



**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: OMOLO, O'KUBASU & GITHINJI, J.J.A)

CRIMINAL APPEAL NO. 467 OF 2007

BETWEEN

FREDRICK MACHARIA NDUNGU APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Nakuru (Kimaru & Koome, J.J.A) dated
14th December, 2006*

In

H.C. Cr. A. No. 268 of 2002)

JUDGMENT OF THE COURT

The appellant FREDRICK MACHARIA NDUNGU was charged with robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the offence were that on the 23rd of June, 2002 at Murinduko Trading Centre, Kuresoi, Nakuru District, the appellant jointly with others not before court, while armed with dangerous weapons namely a pistol and simis robbed Peter Mucheru of Kshs.7,000/- and a pair of gumboots and at or immediately before or immediately after the time of such robbery, threatened to use personal violence to the said Peter Mucheru. The appellant was alternatively charged with handling stolen property contrary to **section 322 (2)** of the Penal Code. The particulars of the offence were that on the same day and at the same place otherwise than in the course of stealing, the appellant dishonestly received or retained a sum of Kshs.2,335/- knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

The appellant pleaded not guilty to the charges and after a full trial, the appellant was convicted on the main charge and sentenced to death.

The facts as accepted by both the trial court and the first appellate court were that on 23rd June, 2002 at about 7.30 p.m., Peter Mucheru (PW1) was at his shop at Murinduko Trading Centre when four men entered the shop. They pointed something which looked like a pistol at him and ordered him to surrender all the money that was in his possession. They further ordered him to lie down on the floor. His pockets were frisked and a sum of Kshs.4,100/- removed therefrom. One of the robbers, whom the complainant identified as the appellant went to the cash box and removed a further sum of Kshs.3,000/-. The complainant testified that he had put on a lamp which enabled him to identify the appellant. The commotion at the shop attracted the complainant's wife Virginia Wangari Mucheru (PW2), who screamed and alerted the members of the public. On hearing the screams, the robbers ran away

after putting off the lamp in the shop. However, the appellant and one of his accomplices were apprehended by members of the public and beaten senseless. The accomplice of the appellant was actually beaten to death, while the appellant was rescued by police constable, Jackson Muriithi (PW4) who had rushed to the scene to investigate what the commotion was all about. It was the evidence of P.C. Muriithi that when he searched the appellant, he recovered the sum of KShs.3,000/- from the trouser pockets of the appellant. He arrested the appellant and took him to Murinduko Police Post. Two days later the complainant found the imitation of a pistol which had been left at the cash-box when the robbers left in a hurry. The imitation pistol and KShs.2,235/- were produced in evidence as exhibits.

In his defence, the appellant told the trial court that on the material evening he too was at Murinduko Trading Centre when he heard people screaming and running towards his direction. He was surprised when the people started beating him up claiming that he had robbed the complainant. He maintained that he was innocent.

In his judgment delivered on 2nd September, 2002 the learned trial Magistrate (R. Kirui – Senior Resident Magistrate) stated inter alia:-

“From the evidence adduced, there is no dispute that the complainant was robbed of his stated property by more than one persons armed with dangerous weapons, namely, a pistol imitation, club and simis and who threatened to harm him. The point for determination is whether or not the accused was involved.

The accused denied being involved claiming to had been on his way from his grandmother’s place when attacked. But the complainant and PW2 knew before (sic) and saw him clearly as one of the robbers as there was light from a pressure lamp. He was also caught a few metres away and when searched KShs.3,000 that was stolen from the complainant cash (sic) was recovered from him. I find his claim to be untrue as I believe the complainant and PW2 properly identified him.

In the circumstances, I am convinced beyond reasonable doubt the accused committed the offence as charged. I accordingly find him guilty and convict him of the main charge under section 296 (2) of the Penal Code.”

After that conviction the appellant was sentenced to death as provided by law.

Being aggrieved by both conviction and sentence, the appellant filed an appeal to the High Court. The learned Judges of the High Court (Koome & Kimaru, JJ) considered the appellant’s appeal and found it unmeritorious. In their judgment dated 14th December, 2006, the learned Judges stated inter alia:-

“The prosecution proved its case to the required standard of proof. The defence offered by the appellant is self serving. His was not a case of mistaken identity when he was apprehended by the members of the public. The prosecution proved that the appellant was apprehended by the members of the public immediately after he attempted to run away from the shop of the appellant (sic). The complainant and his wife properly identified the appellant after he was apprehended by the members of the public. The appellant was arrested by PW3 while in possession of some of the money which was robbed from the complainant.

We therefore find no merit with the appeal filed by the appellant. We dismiss it and confirm the conviction and the sentence of the trial Magistrate.

It is so ordered.”

Still aggrieved by the foregoing, the appellant now comes to this Court by way of second appeal.

When the appeal came up for hearing on 11th January, 2012 the appellant was represented by Mr. Nicholas Bichang’a, while the State was represented by Mr. A. J. Omutelema (Senior Principal State Counsel). Mr. Bichang’a based his submissions on what was described as “Consolidated Supplementary Memorandum of Appeal” which had the following five grounds:-

“1) That the learned Judges of the superior court erred in law in finding that identification of the appellant by the prosecution witnesses was sufficient to sustain a conviction.

2) That the learned Judges erred in law and fact in convicting the appellant based on the Doctrine of recent possession.

3) That the learned Judges erred in law and fact by failing to thoroughly re-evaluate and analyze the evidence adduced by the prosecution and arrive at their own conclusion as required of them by the law.

4) That the learned Judges erred in law and fact by failing to find that the charge against the appellant had not been proved beyond any reasonable doubt to warrant a conviction on the appellant.

5) That the learned Judges erred in law and fact by failing to appreciate that in criminal cases the burden of proof is always upon the prosecution and doesn't shift.”

On the first ground, Mr. Bichang'a submitted that since the complainant was in a state of shock during the robbery and in view of the fact that the source of light was not clearly stated then even if the complainant and his wife claimed that they recognized the appellant that evidence of identification ought not to have been relied upon.

On the second ground of appeal, Mr. Bichang'a took issue with the application of the doctrine of recent possession in that the two courts below relied on that doctrine just because the appellant was found with KShs.3,000/-

As regards the third ground of appeal, Mr. Bichang'a submitted that the first appellate court did not re-evaluate the evidence and that had it re-evaluated the evidence it would have come to a different conclusion.

Mr. Bichang'a argued the fourth and fifth grounds together and faulted the learned Judges for not giving the appellant the benefit of doubt as this was a criminal case in which the burden of proof never shifted to the accused person.

On his part, Mr. Omutelema opposed the appeal pointing out that both the complainant (PW1) and his wife (PW2) knew the appellant well and that the source of light was a pressure lamp which was on during the robbery, only to be put off by the robbers as they ran away. Mr. Omutelema went on to submit that when the appellant was searched, money was recovered from a trouser which was inside two other pairs of trousers.

It was Mr. Omutelema's contention that there was no shifting of burden of proof as there was sufficient evidence to support the charge. He therefore asked us to dismiss the appeal.

We have considered the rival submissions in this appeal and it would appear that the main issue was identification. The robbery took place after 7.30 p.m. in a rural trading centre. However, the complainant (PW1) testified that he recognized the appellant as one of the robbers. He had known the appellant prior to this incident. That evidence of identification was supported by the testimony of the complainant's wife (PW2). It was her evidence that when she heard the commotion in the shop she went out screaming and as the robbers were running away she recognized the appellant. It was her further evidence that she knew the appellant well.

In this appeal, it is to be noted that the conviction of the appellant was based on the evidence of identification (on recognition) by two witnesses and the fact that he was found in possession of some of the money stolen during the robbery.

Although Mr. Bichang'a took issue with the question of identification, it is clear to us that the appellant was convicted on the evidence of recognition. The complainant (PW1) and his wife (PW2) knew the

appellant well prior to the incident of that evening.

In **Anjononi & others v. the Republic [1980] KLR 59** at p. 60. this Court said:-

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

In view of the foregoing we do not accept Mr. Bichanga’s submission that the evidence of identification was weak . As the appellant was known to the two identifying witnesses (PW1 and PW2) this makes the evidence of identification, nay recognition, free from any possibility of error.

On the question of the appellant being found in possession of KShs.3000/- we are satisfied that the two courts below were perfectly entitled to conclude that this was part of the stolen money since the appellant and his colleague (who was killed by the members of the public) were arrested immediately after the robbery.

Mr. Bichang’a submitted that the first appellate court did not re-evaluate the evidence. We do not agree. The learned Judges of the High Court were alive to their duty as a first appellate court. In the course of their judgment the learned Judges said:-

“This being a first appeal, this court is required in law to consider the appeal by way of rehearing. This court is required to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses so as to reach its independent determination whether or not to uphold the conviction of the appellant. Of course, this court has to put in mind the fact that it neither saw nor heard the witnesses as they testified. (See Njoroge vs. Republic [1987] KLR 19). The issue for determination by this court is whether the prosecution proved its case on the charge of robbery with violence against the appellant to the required standard of proof beyond reasonable doubt.”

Having so stated, the learned Judges proceeded to re-evaluate the evidence of each witness and the defence of the appellant and on their own came to the conclusion that the appellant had been properly identified by the two witnesses during the robbery.

In view of the foregoing we are satisfied that the appellant was convicted on very sound evidence. His conviction was inevitable. We find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety. It is so ordered.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.