



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Criminal Appeal 648 of 2010

LAWRENCE AYUKU MAINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Kisumu*

*(Mwera & Karanja, JJ.) dated 23<sup>rd</sup> September, 2008)*

in

*H. C. Cr. A. No. 45 of 2006)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

**Lawrence Ayuku Maina, the appellant** herein, was charged in the Senior Resident Magistrate's Court at Maseno with eight counts being one count of robbery with violence contrary to **section 296 (2)** of the Penal Code; three counts of impersonating a public officer contrary to **section 105** of the Penal Code; three counts of stealing contrary to **section 275** of the Penal Code and possession of public stores contrary to **section 324 (2)** of the Penal Code.

The facts of the offence in Count one were that, on the 11<sup>th</sup> day of March, 2005, at Emasafu village, Ebusiekwe sub-location, West Bunyore Location in the Vihiga District within Western Province jointly with others not before court while armed with dangerous weapons namely *pangas, rungus*, metal bars and torches, he robbed Dishon Otiende Gamaliel one small radio of make Nakiva, a pair of bedsheets, two pillow cases, one ragsack bag, one jacket and hard cash Kshs.400/= all of the value of Kshs.3,875/= and immediately before or immediately after the time of such robbery used actual violence on the said Dishon Otiende Gamaliel. Count two, Count four and Count six concerned impersonating a public officer contrary to **section 105** of the Penal Code where it is alleged that on 1<sup>st</sup> March, 2005, 9<sup>th</sup> March, 2005 and 10<sup>th</sup> March, 2005 in Vihiga District within Western Province jointly with others not before court he with others falsely represented themselves as persons employed in the public service namely police officers and assumed to arrest and searched John Kisia Okongo, Florence Bwabo and Dishon Otukho. Count three, Count five, and Count seven were with regard to the offence of stealing contrary to **section 275** of the Penal Code. It is alleged in Count three that on the 1<sup>st</sup> day of March 2005 at Luanda township, Ebusikhale sub-location in Vihiga District within Western Province, jointly with others not before court he stole one leather jacket valued at Kshs.1,500/= the property of John Kisia Okongo. Count five stated that on 9<sup>th</sup> March in Vihiga District jointly with others he stole one wall clock, two wrist watches, one walkman, two padlocks and hard cash Kshs.2,500/= all totaling to Kshs.5,000/= the property of Florence Obwano. Count seven stated that on 10<sup>th</sup> March, 2005 at Mabungo Centre, Ebando sub-location,

Wekhomo location in Vihiga District within Western Province jointly with others not before court he stole Kshs.3000/= the property of Naboth Timbwa. Finally as outlined in count eight, it is alleged that on the 11<sup>th</sup> day of March, 2005, at Ebusakami village, South Bunyore District within Western Province he had in his possession public stores namely one police beret and two police head badge (crown) such property being reasonably suspected of having been stolen or unlawfully obtained.

The prosecution called a total of nine witnesses and after hearing their evidence as well as the sworn evidence of the appellant, the learned Senior Resident Magistrate (Mr. A. C. Ong'injo) found the appellant guilty of all the charges and on the count of robbery with violence, he sentenced him to death, and to one year imprisonment for all the other offences to run concurrently. His first appeal to the High Court (Mwera and Karanja, JJ.) was dismissed, hence this second and final appeal.

The evidence adduced by the prosecution is that on 11<sup>th</sup> March, 2005 at about 11.00 a.m. while APC Vincent Abundo (PW 6) (Abundo) and APC Felix Nzungi (PW 7) (Nzugi) were on patrol within Ebusakami sub-location, they saw the appellant who looked suspicious and approached him. Several items were recovered from the appellant among them a jacket that he was wearing at the time of arrest, a police beret, two crowns (head badges), a small radio make Nakiva, five wrist watches and a whistle. Dishon Otiende (PW 1) identified some items robbed from him on the night of 10<sup>th</sup> March, 2005 when his family was attacked by six assailants pretending to be policemen. These items include: a jacket, three of the wrist watches, radio, and the ragsack. Florence Obwamo (PW 3) also identified a wrist watch that was recovered from the appellant. None of the prosecution witnesses who had been victims of the various robberies were able to recognize their attackers. The only evidence that linked the appellant to the various incidents of robbery was possession of items identified by some prosecution witnesses as having been robbed from them. This finding was made both by the trial and the High Court.

The appellant denied having been found with the stolen items. In his memorandum of appeal dated 22<sup>nd</sup> May, 2010 filed by his learned counsel, Mr. S. O. Madialo, the appellant contended that the High Court failed to appreciate from the evidence on record that the important issue arising was that of recognition rather than recent possession which led to the appellant's conviction. The appellant is of the view that such an analysis would have tilted the case in his favour. Secondly, that failure to call the investigation officer was fatal to the prosecution's case during the trial and lastly that the appellant's defence was ignored all together.

Mr. P. Kiprop, learned State Counsel, submitted that the appellant was arrested a day after the alleged robbery and therefore the presumption made by the court was that he was a robber. The appellant's contention that the issue of recognition was more prominent from the evidence at the trial court is not true. It is obvious that none of the witnesses had recognized their assailants in the reported incidences of robbery. This makes recognition a none issue as no one alleged to have identified the appellant during the reported incidences of robbery. However, a day after Dishon Otiende (PW 1) had been robbed by persons impersonating policemen, the appellant was arrested after being found in possession of several items that had been reported stolen from that incident. A number of prosecution witnesses were able to identify these items as having been robbed from them on the stated days that the robberies occurred. This correctly made the issue of recent possession the crucial point against the appellant in the case.

Being a second appeal, only points of law fall for the consideration of this Court – see **section 361 (1)** of the Criminal Procedure Code. The law is well settled and we need not belabor it, that a person found in possession of recently stolen item is, in the absence of any plausible explanation, presumed to be either the thief or the handler of the stolen item. Under **section 111** of the Evidence Act, Chapter 80 Laws of Kenya, the burden as to how he came to be in possession of the goods or in the knowledge of the whereabouts of the same goods shifted to him and although it was not as heavy a burden as that on the prosecution, he had to discharge it. He was only to give a plausible explanation as to how the items stolen were in his possession.

In the circumstances of this case, we are of the opinion that both the trial and High Court correctly made a presumption that the appellant had been involved in the crimes charged in particular the robberies. The appellant was found with a number of the items reported to have been robbed from the complainants and

his demeanor when approached by police officers Abundo and Nzugi clearly gave him away. The appellant's defence was looked into and dismissed by both courts as unbelievable. We find no reason to hold otherwise. On the issue of failing to call the investigating officer, we find that there was no miscarriage of justice caused as a result. It is a general principle that calling a witness to testify is at the discretion of the prosecution and an appellate court will not interfere with the exercise of this discretion unless it is shown that the prosecution had an ulterior motive and such omission caused a failure of justice to the accused.

Accordingly, and for the reasons outlined, we find no merit in this appeal, and dismiss the same.

**Dated and delivered at Kisumu this 28<sup>th</sup> day of November 2012.**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....  
**JUDGE OF APPEAL**

**D. K. MARAGA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**