



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 541 & 544 OF 1993 (CONSOLIDATED)

1.BUYA JILO.....1ST APPELLANT

2. DAVID GICHO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 108 of 1993 of the Senior Resident Magistrate's Court at Kilifi - P M Ndungu, Esq, SRM)

JUDGMENT

These appeals have been consolidated.

The 1st appellant, Buya Jilo (original A1); and the 2nd appellant, David Gicho (original A3) were jointly convicted after trial by the learned Senior Resident Magistrate, Kilifi of the offence of robbery contrary to section 296 (1) of the Penal Code. Upon their conviction, each of them was sentenced to serve 5 years imprisonment and to receive 3 strokes corporal punishment. They were further ordered to undergo a period of police supervision for 5 years upon completion of their sentence. Their appeals to this Court are against conviction and sentence.

Briefly the prosecution case was that on the night of 30th of January, 1993 at about 1 am while the complainant, Kesra Kesina (PW1) was sleeping at his house within Mtomodoni village in Kilifi area, he was awakened from sleep by his dogs which were barking. He peeped through the window and saw some men who were strangers in his compound. They knocked his door asking him to open and he refused to do so. The said men then proceeded to his servant's quarters where they woke up his workmen PW2 and PW3, roughed them up and threatened to kill them unless the complainant opens his door. The two workmen were then taken to the complainant's house. They persuaded him to open the door and he finally did so. The gangsters then entered the house and took away his torch, radio cassette, iron box, wrist watch, kitchen knife and cash Kshs 5,040/- together with assorted clothings. They attempted to go away in his car but they were unable to start it. They then left on foot. The complainant then raised an alarm and with the help of his neighbours proceeded to Mtwapa Police Patrol Base where he reported the matter.

On the same night as PW5 who is an administration police officer was going home from Mtwapa Trading Centre, he met with some 2 young men one of whom was carrying a radio while the other was carrying a carton box. He ordered them to stop as he thought that it was odd for them to carry a radio cassette at that time. Instead the two men started running away and he chased them. He managed to arrest one of them

who had the radio cassette who was the 1st appellant. He also found him with a wrist watch and a knife. He took him with the said exhibits to a police post where the complainant had made the robbery report. The complainant was contacted and he identified the said radio cassette, wrist watch and knife as some of the items that he had been robbed of. The 1st appellant was thereafter taken to Kijipwa Police Station where he was interrogated. He then lead the police to a certain house in Kisauni in Mombasa. In that house there was the 2nd appellant. When the said house was searched, the police officers found 6 long trousers and an electric iron box which were identified by the complainant as some of the items which he had been robbed of. He too was arrested. Identification parades were later held at the police station where the two appellants were identified by the complainant's workmen (PW2 and PW3) as members of the gang who had attacked them on the material night. They were then charged.

Both appellants denied any involvement in the said offence. The 1st appellant claimed that he had been innocently arrested by the police after they had found him at Bamburi stage. He was then taken to the police station where he was beaten up before being taken to an identification parade. He stated that he knew nothing about the charge that was preferred against him.

The 2nd appellant stated that he had been innocently arrested by the police in his house in Kisauni.

In their respective petitions of appeal, both appellants stated that they were convicted upon insufficient evidence and that the learned magistrate had not considered their respective defences.

It is abundantly clear from the evidence that was adduced in the court below that the complainant had been attacked by a gang of men armed with *rungus* and iron bars who robbed him of various items specified in the charge. It was then about 1 pm. The said men then escaped on foot. Later the same night, while PW5 was walking towards the AP's Lines, he met some two men one of whom was carrying a radio cassette and the other a carton box. When he challenged them to stop, they took to their heels but he arrested one of them who is the 1st appellant. He had a radio cassette, a wrist watch and a knife all of which were satisfactorily identified as some of the items that the complainant had just been robbed of. The defence of the 1st appellant that he had been innocently arrested was therefore not true. The learned trial magistrate found PW5 to have been a truthful witness who at the time of arresting the 1st appellant, had not known of the robbery that had occurred at the complainant's house. I agree with him that it was safe to act on the testimony of this witness (PW5). I make a concurrent finding of fact that it was established on good and reliable evidence that the 1st appellant was arrested on the material night, just within few hours of the robbery at the complainant's house with some of the items ie radio cassette, the wrist watch and a kitchen knife belonging to the complainant. He was definitely one of the thieves who had just attacked and stolen the said items from the complainant.

As for the 2nd appellant, although he says that he had been innocently arrested at his house, I am equally satisfied that he had been found in possession of an iron-box and 6 long trousers which were satisfactorily identified by the complainant. This was within just one day of the theft at the complainant's house.

The fact that the 1st and 2nd appellants were found in possession of very recent stolen properties corroborates the evidence of PW2 and PW3 that they were able to see them at the scene of crime during the robbery. Electric lights were then on and they had plenty of time to see the said gangsters who wanted them to go and wake up their employer.

I am satisfied that the respective defences of each of the appellants were duly considered by the court below and rightly dismissed.

Upon my consideration and evaluation of the recorded evidence, I am satisfied that the conviction of each of the appellants was quite safe. I find no merit in their appeals to this Court against conviction.

The sentence that was imposed on each of the appellants was neither harsh nor manifestly excessive. I have no basis to interfere.

In the result, the appeal against conviction and sentence in respect of each case is dismissed.

Dated and Delivered at Mombasa this 24th day of October 1994.

S.O.OGUK

JUDGE