



IN THE COURT OF APPEAL

AT KISUMU

(CORAM): MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 74 OF 2014

BETWEEN

GILBERT ONYANGO OSINO.....1ST APPELLANT

VINCENT IGANGA2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisumu Chitembwe and Dulu, JJ.) dated 28th May 2014, in H.C.C.R.A No.188 & 190 of 2014 (Consolidated))

JUDGMENT OF THE COURT

Gilbert Onyango Osino (the 1st appellant), Vincent Iganga (the 2nd appellant), and their co accused, Boniface Mbanilwa, were jointly charged with 3 counts of the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of count I are that on the 3rd April 2010 at Shiruma village Shilongo sub- location in Kakamega North district within the former Western Province being jointly armed with dangerous weapons namely; metal bars and a toy pistol, robbed Jackline Khalisia of Kshs 4000/- and at such time used actual violence against the complainant, **Jackline Khalisia PW 1 (Jacklyne)**.

The particulars of count II were that on the 3rd April 2010 at Shiruma village Shilongo sub- location in Kakamega North district within the former Western Province, being jointly armed with dangerous weapons namely; metal bars and a toy pistol, robbed Beth Atieno Otieno of one leather handbag and DVD Sony, all valued at Kshs 10,000/- and at such time used actual violence against the complainant, **Beth Atieno Otieno PW 2 (Beth)**.

On count III of handling stolen property contrary to **section 322** of the **Penal Code**, the particulars were that on the 4th April 2010 at Lurambi village East Butso location in Kakamega Central District within the former Western Province, jointly otherwise than in the cause of stealing, dishonestly retained or received one handbag and DVD Sony, having reasons to believe them to be stolen property.

The appellants and their co accused pleaded not guilty.

Upon consideration of the entire evidence, the learned trial magistrate found that the charges against the appellants were proved to the required standard, and convicted and sentenced them to death as by law prescribed. But the trial court acquitted Boniface Mbanilwa on grounds that the case against him was not founded.

Dissatisfied with the decision, the appellants appealed to the High Court which dismissed the appeal and upheld the trial court's decision.

The appellants were further aggrieved by the High Court's decision and lodged this appeal setting out four grounds of appeal which were, that the prosecution failed to prove its case beyond reasonable doubt; that the courts below wrongly relied on the doctrine of recent possession; that the conviction on the doctrine of recent possession was unfounded as there was no inventory showing which items were recovered from the appellants; that the evidence of the **Alex Musinde Oremo, PW 10**, the Assistant Chief upon which the court relied was not corroborated by other independent evidence; and that the evidence was inconsistent and contradictory.

Mr. Mshindi, learned counsel for the appellant, argued the appeal on two main grounds, namely; that there was no inventory of the recovered items produced in court which prejudiced the appellants, and that the doctrine of recent possession was misapplied by the courts below.

Turning to the aspect of the issue of possession, counsel argued that the courts below wrongly relied on the doctrine of recent possession, as despite the recovery of a toy pistol and jungle jackets from the appellants, it could not be said that the recovered items belonged to the complainants. Furthermore, none of the items specified on the charge sheet were among items recovered from the appellants.

Counsel's other complaint was that there was no inventory of the recovered items produced in court. Counsel took the view that, the numerous arrests and the recovery of various items on the night in question, necessitated the production of an inventory to enable the prosecution ascertain from whom the various items were recovered.

Learned counsel for the State, **Mr. Ketoo**, conceded the appeal. According to counsel, the conviction was unsafe as the basis of the doctrine of recent possession relied upon by the courts below was wrongly applied as the recovered items namely, the jungle jackets and toy pistol, did not belong to the complainants. Additionally, since there was no inventory of the recovered items, it was not possible to ascertain from whom the stolen items were recovered.

We have considered the grounds of appeal, the submissions by counsel on both sides and carefully read the record of appeal. The issues for our determination are whether the doctrine of recent possession was applicable to the circumstances of the case.

This being a second appeal, only matters of law fall for the consideration of this Court – See **section 361 (1)** of the **Criminal Procedure Code** and ***Njoroge vs Republic [1982] KLR 33***.

We will begin by addressing the issue raised by the appellants that the prosecution failed to prove its case as there was no inventory of the recovered items.

The evidence showed that a number of persons were arrested following the robbery on the material night, and various items recovered by the Alex Oremo. No inventory of the stolen items was made available to the court.

In ***Leonard Odhiambo Ouma & another vs Republic, Nakuru Criminal Appeal No. 176 of 2009***, this Court observed;

“Failure to compile an inventory as contended in ground 5, is in our view, a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial.”

In the instant case, we are of a similar view. The evidence of Alex Oremo was clear that a toy pistol and a jungle jacket were recovered from the 1st appellant's house, while a jungle jacket was recovered from the 2nd appellant's house. Since there was no uncertainty as to the items recovered from the appellants, we find that the lack of an inventory would not amount to a valid basis upon which to declare a mistrial. This ground is therefore without merit.

Before determining the question on the doctrine of recent possession, it will be important to note that the courts below relied solely on the doctrine of recent possession as the basis of conviction. Both the trial court and the High Court rejected the evidence of the appellants' identification as, the witnesses did not know any of them, and no identification parade was conducted to establish whether the appellants were properly identified.

It was therefore imperative that the various items recovered provided sufficient evidence to connect the appellants to the offences, under the doctrine of recent possession.

On the question of the recoveries made, the trial court stated that there was no doubt that the 1st and 2nd appellants were found in possession of the jungle jackets that were worn during the robberies, and the 1st appellant was also found in possession of a pistol by Alex Oremo the Assistant Chief a few hours after the robbery.

The High Court on its part concluded;

“Although the doctrine of recent possession mainly relates to stolen items, we do find that the doctrine applies to this case as the appellants were found in recent possession of a toy pistol and the jungle jackets that had been used during robbery which had taken place about six hours earlier. The trial court held that the recovery was made six hours later and this is because according to PW10 he reached the house of the 1st appellant at about 3.00 pm. The robbery had taken place at 9 pm.”

In so doing, was the doctrine of recent possession aptly applied by the courts below to the facts of this case? In order to enable us determine this issue, we find that a brief outline of the facts is necessary.

On 3rd April 2010, Jacklyne testified that at 10.00pm robbers entered their home disguised as policemen. They were armed with pangas, a sword and something that looked like a pistol and demanded money from her. The robbers poured diesel on her and threatened to burn her. They took Kshs. 4000/- from her and a radio.

When Beth and her husband arrived home from a funeral at 10.00 pm, people who claimed to be police officers attacked them. Beth was robbed of a handbag and a phone. The handbag, hairband and business cards were later recovered. According to her, the robbers were not wearing jungle jackets.

Alex Oremo, the Assistant Chief of Sivakala East Location, holding over for the Assistant Chief of Murandu sub-location, conducted a search on 3rd April 2010 of a number of suspects' homes, including the appellants. He recovered several items from the house of one Stephen, and from the 1st appellant's house he recovered a toy pistol and a jungle jacket. At the 2nd appellant's house he recovered another jungle jacket. It was his evidence that these were the only items recovered from the appellants.

In the case of ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005***, this Court succinctly outlined the parameters within which the doctrine of recent possession can be applied when it was stated thus,

“...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.”

Therefore, for the doctrine of recent possession to be applied, there must be 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.

According to the charge sheet and the evidence, Jacklyne was robbed of Kshs. 4000/-, while Beth was robbed of one leather handbag and a DVD Sony. None of these items were recovered from the appellants' possession.

To the contrary, it was Alex Oremo, the Assistant Chief's evidence that he recovered a toy pistol and the two jungle jackets from the appellants' homes. Neither of those items belonged to the complainants. They were not the complainants' property, and nor were they property stolen from the complainants. Had the courts below taken into account that the toy gun and the jungle jackets found in the appellants' possession were not items stolen from the complainants, they would have concluded that the doctrine of recent possession was inapplicable to the items recovered, and it could not be relied upon as a basis for convicting the appellants.

As rightly conceded by Mr. Ketoo, in the face of the findings by the lower courts that the appellants were not positively identified, and having concluded that the lower courts wrongfully applied the doctrine of recent possession to property that did not belong to the complainants, it is evident that the prosecution has failed to prove that the appellants were connected to the offence, to the extent that the conviction has been rendered unsafe.

In sum, we must allow the appeal, quash the conviction and set aside the death sentence. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED and delivered at Kisumu this 11th day of October, 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