



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, G.B.M. KARIUKI & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 315 OF 2012

BETWEEN

JOSEPHAT KISILU MULINGE..... APPELLANT

AND

REPUBLIC RESPONDENT

**(An appeal against the Judgment, decision and order of the High Court of Kenya at Nairobi
(Kihara Kariuki & Kimaru, JJ.) delivered 8th June, 2012**

in

MACHAKOS H.C.C.R.A. NO. 129 OF 2006)

JUDGMENT OF THE COURT

Mr. Josephat Kisilu Mulinge, the appellant in this appeal, and one Charles Mbai Maliku were convicted on 11th October 2006 by the Principal Magistrate, V. W. Wandera, in Machakos Criminal Case Number 2553 of 2003 of the offence of robbery with violence contrary to Section 296(2) of the Penal Code, Chapter 63 of the Laws of Kenya and sentenced to death as provided under the said Section of the Penal Code.

The charge against the appellant was that on the night of 6th/7th August 2003, while armed with dangerous or offensive weapons, to wit, homemade explosives, pangas, rungas, bows and arrows the appellant robbed Mr. A M K of cash amounting to Shs.11,000/=, a mobile phone (make Nokia 3310) and two wrist watches, make rado, a radio, of make National Star, all valued at 20,400/= and at or immediately before or immediately after the time of such robbery used actual violence to the said A M K.

Aggrieved by the decision of the trial Court, the appellant appealed to the High Court against his conviction and sentence challenging the decision of the trial Principal Magistrate. As required by law, his appeal was heard by two Judges of the superior court below who found no merit in the appeal and in a considered judgment proceeded to dismiss on 8th June 2012.

Not satisfied by the decision of the superior court below, the appellant appealed to this Court. As his conviction carried a death sentence, the State availed the appellant legal representation and learned counsel Mr. Robert Amutallah was assigned the brief and appeared for him. The State was represented by Mr. O.J. Omondi, the Senior Assistant Director of Public Prosecutions.

The appellant put forward the following six grounds of appeal-

1. That the superior court Judges erred in law and facts when confirming conviction and sentence on the evidence of recent possession not considering that the items in question was recovered at my co-accused premises were 1 was or happed to be there as a customer, since it was a kiosk where anyone can stop by and stay for a while.
2. That the superior court Judges erred in law by failing to observe that no inventory documents were tendered as evidence to prove the recovery.
3. That the superior court Judges erred in law by confirming conviction and sentence without observing that there were crucial and essential witnesses or persons mentioned but never testified contrary to Section 150 of the CPC.
4. That the superior court Judges erred in law when they confirmed conviction and sentence basing or leaning on the argument that the second accused led the police to where I was arrested, forgetting that the 2nd accused was released by the trial court and never gave evidence or is there any other evidence to support the allegation.
5. That the superior court of appeal Judges erred in law when they confirmed conviction and sentence without observing that no cogent reason was given when disowning my sworn defence contrary to Section 169 (1) of the CPC.
6. That, I beg to be supplied with both the trial court and the superior court proceedings to extract more firm grounds as well as to be present during the hearing of this appeal.

Mr. Amutallah abandoned ground No.3 in the memorandum of appeal and argued grounds 1 and 2 together and merged the other grounds of appeal. The main thrust of the appeal focused on the evaluation of the evidence and application of the doctrine of recent possession. Counsel challenged the application of the doctrine on the basis that there was no evidence to prove that the appellant had possession of the stolen goods. In addition, counsel contended that there was no proper evaluation of the evidence by the courts below.

The appeal is a second appeal. Section 361 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya stipulates that a party who has appealed to the High Court from the decision of a subordinate court may appeal against a decision of the High Court to this Court on a matter or matters of law. The said Section bars this Court from hearing a second appeal on a matter of fact, and clarifies that severity of sentence is a matter of fact. In effect, this Court is enjoined to pay homage to findings of fact made by the lower courts unless there are circumstances that warrant otherwise.

The brief facts that led to the conviction and sentence of the appellant show that the complainant, A M K, was businessman and a farmer in Machakos and that on 6th August 2003 he spent the day buying goats and returned home at 7.00 p.m. He retired to bed at 9.30 p.m. with his wife, P and his 5 year old daughter J M. After midnight, robbers broke into his house and attacked him. They were armed with weapons and they beat him up and injured him on the knee and elbow joints as they demanded for money. He was robbed of Shs.11,000/=, a nokia 310 mobile phone, a rado watch and a radio. The Evidence shows that he accidentally switched on the lights during the ordeal and saw two of the robbers. After the ordeal, neighbours came to the house. Mr. Ndolo, a young man, and a neighbor of the appellant, informed the complainant that he had identified one of the attackers as Joshua Mbutha. The matter was then reported to the area chief who also alerted police. The complainant, the area Chief and three police officers confronted the said Joshua Mbutha who informed them that the stolen items were in Machakos town and he led the group there. This led to the arrest of accused No 1, Charles Mbai Maliku and the appellant and recovery of the complainant's stolen radio, and rado watch.

