



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CRIMINAL APPEAL NO.47 OF 2015

BETWEEN

MUTINDA SAMUEL KANYALU..... APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Odero & Muya, JJ.) dated 18th July, 2014

in

H.C.Cr.Appeal.No.148 of 2012)

JUDGMENT OF THE COURT

The deceased, eight (8) years old at the time of her death and her sister, also a child aged fourteen(14) years, were on the night of 21st December, 2009 left on their own in their one-roomed house which they shared with 8 goats, at Mgone Village, Msambweni when their parents travelled to Mombasa.

That night they were viciously attacked by a gang of robbers resulting in the death of the deceased while her sister survived with grievous injuries. The latter who was in a state of a coma spent two weeks in hospital.

According to the doctor, the deceased died of blunt trauma as a result of a depressed skull fracture and cervical spine fracture. There was no eye witness to the incident except the aforesaid 14 year old girl who survived the attack. She testified in the initial trial but was not called when the trial began *de novo* before a different magistrate.

During the robbery two of the eight goats belonging to the victims' father. were stolen. The very next morning PW2, Mwangima Ndile, a dealer in livestock met the appellant who was selling a goat at Mwangulu Market. Because the appellant was a stranger and out of abundant caution, PW2 insisted on the appellant availing a witness before buying the goat. Within the market, the appellant knew PW3, Rhoda Mutiso who was engaged in selling porridge. It was only after PW3 confirmed to PW2 that she knew the appellant and his parents that the latter paid Kshs.1600 and took the goat.

Two weeks following these events the father to the victims, PW1 K M was alerted by a neighbour that he had seen one of his stolen goats at PW2's home. He proceeded to the home and identified the goat from special marks on the ears. The matter was reported to the police who arrested PW2 who in turn explained how he had bought the goat from the appellant. The appellant was arrested and PW2 set free after recording a statement. The appellant was subsequently charged with robbery with violence contrary to **section 296(2)** of the Penal Code in that:-

“On the night of 20th and 21st day of December, 2009 at Mgome village in Msambweni District within Coast Province,

jointly with others not before court robbed M N of two she goats valued at kshs.3,000/= and at or immediately before or immediately after the time of such robbery killed the said M N.”(our emphasis)

On the second count, he was charged with assault causing grievous harm contrary to **section 234** of the Penal Code in that:-

“On the night of 20th and 21st day of December, 2009 at Mgome village in Msambweni District within Coast Province, jointly with others not before court unlawfully did grievous harm to U K.”

The appellant in an unsworn defence denied involvement in the robbery and assault maintaining that he did not know the reason for the arrest culminating in his trial.

We reiterate that there was no direct evidence against the appellant, who at the time of the incident was 17 years old and a student in Form 1. The learned trial magistrate, relying on the doctrine of recent possession, found that the recovery of the goat stolen during the robbery in the possession of the appellant soon after the robbery and the appellant's failure to offer an explanation how he came by it, availed the court a rebuttable presumption of fact under **section 119** of the evidence Act, that the appellant was either the thief or the “guilty” receiver of stolen goods. The trial court also found the appellant “guilty” of assault on the second count. The court, upon finding the appellant “guilty” of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code and “convicting” him, bearing in mind his age at the time when the offence was committed, “sentenced him” to be detained during the President's pleasure in accordance with **section 25(2)** of the Penal Code. The court did not however order that a report be made to the President conveying that finding as required by **sub-section (3)** of **section 25**. The first appellate court did not notice the omission but upheld the “sentence.” There was no mention by the trial court of the second count.

The appellant challenged both the “conviction” and “sentence” in the High Court where Odero and Muya, JJ. upheld the decision of the trial court and relying on **Arum v R** [2006] 2 EA reiterated that the doctrine of recent possession was applicable in the circumstances of this case because the goat that had been stolen during the robbery having been proved to have been in the possession of the appellant so soon after the robbery before he sold it, and the owner having positively identified it, the appellant failed to offer an explanation of how he came by it, leading to the presumption that he was involved in the robbery. The High Court also specifically found that the complainant in the second count having not testified the offence under that count was not proved. The “conviction” under the second count was quashed.

The appellant still not satisfied has now brought the present appeal on the grounds that, without referring specifically in the charge sheet to the appellant being armed “*with dangerous and offensive weapon*” the charge sheet was defective; that reference in the charge sheet to the effect that the deceased was **killed** in the course of the robbery took the offence outside the provisions of **section 296(2)** of the Penal Code; that the correct charge ought to have been murder contrary to **section 203** as read with **section 204** of the Penal Code and that it was a misnomer to charge the appellant under **section 296(2)** which does not create an offence but is only a punishment section. We do not intend to consider these last two grounds above as they were not raised in the memorandum of appeal filed herein and no leave to urge them was

obtained as required by **Rule 72 (a)** of the Court of Appeal Rules.

The appellant has also complained that his identification in the absence of an identification parade was flawed. That the prosecution evidence was contradictory; that the doctrine of recent possession was misapplied; and that the appellant's defence was ignored in reaching the conclusions leading to his conviction and sentence. For these reasons, Mr. Mayaka, learned counsel for the appellant urged us to allow the appeal.

Mr. Monda, learned counsel for the respondent opposed the appeal arguing that the appellant had abandoned his earlier grounds of appeal and argued fresh grounds for which no notice had been given. We have, in the previous paragraph, dealt with this issue.

Regarding the omission of the words "**dangerous or offensive**" weapon in the particulars of the charge sheet, counsel argued that the omission was cured by the particulars of the offence that clearly stated that the appellant was in the company of others during the robbery, and that the word "killed" denoted the use of force or violence. In aid of this argument learned counsel referred us to the case of **Pius Otianga v R** Criminal Appeal No.139 of 2007. On identification, learned counsel submitted that the case was founded on the doctrine of recent possession whose elements were proved. Finally counsel submitted that the learned Magistrate imposed the correct sentence which was properly upheld by the High Court.

The only eye witness to the robbery was the deceased's sister. At the initial hearing she testified but when the trial began *de novo* following the transfer of the trial Magistrate she was not called. The prosecution case therefore depended solely on circumstantial evidence to the effect that in the morning of the attack, a black, pregnant goat with the owner's marks on the ear that had been stolen during the robbery was being offered for sale in a local market by the appellant. Although the appellant in his defence did not say anything regarding these events, there was evidence that both courts below found credible, to wit, that the appellant sold the goat to PW2 after the former introduced the latter to PW3 as a witness; and that the owner of the goat was able to positively identify it.

Section 119 of the Evidence Act provides that;

"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

In the normal course of things a thing stolen from a person if found with another person shortly thereafter an irresistible inference, in the absence of an explanation from the latter, will be drawn that the latter must have stolen the thing.

It is common cause that during the course of the robbery on the night of 20th /21st December, 2009 the deceased lost her life while her sister was seriously injured; and also that two goats were stolen. We have no basis to interfere with the concurrent findings of above fact by both courts below and for further that the appellant sold one of the goats to PW2 the morning following the robbery. The doctrine of recent possession applies where, like in the circumstances of this case, the stolen item is recovered in the possession of a person soon after it is stolen, and the person in whose possession it is found fails to give an account of how he came by it. The courts have over the years developed the criteria for the invocation of the doctrine. For instance in **Isaac Nganga Kahiga alias Peter Nganga Kahiga v R**, Criminal Appeal No.272 of 2005 this Court explained that;

"...it is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from

one person to the other.”

The presumption of a person being the thief or an accomplice will only arise where such a person fails to offer reasonable account as to his possession of the stolen item. It is therefore a rebuttable presumption. It was the appellant’s contention that since he was not found in the actual possession of the goat, the doctrine of recent possession was inapplicable to him.

The appellant’s possession need not have been actual, so long as there was evidence linking him with the goat. **Section 4 (a)** of the Penal Code that defines the phrases, “*be in possession*” and “*have in possession*” is wide enough to include constructive possession. There was indeed credible evidence linking the appellant with the goat a few hours after it was stolen in a robbery in which one of the victims was killed and another seriously injured.

We have reproduced the charge sheet at the beginning of this judgment. It does not, as provided in **section 296 (2)** aforesaid, state that the appellant was armed with a “***dangerous or offensive weapon or instrument.***” Instead the particulars of the offence state that the appellant committed the robbery “***jointly with others.***” It is now firmly established that an offence under **section 296(2)** of the Penal Code is committed where any one of the following is proved;

- i. If the offender is armed with any dangerous or offensive weapon or instrument, or
- ii. If the offender is in the company of one or more persons, or
- iii. If at or immediately before or immediately after the time of the robbery the offender wounds, strikes or uses any other violence to any person.

See **Masaku v R** (2008) KLR 604.

Because there was no eye witness, no evidence was presented regarding the precise weapon the attacker or attackers were armed with. Likewise there was no evidence as to the number of the attackers. But from the circumstantial evidence contained in the post mortem report the likely weapon used to inflict the fatal injuries on the deceased is stated to be a blunt object. It can be concluded that that object was dangerous and offensive judging from the result of its use. Secondly there was evidence of wounding, striking and use of violence, thereby satisfying the requirements of **section 296(2)** of the Penal Code.

Finally, on “sentence”, in view of the appellant’s age at the time the offence was committed, both courts below were right in directing his detention at the President’s pleasure under **section 25(2)** of the Penal Code, instead of imposing death sentence. On our part we direct that this matter be brought to the attention of the Cabinet Secretary responsible for prisons for further consideration.

Finally we note that in both the trial court and the first appellate court, contrary to the provisions of **section 189** of the Children Act, the words “conviction” and “sentence” are used in respect of the appellant who was tried with the full knowledge that he was a child.

In the result we find no substance in the appeal which we accordingly dismiss.

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR