



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, J.J.A.)

CRIMINAL APPEAL NO. 418 OF 2010

1. PETER KALOKI MULILI

2. KIVILA KING'OO.....APPELLANTS

AND

REPUBLICRESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Mombasa (Ojwang & Azangalala, JJ.)
dated 16th November, 2010*

in

H.C.Cr.A. Nos.339 & 341 of 2006)

JUDGMENT OF THE COURT

The two appellants herein **Peter Kaloki Mulili** and **Kivila King'oo** were charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars were that on the 27th day of May, 2006 at about 11.00 p.m. at Ziwani Estate Farm in Taita-Taveta District within Coast Province, jointly robbed **Daudi Mulandi Kimatu** a bicycle make Diamond, a torch, a handbag, a bow and three arrows all valued at Kshs.4,100/= and immediately at the time of robbery wounded the said **Daudi Mulandi Kimatu**.

The trial proceeded before **J. M. Githaiga**, the then Senior Resident Magistrate, Taveta who on 28th day of November, 2006 found them guilty of the lesser offence of handling stolen property contrary to **section 322(2)** of the Penal Code and sentenced them to 14 years imprisonment with hard labour.

Dissatisfied with the conviction, the two appellants filed an appeal to the superior court. On 16th November, 2010 **Ojwang & Azangalala, JJ.** (as they then were) dismissed their appeals against conviction, set aside the finding and sentence of the trial court; reinstated the original charge of capital robbery and sentenced each of the appellants to death being the mandatory sentence for that kind of conviction.

Undeterred by the turn of events, the appellants appealed to this Court and advanced several grounds of appeal in their home-made memorandum of appeals.

The appellants were initially represented by **C.A. Odhiang**, learned counsel appointed for them by Court who filed a supplementary memorandum of appeal on 6th July, 2012. As **C.A. Odhiang** was unable to prosecute the appeal, the matter on the instructions of this Court was re-allocated to **Mr. Ngumbau Mutua** who also filed further grounds of appeal to wit:-

“1. THAT the 1st appellate court judges erred in law by failing to re-evaluate and re-analyze the evidence on record exhaustively.

2. THAT the 1st appellate court judges erred in law by failing to consider the defenses raised by the appellants.

When the appeal came before us for hearing, **Mr. Ngumbau**, the learned counsel for the appellants condensed all the grounds of appeal filed by the appellants, by C.A. Odhiang and by himself into two namely, lack of re-evaluation of the evidence on record and failure to consider the appellants' defences. **Mr. Ngumbau** submitted that there were inconsistencies as to the place of the commission of the offence as the charge sheet indicated this to be Ziwani Estate in Taita-Taveta. On the other hand, PW1 **Daudi Mulandi Kimatu**, PW2 **Issa Dame Abashora** and PW3 **Leonard Maritim** stated that it was in Ziwani Estate in Kiboko “A” whilst PW6 **Apc. Joseph Kioko**, PW7 **Cpl. Saidi Munga** and PW8 **Joseph Saleli Fundi** said that the attack was in Gicheha Farm. He submitted that there was a further contradiction as regards the time of the commission of the offence as PW6 **Apc. Joseph Kioko** said it was around mid-day. Whilst PW2 **Issa Dame Abashora** and PW4 **Samwel Omondi** told the trial court that the stolen items were recovered immediately after the robbery during the night. The learned counsel submitted that there was further contradiction as to whether the house was isolated or as to whether there were two other houses in the vicinity.

The learned counsel's further submissions were that there was no positive identification of the appellants; that the defences of the appellants were not considered; that since the offence of robbery was not proved beyond any reasonable doubt, then the doctrine of recent possession does not apply. His further argument was that there was no relationship between the commission of the offence and the appellants.

Mr. Oyiembo, the learned Assistant Director of Public Prosecutions opposed the appeal for the reasons that the alleged inconsistencies were not material; that there was no doubt as to the owner of the house and that the recovered items were found immediately after the robbery and hence the propriety of the substituted sentence by the superior court.

What is the position of the law as regards a second appeal and particularly where the superior court has substituted a sentence?

Section 361 of the Criminal Procedure Code Cap. 75 Laws of Kenya provides that:

“361(1) A party to an appeal from a subordinate court may, subject to sub-section (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an

appeal under this section:-

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

In the case of **Hamisi Mbela Dennis & Another v R. (UR)** Mombasa Court of Appeal **Criminal Appeal No. 319 of 2009** this Court held:-

“8. This being a second appeal, this Court is mandated under section 361(1) of the

Criminal Procedure Code to consider only issues of law. As was held in M'Riungu vs Republic [1983]KLR 445.

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 courts 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 (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings).”

This position was reiterated by the Court of Appeal in Nakuru **Criminal Appeal No. 242 of 2008 John Sadera v R.** where it was held *inter alia* that only issues of law may be raised and considered on a second appeal to the Court of Appeal.

The learned counsel for the appellants' contention was that there was lack of sufficient re-evaluation of the evidence by the superior court and hence this was a matter of law and not fact and we agree with him.

It is uncontroverted that PW1, **Daudi Mulandi Kimatu**, the Security Officer of Ziwani Estate, of a section called called Kiboko “A” was on 27th May, 2006 at about 11.00 p.m. attacked by robbers who roughed him up. He fled the scene. In the incident, his bicycle, bow and three arrows, as well as a handbag were stolen. He later learnt that the items were recovered at Lumi Njukini area. He had not known any of the appellants before. The evidence of the other witnesses was briefly as follows;

PW2, **Issa Dame Abashora** and PW3 **Leonard Maritim** learnt of the attack and proceeded to the scene. There were shoe-marks as well as tyre-marks of the bicycle which they followed to a house where they recovered the stolen items.

PW4 **Samuel Omondi** also joined the search team that led them to the house where the items were recovered.

PW5 **Stanley Chelanga** was the Clinical Officer who attended to the complainant, PW1. PW6 **Apc. Joseph Kioko** received the report of the robbery on 28th May, 2006 at around mid-day.

PW8, **Joseph Saleli Fundi** was the Assistant Chief, Njukini Sub-Location. He was informed by PW9 **Mwandau Mberi**, the village elder, that the house belonged to the two appellants.

In their defences, the appellants chose to make unsworn statements of defence. Each one of them denied that the house where the items were found belonged to them.

There is no dispute that the complainant herein was attacked by robbers at around 11.00 p.m. on 27th May, 2006. There is also no doubt that several items were taken away from him during the robbery. There is also no doubt that these items were found in a house. As to the submission as to whether the house may or may not have been isolated we agree with **Mr. Oyiembo** that this was not material. We also do not think that the contradictions (*if any*) as to the place where the offence was committed and to the exact time of the commission are material.

The puzzle that must however, be resolved, is as to the ownership of the house. The only witness who testified as to the ownership was PW9 **Mwandau Mberi**. This is what he said:-

“I am the village-elder-in-charge of Lumi area. The accused are neighbours. I remember on 28th May, 2006 the assistant Chief approached me. He said some house had been found within my area and the house was being used as a store for stolen property that had been recovered. The assistant Chief took me to the house. I

recognized the house. It belonged to the accused in the dock. I have known the accused for a long time. I have no grudge against them. I recorded a statement.”

Whilst being cross-examined by the 1st appellant PW9 stated thus:-

“I heard you usually walk together with the 2nd accused. I had seen you and the 2nd accused building the house.”

In cross-examination by the 2nd appellant, PW9 stated that:-

“The father of KINGOO and who is your grandfather was the owner of the plot where the house is built. That is the house where the stolen goods were recovered.”

From the above, it was not disclosed who had informed PW9 that the 1st appellant ***“usually walked with the 2nd appellant”*** (emphasis ours). And as to the testimony that PW9 saw the two appellants building the house, was this a one day's event or did he see them doing it over a long period of time? Were they building it for themselves? It is noteworthy that each of the appellants denied being the owners of the house where the stolen items were recovered from.

In our view, this boils down to the fact that it was PW9's word as to the ownership of the house *vis-à-vis* the appellants denial of the ownership of the house. In this case there was no concrete and credible evidence that the house where the stolen bicycle was recovered belonged to or was exclusively occupied by the appellants. We are therefore in agreement with ***Mr. Ngumbau*** that the evidence was not sufficiently re-evaluated and re-analyzed and there was a reasonable doubt as to who the owner of this house was. The upshot of this is that the appellants were not properly convicted.

Accordingly, the appellants' appeal is allowed, conviction quashed and sentences imposed on each appellant is set aside. It is further ordered that the appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Malindi this 10th day of July, 2013

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR