



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING IN MERU)**

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

**CRIMINAL APPEAL NO. 53 OF 2013**

**BETWEEN**

**DEDAN KIMATHI ..... 1<sup>ST</sup> APPELLANT**

**PHINEAS KAARIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Embu (Lesiit &*

*Makau, JJ.) dated 12<sup>th</sup> July, 2012*

**in**

**H.C.CR.A No. 43 of 2009 consolidation with 41 & 40 of 2009)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> appellants jointly with Chabari M’ruare were charged with one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in the Principal Magistrate’s Court at Chuka. Chabari M’ruare was also charged with an alternative count of handling stolen property contrary to **Section 322(2)** of the **Penal Code**.

2. The particulars of the offence of robbery with violence were that on 30<sup>th</sup> September, 2008 at Kamujwa Village, Tunyai Location in Tharaka District within the then Eastern Province while armed with dangerous weapons namely pangas, the appellants and their co-accused jointly robbed Chabari Ntariberia of two sacks of maize, two sacks of peas and cash Kshs. 30,000/= all valued at Kshs. 37,000/= and at or immediately before and immediately after the time of such robbery wounded Chabari Ntariberia. On the alternative charge, the particulars were that on the abovementioned date and place otherwise than in the course of stealing Chabari M’ruare dishonestly retained 140 Kilograms of maize knowing or having reasons to believe them to be stolen goods the property of Chabari Ntariberia.

3. It was the prosecution's case that on 30<sup>th</sup> September, 2008 at around 3:00 a.m. while PW1, Chabari Ntariberia (Chabari), and PW2, Mbaka Mati Chabari (Mbaka), were asleep robbers broke the door and gained entry into their house. One of the robbers hit Chabari on his head with a panga. The robbers tied up Mbaka (Chabari's wife) and beat her severely until she lost consciousness. The robbers stole two sacks of maize, two sacks of peas and Kshs. 30,000/=. Thereafter, the robbers left and Chabari's neighbours came to their aid. Both Chabari and his wife maintained that they were able to identify the robbers during the incident.

4. PW4, James Mugambi (James), testified that on the material day at around 5:00 a.m. he heard people running outside. He became curious and went out to see what was going on. He saw the appellants and their wives carrying sacks on their backs. He noticed that the 1<sup>st</sup> appellant's wife who was walking behind was rubbing the ground with her feet in order to distort their footprints.

5. Some of the stolen cereals spilled while the robbers fled. The trail of cereals led to Chabari M'ruare's house wherein the stolen cereals were recovered. It was the prosecution's case that both appellants and Chabari M'ruare were in the said house; they failed to give an explanation of how they came to be in possession of the stolen cereals hence they were arrested and charged.

6. In their defence the appellants and Chabari M'ruare gave unsworn statements and denied the charges against them. The first appellant testified that on 29<sup>th</sup> October, 2008 he was given a casual job by one Henry Kiria at his home; he worked until 6:30 p.m. and went home. The following morning he met Regina Gakandi who informed him about the robbery. The 1<sup>st</sup> appellant went to Chabari's house in the company of other people. According to him, Chabari stated that he could not recognize the robbers.

7. The 2<sup>nd</sup> appellant testified that on the material day his wife informed him that the Assistant Chief was looking for him. Thinking that the Chief was looking for illicit brew, the 2<sup>nd</sup> appellant ran away but he was later arrested. Chabari M'ruare gave evidence that on the morning of 30<sup>th</sup> October, 2008 people came to his house claiming they were looking for stolen maize. They searched the house and took his maize.

8. At the conclusion of the trial the trial court convicted the appellants and their co-accused for the offence of robbery with violence and sentenced them to death. Subsequently, the appellants and their co-accused filed an appeal in the High Court. Vide a judgment dated 12<sup>th</sup> July, 2012 the High Court confirmed the appellants' conviction and quashed Chabari M'ruare's conviction. It is that decision that has provoked this second appeal based on the following ground:-

- ***The learned Judges erred in upholding the conviction by the trial court despite there being no positive identification of the appellants as the assailants.***
- ***The learned Judges erred in relying on circumstantial evidence which was marred with inconsistencies.***

9. Mr. Kaburu, learned counsel for the appellants, submitted that it was PW4's (James) evidence that on the material day at around 5:00 a.m. he saw the appellants and their wives carrying sacks on their backs. Based on the foregoing he argued that there was no way James could have seen the appellants going to the complainant's house since the incident occurred at 3:00 a.m. and not at 5:00 a.m. Mr. Kaburu faulted the High Court for upholding the appellants' conviction. He submitted that the circumstantial evidence against the appellants was not watertight and did not irresistibly point to the appellants' guilt. He urged us to allow the appeal.

10. Mr. Makori, Senior Prosecuting Counsel submitted that the evidence tendered by the prosecution connected the appellants to the robbery. One of the appellants' wives was seen distorting their footprints. The appellants' were found in recent possession of the stolen maize. He urged us to dismiss the appeal.

11. This is a second appeal and this Court by dint of **Section 361** of the **Criminal Procedure Code** is restricted to delve on matters of law only. In **Karingo –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. The trial court based the conviction of the appellants on the identification evidence tendered by the complainant and his wife. However, upon re-evaluation of the said evidence the High Court expressed itself as follows:-

**“We have thoroughly re-analyzed the evidence adduced before the court and find that soon after the attack PW1 told PW3 that he did not recognize anyone during the robbery. That statement was made before the bags of cereal were recovered. PW1’s position changed after the maize was recovered from the appellant’s home. In the face of PW1’s confession to PW3, we find that the evidence of identification by PW1 was not reliable. Regarding PW2, she was severely injured during the robbery to the extent she lost consciousness until her admission in hospital. Her evidence that she was able to recognize her attackers cannot be given much weight given the fact that PW1 who never lost consciousness was not able to identify anyone and yet both of them were in the same room at the time of attack.”**

We concur with the findings of the High Court that the evidence by the complainant and his wife was not safe to warrant the appellants’ conviction.

13. The only evidence against the appellants was circumstantial. In *Sawe -vs- Republic (2003) KLR 364*, this Court held,

**“As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of the innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”**

See also this Court’s decision in *Mwita –vs- Republic (2004) 2 KLR 60*.

14. The High Court in upholding the appellants’ conviction relied on the evidence of PW4 (James). The High Court held :-

**“There was important evidence adduced by PW4. This witness can be regarded as an independent witness. PW4 said that he was awake and working within but outside his home when he saw the 1<sup>st</sup> and 2<sup>nd</sup> appellants and their wives walking on the road. PW4 testified that he saw the two appellants and their wives carrying sacks of something on their backs. He said that one of the women walked behind and was distorting the footprints with her foot. PW4 said he did not give what he saw any thought until PW3 and 5 told him about the attack on PW1 and 2..... We find that the evidence PW4 was reliable and safe. PW4 saw the 1<sup>st</sup> and 2<sup>nd</sup> appellants at 5a.m.”**

15. We find that the fact that PW4 saw the appellants carrying sacks on the material day was not enough to infer guilt on their part. We also cannot help but note that during cross examination PW4 testified that on the material day he had seen the appellants going to the complainant’s home. It was the prosecution’s evidence that the robbery took place at around 3:00 a.m.; PW4 saw the appellants at around 5:00 a.m. Therefore, when did PW4 see the appellants go to the complainant’s home? No evidence was tendered by the prosecution as to the whereabouts of PW4 at 3:00 a.m. to prove that he actually saw the appellants going to the complainant’s home.

16. Therefore, what was left of PW4's evidence was mere suspicion. Mere suspicion cannot justify the conviction of the appellant. In *Mary Wanjiku Gichira –vs - Republic- Criminal Appeal No. 17 of 1998*, this Court held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

17. The High Court also based the appellant's conviction on the doctrine of recent possession. The High Court found that the appellants were found in possession of the stolen maize. In *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- R -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.”***

It was incumbent upon the prosecution to prove that the maize which was found in the appellants' possession belonged to the complainant. Maize is a staple food in most households and as such it is readily available. In our view the prosecution did not prove that the maize found in the appellants' possession actually belonged to the complainant. Consequently, we find that the circumstantial evidence before the trial court was not sufficient to warrant the conviction of the appellants.

18. The upshot of the foregoing is that we find the appeal has merit and is hereby allowed. Accordingly, we quash the conviction and set aside the sentence meted out against the appellants. We direct that the appellants be hereby set at liberty unless otherwise lawfully held.

***Dated and delivered at Meru this 26<sup>th</sup> day of February, 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**