The case against the appellant was that he (the appellant) was found by the police at Kathemboni at a kiosk where the stolen items (radio and watch) were recovered. He was listening to music from a radio. The appellant was not found with any of the stolen items, but he was in company of the 1st accused who was wearing the stolen rado watch on his wrist. The radio from which he was listening to music was one of the items stolen from the complainant, A M K. The prosecution contended that the stolen radio which the appellant was listening to was in his possession and therefore proceeded on that basis to arrest him.

That was the evidence which police officer, APC Boniface Mgatha (PW4) gave to the trial magistrate and it was on that evidence that possession of the stolen radio by the appellant was inferred.

In its judgment, the superior court below acknowledged that the appellant's appeal to that Court was founded on the doctrine of recent possession. It noted that the evidence against the appellant was that he was found at Kathemboni outside a kiosk belonging to Charles Mbai Kitiku, the 1st accused. In the kiosk, rongs, artificial explosive, a big stick that was blood stained, scissors, brown sheet cutter and a radio were found. The wrist watch and the radio were identified as some of the items which A M K was robbed of on the night of 6th and 7th August 2003. The 1st accused was wearing the stolen watch on his wrist. The superior court below found that the evidential burden had shifted to the appellant and his colleague to offer a plausible explanation as to how they had come by the stolen items. The Court found that they had failed "to offer any acceptable explanation of how they came into possession of the stolen items." The superior court below stated-

"once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is especially within the knowledge of the accused and pursuant to the provisions of Section 111(i) of the Evidence Act, Chapter 80 (of the Laws of Kenya) the accused has to discharge that burden"

"... in the instant case, the 1st and 5th accused persons were found in possession of goods robbed from (sic) the complainant's house and they failed to offer any acceptable explanation of how they came into possession of the stolen items."

There was evidence that the kiosk where the stolen items were found belonged to the 1st accused and that the latter resided there. The superior court below acknowledged this in its judgment when it stated that the 2nd accused led PC Kimani (PW5)

"...to Kathemboni where he showed them a kiosk where the 1st accused resides..."

The superior court also made a finding that there was no evidence of identification of the robbers. The Court stated in this regard in its judgment.

"...having carefully and anxiously considered the evidence adduced by the prosecution witnesses, I find that the complainant and his wife (PW2) did not give the names of the suspects they recognized during the robbery to the police before they were arrested. Hence their testimonies before the Court that they had recognized any of the suspects are (sic) an after-thought. There was no identification parade conducted for the complainant (PW1) and his wife (PW2) to identify the suspects they had seen but recognized during the robbery."

The superior court below proceeded on the footing that both the owner of the kiosk (accused No 1) and the appellant who did not live there jointly had possession of the stolen items.

Mr. Amutallah, learned counsel for the appellant, submitted that the superior court below erred in applying the doctrine of recent possession in absence of any proof that the appellant had custody of the stolen items or any of them. He submitted that there was no evidence to show clearly that the appellant had any control of the kiosk and contended that there was no evidence that the appellant had possession of the stolen items found in the 1st accused's kiosk. In absence of such evidence, said counsel, the appellant was entitled to maintain silence and remain mum. It was also counsel's submission that the superior court below failed to properly evaluate the evidence and that if it had, it would have found that the appellant had no evidential burden to discharge and the question of his giving a plausible explanation did not arise as there was no evidence that he had possession of or control over the stolen items or any of them.

Counsel further referred to the case of ARUM V. REPUBLIC [2006] 2 EA 10 in which this Court (differently constituted) allowed a second appeal by the appellant in the case whose first appeal following

his conviction by the Senior Resident Magistrate Court for robbery with violence under S.296(2) of the Penal Code had been dismissed by the superior court below relying on the facts that the mobile phone and car keys in that case were found with the appellant and that he had hidden them in his pants. He had been arrested a few hours after the robbery. Allowing the second appeal, this Court held that-

"the trial Court has a duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced as analysed."

In that case, the Court found that-

"the evidence of possession which would have been proved through evidence of arrest, search, and recovery was absolutely contradictory."

Relying on this authority Mr. Amutallah urged this Court to find that there was no evidence to establish that the appellant had possession of any of the stolen items.

Mr. Amutallah also referred us to the case of *MUNYOLE V. R.* [1985] KLR 662 which is a decision of this Court. In that case, the appellant and six others were jointly charged with four counts of robbery with violence contrary to Section 296(1) of the Penal Code and the appellant who had denied taking part in the robberies was convicted and sentenced on three of the counts. His appeal to the High Court resulted in the quashing of two counts and reduction of his sentence. On his second appeal to this Court, it was submitted among other things, that a statement made by his co-accused which incriminated him should not have been admitted in evidence against him because his co-accused had not been asked whether he objected to that statement and that the prosecution, having elected to charge the seven accused persons jointly under the several counts, failed to lead evidence to prove which accused was found in possession of which allegedly stolen goods and to which complainant such goods belonged. This Court, in allowing the second appeal held that

"...there had been a failure by both the trial magistrate and the Judge on the first appeal to analyse the evidence so as to establish which person was in possession of which allegedly stolen goods and to which complainant such goods belonged."

The Court further held (in holding 2) that-

"This failure to analyse the evidence led to a failure by the lower courts to make findings of fact as to whether the appellant was found with any, and if so, which goods. That was an error of law which prejudiced the case of the appellant."

Mr. Amutallah emphasized that the appellant was never found in possession of the radio watch or the radio which were recovered from the kiosk and that in any case, there was no evidence of positive identification of the property to prove that the appellant was the owner. Mr. Amutallah urged us to allow the appeal.

On his part, Mr. Omondi, the Senior Assistant Director of Public Prosecutions opposed the appeal and submitted that there were concurrent findings by the two Courts below that the appellant was in possession of the stolen items and that it correctly applied the doctrine of recent possession. According to Mr. Omondi, the issue was whether possession was positively proved and whether the property was positively identified by the complainant. It was his submission that the property was proved to be the one stolen. He submitted that the radio was outside the kiosk and that the appellant should have given an explanation to show his association was "innocent." He urged us to reject and dismiss the appeal.

In retort, Mr. Amutallah told us that contrary to what Mr. Omondi submitted, there can be no joint criminal responsibility and that it was up to the state to prove the culpability of the appellant which it did not do. Listening to radio as the appellant did was not evidence that he had control of the radio equipment, submitted Mr. Amutallah.

We have duly perused the record of appeal and considered the submissions made by counsel.

It is patently clear in this case that there was no evidence to prove identification of any of the robbers, a fact which the superior court below was alive to. The only evidence which seemed to link the appellant to the robbery was his presence at the kiosk where two of the items stolen were recovered soon after the robbery. One of the two items was a wrist watch which the first accused who was the owner of the kiosk was found wearing. The police officers were led to the kiosk by accused numbers 2 and 4 who had been arrested and were being taken to the police station when the 2nd accused offered the information to the three police officers and the complainant and one Ndolo that the things they had stolen were in Machakos and volunteered to show them where they were, whereupon the police officers made a bee-line to Machakos. On the way, they nabbed accused 3.

On reaching Machakos, accused 4 said that he knew where the things were. He took the police officers to the kiosk, leaving the complainant behind. Police Constable Patrick Kimani (PW5) gave testimony that the appellant was inside the kiosk listening to music from the radio. There was no evidence to show that the appellant was not in the kiosk as an innocent person merely enjoying listening to music from the radio. There was no evidence to show that he was aware the items had been stolen. Suspicion that he might have been a member of the gang that had robbed the complainant was however rife.

But neither Court below made a finding of fact whether the appellant had control of any of the stolen items or knew that they were stolen. The fact that the appellant was found in the kiosk listening to music from the stolen radio did not ipso facto amount to possession by him of the radio nor did it constitute knowledge on his part that the radio had been stolen. Suspicion can never be a ground for conviction however strong it may be. No evidence was adduced to prove the nature of relationship between the appellant and the 1st accused or any of the other accused persons. "Possession" is defined in Black's Law Dictionary (9th Edn) as-

1. "The fact of having or holding property in one's power; the exercise of dominion over property.
2. The right under which one may exercise control over some things to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object."

It is patently clear that for one to be said to have possession of an item, one must have knowledge that it exists and power or control over it. Possession can be actual or constructive. Black's Law Dictionary defines "actual possession" as "physical occupancy or control over property" and "constructive possession" as - "control or dominion over a property without actual possession or custody of it..."

The evidence on record does not show that the appellant had control over the radio or knowledge that it was stolen or unlawfully obtained. The evidence shows that the appellant neither owned the kiosk nor lived in it. The 1st accused did. It is important to emphasize that the superior court below did not make a finding of fact whether or not the appellant exercised any control over the radio or had its physical possession so as to be said to have its possession. If the appellant was part of the gang of robbers that robbed the complainant and therefore one of the robbers who brought the two stolen items (radio and wrist watch) to the kiosk evidence was not led to establish this fact. We have stated that, the mere presence of the appellant in the kiosk listening to music from the radio did not ipso facto prove that the appellant knew that the radio was stolen much less that he had possession of it, whether actual or constructive. In absence of other evidence, presence of the appellant at the scene where the stolen radio was found and the act of his listening to music blaring from it cannot be a basis for presuming that the appellant was in possession of the radio.

The doctrine of recent possession could not in the circumstances be applied in absence of a finding of fact that the appellant had control of the radio, and hence possession of it. ARCHBOLD 2002 on Criminal Pleading, Evidence & Practice (Sweet a Maxwell) opines that recent possession as a rule is no more than the application of common sense and it is submitted that where it is proved that premises have been entered and property stolen therefrom and that very soon after the entry the defendant was found in possession of the property, it is open to the jury to convict him of burglary, and the jury should be so directed: R. V. Loughlin, 35 Cr. App. R. 68, CCA.

Cross on Evidence, 5th Edn., Pg 49 (now 9th Edn., pg 38) states:

"if someone is found in possession of goods soon after they have been missed, and he fails to give credible explanation of the manner in which he came by them, the jury are justified in inferring that he was either the thief or else guilty of dishonestly handling the goods, knowing or believing them to have been stolen.... The absence of an explanation is equally significant whether the case is being considered as one of theft or handling, but it has come into particular prominence in connection with the latter because persons found in possession of stolen goods are apt to say that they acquired them innocently from someone else. Where the only evidence is that the defendant on a charge of handling was in possession of stolen goods, a jury may infer guilty knowledge or belief (a) if he offers explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue.

In this appeal, the superior court below did not in its evaluation of evidence make any finding of fact whether or not the appellant had control over the radio or whether the owner of the kiosk who also resided there, namely the 1st accused, was the only person who exercised control over the items and goods in the kiosk. The only two aspects in relation to the stolen radio which exposed the appellant to suspicion were (a) his physical presence in the kiosk and (b) the fact that he was listening to music from the radio. These two aspects when combined do not remotely begin to show any degree of control by the appellant over the radio. Without a finding of fact that the appellant had control over the radio, actual or constructive, the doctrine of recent possession was inapplicable. In short, proof of control over the thing stolen without which there can be no possession is a sine qua non to the application of the doctrine of recent possession. We think the Courts below erred in not analyzing the evidence properly and in not making a finding whether or not the appellant exercised any control over the radio.

As correctly pointed out by this Court in ARUM V. REPUBLIC (supra)

"before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is, there must be positive proof, first; that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; the property was recently stolen from the complainant.

In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice no matter how many witnesses.

In this case, the evidence of possession which would have been proved through evidence of arrest, search and recovery was absolutely contradictory."

Counsel for the appellant also referred us to the decision in MUNYOLE V. REPUBLIC (supra) in holding 5 of which this Court also pointed out-

"5, In a joint trial involving more than one accused person, the evidence against each accused must be considered separately and the case against each accused must be such as to prove the guilt of that particular accused beyond reasonable doubt. It is also a misdirection to deal separately with one part of the evidence and omit to relate it to the whole." In the cited case, this Court also held that

"there was failure to analyse the evidence which led to a failure by the lower courts to make findings of fact as to whether the appellant was found with any, and if so, which goods. That was an error of law which prejudiced the case for the appellant."

We are satisfied that the trial and the appellate courts below erred in not evaluating the evidence properly and in not making a proper finding that the appellant had no possession of the radio as clearly there was no evidence that he exercised any power or control over it. On the face of it, it may well be that he was, as the record shows, just enjoying listening to music from the radio in a kiosk that did not belong to him and over which the evidence on record does show he had any control, and hence the application of the

doctrine of recent possession by the Courts below was a misdirection. We so hold.

We think the appellant was convicted and his appeal was dismissed due to lack of proper evaluation of the evidence which led to a misdirection in application of the doctrine of recent possession. For these reasons, the appellant was entitled to an acquittal. Accordingly, we allow the appeal and quash the conviction and set aside the sentence. Unless otherwise lawfully held, the appellant shall be set free forthwith.

Dated and delivered at Nairobi this 14th day of November, 2014.

M. WARSAME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR