



IN THE COURT OF APPEAL

AT NYERI

(CORAM:VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 30 OF 2010

BETWEEN

JAMES KARANI M'IKOMBOAPPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Nyeri

(Sergon & Makhandia, JJ.) dated 13th January, 2010

in

H.C.CR. Appeal Nos. 9 & 10 of 2007)

JUDGMENT OF THE COURT

1. The appellant James Karani M'ikombo as the 2nd accused was jointly charged with four other persons with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The four co-accused persons were acquitted by the two courts below. The appellant's conviction was confirmed by the High Court and he has lodged this second appeal. In addition to the charge of robbery with violence, the appellant faced an alternative count of handling stolen property contrary to **Section 322 (1)** of the **Penal code**.
2. The Information is that on the night of 4 / 5 February 2005 at Karia village in Nyeri District within Central Province, jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed Festus Kithule one television set (Sanyo 21"), video deck make L.G., 2 singer sewing machines, I wool (singer) sewing machine, one bicycle, one blanket, one suit, 5 pairs of shoes and a radio cassette all valued at Ksh. 350,000/= and at or immediately before or immediately after such robbery threatened to use actual violence against the said Festus Kithule.
3. The Information on the alternative charge of handling stolen property is that on the 5th day of February, 2005, at Nyeri town in Nyeri District within Central Province, jointly with others, dishonestly handled one speaker, one juice blender and one video deck make LG knowing them to be stolen goods or unlawfully obtained from Hellen Wanjiru Mathenge.
4. The High Court (Sergon & Makhandia, JJ.) by a Judgement dated 13th January, 2010, upheld the

conviction and death sentence meted out to the appellant on the charge of robbery with violence. The learned Judges upheld the appellant's conviction under the doctrine of recent possession. The Judges expressed themselves as follows:

“According to the evidence of PW5 IP Ochillo, the house of the appellant was searched. Under the appellant’s bed, the police recovered a radio cassette stereo, a video deck, speaker and blender. The complainant and his witnesses positively identified the aforesaid items to be those stolen from their house. ... We are satisfied that the doctrine of recent possession should be applied to sustain the conviction of the appellant”.

5. Aggrieved by the judgment of the High Court, the following pertinent grounds of appeal have been raised:
 - i. ***The learned Judges erred in law by failing to find that the evidence adduced pointed to a case of breaking and stealing and not robbery with violence.***
 - ii. ***The learned Judges erred in law in accepting the doctrine of recent possession without finding that some of the allegedly recovered items were not mentioned in the charge sheet.***
 - iii. ***The learned Judges erred by failing to re-evaluate the evidence on record.***
 - iv. ***The learned Judges erred in law in that no proper identification of the appellant was made.***
 - v. ***The learned Judges erred in law in relying on the evidence of a single witness.***
6. At the hearing of the appeal, learned counsel **Messrs A. M. Nganga** appeared for the appellant while the Prosecution Counsel **Mr. J. Isaboke** appeared for the State.
7. Counsel for the appellant adopted the home-made grounds of appeal and elaborately argued them. It was submitted that the gist of the appeal is that the learned Judges merely repeated what the trial magistrate had done and failed to re-evaluate the evidence to determine if the appellant had been positively identified as one of the persons who committed the alleged offence of robbery. That the identification of the appellant by PW1 Festus Ngiri Kithure was mistaken since the witness never gave the name or description of the appellant to the police at the earliest opportunity. Counsel submitted that PW1 testified that he did not know the appellant by name and he also did not attend any identification parade. That the appellants name was given to the police by a co-accused who was later acquitted of the offence. It is the appellant's submission that dock identification without more cannot sustain the conviction of the appellant for the offence of robbery with violence. In support of his submission, counsel cited the case of ***John Stelen Ole Mwenda, Criminal Appeal No. 51 of 1989.***
8. Another ground of appeal by the appellant is that the charge sheet was fatally defective. In support of the submission, counsel stated that some of the items recovered from the appellant's house were not included in the charge sheet and it is an error of law to convict the appellant based on the doctrine of recent possession for items that are not stated in the charge sheet. Counsel submitted that in the main charge sheet, the speaker, blender and radio cassette stereo are not mentioned and the make of the video deck is not given. That the speaker that is mentioned is in the alternative charge and not in the main charge sheet. Counsel submitted that these discrepancies rendered the charge fatally defective and was prejudicial to the appellant.
9. The appellant further takes issue with the learned Judges' application of the doctrine of recent possession. It was submitted that no evidence was led to prove that the house in which the items were recovered was in exclusive control of and occupation by the appellant. That PW 5 Inspector Ochillo testified that the appellant was in the house with his brother and there was no proof that the house exclusively belonged to the appellant. For the appellant it was submitted that the stolen goods were not marked and the recovered items were common goods that could be owned by any person; that the complainant did not lead evidence to identify the goods as his and no special mark was on the recovered items to prove that they belonged to the complainant; that the learned Judges totally ignored the appellant's explanation as supported by the testimony of the 1st co-accused that

- when the police visited that appellant's house, no goods were recovered therefrom.
10. The State opposed the appeal and submitted that the prosecution had proved its case to the required standard and that the two lower courts properly applied the doctrine of recent possession. That the search conducted by the police was done one day after the robbery and according to the PW5, the stolen items were recovered in the house of the appellant hidden and concealed in various places.
 11. On identification of the appellant, the State submitted that he was positively recognized by PW1 Festus Ngiri Kithure at the time of the offence as there were two security lights that enabled PW1 to visually recognize him. That the evidence of recognition coupled with recent possession proved beyond reasonable doubt that the appellant committed the offence as charged. The State urged this Court to find that the issue in this appeal is not one of identification but recognition of the appellant. That the appellant was not able to explain his possession of the stolen items and he did not lay any claim to the goods recovered. That PW2 Hellen Wanjiru Wachira identified the recovered goods as items stolen from her house. On defectiveness of the charge, the State submitted that the omission to list all items stolen from the complainant in the charge sheet did not render the charge fatally defective.
 12. We have considered the rival submissions by counsel. We have examined the record of appeal and the Judgement of the High Court. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in ***Chemagong vs. Republic (1984) KLR 213*** at page 219 where this Court held:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)”

13. The main ground of appeal relates to identification of the appellant in relation to the charge of robbery with violence. The evidence connecting the appellant to the crime was given by PW1 Festus Ngiri Kithure and PW5 Inspector of Police Ochillo. PW1 testified that two security lights were on when he went out of the house to find out why the dogs were barking. That he saw the appellant before the attackers threw an object to the security bulbs to blow it out. That the people who attacked the complainant are the people he saw in court. In cross-examination PW1 stated that he was able to identify the appellant when he was arrested as he saw him before the bulb was blown out. That with the aid of the two security lights he saw the appellant whom he knew very well as he had previously seen him in Nyeri Town. That the appellant was the one ahead of the other robbers at the time of the offence.
14. We have considered the testimony of PW1 and note from the record that PW1 never attended any identification parade to identify the appellant. We noted that in cross-examination, PW1 stated he obtained the name of the appellant while at the police station and he never gave any description of the appellant to the police. PW1 was able to do a dock identification of the appellant. This court has on many occasions reiterated that dock identification without an earlier identification parade is almost worthless. (See ***Njoroge – v- R, 1987 KLR 19; John Wachira Wandia & Another – v- R, [2006] eKLR***); see also ***Ajode – v- R, [2004] 2KLR 8***; see also ***Kiarie –v- R, Criminal Appeal No 93 of 1983***). It is our considered view that the dock identification of the appellant by PW1 is insufficient to form a basis for conviction for the offence of robbery with violence. We are not satisfied that the identification of the appellant by PW1 was free from error as the intensity of the light from the security bulb was not tested. The failure by PW1 to give a description of the appellant to the police coupled with the failure to test the intensity of the light raises doubt as to whether the identification of the appellant was free from error. Pertaining to the argument that the issue at hand is one of recognition, we are in doubt as to whether PW1 actually knew the appellant. PW1 never gave the name of the appellant to the police and no description was given. Failure to give either of the two, casts doubt in our mind as to whether PW1 indeed knew the appellant. We are not convinced that the appellant was positively identified or

- recognized as one of the persons who robbed the complainant as alleged in the charge sheet.
15. Notwithstanding the foregoing, this Court in ***Muiruri & 2 Others, – v- R [2002] KLR 274,277*** at **paragraphs 25-35** stated that not all dock identification is worthless. In the present case, upon our re-evaluation of evidence, we are satisfied that the absence of an identification parade, or the fact that no description was given to the police did not prejudice the 2nd appellant because there is credible, cogent and reliable evidence from the doctrine of recent possession that connects and links the appellant with the alternative charge of handling stolen goods.
 16. PW 5 Inspector of Police Ochillo, who was the investigation officer, testified that on receiving the report of the robbery he proceeded to the scene of crime and found the appellants 1st co-accused who stated he could identify the robbers if he saw them. That the 1st co-accused gave PW5 the name of the appellant. PW5 testified that he together with other police officers proceeded to the house of the appellant and found him with the 4th accused. A search was conducted and the house had a chimney at the fireplace and it had potato peels which he searched and found a video deck LG make covered by the peels. That under the appellant’s bed he found a radio cassette stereo; he also found a blender. That the complainant PW2 Hellen Wajiru Wachira identified the items as part of the goods that had been stolen. That PW 2 stated that some parts of the blender had been left at home and he later availed these parts and identified the blender.
 17. In his defence, the appellant explained how he came to be in possession of the stolen goods. During the submissions, counsel for the appellant stated that the appellant had offered an explanation to the effect that when a search was conducted at his house, nothing was recovered and learned Judges did not consider this explanation. The appellant’s response to the doctrine of recent possession is that nothing was recovered from his house. PW5 testified that the stolen items were recovered from the appellant’s house. The issue that ponders our mind is as between PW5 and the appellant’s explanation, what is the correct factual position. The two courts below have established the fact that the stolen goods were recovered from the appellant’s house. This being a second appeal, we are satisfied that the two courts below have established the facts of this case and we decline to interfere with the finding that the stolen goods were recovered from the appellant’s house. We have failed to find on record any reason that could make us believe that PW5 did not tell the truth as to where the stolen goods were recovered from.
 18. It is our considered view that based on the doctrine of recent possession, the alternative charge of handling stolen goods was proved to the required standard. We hereby quash the appellant’s conviction for the charge of robbery with violence and set aside the death sentence meted in relation to the same. Having found that the alternative charge of handling stolen goods was proved to the requisite standard, we hereby convict the appellant on the alternative count of handling stolen goods contrary to **Section 322 (1)** of the **Penal Code**. We sentence the appellant under

Section 322 (2) of the **Penal Code** to a term of 10 years imprisonment with effect from 20th December 2006 when judgment was read and delivered by the trial court.

Dated and delivered at Nyeri this 3rd day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR