



IN THE COURT OF APPEAL

AT ELDORET

CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

CRIMINAL APPEAL NO. 479 OF 2010

BETWEEN

FESTUS MBWELI MUTISYA FIRST APPELLANT

VINCENT OPOLOI ONGALA SECOND APPELLANT

AND

SULEIMAN IBRAHIM RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Bungoma (Muchemi & Chitembwe, JJ.)
dated 15th July, 2009*

in

HCCR APPEAL NO. 41 & 42 OF 2008)

JUDGMENT OF THE COURT

1. **Vincent Opoloi Ongala** (the appellant), together with **Festus Mbweli Mutisya** (deceased), were convicted for the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code** and sentenced to death. Their first appeal to the High Court was unsuccessful, hence this second appeal. While the appeal was pending before this Court, Festus Mbweli Mutisya, who was the first appellant, died and consequently his appeal abated in terms of **rule 69 (1) (a)** of the **Court of Appeal Rules**.

2. The facts that gave rise to this appeal were that on 30th April, 2006 at 10.00p.m., at Runda Estate, Nairobi, the appellant jointly with others, while armed with a dangerous weapon namely, a pistol, robbed **George Stephen Owuor**, the complainant, of assorted household items including a television set, video recorder, music system, mobile phones and clothes, and at the time of the robbery or immediately before or after the robbery used actual violence on the complainant.

3. The complainant was a licenced firearm holder and was residing at Runda Estate, Nairobi. He had employed the appellant as his househelp. On 30th April, 2006 the complainant, (PW 1) returned to his house at about 8.00 p.m. and realized that the safe where he kept his firearm had been broken and the

firearm was missing. A box that contained assorted clothing was also missing. When he asked the appellant what had happened, the appellant responded that some people had drugged him during the day and therefore he did not know what had happened.

4. The appellant offered to call a neighbour's househelp to come and explain the incident further. The appellant gave his employer a certain number to call, which he did, and after a short while the appellant opened the gate, ostensibly for the neighbour's househelp to come in. But to the complainant's shock, two strangers burst into the house, tied the complainant's hands and legs and locked him up in his bathroom. The two strangers were armed with the complainant's stolen gun. They stole assorted household goods and left. The complainant broke open the bathroom door after the assailants left and reported the incident to the police.

5. The appellant walked out of the house when the assailants entered. He ran away to his upcountry home in Teso District. When the police got wind of his whereabouts they proceeded there and found him. He was in possession of several items that had been stolen from his employer's house. The police arrested the appellant. Thereafter the complainant together with his brother, PW 4, identified the recovered items as being among those that had been stolen.

6. Following some robberies that were committed on 20th June, 2006 around Malaba, police launched investigations and managed to arrest Festus Mbweli Mutisya, (now deceased), who they found in possession of the firearm that had been stolen from the complainant's house.

7. In his defence, the appellant alleged that he was also a victim of the robbery, just like the complainant. He admitted that he was the complainant's househelp at the material time. After the robbery, the appellant alleged, the complainant gave him some money and allowed him to travel to his upcountry home. He remained there until the night of 23rd and 24th September, 2006 when he was arrested.

The appellant further alleged that the complainant's clothes that he was found in possession of had been lawfully given to him by the complainant.

8. The trial court having found that there was overwhelming evidence against the appellant, convicted and sentenced him to death as earlier stated.

9. In his supplementary memorandum of appeal before this Court, the appellant stated that the first appellate court erred in law in failing to submit the evidence that was tendered before the trial court to an exhaustive examination. He further contended that the High Court erred in law in its application of the doctrine of recent possession to affirm the trial court's conviction against him.

10. In his brief submissions, **Mr. Kitigin**, learned counsel for the appellant, urged this Court to find that his client was a victim of the robbery, just like the complainant. He added that the complainant's clothes that were found in the appellant's possession had been lawfully given to him by his employer, the complainant.

11. **Mr. Omwega**, learned Assistant Deputy Director of Public Prosecutions, opposed the appeal. He submitted that considering the manner in which the robbery was committed, all indications were that the appellant was an accomplice, not at all a victim of the robbery. He further submitted that appellant's conduct of leaving the complainant's employment immediately after the robbery and subsequently being found in possession of the complainant's stolen clothes was sufficient proof that he was involved in the robbery.

12. We have carefully considered the record of appeal as well as the submissions by counsel. It is not in dispute that the appellant was an employee of the complainant at the time of the robbery.

The appellant was the only person in the complainant's house when the latter's firearm was stolen following a break in into the safe where it had been kept.

13. The appellant did not report anything to the complainant until the complainant noticed that the safe had been broken open. That is when the appellant came up with the pretext that he had been drugged by some unknown person.

14. It is also instructive that it was the appellant who gave to the complainant a certain mobile phone number to call, purporting to belong to a neighbouring househelp, only to find that it was a scheme intended to alert the assailants about the respondent's presence in the house.

15. After the robbers entered the house and robbed the complainant of his household goods, the appellant went missing until the police traced him to his rural home, nearly five months after the robbery. All along the appellant had not made any report to the police, assuming he was as innocent as he posed.

He was also found in possession of the complainant's stolen clothes, for which he had no reasonable explanation. On the basis of the doctrine of recent possession, we find that the appellant was lawfully convicted.

16. As to whether the High Court re-evaluated the evidence on record properly, this Court has severally held several times that there is no set format to which a re-evaluation of evidence by a first court should adhere to. See **BERNARD ZEPHANIA OMARI V REPUBLIC** [2014] eKLR.

Having perused the judgment by the first appellate court, we are satisfied that the court sufficiently re-evaluated the evidence on record.

17. Consequently, we find this appeal lacking in merit and accordingly dismiss it in its entirety.

DATED and delivered at Eldoret this 10th day of December, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR