



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWERA & KANTAI, JJ.A)

CRIMINAL APPEAL NO.163 OF 2014

BETWEEN

MARTIN NDEGWA KABOCHO.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ogola & Kamau, JJ.), dated 20th December, 2013

in

HC.CR.A. No.275 of 2009)

JUDGMENT OF THE COURT

This appeal arose from the judgment of the High Court (*Ogola & Kamau, JJ.*), delivered on 20th December, 2013. The learned judges heard the appeal filed by the appellant, *Martin Ndegwa Kabocho*, who had been convicted and sentenced to death by the Chief Magistrate's Court at Thika on 23rd June, 2009.

In the lower court the appellant faced two charges of robbery with violence contrary to section 296(2) of the Penal Code. It had been alleged that on 9th June, 2008 at Mutomo Village, Thika, he jointly with others not before court attacked and robbed *Elijah Ng'ang'a Nduku* of cash, *Vodafone* cellphone, and a tool box containing spanners. At the same time, place and by the same gang, *Samuel Kiarie Gachengici* was robbed of cash and *Nokia* cellphone. At the time of the robbery incidents the two victims were threatened with actual violence to their persons.

The trial commenced on 25th September, 2008. On 2nd October, 2008 the lower court took evidence from the Officer Commanding Police Station, Gatundu, regarding the delay in presenting the appellant to court since his arrest on 7th September, 2008. The explanation tendered that the station vehicle broke down was found satisfactory and the hearing of witness proceeded.

The prosecution presented **Elijah Ng'ang'a** (PW1) as well as **Samuel Kiarie** (PW2) – the complainants. The court also heard **P.C. Chris Maida** (PW3), who rearrested the appellant. The appellant gave an unsworn statement in his defence. In his judgment, the learned trial magistrate found that the incidents of robbery took place at night, and that the complainants did not identify their attackers. But that:

“What connects the accused to this robbery is the recovery of the stolen spanner.”

PW1 had testified that the next day after robbery, he had learned from one **Ngugi** that he, **Ngugi**, had seen someone selling PW1's spanners at Unity Club.

PW1 went to Unity Club and presented himself to the appellant as a prospective customer. He was shown a spanner that he identified as one of his. He asked if there were more spanners and the appellant allegedly led him to a certain butchery where PW1's tool box was kept. It was recovered; with it, the appellant was led to the police station where PW3 rearrested him and preferred the charges. So on the basis of this evidence of recovery and the doctrine of recent possession, the appellant was convicted of both counts of the offence of Robbery with Violence contrary to **Section 296(1) of the Penal code** and sentenced. He appealed to the High Court.

In its judgment, the High Court considered grounds of appeal raised by the appellant including one of failure on the part of the prosecution to call vital witness in accordance with **section 144** as read with **section 150 of the Criminal Procedure Code**. However, it, too, found that the prosecution had proved its case on the basis of the doctrine of recent possession and dismissed the appeal.

The appellant was further dissatisfied with the High Court decision so he filed an appeal to this Court supported by a home-made memorandum of appeal wherein he raised six grounds. When **Mr. Nyachoti**, learned counsel, was instructed to represent the appellant, he filed a supplementary memorandum with four grounds. At the hearing of the appeal, counsel condensed the grounds arguing the first ground on its own and combining the rest.

Mr. Omirera, Senior Assistant Director of Public Prosecutions opposed the appeal.

Mr. Nyachoti submitted that the alleged robbery acts took place at night. He urged the Court to consider the prosecution evidence of recovery against what the appellant stated in his defence that when he went to Unity Bar, PW1 called him out and there began beating him up claiming that he, the appellant, had stolen from him. The two ended at the police station where the present charges were preferred against the appellant.

Mr. Nyachoti urged us to note that the conviction and sentence, based on evidence of PW1 as against that of the appellant was not safe. He submitted that **Ngugi** whom PW1 referred to, the bar owner and the butchery owner were vital witnesses who should have been summoned to testify in these circumstances, where the appellant had, in essence, denied committing the offence or being in possession of the spanner and/or the tool box. While conceding that in law it does not require a given number of witness to prove or disprove an allegation/claim, counsel told us that the evidence before the trial court was weak and could not be relied on to convict.

Mr. Omirera's position in opposing the appeal was that the two courts below made concurrent findings that the robbery victims did not identify their attackers but that the doctrine of recent possession was properly relied on to convict; that the appellant was not only found in possession of one of PW1's spanners but also led PW1 to the place where the rest of the spanners in a tool box, were recovered, that he alone had the knowledge of the place where the tool box was; and that the appellant did not offer any explanation for being in possession or claim ownership of the recovered property which PW1 positively identified as his. It was not necessary therefore to call either **Ngugi** (PW1's informer), the bar owner or the butchery owner to testify in the matter.

Mr. Nyachoti made a brief response and that closed the hearing before us.

In determining this second appeal, we are cognizant of the provisions of **section 361(1) of the Criminal Procedure Code** as has been propounded upon in many past decisions of this Court, including *Njoroge v. Republic [1982] KLR 388* which stated that:

“On second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.”

In the present appeal, the appellant’s position is that the aspect of possession was not conclusively proved and decided as against him.

Possession is defined in **section 4 of the Penal Code** as follows:

“(a) “be in possession of” or “have possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of or benefit of oneself or of any other person.”

Mr. Omirera’s position was that possession could either be actual or constructive; that the prosecution proved that not only was the appellant found in possession of one spanner at a bar, but he also knew and led PW1 to the butchery where the tool box was recovered; and that PW1 positively identified the tool box and spanners as his property.

We agree that that was the evidence of PW1 and that there is no law that requires a certain number of witnesses to prove a fact. However, the appellant was facing serious charges and, it was necessary that all relevant evidence be availed to the court. In the circumstances, **Ngugi**, the bar owner and particularly the butchery owner were crucial witnesses in regard to the possession of the recovered item. We emphasize that the evidence of the butchery owner was vital because he should have told the court that indeed the appellant took the tool box to his butchery and he handed it over to PW1 in the presence of the appellant. At no moment are we suggesting that PW1’s testimony was not truthful or reliable. But only that in such a case, it was necessary that the bar owner testify that the appellant took the tool box to his butchery. That would have provided support for PW1’s evidence and the nexus between the appellant and the recovered tool box, leading to the inescapable conclusion that the appellant was in constructive possession of it. The failure to call this crucial evidence, weakened the prosecution case with regard to the constructive possession, creating a doubt the benefit of which must be given to the appellant. We find that the appellant’s conviction was not safe and cannot be upheld.

Accordingly, we allow appeal, set aside the High Court judgment, and substitute thereto an order allowing the appeal and quashing the appellant’s conviction and sentence. We direct that the appellant therefore be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 3rd day of July, 2015

H. M. OKWENGU

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

