



REPUBLIC OF KENYA

HIGH COURT OF KENYA

CRIMINAL APPEAL 334, 479 & 480 OF 1994 (Consolidated)

(From Original Conviction and Sentence in Criminal Case No.453 of 1994 of the Principal Magistrate's Court at Makadara)

LENGAI MOITA SILANGEI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO. 479 OF 1994

LEGISHO OLE SAITOTI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 480 OF 1994

WILLIAM SAGALE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

Coram: Aluoch, J

Interpreter - Kaniaru

Mrs. Oduor for the respondent

all 3 appellants are absent and do not wish to be present

JUDGEMENT

The 3 appellants herein, Lengai Moita Silangei, Legisho Ole Saitoti and William Sagale, were charged of Robbery with violence, contrary to Section 296(2) of the Penal Code. There were 2 alternative counts of handling stolen property contrary to Section 322(1) of the Penal code, against William Ole Sangale, and Legisho Ole Saitoti.

All the 3 appellants were convicted on a reduced charge of simple robbery contrary to Section 296(1) and sentenced as follows:-

- 1. William Sagale, 6 years imprisonment plus 3 strokes of the cane.**
- 2. Legisho Saitoti, 7 1/2 years imprisonment plus 3 strokes of the cane.**
- 3. Lengai Moita Selangei, 7 years imprisonment plus 3 strokes of the cane.**

The Magistrate made no finding on the alternative counts.

The appeals filed by the 3 is against both conviction and sentence. They have all filed several grounds of appeal.

The prosecution evidence on record is to the effect that on the nights of 1 st and 2nd January, 1993, there was a robbery in PW1 's house where items including a TV set, a hair drier and other things were stolen and put in a vehicle after PW1 had been ordered to lie down together with her watchman who subsequently disappeared as the robbers were running out of the house.

PW1 cried out for help after the robbers had left. Neighbours came to her aid and she related the story and also told them the things which had been taken from the house. PW1 said she was able to see the people who robbed her as there were lights.

PW2 is a watchman who used to guard PW1's saloon as well as a butchery at Kayole. He related in court, what happened on the nights of 1st and 2nd January, 1993 at about 3 .00 a.m. whilst he was on duty when people came in a pick up vehicle and said they were policemen. They alighted from the vehicle and showed him a pistol. They disarmed him of his bow and arrow. He identified original accused 2 and 3, now appellants 1 and 2 - ie Lengai Moita Siangei and Legisho Ole Saitoti. He identified the 2 as the people who came out of the vehicle. They were armed with knives and original accused 3, Lengai Moita Siangei, started removing the bulbs of the lights and it became dark. He also had a big scissors for cutting padlocks. The original accused 1, William Sagale who had a pistol took them to the rear of the house, and ordered PW2 to lie against the wall. The robbers discussed amongst themselves whether they should shoot PW2 before carrying things or not. They entered the saloon and took a welding machine and ordered PW2 to go and wake up PW1 who lives on the same plot. William Sagale knocked on the window PW1 opened and she and the watchman PW2 were ordered to lie down.

The original accused 2 and 3, Legisho Saitoti and Lengai Moita entered the house and started taking things. They were later joined by William Sagale the 1st accused, now 1st appellant. PW2 and 1 got a chance to escape, and PW2 said he ran to the nearby bush to hide. The 1st accused fired at him but he was not shot. He eventually went to report the matter to the police but found that a report had already been made. About 3 days later, he saw accused 1 William Sagale (appellant No. 1) having been arrested. The others were arrested later.

Further was the evidence of PW3 who was also asleep the same night, at about 3.00 a.m., in the house of Dominic. Somebody knocked on the window wanting to see Dominic. Though PW3 said she was asleep, the person insisted that he must be woken up as he had employed somebody who did not have an I/D. This was the same trick used on PW1, as the record shows. PW3 got up and went to peep through the window and switched on the light. She saw a person at the window. The

person was dark, but she saw his face. It was the 2nd accused Legisho Saitoti. He is now the 2nd appellant. PW2 went to call the owner of the house, she called Mildred who opened the door and went out but the people said they wanted the husband. The same second accused entered the house and ordered her out and she obeyed and sat outside on the other side of the house. Whilst there, she could see somebody going up the roof of the house.

Later after the robbers had gone the witness found several items including 2 TV sets, a Drier, a dress belonging to PW1, Mildred, missing. The witness identified the 2nd appellant as the person who stood by the window that night and then entered the house and told her to get out. There were lights in the house, but not outside.

PW4, Peter Macharia Mucheru a Std. 6 pupil at Jabini Primary School was asleep at their house in Kayole on the night of the robbery at about 3.00 a.m. He recalled that people knocked on the window and asked them to open. They were about 7 people. The door was opened for them. Peter saw the original 3rd accused Lengai Ngita Silangki, now 3rd appellant. Peter saw him take 2 T.V sets. The other of the appellant's companions went into the houses and took Blow Dry comb, Ex.12, radio cassette.

Peter identified another radio cassette which was recovered, Ex.14, and other things. As the robbers left the house Peter followed them and saw them load the things in a white vehicle. To several questions by the 3rd appellant, Peter answered that the 3rd appellant spoke to him, demanding money from him. That the appellant was dressed in police uniform. Peter saw the 3rd appellant again a day after the robbery. Appellant was in the company of many people who had come to see what had happened at the shop the previous night.

PW5, Njiraini Njau is a businessman in Kayole village, Nairobi. He has 2 butcheries. He recalled that on 5.1.93 at about 9.00 a.m., 2 people entered the Soweto Butchery to buy meat. He identified the 3rd appellant as one of them. The appellant had a radio ex.7 whilst his companion had a red bag, ex.33. They left the luggage and asked Njiraini to look after it. The bag was opened and it had a TV inside it, but at that time Njiraini did not know the contents of the bag. The 2 had bought meat, which they left on the jiko being roasted. It was never collected. It stayed. The 3rd appellant and his companion did not come back until midnight in the company of Police Officers. In fact the 3rd appellant was under arrest and he asked for his things which he had left and he was given and the police took them, together with him. The 3rd appellant was a customer of Njiraini as he used to go and roast meat at the butchery. He was arrested as a result of these things being found in his butchery but he was released when he explained how the things came to be in his butchery.

Further prosecution evidence from PW6 was that on 5.1.95 at about 12.15 p.m. a boy whom he knew and whom he had sent to look for a cheap TV for him to buy, arrived to report to him that he had found a cheap TV for Kshs.7,000/=. PW6, went to the boy's house in Kayole that evening, accompanied by his brother. He was introduced to somebody who eventually sold him the TV at Kshs.5,000/=. PW6 also paid a commission of Kshs. 500/= to the person selling the TV as he said the TV was not his. He paid for the permit too but he did not get it that day. He was to get it the following day, but it was not brought. PW6 identified Ex.2 Orion TV as the one he bought.

Another prosecution witness, PW8 identified the 2nd appellant Ole Saitoti, as the man who went to him on 5.1.93 at 4.30 p.m. in Eastleigh and offered to sell him a welding machine. The appellant was in company of other people in a Mazda Pick Up. He was selling the welding machine for Kshs.30,000/=. The witness did not buy the machine but allowed the appellant to leave it behind as a security since he gave him cash, Kshs.150/=. The following morning before the appellant returned for the machine the police arrived to enquire about it. The witness identified Ex.8 as the machine which was left with him. It was wrapped in a polythene bag. The appellant did not return that day until the following day after the police had come and gone. The appellant went back to the same shop several times asking for money for the welding machine and eventually he was arrested and taken to Buru Buru police station.

PW12 Simon Njoroge Paul gave further evidence about the Orion TV, Ex2 which was sold to Solomon for Kshs.5,000/=. The witness was present as the TV was sold. PW7 PC Joseph Kinuthia arrested the original accused No.1, now the 1st appellant, William Ole Sagale. He was arrested from a Kiosk, near his house. That he was led to his house which was searched and found eight cassettes, identified as Ex.9, tied in a black paper bag. The complainant who was present identified them as his. Also found in his house was an electric shaver, Ex.11, Jolly comb brown, Ex.14. These were inside a box. The items were taken to Buru Buru police station.

Sgt. Ephantus Mathenge, PW9 is attached to Buru Buru police station, crime branch section. He got information about a person who had been arrested, and who was willing to show where the stolen items were. The person referred to was the 1st appellant, the original 1st accused, William Ole Sangale.

The 1st appellant directed PW9 to the house of the original 3rd accused Legai Moita, who was found at home with his wife. In that house the complainant identified a flowered dress, Ex.5, 2 other clothes, Ex.6 and 2 curtains, Ex.15.

From there, the appellant directed the police to Soweto village, to the house of Njurami, where the complainant identified a Television Set, make Calcon, a socket Ex.8, one radio cassette, pantronic model, Ex.7, cassettes Ex.9. A shaving machine, Ex.11 was found in the 3rd appellant's house. The 1st appellant stated that the things had been taken to his house by appellants 1 and 2. He further volunteered to show where the welding machine was, in Eastleigh. The 2nd appellant was eventually arrested, and he volunteered to show where he had sold the hair drier, at Kariobangi North shopping centre. PW9 and his group proceeded there and in a salon, they found a hair drier and stand Ex.3 and a blow drier comb - Ex.12. The 1st appellant even gave further information about the colour TV.

Pw 13, a welder used to keep his tools a welding machine and grinder in the saloon at Kayole. On 2.1.93 he found the things missing as the saloon had been broken into. The incident had been reported. After about 2 days PW13 went to the police station and found the 1st appellant who said that he knew where the things were. First he took them to a place where he pointed out appellant 3, and from there they went to several places where several recoveries were made including the welding machine which the witness identified.

PW14 took the 1st appellant on enquiries. The appellant pointed out the 3rd appellant, whom he said was with him when the robbery took place. Several properties were recovered and identified by the owners. PW14 is the complainant's husband. He had been out of Nairobi when the robbery occurred and on return found that the incident had been reported to the police officers in a search for his property which included going to the houses of appellants 1 & 3 where several recoveries were made. He identified his properties which were recovered. He alerted transporters about his stolen property. On 7th January, 1993, he started getting information about people trying to sell such items as colour TVs. PW14 went to the police station and accompanied police to where both the 1st and 3rd appellants were arrested. All the 3 appellants denied the offence to their evidence in court.

The Learned Magistrate considered the evidence in its totality and reached the conclusion that the 3 appellants had no defence at all. She found that "They are the ones who attacked PW 1 and robber her. PW 1 and 2 said accused 1 was armed with a pistol. It was not recovered apart from PW1 being tortured nobody suffered any serious bodily injuries. I will therefore reduce the offence to one of robbery contrary to Section 296(1) of the Penal Code and convict them accordingly".

The appellants were dissatisfied with the Magistrate's finding and have filed grounds of appeal complaining about lack of light at the scene to help with their identification. They also complained about the items which were recovered. They complained further that prosecution evidence was contradictory.

The Learned State Counsel Mrs. Oduor supported the conviction and sentence imposed on William Ole Sangale, the 1st appellant and Lengai Moita Sinagei, 3rd appellant. Mrs. Oduor did not support the conviction and sentence imposed on the second appellant, Legisho Saitoti.

Mrs. Oduor submitted that though identification might have been difficult at the scene of the robbery, evidence on record showed that most of the stolen property, which was identified by the owners was found with the 1st and 3rd appellants or they led the police to where the properties were recovered. The Learned State Counsel supported the Magistrate's conviction of robbery, using the Doctrine of Recent Possession of Goods. She submitted that the appellants did not give a satisfactory explanation as to how they came to have the complainants property in their possession. Though the Learned State Counsel did not support the conviction and sentence imposed on the 2nd appellant Legisho Saitoti, I find, after considering the evidence on record that he was rightly convicted by the Learned Magistrate. The 2nd appellant was seen by PW3 at the scene that night. That evidence was corroborated by the evidence of PW8 whose evidence was that the 2nd appellant, Ole Saitoti and a lady and others arrived at his shop in a Mazda pick up vehicle and brought a welding machine which was for sale. In fact they eventually left it there that day after PW8 had given them Ksh.150/= for the taxi. The 2nd appellant was eventually arrested from PW8's shop. The welding machine was identified by the owner and also PW8. It was one of the items stolen during the night of the robbery. It had been kept in PW1 's saloon.

I find that there was sufficient evidence on which the Learned Magistrate convicted all the 3 appellants. The doctrine of Recent Possession of Goods was rightly invoked by the Magistrate. None of the 3 appellants gave any explanation as to how the properties found in their possession or which they were conveying for sale, property identified by the rightful owners, came to be in their possession. I have read the grounds of appeal filed by all 3 and I do not find any merit in them. I find that despite difficult circumstances that night the identification of the appellants was complete when they were found in possession of stolen property so soon after the incident. I have not found any contradiction in the prosecution's evidence which I find proved the charge against the appellant's beyond reasonable doubt. I proceed to dismiss the appeal against both conviction and sentence in respect of all the 3 appellants.

Dated at NAIROBI this 24th day of September, 1998.

JOYCE ALUOCH

PUISNE JUDGE