



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, MWILU & MUSINGA, JJ.A)

CRIMINAL APPEAL NO 16 OF 2013

BETWEEN

SAMSON NYANDIKA ORWERWE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at

Machakos (Makhandia & Ngugi, JJ.) dated 15th June 2012

in

H.C. Cr. A. 116 of 2009

JUDGMENT OF THE COURT

1. The appellant, **Samson Nyandika Orwerwe**, was charged before the Senior Resident Magistrate's Court at Kajiado with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, Chapter 63 of the Laws of Kenya.

2. The particulars of the offence were that on the 8th December 2007 at about 7:30pm, jointly with another not before the court, robbed **Martin Matolo Muinde** of a vehicle, registration number KAE 834 M, a Toyota Sprinter taxi, Kshs 1,200.00 and a Nokia 1600 mobile phone, all valued at Kshs 225,200.00, and at or immediately before or immediately after the time of that robbery wounded the said Martin Matolo Muinde.

3. By way of background, we shall set out the evidence led before the trial court: Martin Matolo Muinde (**PW1**) was at the time material to this appeal employed by a Mr. Nzuki as a taxi driver. On the material day, at about 7.30 pm, while he was at the taxi stage at Namanga, two people, and one of whom was the appellant, came along and told him that they needed a taxi to take them to Maili Tisa. They agreed to the fee of Kshs 500.00, and commenced the journey to Maili Tisa. The appellant sat at the front, while the other passenger sat at the back, directly behind PW1. When they reached Maili Tisa, they instructed PW1

to turn left towards Oroko Secondary School. PW1 was then asked to stop the car, which he did. The passenger at the back of the car grabbed his throat and with the assistance of the appellant, pushed him into the back seat. They robbed him of Kshs 1,200.00 and his Nokia 1600 phone. They then pushed him out of the car and into a bush, and tied him to a tree, until he was rescued by one **Stanley Kisaka (PW2)**. PW1 was able to describe his attackers and stated that he was able to recognize the appellant because he had sat next to him during the 20 minute drive to Maili Tisa.

4. PW2, a herdsman who lives in Maili Tisa, was on his way home at around 10.00 p.m., on that fateful day. He heard someone scream, went and borrowed a torch, and proceeded towards the screams. He found PW1 tied to a tree and untied him and took him to Maili Tisa. With the aid of PW2, PW1 was able to call his colleague, **Geoffrey Makau (PW6)**, and inform him that he had been carjacked. He reported the matter to two Administration Police officers.

5. Administration Police **Constable Ismail Isaac (PW3)** was at the time material to this appeal attached to the Namanga AP camp. On the 8th December 2007 he was on patrol in Namanga Town with his colleague, APC Peter Muiruri Muchoki. They met a taxi driver called Makau (PW6) who informed them that his colleague, Martin, had been carjacked. They boarded PW6's vehicle and headed to Maili Tisa, where they found PW1. He was alone and standing next to the road. He narrated to them how he had been robbed and tied to a tree. He was injured. PW1 told them that his vehicle had been driven towards Nairobi, so they took the road towards Nairobi. On the way, at Ngatataek, they saw the vehicle by the side of the road. The hazard lights were on, and there were two people disembarking from it. The police ordered the two people to raise their hands; one of them being the appellant, stayed where he was but his cohort ran into a nearby bush. They arrested the appellant, who claimed to be a teacher at Lenkishon Primary School. They ordered the appellant to take him to the school. They were also led by **Samwel Sintela (PW7)** to the school, and upon reaching the school, the watchman stated that he did not know the appellant.

6. The appellant was escorted to Namanga Police Station together with the vehicle, and the appellant was booked in the occurrence book.

7. PW1 was examined by **Peter Ikwam (PW5)**, a clinical officer at Namanga Health Centre. PW1 had bruises on his hands; PW5 treated them and administered some medication. PW5 classified the degree of injury suffered by PW1 as harm.

8. The appellant's evidence was that on the material day, he went to Lenkishon to work. He arrived there at around 10.15 a.m. and he worked until 6.00 p.m. He then walked to the road to look for a vehicle to bring him to Bissil. At about 10.30 p.m., he was walking towards Bissil, when a vehicle stopped ahead of him. He was instructed to identify himself, which he did by producing his identification card. He was arrested and brought to the station along with some other ten men and was told that he had carjacked a vehicle. The OCS asked him for a bribe of Kshs 20,000.00 to release him but he could not raise it, and he was therefore taken to Loitoktok and charged.

9. Upon receiving all the evidence, the trial court formed the opinion that the appellant's version of events was implausible. The trial court held that the fact that the appellant was found in the stolen vehicle was evidence that he was one of the people who had carjacked and robbed the complainant. The appellant was accordingly found guilty as charged, convicted and sentenced to death.

10. The appellant was aggrieved by this finding and thus filed a first appeal. In his submissions to the first appellate court, the appellant faulted his conviction on the grounds that the charge was defective; that the trial magistrate had erred by relying on the identification evidence and the doctrine of recent possession; that vital witnesses were not availed; and that the evidence relied upon was inconsistent and contradictory.

11. The first appeal was heard by **Makhandia** and **Ngugi, JJ**. That court first reminded itself of its duty to re-evaluate all the evidence before it and come up with an independent conclusion, as is required in **Okeno v Republic [1972] EA 32**.

12. After considering and finding that the charge as framed was proper, the first appellate court addressed the substantive issues raised by the appellant. Regarding the identification evidence, the court was of the opinion that the trial court did not rely on identification evidence alone in reaching the verdict, but in addition relied on the doctrine of recent possession. The court also found that the discrepancies in the testimony of the witnesses were harmless errors, affirmed the decision of the trial court, and left both the conviction and sentence undisturbed.

13. The appellant still feels aggrieved, and has now preferred this second appeal. His grounds of appeal can be summed up as follows:

a. That the offence of robbery with violence was never proved to the required standard;

b. That the doctrine of recent possession was wrongly applied;

c. That the trial magistrate did not treat the parties with impartiality;

d. That the trial judges failed to discharge their duty to re-analyse and re-evaluate the evidence and arrive at an independent conclusion

14. These grounds were advanced by **Mr. Mogikoyo**, learned counsel, on behalf of the appellant. He argued just two grounds; that the charge was not proved beyond reasonable doubt; and that the learned judges erred in applying the doctrine of recent possession. Counsel abandoned the other grounds of appeal.

15. His first argument was that the ownership of motor vehicle registration Number KAE 834 M was not legally established as PW1 did not produce any documentary evidence of ownership. Counsel also faulted the photographic evidence produced by PW3 as there is no indication of who took the photos, or when these were taken, which is contrary to section 78 of the Evidence Act. He therefore submitted that these photographs were inadmissible. Learned counsel also faulted the evidence because the owner of the vehicle was never called to testify. He further argued that while PW6 stated that he had seen the vehicle outside the court room, the court never went outside to verify that the vehicle was indeed the one; that while the vehicle was said to have been discovered at the road side, it was never explained how it was driven to the police station.

16. On identification, Counsel submitted that it was unclear how the appellant was identified since the nature and intensity of the light was not given. He also faulted the identification parade that was conducted as it was done after PW1 had already seen the appellant at the police station.

17. On the doctrine of recent possession, Counsel argued that the evidence led was contradictory since both PW3 and PW4 stated that they saw the appellant disembark from the vehicle, yet PW6 stated that the appellant was inside the vehicle.

18. The appeal was opposed by **Mr. Monda**, learned Senior Principal Prosecution Counsel, on behalf of the State. He submitted that the High Court properly undertook its duty to re-evaluate and re-analyse the evidence on record and came to the correct conclusion. Counsel argued that the appellant never explained how he came to be in possession of the vehicle, and that the vehicle was properly produced in court. Mr. Monda submitted therefore that the appellant was connected to the crime and that his only witness, DW1, denied knowing him or anything about the charges facing the appellant.

19. Section 361 of Criminal Procedure Code enjoins us, acting as a second appellate court, to consider only issues of law. This Court will therefore not interfere with concurrent findings of fact by the two courts below unless such findings were made on no evidence at all or on a perversion of the evidence, or if no court would reasonably have concluded as the lower courts did if it followed that evidence. See **M' Riungu V. Republic [1983] KLR455.**

20. One issue that is central to this appeal is whether the charge of robbery with violence was proved to

the required standard. The offence of robbery with violence, as well as its ingredients are provided in section 296 (2) of the Penal Code in the following terms:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

21. In ***Oluoch V Republic [1985] KLR 549*** this Court set out the ingredients of robbery with violence. The Court rendered itself in the following manner:

“The ingredients of the offence of robbery under section 296(1) of the Penal Code are:

a. stealing anything and

b. at or immediately before or immediately after the time of stealing,

c. using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.”

22. This has been reaffirmed by this Court on several occasions, such as in ***Daniel Muthomi M’arimi v Republic [2013] eKLR*** where the court stated that proof of any one of the three elements of the offence of robbery with violence would be enough to sustain a conviction under section 296 (2) of the Penal Code.

23. Applying these principles to the appeal before us, we are satisfied that the three elements were proved. The uncontroverted evidence of PW1 was that he was approached by two men, who used personal violence on him, one choked him and the other helped push him out of the car, to where they tied him to a tree. He was found tied to this tree by PW2. PW1 had injuries on his hands and mouth as attested to by PW5 who confirmed that fact, and that the degree of injury was harm. It is therefore clear that the ingredients of the offence of robbery with violence were present.

24. One of the factors relied upon by the magistrate, and which the appellant faults, is the reliance of the doctrine of recent possession. In ***Gideon Meitekin Koyiet v Republic [2013] eKLR (Criminal Appeal No. 297 Of 2012)*** this Court stated that the doctrine of recent possession is applicable where the Court is satisfied that the prosecution have proved the following:

“a) that the property was found with the suspect;

b) that the property was positively identified by the complainant;

c) that the property was recently stolen from the complainant.”

25. PW1 had stated in his evidence that the registration of his vehicle was KAE 834 M. This evidence was corroborated by PW6. It was PW6 who produced the photographs of this car. However, we think that nothing turns on this ground of appeal as the evidence of the Administration Police officers, PW3 and PW4, was that they recovered a car, with the same registration, along the Nairobi – Namanga highway. PW3, PW4 and PW6 all saw the appellant, in the company of another, disembark from the car. The appellant did not run away, and it was at this point that he was arrested. Our conclusion from these facts is that neither the trial court nor the first appellate court could be faulted for relying on the doctrine of recent possession in finding the appellant guilty. The motor vehicle had been recently stolen from PW1, and when it was recovered, the appellant was seen in it. It fell upon the appellant to offer an explanation as to what he was doing with the vehicle. As correctly noted by the courts below, all he did was deny ever being anywhere near the vehicle, a narrative which the two courts below rejected. On our part we have no hesitation in finding, as the lower courts did, that the appellant was one of those who accosted PW1 and robbed him of his property.

26. This Court in Boniface Kamande & 2 Others v Republic [2010] eKLR (Criminal Appeal 166 of 2004) stated that:

“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.”

27. We find that none of these circumstances are obtaining here. The evidence that led to the conviction of the appellant was cogent and credible. We have no basis to interfere with the concurrent findings of the lower courts. The result of this is that this appeal is unmeritorious and is for dismissal. We hereby order it dismissed.

Dated and delivered at Nairobi this 6th day of June, 2014.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR