



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 74 OF 2010

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 73 OF 2010

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 75 OF 2010

BETWEEN

1. MICHAEL WAFULA WAMBANI

2. SAMUEL KARIUKI KINYUA

3. JOSEPHAT MUSYIMI MAKAU.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Odero & Omondi, JJ.)

dated 17th March, 2010

in

H.C.Cr.A. No. 78,79 & 80 of 2007)

JUDGMENT OF THE COURT

The three appellants *Michael Wafula Wambani*, *Samuel Kariuki Kinyua* and *Josephat Musyimi Makau* were charged with the offence of robbery contrary to *section 296(2)* of the Penal Code. The particulars were that on:

“On the 19th and 20th day of October, 2003, at Naira house in Casuarina area in Malindi Location within Malindi District of the Coast province, jointly while armed with offensive

weapons namely knives, robbed KAZUNGU RANDU RASHID of one motor cycle make SUZUKI REG. NO. KAC 771 M, ONE alarm control and one knife all valued 200,000/= and at or immediately before or immediately after threatened to use violence against KAZUNGU RANDU RASHID.”

There was an alternative charge of handling suspected stolen property contrary to **section 322** of the Penal Code. The particulars were that on the:

“On the 19th and 20th day of October, 2003, at BP Petrol Station Area in Malindi Location within Malindi District of the Coast province, otherwise than in the course of stealing, jointly dishonestly handled one SUZUKI Motor cycle REG. NO. KAC 771 M, knowing or having knowledge that it was unlawfully obtained or stolen property.”

The case proceeded before **K. Ogolla**, the then Senior Resident Magistrate, Malindi who recorded the evidence of **PW1, Vitali Sabatina**, **PW2 Patrick Kazungu** and **PW3 Suleiman Nyamoti Otieno**. Thereafter the trial was taken over by **Ogembo D.O**, the then Senior Resident Magistrate Malindi, who recorded the evidence of **PW4 Kiluno Kombo Muneni**, **PW5, Kazungu Randu Rashid**, **PW6 Salim Omar Kinyama** and **PW7 Corporal Emmanuel Kondo**. On the close of the prosecution case, the court found the trio to have a case to answer. The three appellants elected to make unsworn statements of defence. On 21st June, 2007, the court found the three appellants guilty of the main charge of robbery with violence, convicted them and sentenced them to death as by law prescribed. The appellants were dissatisfied with their convictions and filed an appeal to the High Court. On 17th March, 2010, **Omondi & Odero, JJ.** dismissed the appellants’ appeal, thus precipitating this appeal.

Each of the appellants filed his home grown grounds of appeal. However, during the plenary hearing of the appeal, **Mr. Ngumbau** learned counsel for the appellant condensed all the grounds into one, i.e. the misapplication of insufficient evidence in support of the doctrine of recent possession. Mr. Ngumbau invited us to find that although Patrick Kazungu (PW5) was said to have been the complainant, the motor cycle allegedly stolen at the time of the robbery did not belong to him, and that the real complainant did not testify. Secondly, he urged us to find that the offence of robbery with violence was not proved as the ingredients of the offence thereof were not established. He invited us to apply **section 179(2)** of the Criminal Procedure Code and convict the appellants of the alternative charge.

He relied on the following authorities:

1. *Malingi v Republic* [1989] KLR 225

2. *Daniel Muthomi M’Arimu v Republic*

Criminal appeal No. 165 of 2011 (UR)

3. *Andrea Obonyo v Republic* [1962] EALR 542

Mr. Musyoki the learned Senior Principal Prosecution counsel opposed the appeal. According to him, all the ingredients of the offence of robbery with violence were proved. He submitted that the appellants were found in possession of the recently stolen motor- cycle. According to him the motor cycle belonged to Kazungu Randu Rashid (PW5) as **GIANCARLO MUSCIANO** the registered owner who at the time was out of the country and he had left it under the custody and care of PW5. Further he added, the fact that the appellants were found in possession of the motor-cycle, raised a rebuttable presumption of fact that they were the thieves or knew the thieves, hence the burden of proof shifted to the appellants to explain how they came by the motor-cycle which they had not discharged. He relied on **section 211** of the Evidence Act in support of this postulation.

This being a second appeal, our mandate is as provided under **section 361** of the Criminal Procedure Code. Hence, our jurisdiction is limited to only matters of law and not fact. The rationale for this is that matters of fact were properly attended to by the trial court as well as the first appellate court. In the case

of *M'Riungu vs Republic [1983] KLR*, the court stated that where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law and should not therefore interfere with the decision of the trial court or first appellate court unless it is apparent that on the evidence no reasonable tribunal or court could have arrived at that conclusion.

The evidence on record is that on the night of 20th October, 2003, at about 4a.m., PW2, Patrick Kazungu, a cook at Naira House woke up to answer a call of nature. He found the two gates in the compound open. He called the watchman Kazungu Randu (PW5) but on getting no response, he pressed the alarm. Shortly thereafter, the security team comprising of PW3 Suleiman Nyamoti Otieno and others arrived. On going round the compound, they heard noises which led them to PW5 whom they found tied with ropes. The motor-cycle was missing. It had been left in the parking area on the eve of the theft although it would usually be placed in a locked room. On 9th October, 2003, PW4 Kilumo Kombe Muneni, an employee of Naira House had removed the motor-cycle from the house to the parking yard for cleaning. As he left at the end of the day's chores, he did not return the motor-cycle into the house as it had no fuel. On the following day, he saw the motor-cycle at Malindi Police Station. He is the one who had kept the key which he later gave it to the police with which they started the motor-cycle's engine. PW3 Suleiman Nyamoti Otieno from Securicor Kenya Limited responded to the alarm together with his three other colleagues. They went round the compound and rescued the watchman (PW5), who on the material night was attacked whilst in Naira House at about 1 a.m. His hands were tied and he was put in a gas cylinder chamber. When after a long time he heard footsteps, he yelled for help and was thus rescued by PW3 together with others. On going round the compound, he realized that the motor-cycle was missing. The logbook serial No. 507179 for the motor-cycle in the name of **GIANCARLO MUSCIANO** was produced by PW1 Vitali Sabatina who worked at Naira House as a caretaker. **GIANCARLO MUSCIANO** an Italian national was out of the country at the time of the theft.

As fate would have it, PW6, PC Salim Omar Kinyama together with others were on patrol duties on 20th October, 2003. At about 4.00a.m., he was near the BP Petrol Station in Malindi. He saw four persons pushing motor cycle make Suzuki and registration No. KAC 771 M. They stopped their Land Rover and arrested the four persons. On reaching the police station, he learned of the robbery at Naira House and locked up the suspects. Unfortunately, the 4th suspect died whilst in remand.

PW7, Corporal Emmanuel Kondo took photographs of the motor-cycle at Malindi Police Station and later produced them in court as exhibits. In their defences all the three appellants made unsworn statements.

The appellant told the court that he was arrested at a Mnazi Joint where he had retreated to after failing to get vegetables which he had gone to buy at Malindi New Market. As far as he was concerned, the arrest was on account of being drunk. He had a grudge with one of the investigating officers namely Ogolla who was with PW6 when he was arrested, as they had disagreed over a lady at Pumzika Bar. He denied being found in possession of the motor cycle.

The 2nd appellant on the other hand who was a turn boy, told the trial court that he left Kongowea Market in Mombasa on 20th January, 2003 at about 5.30 a.m. with an assortment of vegetables to sell in Malindi where he arrived at about 7a.m. He left the market to see his brother-in-law and as he was waiting for him, he was arrested by police officers. He was frisked and Kshs.3,300/= taken away from him. When he requested for the return of his cash, he was bundled into the police Land Rover. He denied any knowledge of the robbery.

On his part, the 3rd appellant stated that he was heading to his place of work when the police who were in a Land Rover, stopped the vehicle and bundled him into it. He too denied having been found in possession of the motor-cycle.

The appellants first line of attack on their conviction was on the basis that the owner of the motor-cycle namely Giancarlo Musciano did not testify. Whereas it is true that the motor-cycle was registered in the

name of Giancarlo Musciano, it is not disputed that at the time of the theft it was under the care and custody of PW5. At the time, the registered owner was out of the country and he had left the motor cycle under the care and control of PW5. To this extent therefore PW5 was a special owner of the motor-cycle and hence the complainant. In view of this we reject the invitation by the appellants to the effect that the evidence against the appellants was insufficient as there was no complainant.

The other ground raised by the appellants was that they ought to have instead been convicted of the offence of handling stolen property with the knowledge that it was stolen as opposed to the offence of capital robbery. For this proposition Mr. Ngumbau relied on the authority of *Andrea Obonyo & Others v Republic* in which it is stated that:

“Where it is sought to draw an inference that a person has committed another offence (other than receiving) from the fact that he has stolen articles, the theft must be proved beyond reasonable doubt and if a finding that he stole the article depends on the presumption arising from his recent possession of the stolen articles, such a finding would not be justified unless the possibility that he received the article has been excluded.”

The appellants also furthered their proposition by placing reliance on the case of *Daniel Muthomi M’Arimu v Republic* (Supra).

Firstly, the holding in *Andrea Obonyo & Others v Republic* (supra) is that one cannot be found guilty of theft (or robbery as the case maybe) even if they are found in possession of recently stolen property unless the possibility that he received the stolen goods has been excluded. In the particular circumstances of this case, the appellants were found pushing the motor -cycle at about 4 a.m. on the night of 19/20th October, 2003 by PW6 and others who were on patrol. The policemen on patrol suspected them as they had no knowledge of the theft which had occurred at Naira House at about 1.00a.m. On the other hand, PW5 was attacked on the said night at about 1.00 a.m. He was hit from behind and his throat held to prevent him from screaming. He was tied whilst being threatened with death. He was thereafter placed in a gas cylinder chamber where he remained helpless until he was rescued by PW3. The time when the motor-cycle was stolen up to the time it was found in possession of the appellants was barely three (3) hours. The motor- cycle is not the kind of goods that can exchange hands easily. It is therefore improbable that the appellants would have come by the motor-cycle, innocently within that short period of time. The appellants were found pushing the motor-cycle as it had no fuel. PW4 told the trial court that after washing the motor-cycle at Naira House, he did not move it to its usual place as it had no fuel. We think that these factors led to the conclusion that the appellants were active participants in the robbery and excluded the possibility that the appellants merely received the motor-cycle.

The appellants’ further submissions was that they ought to have been found guilty of the alternative count of handling suspected stolen property. Counsel placed heavy reliance on the case of *Daniel Muthomi M’Arimu v Republic* (supra) where the court sitting in Nyeri (*Visram, Koome & Odek, J.J.A.*) found that recent possession provides evidence of probative value and further held that apart from being in possession;

“... there must be additional evidence that corroborate and identify the appellant ... where identification arises from possession of stolen items, it is advisable (emphasis ours) to seek corroborative evidence on identity. In cases where the doctrine of recent possession has been applied to convict an accused there has been additional evidence on identification such as confessions or the complainant being able to describe or identify the accused person and the recovery of the recently stolen items have been held to corroborate the evidence on identification.”

In the case of *Lucian Mwandoe Shuma & 4 others v Republic Criminal Appeal No. 63 of 2014* (unreported) this Court had occasion to consider the holding in *Daniel Muthoni M’Arimu v Republic* and we stated:

“The doctrine of recent possession is in the nature of circumstantial evidence linking the

accused to the offence. In the circumstances to insist that there must be other evidence linking the accused to the offence is erroneous and flies in the face of the very difficulties that the application of the doctrine was meant to cure. We do not agree with the position that seem to be suggested that the doctrine of recent possession per se cannot form a basis for conviction. We need not emphasize the fact that the application of the doctrine is presumptive in nature. It is a rebuttable presumption. This is why the accused is called upon to explain his possession of the goods. As far as we are concerned, the doctrine is invoked once the following is proved with credible evidence:

- 1. That the suspect was found in possession of the items allegedly stolen from the complainant(s).*
- 2. The items belong to the complainant and were positively identified as such.*
- 3. The items were stolen from the complainant.*
- 4. The items were recently stolen from the complainant.*
- 5. The goods are of such that they could not have easily exchanged hands”*

In the case of *Lucian Mwandoe Shuma & 4 others v Republic* (supra) we cited the case of *Christopher Rabut Opaka v Republic, Kisumu Criminal Appeal No.82 of 2004 (UR)* wherein it was held:-

“... It is trite that before a court of law can rely on the doctrine of recent possession as a basis of 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.”

We proceeded to conclude as follows:-

“It is the foregoing reasons that with respect, we do not agree with the decision in Daniel Muthoni M’arimi v Republic (supra), as it is not the law that if one is found in possession of recently stolen items, there must be some other evidence to corroborate that possession in order to convict for robbery with violence.”

With respect, we still maintain the considered view that no corroborative evidence is required to supplement evidence of recent possession in order to sustain a conviction for robbery with violence. This ground of appeal must inevitably also fail.

The upshot of the above is that we find no merit in this appeal and it is accordingly dismissed.

Dated and delivered at Malindi this 26th day of February, 2015

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR