



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: OMOLO, GITHINJI & VISRAM, J.J.A.)

CRIMINAL APPEAL NO. 347 OF 2008

BETWEEN

BENARD OTUNGA 1ST APPELLANT
CHARLES OMUNGO KALICHE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Maraga & Mugo, JJ.) dated 18th July, 2008

in

H.C.CR.A. NO. 170 OF 2005)

JUDGMENT OF THE COURT

The two appellants were jointly charged with one, *Emilly Wambui*, with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. Each of the three was also charged with an alternative count of handling stolen property contrary to **section 322(2)** of the Penal Code. The first appellant, *Bernard Otunga*, was the second accused at the trial while *Charles Omungo*, the 2nd appellant was the first accused. Each of the two appellant was after trial convicted on the main charge and each sentenced to death. The co-accused was acquitted. This is the second appeal, the appellant's first appeal having been dismissed by the High Court.

The appellants were alleged to have robbed *Fredrick Ochieng* (complainant) of a T.V. Set, radio cassette, seven shirts, ten long trousers and cash Shs.77,000/=; all valued at Shs.17,400/= on the night of *21st December, 2002*. The first appellant was also alleged to have dishonestly received or retained one Maroon suit valued at Shs.2,400/=. The second appellant was alleged to have dishonestly received or retained one green shirt valued at Shs.300/=, the properties of the complainant.

The trial of the appellants commenced before S. Muketi, Senior Resident Magistrate (as she then was) on *March, 2003*. The prosecution called four witnesses namely, **the complainant**; (PW1), *Lovina Auma Ochieng (PW2)* (Lovina), the complainant's wife, *Cpl. George Jopanda (PW3)* the investigating officer; and *Kugutu Vitalis (PW4)*, a medical officer who had examined the complainant. After the close of the prosecution case, the trial magistrate ruled that the appellant had a case to answer. However, before the appellants defended themselves, the 2nd appellant objected to continuation of the case before the same

court saying that witnesses were standing at the door. This led to the trial magistrate disqualifying herself. As a consequence, the trial started afresh before A.O. Atonga – a Senior Resident Magistrate but before the complainant could complete his evidence, the 2nd appellant again complained that the complainant had interfered with the investigating officer and that the court was also interfered with. The second magistrate thereupon disqualified himself from hearing the case.

The case was later allocated to Mrs. H. Wasilwa, Senior Resident Magistrate who disqualified herself at the outset on the ground that two other magistrates had previously disqualified themselves.

The trial was subsequently conducted by H.M. Nyaga – a Senior Resident Magistrate to its conclusion. At the trial, only the complainant his wife, Lovina and Cpl Jobando the investigating officer testified. The prosecution case was brief as follows:-

On the night of 21st – 22nd December, 2002, the complainant was asleep in the house, a single room. At about 3:30 a.m., the house was broken into and robbers entered. The complainant switched on the electricity light after robbers entered into the house and two of them, later identified as the two appellants, pressed the complainant on the bed. The first appellant was armed with a panga which he placed against the complainant's throat, and the 2nd appellant was armed with a metal bar. The appellant and his wife did not know the two appellants before. The two appellants beat the complainant demanding money. The robbers left after stealing clothes, household goods and a handbag which contained Shs.1,000/=.

On 30th December, 2003, at about 1 p.m., the complainant who was accompanied with his wife saw the second appellant who was wearing a green shirt and brown pair of trousers. He recognized the second appellant as one of the robbers. He also recognized the shirt and trouser as his. He followed him leaving his wife behind and caused him to be arrested by members of public. The 2nd appellant was taken to Bondeni Police Station where the shirt was removed. The 2nd appellant remained with the trouser. Thereafter, the 2nd appellant led the complainant and police to the house of Emilly Wambui where a shirt and a T-Shirt (which had the label –“**cardinals**” were recovered and which complainant claimed to be his.

On 5th January, 2003, Bernard, the first appellant was arrested by members of the public in presence of the complainant. He was wearing a maroon trouser which complainant claimed to be his. The first appellant was taken to the police station. He later led police to his house where a maroon coat which complainant claimed to be his was recovered.

The first appellant testified at the trial that he was a mason and that after he was arrested, he led police to his house which was searched and his clothes including a maroon suit was taken.

On his part, the 2nd appellant Charles testified that Emilly the co-accused was his wife; that he used to sell second hand clothes, that he knew complainant and had disagreed with him over one of his wives and that he was arrested, his house searched and his 13 trousers, 3 suits, 12 shirts, 3 track suits, 3 shorts, 6 T-shirts jackets and Shs.7,000/= were taken by the investigating officer. He claimed that the clothes produced in court were his.

The trial magistrate convicted the appellants on the basis of the evidence of visual identification and recent possession of the complainant's clothes. The High Court was also satisfied that the appellants were identified at the time of the robbery and that they were also found in recent possession of the complainant's clothes.

At the hearing of the appeal, Mr. Githui, learned counsel for the appellants, submitted on two issues – identification and explanation for possession for the clothes which are the broad grounds raised by the grounds of appeal.

On the issue of identification, he submitted among other things that both courts below did not consider whether or not the circumstances were favourable for identification; and that the circumstances obtaining

were not conducive to proper identification.

Both the complainant and his wife testified that they identified each of the two appellants. However, it is clear that the complainant and his wife were suddenly awakened by a bang on the door; that this was a single room and about six robbers entered into the room; that complainant was lying on the bed and was pressed on the bed by two people one placing a panga on his neck; that complainant was beaten; that the first appellant (Bernard) was wearing a hat; and that the complainant's wife had covered herself on the head and only peeped underneath the cover. The trial magistrate made a finding that the conditions were conducive to identification merely because he believed the evidence that there was light from electricity.

Similarly, the High Court concluded that the complainant and his wife saw the appellant with the help of the electric light without evaluating and weighing all other relevant factors.

Moreover, the two court's below did not appreciate that the evidence of the identification of the appellants in the dock by the complainant and his wife was worthless because the complainants had caused the arrest of the 2nd appellant and was also present when the first appellant was arrested. It is clear from the evidence of the complainant that it is the clothes that the 2nd appellant was wearing rather than his physical appearance that caught the attention of the complainant.

Had the High Court evaluated the evidence relating to identification sufficiently, and directed itself properly it would have found that the evidence was not reliable.

The only other evidence to connect the first appellant with the offence was that he was in recent possession of the complainant's maroon suit. The evidence of the complainant was that the first appellant was wearing his maroon trouser and when the house of the first appellant was searched, the maroon coat was recovered.

The complainant testified that the suit was tailor-made and identified the trouser by reddish pockets and the coat by a zip on the left pocket. The appellant in sworn testimony claimed that the maroon suit was his.

The trial magistrate made a finding that the maroon suit was identified by complainant and his wife as belonging to the complainant. The High Court also believed the evidence that the maroon suit belonged to the complainant. There was evidence that the first appellant explained that he was given the suit by his uncle. However, the explanation was rejected by the two courts. There are concurrent findings of the two courts below that the complainant was robbed of the maroon suit amongst other goods and that it belonged to him. That finding was dependent on the credibility of the complainant. We cannot interfere with the finding unless we are satisfied that no reasonable tribunal could have made such a finding. We are satisfied that there was ample evidence to support the finding. Thus, the first appellant was in possession of the stolen items on 5th January, 2003, about 2 weeks after the robbery. A presumption from the recent possession that he was one of the robbers arises.

The other evidence to connect the second appellant with the offence was possession of complainant's clothes.

The second appellant was arrested on 30th December, 2003, ten days after the robbery. At the time of arrest, he was wearing a green shirt and brown pair of trousers which the complainant claimed to be his. He led police to the house of Emilly Wangui (co-accused) where a shirt and T - shirt were recovered. The complainant identified the green shirt by a broken collar padding and some yellow threads. He identified the T-shirt recovered in the house of Emilly Wangui by a label (cardinals). He picked the shirt and T-shirt in the house of Emilly Wangui from several other clothes which he said were not his.

The second appellant claimed and Emilly Wangui agreed in court, that she was his wife. The second appellant further claimed that all the clothes recovered were his. The trial magistrate made a finding that the recovered clothes belonged to the complainant and dismissed the alleged grudge between 2nd appellant and the complainant *to be a carefully crafted tale*. The High Court agreed with that finding.

The first appellant herein was the 1st appellant in the High Court and the second appellant herein the second appellant in the High Court. The High Court said of them:-

“The 2nd appellant mentioned the 1st appellant as someone who knew where clothes stolen from the complainant were. He also led the search party to the 3rd accused where more clothes were found. The first appellant mentioned the 2nd appellant as the one who had given him the clothes even before he was brought to his house from the police cells.

The three accused persons knew each other. Although they laid claim to the clothes with the 3rd accused saying that the clothes found at her house belonged to the 2nd appellant, it is quite impossible that all these clothes found in separate places upon leads provided respectively by the two appellants would by mere coincidence match the clothes that the complainant said he had lost during the robbery.”

No grounds have been shown for interfering with the concurrent findings of fact by the two courts below.

In the result, we are satisfied that the appellants were properly convicted.

Accordingly, the appeal is hereby dismissed.

Dated and delivered at Nakuru this 23rd day of February, 2012.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR