REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU
CORAM: GICHERU, TUNOI & SHAH, JJ.A.
CRIMINAL APPEAL NO. 16 OF 1995

BETWEEN

FRED WAWERU KIRIMO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Nakuru (Justice Rimita) dated 16th September, 1994

in

H.C.CR.A. NO. 998 OF 1993)

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JUDGMENT OF THE COURT

This is a second appeal against conviction and sentence passed by Senior Principal Magistrate at Kericho whereby the appellant was convicted of robbery contrary to section 296(1) of the Penal Code and sentenced to 6 years' imprisonment and was ordered to receive 15 strokes of the cane.

His appeal to the superior court was dismissed on both conviction and sentence.

There is no eye-witness evidence connecting the appellant with the actual robbery as none of the victims were able to identify the appellant as one of the robbers who took part in the robbery which took place at the house of one Sabina Sarange Phillipowsky at Kimou Estate, Kericho on the night of 21st June, 1993.

On 22nd June, 1993 P.C. Reuben Otuma was travelling in a mini bus registration number KYR 027. This was at about 7.00 a.m. The mini bus having travelled from Kericho to the junction of Sotik and Kericho road stopped to pick up one passenger. Later the said the bus was stopped by four persons (three men and one woman) one of whom, according to P.C. Otuma was carrying a television (TV) holding it. That person was the appellant, P.C. Otuma said. The TV was identified by P.C. Otuma.

P.C. Otuma stated in his evidence that the appellant asked the bus conductor to load the TV on the carrier. As a TV is a fragile article

P.C. Otuma became suspicious. The other three persons who had stopped the bus ran away after dropping two suitcases. It is clear that the suitcases contained goods belonging to the complainant and that fact has never been challenged. P.C. Otuma asked the bus conductor PW8 (Jackton Olando) to "lock up" the appellant inside the bus. The appellant became violent. P.C. Otuma took possession of the TV, the video and the suitcases. Upon being cross-examined by the appellant P.C. Otuma steadfastly stuck to his version of what happened.

The appellant denied being in possession of the TV. He said he was merely a passenger.

The bus driver (PW7) Walter Okoyo confirmed that the appellant was left inside the bus after being prevented from running away. He also confirmed that the appellant was in possession of the TV wrapped up. Basically the versions of P.C. Otuma, the driver and the conductor confirmed the possession, in the appellant, of the TV. The two courts below came to concurrent findings that the appellant was found in possession of TV a day after the robbery in question. We are not able to find any flaw with such findings and in any event these are findings of facts we cannot interfere with.

We see no substance in the appellant's argument that the courts below could not properly conclude that he was found in possession of the TV.

The appellant complained of not having had enough time to prepare his defence. To begin with that was so. The trial started on 26th June, 1993 when the evidence of the complainant was taken some hours after the plea. But that evidence did not implicate the appellant in any way and it is not surprising that the appellant did not even cross-examine him. Similarly the evidence of PW2 Jacinta Phillipowsky also did not implicate the appellant in the robbery in any way.

The appellant did not seek adjournment on 29th June, 1993. The record does not show that he did so ask. Although in this court he belatedly raised this point we do not see what prejudice the appellant suffered.

We see no reason to accept the assertion by the appellant that the TV he was allegedly found with may not have been the TV taken away from the complainant's house. The appellant denied being in possession of any TV. This version was not accepted.

The trial magistrate made no findings on the alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code which in our view was correct although both courts below should have adverted to the issue.

It was held in the case of Abdulla Ibrahim vs R [1960] E.A. 43 that where a conviction is founded on the law of recent possession a magistrate must sufficiently direct himself on the scope and limitation of the presumption to be drawn.

In normal circumstances failure to so direct the mind on scope and limitation of the presumption to be drawn could lead a court to say that there was no burglary (or robbery).

But in this particular case the appellant was found in possession of the TV within hours of the robbery and it would be correct to conclude that he was one of the robbers. There is no other inference either this court or the courts below could have drawn from the fact of such recent possession.

Additionally there was the appellant's retracted confession which was admitted after a trial within a trial.

The confession as it stands is a full confession, detailed and was in our view correctly admitted in evidence. It could not be true that the appellant was simply forced to sign it.

In the result we agree with the concurrent findings of both courts below and dismiss this appeal. It is so ordered.

Dated and delivered at Nakuru this 29th day of September, 1995.

J. E. GICHERU

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR