



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 29 OF 2014**

**BETWEEN**

**JOHN MUTEMBEI MUTHAMA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nyeri (Ougo & Aboudha, JJ.)*

*dated 19<sup>th</sup> December, 2013*

**in**

**H.C.CR.A No. 77 of 2012)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

**1. John Mutembei Muthama**, the appellant, and one Robert Mutahi Ndirangu were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in the Chief Magistrate's Court at Nanyuki.

2. The particulars of the charge were that on 25<sup>th</sup> February, 2010 at Ichuga area in Laikipia District of the then Rift Valley Province, the appellant and his co-accused jointly with others not before the court, being armed with offensive weapons namely, axes and swords robbed Zachary Mathai of motor vehicle registration number KBJ 544K, Toyota station wagon, cash Kshs. 6,000/=, ATM card, two mobile phones, one radio, binoculars, wrist watch, clock, beddings and other household goods all valued at Kshs. 900,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Zachary Mathai.

3. The appellant and his co-accused pleaded not guilty and the prosecution called a total of seven witnesses. It was the prosecution's case that on 25<sup>th</sup> February, 2010 at around 10:00 p.m., PW1, Zachary Mathai (Zachary), drove into his compound after his employee PW2, Titus Kimathi Kamungi (Titus), opened the gate. While Titus was closing the gate, seven men armed with bows and arrows entered the compound. Zachary who was still in his car saw the intruders tying Titus up and ordering him to lie down on the ground. One of the intruders went to Zachary and pointed an arrow at him through the vehicle's

window; the intruder ordered Zachary to come out of the vehicle. Zachary came out and the intruder searched him. According to Zachary, the intruder took Kshs. 8,000/= and his Barclay's bank ATM card from his pocket.

4. The intruders then led Zachary into his house and tied his hands and legs; they ordered him to lie down on the floor and placed cushions and a stool on him; they ransacked the house and took some items therein. Before leaving, the intruders ordered Zachary to give them the PIN to his ATM card which he obliged. Zachary managed to untie himself and raise an alarm. Zachary discovered that the intruders had taken an artificial dog, Sony system, speakers, a gas cylinder, a meko gas, two mobile phones, 10 pairs of bed sheets, a watch and binoculars; they had carried the said items in his vehicle registration number KBJ 544K, Toyota Fielder.

5. Meanwhile, PW3, PC Boniface Lukwa (PC Boniface), and PW6, PC Billey Njuguna (PC Billey), were on patrol in Nanyuki town. They received a report of the said robbery from the control room; they were informed that the robbers had stolen the victim's vehicle and Barclay's bank ATM card. They both testified that they were given the description of the car and instructed to be on the lookout. PC Boniface testified that they went to the Barclay's bank ATM machine and parked close by. At around midnight, they noticed a motorcycle with three people stopping at the ATM. The three people alighted; two of them stood on the road as lookouts while the third went to the ATM booth.

6. Suspecting that they could be robbers, PC Boniface and PC Billey came out of the patrol car and ran towards the ATM to apprehend the said persons. The two who were on the lookout managed to run away but the appellant who had gone to the ATM was apprehended. It was both PC Billey's and PC Boniface's evidence that they found the appellant with a Barclay's bank ATM card bearing the complainant's name. Zachary's vehicle was later found abandoned. The appellant's co-accused was later arrested following information by an informer. They were both subsequently arraigned and charged in court.

7. The trial court found the prosecution had not established a case against the appellant's co-accused and therefore acquitted him. However, the trial court found the appellant had a case to answer and placed him on his defence. The appellant gave unsworn statement. He testified that prior to his arrest he used to operate a *boda boda* motorcycle; on 25<sup>th</sup> February, 2010 at around 11:00p.m. two men hired his services to drop them at the stage. Before arriving at the stage, the two men directed him to take them to the Barclay's bank ATM machine to withdraw some money in order to pay him. At the ATM the two men alighted and he was left with the motorcycle; a few seconds after he heard gunshots from the opposite side and he was arrested by police officers. He denied being in possession of the said ATM card or committing the offence he was charged with.

8. After considering the evidence on record, the trial court found that the prosecution had proved its case against the appellant. The appellant was convicted and sentenced to death. Aggrieved with the said decision, the appellant filed an appeal in the High Court which was dismissed vide a judgment dated 19<sup>th</sup> December, 2013. It is that decision that has provoked this second appeal based on the following grounds:-

- ***The learned Judges erred in law in failing to note and consider that the charge sheet was defective in form and substance and it affected the entire proceedings.***
- ***The learned Judges erred in law in failing to note and consider that by expunging the evidence of PW3, the rest of the evidence became shaky and weak thus casting doubt.***
- ***The learned Judges erred in law in failing to note that the trial had amounted to a miscarriage of justice for reasons that the appellant had not been supplied with witness statements of PW7- Gabriel Njuguna and PW5- William Kangongo thus violating the provisions of Article 50 of the Constitution of Kenya, 2010.***
- ***The learned Judges erred in law in failing to note and consider that the alleged recovered ATM card contained a different number from that which was described by the complainant thus casting doubt to the authenticity of the said evidence.***
- ***The learned Judges erred in law in failing to note and consider that the prosecution case was marred with contradiction and inconsistency.***
- ***The learned Judges erred in law in failing to note that at the time of occurrence of the***

*offence, the appellant had already been arrested on 21<sup>st</sup> February, 2010 hence he could not have committed the offence.*

- *The learned Judges erred in law in failing to note that the prosecution had not discharged their burden as enshrined in the Evidence Act.*

9. Mr. Maragia, learned counsel for the appellant, submitted that the charge was defective because the weapons described therein were not the same as those mentioned in the evidence of the witnesses; the charge sheet mentioned axes and swords yet none of the prosecution witnesses testified that the robbers were armed with axes or swords. He submitted that the appellant ought to have been charged with the offence of simple robbery under **Section 295** of the **Penal Code**. Mr. Maragia argued that there was no evidence that the appellant was found in possession of the complainant's ATM card, neither was the appellant identified by the complainant as one of the intruders. He urged us to allow the appeal.

10. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal, maintained that the prosecution had proved its case against the appellant to the required standard. According to him, the case was based on the doctrine of recent possession. The appellant was found with the complainant's ATM card an hour after the robbery. Mr. Kaigai submitted that the defects on the charge sheet were curable under **Section 382** of the **Criminal Procedure Code**. He urged us to dismiss the appeal.

11. We have anxiously considered the grounds of appeal, the record, submissions by counsel and the law. This is a second appeal and by dint of **Section 361** of the Criminal Procedure Code, this Court is restricted to delve on matters of law only. In **Kaingo –vs- Republic (1982) KLR 213**, this Court at page 219 stated:-

*“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari C/O Karanja –vs- R (1956) 17 EACA 146)”*

12. On the issue of the charge sheet, we note that the charge sheet indicated that the appellant and his accomplices were armed with axes and swords. However, PW1 (Zachary) and PW2 (Titus) testified that the robbers were armed with bows and arrows. What then is the consequence thereof? **Section 382** of the **Criminal Procedure Code** provides;

*“Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

*Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”*

13. We are of the considered view that the said discrepancy in respect of the description of the weapons in the charge sheet did not in any way prejudice the appellant. This is because firstly, the charge sheet indicated that on the material day the appellant and his accomplices were armed with dangerous offensive weapons which was an essential ingredient for the offence of robbery with violence. Secondly, the appellant was aware of the offence he was charged with and thirdly, the said discrepancy had no bearing or effect in the appellant's conviction. In **Joseph Maina Mwangi -vs- Republic - Criminal Appeal No. 73 of 1993** this Court held:-

*“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are*

***inconsequential to the conviction and sentences.”***

14. Having perused the record, we note that after taking the appellant's plea, the trial court issued an order directing the appellant to be furnished with the witness statements. Thereafter, the appellant never indicated to the trial court and the High Court that he was never supplied with the same. Before the trial court, the appellant was able to conduct his defence; he neither intimated nor demonstrated the prejudice he suffered, if any, by virtue of failure to have the witness statements availed to him. We find that this ground of appeal is an afterthought and lacks merit.

15. The case against the appellant was based on the doctrine of recent possession. According to the appellant, the two lower courts erred in invoking the said doctrine. It was Zachary's evidence that the robbers took his Barclay's bank ATM card on the material day; a few hours later PW3 (PC Boniface) and PW6 (PC Billey) saw the appellant and his accomplices at the Barclay's bank ATM machine; they managed to apprehend the appellant who was in possession of the stolen ATM card. It was submitted on behalf of the appellant, that the High Court having expunged the evidence of PW3 (PC Boniface), possession of the ATM card by the appellant had not been established.

16. It is our considered view that the High Court correctly expunged the evidence of PC Boniface on the ground that his evidence was taken under the conduct of one PC Ihaji who was not a qualified prosecutor. However, we note that the evidence of PW6 (PC Billey Njuguna) who was also present when the appellant was apprehended, was taken by a qualified prosecutor, one Chief Inspector Osman. PW 6 testified that upon apprehending the appellant, they found him in possession of a Barclay's bank ATM card bearing the complainant's name. PW6 testified as follows in regards to recovery of the ATM Card and its possession by the appellant.

***“On the 25<sup>th</sup> February, 2010 at 11 pm I was on duty within Nanyuki town with PCC Boniface Lukwa. We received a report from the control room that there had been a robbery at Kwa Huku area. We were instructed to be on alert. We were informed that a vehicle registration no. KBJ 544K Toyota station wagon white in colour had been stolen. That the thieves had stolen an ATM Card from Dr. Kingori. We kept watch between Barclays Bank. After about 30 minutes, we were near Barclays Bank when a motor cycle came carrying three people. It parked outside the bank. The rider alighted and went towards the ATM machine of the bank. The other two were left standing near the motor cycle. We went towards them. Those who were standing near the motor cycle started to run away. We ordered them to stop but they did not. They escaped through an alley between Barclays Bank and a VCT Centre building. We ordered the other one to stop. He stopped. We went to him. He had tried to escape but we stopped him. We found him holding the ATM Card on his hand. We checked it. We found the bearer was Zachary Kingori. We arrested him. He is the 1<sup>st</sup> accused (John Mutembei Muthami) in the dock. We phoned the OCPD. He came to the place. We interrogated the 1<sup>st</sup> accused. He said that the others who had escaped were “Kina Musyoki”. We waited for the duty officers Cpl Kangogo to come. He came. We handed over the 1<sup>st</sup> accused, the motorcycle and the ATM Card to him. We went in search of the others who had escaped. We did not get them.”***

17. It is our considered view that the testimony of PW6 remained unshaken; the trial court found that PW6 was a credible witness and we see no reason to interfere with that finding. See this Court's decision in *Nelson Julius Irungu –vs- Republic- Criminal Appeal No. 24 of 2008*. The complainant PW1 positively identified the recovered ATM as the one which was stolen on the material day. We note that the appellant did not give any explanation for being in possession of the said ATM. In *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005*, this Court held,

***“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.”***

18. In the instant case, the appellant was found in possession of the ATM card a few hours after the robbery. It is trite law that when the prosecution case rests on the doctrine of recent possession, once exclusive possession by the accused/appellant of the stolen item has been proved, there is no need for independent, additional or corroborative evidence. The case of ***Daniel Muthomi M’Arimu (Nyeri Criminal Appeal No. 166 of 2011)*** is distinguishable to the extent that in the instant case, exclusive possession of the ATM card by the appellant was proved while in the ***Daniel Muthomi case***, the stolen item was recovered in possession of a third party and exclusive possession by the appellant was not proved. We hasten to add that the case of ***Daniel Muthomi M’Arimu (Nyeri Criminal Appeal No. 166 of 2011)*** does not establish the principle that additional corroborative and independent evidence is required before convicting an accused when the doctrine of recent possession is applicable. In ***George Otieno Dida & Another -vs-Republic [2011] eKLR*** the appellant therein had been found in possession of the stolen goods less than five hours after the robbery and this Court held that:-

***“There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies.....”***

***In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands.”***

19. The upshot of the foregoing is that we find no reason to interfere with the concurrent findings of the two lower courts. Consequently, the appeal herein is hereby dismissed.

***Dated and delivered at Nyeri this 21<sup>st</sup> day of January, 2015.***

***ALNASHIR VISRAM***

.....

***JUDGE OF APPEAL***

***MARTHA KOOME***

.....

***JUDGE OF APPEAL***

***J. OTIENO- ODEK***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**