REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 133 of 2010

FRANCIS KAMWITHU..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Meru, (Kasango & Emukule, JJ) dated 16th April, 2010

in

H.C.CR.C. NO.104 OF 2007)

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JUDGMENT OF THE COURT

This is a 2nd Appeal by the appellant, ***Francis Kamwithu,*** on conviction and sentence for robbery with violence contrary to **Section 296 (2)** of the **Penal Code Cap 63, Laws of Kenya** upheld by the Judges of the Superior Court, sitting as the 1st appellate court. The appeal originates from a trial in the lower court where the appellant was charged as aforesaid, was convicted and sentenced to death.

The particulars of the charge are that on 7th day of January, 2006 at Thinyaine Location, Bimbine sublocation in Meru North District within Eastern Province the appellant**,** jointly with others not before court while armed with dangerous weapons namely, pangas robbed ***George Kiriba Mwirichia*** one jacket , reading glasses, mobile phone make Philips and Plastic wrist watch all valued at Kshs. 3,650/= and at or immediately before or immediately after the time of such robbery used actual violence to the said ***George Kiriba Mwirichia***.

The appellant was presented before the subordinate court at Maua where he pleaded not guilty to the charge. The matter proceeded to full hearing with the prosecution calling a total of four (4) witnesses. In his defence, the appellant tendered his evidence on oath but did not call any witnesses.

The brief facts of the case are that, on the material day the complainant, ***George Kiriba Mwirichia PW1 (George)*** was heading home at 11.00p.m from the Tigania Police Station canteen in the company of one ***Joseph Gitirime.*** He testified that he parted with Joseph and continued to walk alone. On his way home, he was accosted by the appellant who hit him with a panga on the mouth and on the head. At the same time he saw eight (8) other people armed with pangas emerge from both sides of the road who surrounded him and placed pangas on him. One of them demanded money from ***George*** but he told them that he did not have any. The assailants searched him and found that he really did not have any money. The assailants then removed his wrist watch and the jacket he was wearing and left him. Inside the jacket

pocket was a mobile phone and a pair of reading glasses. The following day, ***George*** asked his wife to ***'flash',*** that is to say to ring the number of his mobile phone. His wife rang the phone and it was answered, and when she asked who was on the line, she was abused. According to the evidence ***James Kayiiera (PW2), Patrick Kaindio (PW4) and Kibunja*** weredrinking at Kanyaungi's home with the appellant. The appellant had a mobile phone which he was placing on his ears saying that the customer could not be found, and was giving it to another person to listen. ***Kayiiera*** and ***Kaindio*** suspected that the phone did not belong to the appellant. They had also heard that ***George*** who was known to them had been robbed of his phone and a jacket the previous night. They then, sent ***Kaindio*** to call ***George*** to confirm whetherit was his phone**.** Upon arrival at Kanyaungi's home ***George*** saw the appellant in his jacket and identified his phone which was on the right hand side pocket of the jacket. He then together with the other witnesses took the appellant to the Tigania Police Station where the jacket was removed from him and he was arrested.

According to the evidence of the investigating officer, ***No. 79546 Mary Muinde (PW3)***, the appellant was marched into the police station by members of the public and George made a report of the robbery of a mobile phone, a wrist watch, jacket and reading glasses which had occurred the previous night. The said investigating officer recorded the statements of the witnesses and visited the scene. At the hearing ***George*** identified the jacket to the satisfaction of the court. The complainant also produced a receipt for the phone with the same serial number as the phone PExb-2 before the court. On cross examination ***George*** testified that he did not know the appellant although he may have come from his own village. He further testified that he did not fabricate the complaint against the appellant.

In his defence, the appellant denied the charge and testified that, ***George*** had a grudge against him for chasing him away from his home. His evidence was that ***George*** fabricated the complaint and had collaborated with the other witnesses to plant evidence on him and testify against him. He denied having robbed ***George*** and having been found with the mobile phone in his jacket pocket.

The learned trial Magistrate applied the doctrine of recent possession of stolen goods to make the finding that the appellant was one of the robbers. Consequently, the trial court found the appellant guilty as charged, convicted him and sentenced him to death. Aggrieved by the decision of the trial court, the appellant filed an appeal before the High court (Kasango & Emukule, JJ).

The High court re-analysed and re-evaluated the evidence tendered before the trial court and concurred with the findings of the trial court. Based on its findings, the High court dismissed the appeal and affirmed the conviction and death sentence. Dissatisfied with the decision of the High court, the appellant filed a Memorandum of appeal which is undated. Thereafter, he filed two (2) Supplementary Memoranda of appeal dated 29th September, 2012 and filed on 22nd October, 2012 respectively.

At the hearing of the appeal before us, the applicant was represented by learned counsel Mrs. Ntaragwi while the state was represented by the learned acting assistant deputy public prosecutor Mr. Kaigai . Learned counsel for the appellant abandoned the other memoranda of appeal and relied on the supplementary memorandum of appeal dated 29th September, 2012 which raised the following grounds:-

"1. That the learned judges erred on point of law in failing to subject the evidence that was tendered during the trial to a thorough analysis and further erred in holding that the trial court had made a finding that the appellant had been recognized or identified by the complainant during the attack.

2. The learned Judges erred on a point of law in failing to take into account the doctrine of recent possession was not applicable against the appellant

3. The learned Judges erred on a point of law in failing to take into account the appellant defence."

Learned counsel for the appellant urged these three grounds together. On the first ground, she submitted that the court erred when it found that the complainant had recognised or identified the appellant.

Secondly, she argued that the doctrine of recent possession was not applicable. The appellant's defence was that the jacket and the cell phone were planted on him by the complainant who bore a grudge against him. By the time the stolen goods were said to have been recovered from the appellant, the complainant had not made any report to the police. ***George (PW1)*** had not told ***Kaindio (PW4)*** that he had lost his items, thus leaving the question as to how ***Kaindio (PW4)*** would have known that the mobile phone in question belonged to the complainant.

She also contended that there was doubt as to whether the appellant was found wearing the jacket or whether the exhibits were carried to the police station. If it was the latter then the same amounted to a frame up by all the witnesses and therefore, the defence of the appellant gave an explanation which was reasonable and which ought to have been believed.

Mr. Kaigai, learned Assistant Deputy Public Prosecutor opposed the appeal and urged the Court to uphold the conviction and sentence. He submitted that the stolen items were recovered a few hours after the robbery and therefore, the doctrine of recent possession was properly applied by the trial magistrate and upheld by the superior court. Moreover, the items were recovered on the following day and properly identified by the complainant. He contended that the appellant did not give any explanation as to how he came to be in possession of the items; that the issue of a grudge never arose and was therefore an afterthought and that they were all drinking together in the house as friends.

This being a 2nd appeal, only issues of law fall for our determination. As this Court has stated many times before, it will not normally interfere with concurrent findingsof fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings see **CHEMAGONG V. R [1984] KLR 611**. In **KAINGO V. R. (1982) KLR 213 at p. 219** this Court said:-

"A second appeal must be confined to points of law and this Court will not interfere with concurrentfindings of fact arrived at in the two courts below unless based on no evidence. The test to be appliedon second appeal is whether there was any evidence on which the trial court could find as it did (REUBEN KARARI C/O KARANJA V. R. (1956) 17 EACA 146)"

In view of the foregoing, the issues arising for the court's determination are:-

1. Whether the trial court and appellate court made a finding the appellant had been recognized or identified during the attack?

2. Whether the doctrine of recent possession was to be considered by the Court?

3. *Whether appellant's defence was taken into account?*

On the issue of identification, the complainant told the Court that he was not able to identify any of the robbers at the scene. The conviction of the appellant was not based on visual identification but on the doctrine of recent possession. The complainant's jacket and cell phone were found with the appellant the very following day after the robbery. This was a concurrent finding of fact by the two courts below which we have no reason to interfere with. The only question we need to ask ourselves is whether the two courts below applied the doctrine of recent possession properly. Courts have decided several cases and laid down clear principles to be followed when determining the applicability of the doctrine of recent possession to a case.

In R v Loughin 35 Cr App R 69, the Lord Chief Justice of Englandsaid:-

"If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker."

This principle was applied by this Court in the case of ***George Otieno Dida & Another V Republic***

[2011] eKLR wherethis court, faced with facts that were almost similar to the ones in this case, held that:-

"There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies.....In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands."

Similarly in the case of **Francis Kariuki Thuku & 2 others v Republic [2010] eKLR** the court expressed itself thus:-

"Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. LOUGHIN 35 Cr. Appl. 269 by the Lord Chief Justice of England and this Court's own decision of SAMUEL MUNENE MATU V. R. Criminal Appeal No. 108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The decision of this Court in the case of HASSAN V. REPUBLIC [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-

"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver."

The complainant testified that he was robbed of his jacket, mobile phone, wrist watch and reading glasses between 11p.m going to midnight. He and the other witnesses testified that the appellant was found in his (complainant's) jacket and in possession of his phone the following day at about 10.am i.e about 12 hours after the robbery. Moreover, the appellant did not explain in his testimony how he came to be found in possession of the jacket and mobile phone. He merely denied by stating ***"I was not found with any jacket. ……..I did not have a mobile phone."*** Yet there was overwhelming evidence that he was actually found wearing the complainant's jacket and was in possession of his phone which had not even been switched off yet. We are satisfied that the two courts below gave full consideration to the appellants defence but did not find it credible in view of the very consistent and corroborative prosecution evidence on the recovery of the said items. Ground three in the appellant's memorandum of appeal therefore also fails.

In view of the case law and the evidence ,the trial court and the 1st appellate court came to the same conclusion, and rightly so, that the appellant was one of the robbers. Both courts having arrived at concurrent findings on the defence of the appellant, this Court cannot interfere on such findings which have no misapprehension of the evidence. ***See CHEMAGONG V. R [1984] KLR 611. (supra).***

It is clear from the above analysis that we find no merit in this appeal. The same is therefore dismissed.

Dated and delivered at Nyeri this 6th day of February, 2013.

J.W. ONYANGO OTIENO
….....
JUDGE OF APPEAL

W. KARANJA
….....
JUDGE OF APPEAL

D. K. MARAGA
…….....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR