



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 615 OF 2010

BETWEEN

JOSEPH OKEYO AYIEKO1ST APPELLANT

CHARLES NJONJO OWAWA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii, (Musinga&Muchelule, JJ.) dated 23rd July, 2009

in

H.C.CR.A. NOS. 126 “B” & 127 OF 2007)

JUDGMENT OF THE COURT

1. **JOSEPH OKEYO AYIEKO** (the 1st appellant) and **CHARLES NJONJO OWAWA**, (the 2nd appellant) were with the one **Judith Adhiambo Opajo (Judith)** charged with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. The 1st appellant and Judith were in the alternative charged with handling stolen property contrary to **Section 322(2)** of the Penal Code. They pleaded not guilty but after trial before the acting Senior Resident Magistrate at Rongo, the appellants were convicted on the main charge of capital robbery and sentenced to death. Judith was acquitted.
2. The appellants’ appeal to the High Court having been dismissed, they have come to this Court on a second appeal. The substratum of their seven grounds of appeal, ground seven having been abandoned, is that their identification was flawed and that the learned Judges of the High Court failed to properly re-evaluate the evidence on record.
3. Presenting the appeal before us, Mrs. Onyango, learned counsel for both the appellants, submitted that the intensity of the moonlight and the distance between PW7 and the people he and his colleagues arrested having not been stated, PW7’s purported identification of the appellants cannot be relied upon. She further argued that there is no evidence to show who was found with the

- alleged stolen items. In the circumstances, the High Court erred in upholding the appellants' conviction on the basis of the doctrine of recent possession. At any rate, she further argued that the stolen goods were found in the house of one Ouko who escaped whilst nothing was recovered from the house of the 2nd appellant. The 1st appellant denied having been found in possession of the stolen goods and had explained how he happened to be in the said Ouko's house.
4. Lastly, Mrs. Onyango argued that the appellants were not accorded a fair trial. This is because in spite of their repeated applications they were not supplied with the statements of PW6 and PW7 and that failure caused them great prejudice. In the circumstances she urged us to allow this appeal.
 5. Opposing the appeal, Mr. Sirtuy, learned Principal Prosecution Counsel, submitted that the appellants were found with property that had been stolen a few hours before and their conviction on the doctrine of recent possession was therefore well founded. He therefore urged us to dismiss this appeal.
 6. The robbery giving rise to this appeal took place on the 25th January, 2007 at the house of **Isack Mauti Kisoni, PW1**, at the Sony Sugar staff quarters at Awendo. Three people broke into the house of PW1 and stole several items after assaulting and inflicting serious injuries upon him. Neither him nor his children were able to identify any of the attackers.
 7. Upon receipt of the report on the robbery incident, **PC Michael Owiro** and **PC Mutua** rushed to the scene and found that PW1 had been taken to hospital. After a briefing by PW1's children of what had happened, the two police officers followed footprints which disappeared into a maize plantation. They called for reinforcement and were joined by several other police officers. As they combed the maize plantation they heard people talking nearby and laid an ambush. Three people emerged from the maize plantation, two of whom were carrying some items, and entered into a house about three meters from where the two police officers were. Before they could make any move, one person left the house, and went into another house nearby. The police officers separated into two groups and stormed into the two houses.
 8. The house PW4 and his group went into turned to be that of the 2nd appellant. He found him with his wife and arrested him. **PC Douglas Ongicho, PW7** and his group went into the other house. After knocking, a person who was stark naked opened the door and ran away. They went in and found the 1st appellant and Judith. Several items were recovered from that house which PW1 later identified as having been stolen from his house. They arrested the 1st appellant and Judith and later charged them as well as the 2nd appellant with the charges stated above. The issue for our determination is whether the appellants were among the three people who robbed PW1.
 9. As we have stated PW1 never identified any of his attackers. The appellants' conviction was based on the doctrine of recent possession and the evidence of PW4 and PW7.
 10. We are unable to accept Mrs. Onyango's contention that these two witnesses were not able to identify the appellants. Both of them clearly stated that the moonlight which was bright enough for them to identify the appellants. They were people whom they knew having previously arrested and charged them for other offences. Even if the moonlight was not bright enough, we find that it enabled them to at least see three people emerge from a maize plantation and enter into one of the two houses nearby. Shortly thereafter, one of the three people got out and went into the 2nd house. The two witnesses and their colleagues went into and found the 1st appellant and Judith in one of those houses from which they recovered several items stolen a few hours before from PW1. In the second house where one of the three men who emerged from the maize plantation went into, they found the 2nd appellant and his wife.
 11. Upon being put on their defence, the appellants denied having been involved in the robbery. In her sworn testimony however, Judith stated that she had gone to visit her boyfriend Ouko. At

about 9.00 pm, the 1st appellant went into Ouko's house and soon thereafter another person joined them. They stayed for a short while and went away leaving her alone in the house. While asleep, she heard them come back at about 1.00 am, soon thereafter the police stormed into the house and her boyfriend Ouko ran away. They arrested her and the 1st appellant.

12. We are satisfied that the two appellants and the said Ouko were together on the fateful night and they are the people whom the police officers saw emerge from the maize plantation and enter Ouko's house. Eventhough nothing was found in the 2nd appellant's house and the stolen items were found in Ouko's house, having first entered Ouko's house from which several items which had been stolen from PW1 were found a few hours previously, we are also satisfied that the two appellants and Ouko are the people who robbed PW1. Consequently, we find no merit in this appeal and we accordingly dismiss it.

DATED and delivered at Kisumu this 19th day of June, 2015.

D.K. MARAGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR