they were their attackers.

The appellants testified on oath in defence and denied they were in the attack or were found with the generator.

The trial court believed the prosecution evidence as against the defence. It found the appellants were identified in the attack and were found, two days later, with the generator. The appellants complain that the trial court unduly relied on the prosecution evidence which did not establish their guilt beyond doubt.

It has been indicated in the foregoing that the house in which the attack took place was lit well and the attack took about 6 hours. However, the attackers were strangers to the complainants, and therefore this was a case of identification at night. There is no indication in the judgment of the trial court that the usual caution about such evidence was considered to make sure that the evidence was water-tight and safe to justify a conviction. (See *R.V.Eria Sebwato*[1969] E.A.174). The Court believed the prosecution witnesses. However, it was not borne in mind that a witness may be honest but mistaken. (See *Roria .V. Republic* [1967] 583) and a number of witnesses could all be mistaken (*R. v. Turnbull and others* [1976] 3 ALL ER 549).

Secondly, there was no identification parade held in this case. The appellants refused to take part. The refusal did not lessen the burden placed on the prosecution to prove their guilt beyond all reasonable doubt. In this case, without the conduct of the identification parade what the prosecution was left with was identification of the appellants in court by the complainants. This was dock identification. Such identification is almost worthless without an earlier identification parade. (See *Kiarie .V. Republic* [1984] KLR 739).

The next line of evidence the prosecution relied on to have the appellants convicted was that of recent possession of the generator by the appellants. PW4's evidence was that he found the appellants with the PW1's generator 2 days after its theft in the robbery, and that this was not far from the place of robbery. It is true that where a person is found with an item that was recently stolen such person is either the thief or has feloniously come by the item, unless such possession is explained. (See *Maina & three Others .V.R.* [1986] KLR 301) In this case, it was critical for the prosecution to establish possession. PW4's evidence was material. He testified that he received information that the appellants wanted to sell the generator at Dar es salaam Bar. PW4 was at Garissa Hotel when he received the information. The Bar is behind the Hotel. The witness went on as follows:

"The 1st accused came to the hotel door and saw me. The informer pinched me and indicated it was him. I arrested him and took him to where the generator was. The public assisted to arrest the 2nd accused. I got the generator....."

When cross-examined by 1st appellant, he stated:

"The place is enclosed and the 2nd accused was inside with the generator. You were outside. You had been bargaining since 1 p.m. The generator was on the ground. You had gone outside to survey.....When I got outside my informer told me you were one of the thieves. It was my 1st time to see you. I got you with the generator in the bar behind the hotel..... the generator was behind the hotel. The 2nd accused was with the generator. You were outside surveying. You wanted to sell the generator. The buyers became suspicious. The bar and hotel had many people....."

The police officer was cross examined by 2nd appellant. He stated:

"You were not alone behind the hotel. There were other people. There is a path way near the bar and hotel.....the generator was found with you....."

It is clear from the evidence of PW4 that 1 st and 2 nd appellant were not found together and that 1st appellant was not found with the generator. PW4 did not witness the appellants negotiating to sell the generator. He cannot say the two were together at any time during negotiations. The alleged prospective buyers were not called to testify to say the sellers were the two appellants. PW4 did not know the appellants before. The generator was found on the ground. The 2 nd appellant may have been near it, but the place had many other people. We have anxiously evaluated PW4's evidence as recoded by the trial court and have come to the independent conclusion that it did not prove beyond doubt that the appellants were found with the generator. It follows that the possession could not therefore be basis for convicting the appellants.

The result is that this appeal is allowed in its entirety. The convictions are quashed and the sentence set aside. The appellants are ordered to be released forthwith unless they are otherwise being lawfully held.

Dated, signed and delivered this 2nd day of November, 2009

D.K.MUSINGA

A.O.MUCHELULE

JUDGE

JUDGE

2/11/2009

Before D.Musinga-Judge

Nyangaga court clerk

Mr. Kemo for the state

Appellants-present

D. MUSINGA

JUDGE

2/11/2009