IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KARANJA, MARAGA & MWILU, JJ.A.)

CRIMINAL APPEAL NO. 501 OF 2011

BETWEEN

AHMED ABDALLAH...APPELLANT

AND

REPUBLIC..RESPONDENT

(*An appeal from the Judgment of the High Court of Kenya at Bungoma (Sergon & Kariuki, JJ) dated 31st May, 2005*

in

H.C.CR.A. NO. 33 OF 1998)

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JUDGMENT OF THE COURT

Ahmed Abdallah (Appellant) was charged before the senior principal magistrate's court Bungoma with three others not before court, with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge were that on the nights of 26th/27th day of February 1997, at Bitobo Village in Bungoma District within Western Province, jointly with others not before court while armed with dangerous weapons namely knife, hammers and sticks they robbed Francis Muhindikha Wamalwa of shop goods valued at Kshs. 23,700/= and at or immediately before or immediately after the time of such robbery they used actual violence by assaulting the said Francis Muhindikha Wamalwa.

He also faced an alternative charge jointly with another not before court of handling stolen property contrary to **Section 322(2)** of the **Penal Code.**

He pleaded not guilty on both the main and the alternative charges and the matter proceeded to full trial with the prosecution calling a total of nine witnesses.

In his defence, he made an unsworn statement and called no witnesses.

He was found guilty and convicted on the main count and sentenced to death. Some of his co-accused persons got lucky and were acquitted.

Aggrieved by the conviction and sentence, the appellant and two others moved to the High court on appeal against the said conviction and sentence. The High court (J. K. Sergon & G.B.M. Kariuki, JJ) heard the appeal. They allowed the appeals by the other co-appellants but dismissed this appellant's appeal and upheld the trial court's conviction and sentence.

Undeterred by the said dismissal, the appellant moved to this Court which is for all intents and purposes his final hope for reprieve. At the hearing of this appeal, he was represented by learned counsel, Mr Ntenga Marube who relied on the three grounds contained in the supplementary memorandum of appeal filed on 8th February 2012 which grounds are as follows:-

1. ***That the learned Judges erred in law in not evaluating the whole evidence before the Lower Court, as is incumbent upon them as the 1st appellant (sic) court, weigh all the evidence and draw its own inferences and conclusion. A miscarriage of justice was thereby accassioned.***

2. ***That the learned Judges erred in law and in fact in convicting the appellant on the doctrine of recent possession.***

3. ***That the two courts below erred by failing to consider or adequately consider the appellant defence.***

On ground one, learned counsel submitted that the High court as a first appellate court failed in its duty to re-evaluate the evidence adduced before the trial court and coming up with its own independent decision, as set out in **Okeno vs Republic [1972] EA 32.** His contention was that, had the learned Judges re-evaluated the evidence properly, they would have observed that according to the evidence, the appellant was not in his house when the stolen items are said to have been recovered.

According to the learned Judges of the High court, PW7 (Sylivanus Nyamwari) searched the appellant's house in his presence and recovered the stolen lamp.

According to learned counsel, this finding by the learned Judges was not borne by the evidence adduced before the trial court.

The evidence of PW2 (Chrisantus Wekesa), was that they went with police officers to the home of the appellant after he had already been arrested and recovered the stole lamp. PW2 did not however, state that the appellant was present with them at the time of the recovery. Indeed, from the evidence on record, it was the appellant's father who had opened the door to the appellant's house for the witnesses. Upon carrying out a search, some shop goods which are said to have been in a basket were recovered and taken to the police station.

The lamp which is said to have been identified by the complainant is said to have been recovered during a second search. According to the learned counsel for the appellant, if indeed the stolen lamp was inside the appellant's house, why was it not recovered in the first instance in the presence of PW2, PW4 and PW5? His submission was that had this evidence been re-evaluated properly, the High court would have appreciated that there was a possibility of a frame up.

On ground 2, learned counsel submitted that the doctrine of recent possession was not properly applied as the recovered items were not recovered from the appellant and that there was no proof that the house from which they were recovered belonged to the appellant. Counsel further submitted that the recovered items had not been positively identified and that the evidence of recent possession was therefore shaky.

On the third ground, learned counsel submitted that the two courts below had not considered the appellant's defence and had therefore, arrived at the wrong decision.

In his response, Mr. Mutuku, the learned Senior Assistant Director of Public Prosecutions, supported the conviction. While conceding that the recovered shop goods were not properly identified, he nonetheless maintained that the lamp had been properly identified by the complainant and PW1. He submitted that the lamp had not been recovered during the first search as the search may not have been very thorough. That was nonetheless presumptuous in our view as it was not supported by any evidence on record. He urged us to dismiss this appeal.

We are conscious of the fact that by dint of **Section 361(1)** of the **Criminal Procedure Code,** the law enjoins us to consider points of law only. We are also aware of the various authorities from this Court on that issue (e.g. see **Kaingo v. R (1982)KLR 219.** There is no doubt however, that the issue of whether the High court properly re-evaluated the evidence before it or not is an issue of law.

We have revisited the proceedings before the trial court. We note, like rightly noted by the two courts below that nobody saw the appellant at the scene of the robbery. The evidence against him is that some suspected stolen goods are said to have been recovered from a house which the witnesses said belonged to the appellant. It is not disputed that the appellant was not present in the house from which the shop goods are said to have been recovered. The witnesses said it was the appellant's father who had opened the house for them.

The appellant's father was not called as a witness and there was no other evidence to the effect that the house in question was exclusively occupied by the appellant. He was not even present when the first search was carried out.

In our view there being no corroborative evidence to link the appellant with the said house and the recovery or theft of the items in question, this evidence is wanting and would be dangerous to base a conviction on in the absence of any other evidence. The lamp which according to the learned counsel for the State "nailed" the appellant was not recovered in the first instance with the shop goods. If it was in that house, why was it not recovered? It was the prosecution evidence that this recovery was done in the presence of the appellant. There was nonetheless no evidence that the lamp was recovered from the same house that was said to have been opened by the appellant's father.

PW2 who was present when the lamp was recovered was not in the group that had earlier on recovered the shop goods. He could not therefore, say whether the lamp was recovered from the same house. PW7 was also not in the first search team and could not therefore, say whether the lamp was in the same house from where the other shop goods had been recovered.

In our view, had the learned Judges of the High court re-examined this evidence keenly, they would have appreciated these doubts and resolved them in favour of the appellant. Having considered the grounds of appeal, the submissions of both counsel and the entire record before us, we hold the view that the appellant's case was not proved beyond reasonable doubt. There existed some doubts which ought to have been resolved in his favour.

In the circumstances, this appeal succeeds. We therefore quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Eldoret this 11th day of April, 2014.

W. KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR