



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)

CRIMINAL APPEAL NO. 659 OF 2010

BETWEEN

ALFRED TINGI EDEWA APPELLANT

AND

REPUBLIC RESPONDENT

Appeal from the Judgment of the High Court of Kenya at Busia (Mbogholi & Ochieng, JJ.) dated 2nd July, 2009

in

HCCRA NO. 39 OF 2006

JUDGMENT OF THE COURT

1. This is a second appeal from the original conviction and sentence of the appellant by the Principal Magistrate's Court at Busia, on four counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The appellant's first appeal to the High Court of Kenya at Bungoma was unsuccessful, hence this second appeal.

2. It was alleged that the appellant together with others, jointly committed the robberies on 30th March, 2005 at Angorom Trading Centre, Alupe Sub-location, Teso District. In count one, they robbed **Patrick Odeke, PW 1**, of several airtime cards, in counts 2, 3 and 4 they robbed **Roda Auma, PW 3**, of one cell phone, two mattresses and cash Kshs.1,000/=, robbed **Ernest Wakhu** of cash Kshs.5,000/= and robbed **Stephen Osoyongo, PW 5**, of a video deck and a radio, respectively.

3. All the robberies were committed at night at about 1.00a.m. The victims of the robberies were sleeping in their respective houses when robbers, armed with various crude and dangerous weapons and carrying powerful torches, broke into their respective houses and forcefully robbed them of the aforesaid items.

4. Three of the complainants, **PW 1, PW 3** and **PW 5**, stated that they were able to see and recognize the appellant because the robbers flashed torches whose light was reflected by white walls. **PW 5** said that he

knew the appellant, as he hailed from the same village, and so it was not difficult to recognize him. PW 5 gave the name of the appellant to the area Assistant Chief immediately after the robbery. The witness added that the appellant wore a checked reddish shirt and a hat. PW 3 also gave a similar description of the appellant's mode of dressing.

5. A few minutes after the robbery a search was conducted in the appellant's house. One of the mattresses that had been stolen from the house of PW 3 was recovered there. The mattress bore inscription of PW 3's child's name and so it was unmistakable. A shirt matching the description given by PW 3 and PW 5 was also recovered. The appellant went into hiding shortly after the robbery but when he re-surfaced on 6th April, 2005 he was promptly arrested.

6. Arguing the appeal, **Miss Ongira**, learned counsel for the appellant, submitted that the search that was conducted in the appellant's house and which led to recovery of the stolen mattress was conducted without a search warrant, contrary to **section 76** of the **repealed Constitution of Kenya**. The search also violated the provisions of **section 118** of the **Criminal Procedure Code**, she added. The evidence that was illegally obtained should not have been used to convict the appellant, counsel submitted.

7. In reply, **Mr. Ketoo**, learned prosecution counsel, submitted that the trial court record does not indicate whether the police had a search warrant or not and so it was speculative of the appellant's counsel to argue that the search was conducted illegally. In any event, that issue had not been raised before the two courts below and it was therefore improper to raise it on a second appeal.

8. Mr. Ketoo added that it is trite law that a police officer can search premises without a search warrant if a cognizable offence was involved and the process of obtaining a warrant would defeat the purpose of obtaining it. He cited **MUNEER HARRON ISMAIL V REPUBLIC [2014] eKLR**.

9. Lastly, Mr. Ketoo submitted that even if the court were to disregard the evidence relating to recovery of the stolen mattress and the shirt, there was other credible evidence that the appellant was one of the robbers. He had been positively recognized by at least one of the robbery victims, **PW 5**, who also gave out his name to the area Assistant Chief shortly after the robbery.

10. We have carefully considered the record of appeal as well as submissions by counsel. The appellant's conviction was based on his identification by PW 1, PW 3 and PW 5, as well as evidence of recent possession of a mattress that had been stolen from PW 3. There is concurrent finding on fact by the two courts below that the robbers had put on powerful torches whose light shone in the houses of their victims and enabled the three complainants aforesaid see their faces and their manner of dressing. The two courts below further appreciated that the appellant was well known to PW 5 and the witness promptly reported that the appellant was one of the people that had robbed him.

11. As a second appellate court, we must pay homage to those concurrent findings of fact, unless it is shown that there was no evidence at all upon which the findings were based, or unless it is sufficiently demonstrated that the evidence which gave rise to the findings was of such a nature that no reasonable tribunal could be expected to base any decision upon it, which was not demonstrated. See **BONIFACE KAMANDE & 2 OTHERS V REPUBLIC [2010] eKLR**.

12. Turning to the evidence of recent possession, there was no dispute that a mattress that had been stolen from the house of PW 3 was found in the appellant's house shortly after the robbery. It was positively identified as belonging to PW 3. The appellant gave no explanation for his possession of the mattress. The only issue raised by the appellant's defence counsel against reliance on that evidence was that it had been illegally obtained as the police conducted a search in the appellant's house without a warrant.

13. Miss Ongira's submission is not entirely correct. The police as well as the area Assistant Chief were pursuing the appellant on the night of the robbery. Their purpose in entering into his house was to effect arrest of the appellant as a suspect. They just happened to find a wet mattress and a wet shirt in the house, which turned out to be critical pieces of evidence.

14. It is true that **section 76 (1)** of the **repealed constitution** guaranteed protection against arbitrary search or entry to a person’s premises. However, that protection was not absolute, it was qualified by circumstances as stipulated under **section 76 (2) (a) (b) (c) and (d)** thereof.

15. In any event, **section 20** of the **Police Act (now repealed)**, stipulated the circumstances under which a search without a warrant could be conducted. That section is a replica of **section 60** of the **National Police Service Act** which provides as follows:

“20 (1) When an officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something necessary for the purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant as aforesaid enter any premises in or which he expects the thing to be and there search or cause search to be made for, and take possession of, such thing” ...

16. We are satisfied that the evidence relating to recovery of the stolen mattress as well as the shirt that was worn by the appellant at the time of the robbery was lawfully obtained by the police. The evidence was properly applied by the trial court in reaching its conclusion that the appellant must have been one of the robbers, which finding was endorsed by the first appellate court. We may add that whether there was justification for the search was a matter of evidence and the issue was not raised before the trial court.

17. In view of the foregoing, this appeal is without merit. It is therefore dismissed in its entirety.

DATED and delivered at Kisumu this 12th day of February, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR