



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**(CORAM: MARAGA, WARSAME & MUSINGA, JJ.A)**  
**CRIMINAL APPEAL NO. 193 OF 2004**

**GEORGE MUIA MUTISYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(being an appeal from the judgment of the High Court of Kenya at Machakos (Nambuye & Mutitu, JJ in High Court Criminal Appeal No. 55 of 2002)*

**JUDGMENT OF THE COURT**

The appellant, **GEORGE MUIA MUTISYA**, was charged before the Senior Principal Magistrate's Court at Machakos with one count of robbery with violence, contrary to section 296 (2) of the Penal code; two counts of robbery contrary to section 296 (1) of the Penal code and an alternative count of handling stolen goods contrary to section 322 (1) of the Penal Code. The offences were alleged to have taken place on the 12<sup>th</sup> day of August 2011, at Makaveti Catholic Mission in Kimutwa sub-location of Machakos District within Eastern Province.

It was alleged that the appellant, with others, while armed with a home-made pistol, an iron bar and sticks, robbed Father Urbanus Mutuku Makau, Father Bonaventure Musyoki and Father Julius Kioko (the Complainants) of some money, a Sony pocket radio and an adaptor, a video deck, a Walkman, a mobile phone, vodka, keys, a radio cassette, cameras, and a briefcase; and that immediately before or immediately after the time of such robbery, used personal violence to the said complainants.

The appellant denied all the charges and trial commenced before J. N. Nyagah, SRM. The prosecution's case was that on the material day, at around 9:00 pm, the complainants were in their house when the appellant, together with other robbers, forced the door of the house open and stole the various goods from them. The robbers then escaped. The same night, at about 3:00 am, there was a vigilante group that was on patrol. The group met the appellant and another person. They were carrying bags, which the members of the group demanded to see. The appellant and the other person ran away, dropping the bags. One of the members of the group, **WAMBUA MUSYOKI(PW4)**, blew a whistle, which attracted other members of the public. The appellant was arrested by **NICHOLAS KYALO MUSEMBI (PW5)**. PW4 collected the bags, and inside, there were various items. The appellant was beaten up and after the police arrived, they

took him to the hospital.

The complainants reported the robbery to the police, who showed them the goods recovered from the appellant. They identified the goods as being those that had been stolen from them. The three complainants testified that they had seen the appellant at the time of the robbery, and that the day following the robbery, they heard that one of the suspects was at the hospital. **FATHER BONAVENTURE, (PW2)** and **FATHER JULIUS, (PW3)**, identified the appellant as one of the robbers. **FATHER URBANUS (PW3)** also positively identified the appellant during the trial as one of the robbers.

In his defence, the appellant stated that on the 12<sup>th</sup> August 2001, he had attended a funeral in Kitui. At about 3:00 am, he boarded a vehicle headed for Nairobi. At 5:00 am, the appellant decided to visit his aunt in Eastleigh, and he began walking in that direction. He met with four people. They attacked him, and he resisted. After some time, the police came and he was taken to hospital, and later charged.

After conclusion of the hearing, the trial magistrate found that there was no doubt that ***“the accused was arrested by the village vigilante group members PW4 and PW5 while carrying the goods that had been stolen from the complainants the same night of the robbery. The two witnesses impressed me as truthful and credible witnesses.... The accused was found with the complainant’s stolen goods about 6 hours from the time of the theft. He was thereby in possession of recently stolen goods. He has not given an explanation of how he came into their possession. The inevitable conclusion is that the accused was the thief. The accused was one of the people who robbed the complainants”***.

The trial court found that all the ingredients of the offence of robbery with violence had been proved beyond reasonable doubt. The magistrate found that counts one, two and three of the offences had been proved, and convicted the appellant accordingly, sentencing him to suffer death on count one, and sentenced him further to five years and four strokes of the cane on each of the other counts.

Being aggrieved by the convictions and the sentences imposed on him, the appellant preferred an appeal to the High Court, being Criminal Appeal No 55 of 2002. He faulted the trial magistrate on the basis of the identification of the complainants without having regard to the possibility of error; and that the magistrate convicted him while there was no evidence from the investigating officer.

The first appellate court evaluated the evidence adduced at the trial court and reached the conclusion that the trial magistrate had been alive to all the issues raised before reaching his conclusion. The appellate court faulted the appellant’s alibi for not making sense, given the time of arrest and his proximity to the scene of the robbery. The High Court was not satisfied that the appellant’s grounds had merit and disallowed the appeal.

The appellant now brings this second appeal against the original conviction and sentence in which he has raised six grounds of appeal, argued by his advocate, Mr. Oyalo. Miss Oundo, Principal Prosecution Counsel opposes the appeal.

The appellant argues that Section 211 of the Criminal Procedure Code which deals with the presentation of the defence case has not been complied with. This section states that when an accused person is put on his defence, the court must explain the substance of the charge to him and inform him of his right to give evidence, on oath, from the witness box, or make a statement from the witness box.

Counsel for the State challenged the appellant’s position by submitting that that the appellant gave unsworn testimony and that he understood and even cross-examined the witnesses, and even gave evidence for his defence. In our view, that is the correct legal proposition. The appellant gave unsworn evidence on 13<sup>th</sup> February 2002, and stated that he had no witnesses to call. It is also our view that there was no prejudice caused to the appellant in the manner the trial court conducted the trial as the trial magistrate materially and substantially complied with the objects of section 211 of the Criminal Procedure Code. This ground of appeal is baseless and it fails.

Mr. Oyalo also argued that the trial court accepted as truth his testimony that he travelled from Kitui on the material night. In the appellant's view, this implied that the trial court accepted the appellant's version of events. Counsel also argued that the robbery took place over ten kilometres from Machakos town, and it was therefore not possible that the appellant participated in a robbery which took place at 9:00pm. It is the appellant's position that the trial court misdirected itself because in actual fact, the appellant was either a handler of the goods, or an innocent purchaser for value and could not have participated in the robbery. He further argues that the appellant bore no burden in regard to the alibi.

Miss Oundo counters this argument by stating that as this is a second appeal, only matters of law should be canvassed. Counsel submits that it is not an issue where the appellant was coming from, and even if it was, then the real question that would be raised is whether the appellant was found in possession of the recently stolen items and whether he gave a reasonable explanation for this.

The trial court invoked the doctrine of recent possession as one of the factors in convicting the appellant. This was affirmed by the first appellate court.

That the appellant was in possession of the items stolen from the complainants is not at issue. These items were positively identified by the complainant as being those that had been stolen from them on that night. The appellant offered no explanation at all as to what he was doing with these goods. As was stated by this Court in *Hassan v Republic [2005] 2 KLR 151* at 154,

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

As was also stated in *Isaac Ng'ang'a Kahiga & Another V Republic [2006] eKLR*, a court that will rely on the fact of recent possession of stolen items in a conviction must first satisfy itself that the items must be positively identified as those that were stolen, that the items belong to the complainant, that the items were stolen from the complainant and that the items were recently stolen. The Court stated that:

***“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”***

We are satisfied that the two courts below properly invoked this doctrine in reaching the conclusion that the appellant was involved in the robbery. The lack of an explanation as to how he came into possession of the recently stolen items so soon after the robbery could only mean that he was involved in their theft.

The appellant faults the search conducted on him by members of the vigilante group. In his view, he was subjected to an arbitrary search by the members of the vigilante group who beat him up, and the items taken from him were the result of an illegal search. It is the appellant's contention that pursuant to the provisions of section 76 of the former Constitution, these items should never have been used as a basis of conviction. We must point out however that the appellant was never subjected to any search. As the prosecution witnesses testified, he and his colleague dropped their bags and ran away upon seeing PW4 and PW5. The search was conducted on the bags that they had dropped, and it was inside these bags that the recently stolen items were found.

The learned judges of the High Court are also faulted for misapprehending the evidence before the court. The appellant also alleges that the first appellate court did not re-evaluate the entire evidence, but merely

restated the facts and affirmed the conclusion of the trial magistrate. In particular, that the court did not take into account the lengthy submissions of the advocates, which pointed out glaring contradictions in the prosecution case. Moreover, the appellant states that the visual identification was rejected by the trial court but it went ahead and based its conviction on circumstantial evidence. It is the appellant's position that the legal threshold was not reached or achieved. Miss Oundo on her part argues that the evidence on record was basic, and there was no need for a re-evaluation of the same.

This being a second appeal, section 361 of the Criminal Procedure Code binds us to consider issues of law only. See *M'Riungu v Republic*[1983] KLR 455 in which the Court clarified the jurisdiction of the Court of Appeal hearing a second appeal:

***“Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.”***

The duty of the first appellate court is to re-evaluate the evidence on record and come up with its own conclusion. See *David Njuguna Wairimu V Republic* [2010] eKLR where the court, quoting the sentiments expressed in *Okeno v R* [1972] EA. 32 stated that:

***[the duty of the first appellate court] is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.***

The appellant faults the trial court's re-evaluation of the evidence. We find that there is no merit in the argument that the first appellate court did not re-evaluate the evidence. Having perused the judgment in the High Court, we find that the High Court re-evaluated the evidence and then affirmed the position reached by the trial court. We are satisfied that the conclusion reached was as a result of the High Court's evaluation, and was not a mere repeat of the trial court's findings as the appellant alleges. In the words of the Supreme Court of Uganda, *Uganda Breweries Limited v Uganda Railways Corporation* [2002] UGSC 1 (Civil Appeal No. 6 of 2001),

***‘(i) There is no set format to which a revaluation of evidence by a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstances of each case and the style used by the first appellate court.’***

In this case, there were concurrent findings of fact. Even on appeal, the court is hesitant to interfere with findings of fact as these are arrived at as a result of judicial discretion. This court in *George Otieno Dida & Another v Republic* [2011] eKLR (Criminal Appeal 404 of 2009) stated 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. Can we interfere with those findings of fact? Findings of fact are based on exercise of judicial discretion. An appellate Court may only interfere with exercise of judicial discretion in clear circumstances. In Mbogo & Another vs. Shah [1968] EA 93, the Court of Appeal for East Africa, while considering such an issue rendered itself thus:-***

***“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.” (per Newbold, P)***

***It may be argued that the above cited decision does not directly relate to findings of fact. The principles are more or less the same. ... A finding by a court of law must be based on evidence and sound legal principles. For us to interfere with such a finding, it must first be shown that the lower court, either had no legal basis for such finding or that no reasonable judicial tribunal could have reached such a finding. (emphasis ours)***

We have looked through the record and we find that there is absolutely no basis for disturbing the findings of the trial court and the first appellate court.

The final ground raised by the appellant is that once a person is sentenced to death, then there is no basis to impose another prison term. The appellant argues that since on the first count he was sentenced to death, he ought not to have been sentenced on the second and third counts. Miss Oundo, on the other hand, argues that the fact that the appellant was sentenced on counts two and three has caused no prejudice to the appellant. This Court stated in *Muiruri and Others v R KLR [1980] 1581* that:

***“Where a person is charged with a number of capital charges it is preferable to proceed on one capital charge only and to leave the other capital charges in abeyance, even if the other charges appear to be inter-linked.”***

In *Samuel Waitthaka Mbugua v Republic [2011] eKLR* as well, the Court, dealing with a similar matter stated that:

***“Although it seems to us obvious and a matter of common sense that life sentence cannot run consecutively with another sentence of imprisonment as in Kenya the position is as yet that life sentence means the appellant stays in prison till his demise. Once he is dead, he cannot start serving another sentence, neither would it be appropriate that one starts with a shorter sentence such as 10 years in this case, and after clearing that, he then starts life imprisonment. However, these notwithstanding, the court should for clarity, specify where more than one sentence of imprisonment are pronounced, whether the same will be served concurrently or consecutively. In this case we order that the sentences of life imprisonment and of ten (10) years imprisonment are to run concurrently.”***

In *George Otieno Dida & Another V Republic [2011] (supra)* the court stated that a trial court ***‘should have sentenced the appellant to death in one count but order any other sentence against them to be in abeyance.’***

See also *Godfrey Njogu v R [2005] eKLR* where this court expressed itself as follows:

***“We have said time and again that where an accused person has been sentenced to death, there is no reason for imposing other sentences on him. It would be unjust, in this case for the appellant to first serve the sentence of ten years imprisonment and to be hanged thereafter. As we***

***have repeatedly said in a situation like this the only course open to the court imposing the sentence is to leave the other sentences in abeyance.”***

We agree with the appellant on this ground, that the trial court fell into error in not stating that the sentences on count two and count three were to be held in abeyance.

The totality of the reconsideration of the whole of the evidence leads us to one conclusion: that the appeal has no merit. The appellant was convicted on sound and credible evidence and there is no basis for our interference.

The end result is that this appeal is dismissed in its entirety, save for the ground of appeal regarding the sentence. On this, we would take the approach taken by the court in ***Godfrey Njogu v R (supra)*** and order that the sentences on counts two and three of which the appellant was convicted be held in abeyance.

Dated and delivered at Nairobi this 19<sup>th</sup> day of July 2013

**D. K. MARAGA**

.....

**JUDGE OF APPEAL**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

*mwk.*

**I certify that this is a**

**True copy of the original.**

**DEPUTY REGISTRAR**