IN THE COURT OF APPEAL
AT KISUMU
(CORAM: BOSIRE, GITHINJI & VISRAM, JJ.A.)
CRIMINAL APPEAL NOS. 50 & 51 OF 2009

BETWEEN

1. ABDALLA JUMA OKONGO

2. RODGES AYODI EMOLI *(DECEASED)* ……...…APPELLANTS

AND

REPUBLIC ……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ.) dated 17th February, 2009)

in

H.C.Cr.A. No. 173 of 2004)

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JUDGMENT OF THE COURT

The first appellant ***Abdallah Juma Okongo*** and ***Rogers Ayodi Emoli*** now deceased were convicted by the Chief Magistrate Kisumu for robbery contrary to ***section 296(2)*** of the Penal Code and each sentenced to death. They subsequently appealed to the High Court against conviction and sentence but their respective appeals were dismissed. This is therefore their second and the last appeal. The second appellant died during the pendency of the appeal and his appeal has already been marked as abated.

The prosecution called four witnesses at the trial in support of the charge namely, ***Lilian Chemtai*** (PW1) the complainant; ***Pc. Zakary Nyawach*** (PW2) (Pc. Zakary); ***Pc. George Oloo*** (PW3) (Pc. George) and ***Cpl. Peter Mbua*** (PW4) (Cpl. Peter).

The complainant testified at the trial, among other things, that she lives at lower Railway quarters Kisumu; that on 10th May, 2003, she was seated in her house with her baby; that electricity light was on; that the door of her house was pushed open at about 10.00 p.m. and one person armed with a sword entered into the house and demanded her mobile phone; that when she said that she did not have one, the person *(later identified as the deceased 2nd appellant)* started taking things from the house; that the person was joined by two others; that various assorted goods including clothes, shoes, sheets, handbags, documents were stolen from the house and that after the robbery the robbers carried away the goods threatening to rape and kill the complainant if she screamed.

Meanwhile Pc. Zakary and Pc. George who were on night patrol in upper Railways area in Kisumu heard dogs barking consistently in the railway compound at about 3.00 a.m. and immediately went there. The two police officers testified at the trial that upon going to where the dogs were barking they saw two people walking towards KNA building; that the two people were carrying two black bags, that they suspected the two people and followed them for a distance; that they ultimately stopped them near Imperial Hotel and ordered them to lie down at gun point; that one of the two people attempted to escape; that the 1st appellant claimed that they were going to the bus stage to catch a bus; that after a quick search a Somali sword was recovered from 1st appellant; that the two appellants were taken to Railways Police Station where clothes were found in the bags they were carrying and the appellants were detained in custody for being in possession of suspected stolen properties. On his part Cpl. Peter testified that upon questioning the suspects, the deceased 2nd appellant admitted to have stolen and led police to lower Railways and pointed at Block 26 door A as the house from which the goods were stolen; that the deceased 2nd appellant also informed him that one person had escaped with some of the stolen goods; that Cpl. Peter found the complainant in the house who reported the robbery to them and gave him a description of the stolen goods and that the description of the stolen goods given by the complainant tallied with the goods recovered.

The 1st appellant claimed in sworn testimony at the trial that he was a taxi driver, that he was arrested at 8.00 a.m. as he and other people were pushing his taxi which had run out of fuel and told to board a police land cruiser.

The trial magistrate believed the evidence of Pc. Zakary and Pc. George and disbelieved the appellant's defence.

On appeal to the High Court, the High Court made a finding that the appellant and the deceased were properly convicted.

Mr. Aringo, learned counsel for the appellant submitted in support of the three grounds of appeal *(one of them being failure to consider the appellant's defence)* that the High Court erred in failing to evaluate the evidence of recent possession of the stolen goods together with other evidence; that the recovered goods were common household goods and the complainant did not conclusively identify the recovered goods as hers; that there was no conclusive proof that the appellant was at the scene of robbery, and lastly, that the inference to be drawn from the interval of five hours from the time of robbery to the time of the recovery of the goods is that the appellant was the receiver of the goods rather than the thief as the goods would have changed hands.

The trial magistrate believed the evidence of Pc. Zakary and Pc. George saying:

"These two policemen appeared quite candid to me. They followed the two from railways quarters without losing sight of them up to the point of their arrest. Clearly therefore the facts speak for themselves. To find otherwise would not only be illogical but inconsistent. It would mean that PW1 colluded with PW2, PW3 and PW4 to plant the exhibits on the accused persons, and to do that there has to be a plausible motive. None of the prosecution witnesses knew the accused persons before and attempt by A1 to probe witnesses in that regard bore no fruit. Besides, his defence was as un-coordinated as can be; to the point in fact of being ridiculous.

To PW1 he suggested in cross-examination that she had known him before and that she was his wife. …..

To PW2 he suggested in cross-examination that PW2 had taken his wife. He did not clarify which wife but seemed to suggest that it was PW1.

He also asked PW3 about his wife who a police officer had enticed away from him. He did not pursue it further or say which police officer. In fact PW3 said when they first confronted the two accused, accused 1 said he was from Nyalenda which PW3 had no difficulty in rejecting because they saw them

and followed them from railway quarters.

It is noted that at no time did A1 suggest to any of the arresting officers about his arrest for obstruction at the roundabout. Thus his defence being un-coordinated as it was clearly lacking credibility and I have no hesitation in rejecting it."

The High Court upon reconsideration of the evidence made a finding that the appellant and the deceased:
"were found on the same night PW1 was robbed, in possession of her properties. They had no explanation to offer. They did not claim the property and so they were properly convicted."

Regarding the defence of the appellant the High Court said:
"In his defence Abdalla spoke of being caught with fuel-less taxi near Kisumu District Hospital and being arrested for obstruction. When PW2, PW3 testified this aspect of a stalled taxi was not raised. It was thus an afterthought."

The appellant and the deceased were convicted on the basis of recent possession of the goods that the complainant was robbed of. Whether the appellant was in possession of the complainant's goods is purely a question of fact which in this case is dependent on the credibility of the four prosecution witnesses.

It is trite law that this Court cannot interfere with those findings by the trial court which were based on the credibility of witnesses unless no other reasonable tribunal could have made such findings or where the trial court made errors of law in arriving at the findings ***(***see ***Republic v Oyier) [1985]KLR 353)***. Furthermore, this Court does not normally interfere with concurrent findings of fact by the trial and first appellate courts unless the findings were based on no evidence.

The appellant was the 1st accused at the trial. It is clear from the judgment of the trial magistrate that the trial court, meticulously evaluated the prosecution evidence together with the defence of the appellant. The trial court made an emphatic finding that the witnesses including Pc. Zakary and Pc. George were credible witnesses. The trial court also considered the defence of the appellant in relation to his cross-examination of the witnesses and made a finding that his defence was un-coordinated in several respects. The trial magistrate gave reasons for believing the prosecution witnesses and for disbelieving the appellant's defence. The High Court after evaluating and reconsidering the evidence made similar findings as the trial court and rejected the appellant's defence as an afterthought.

The grounds that the evidence of recent possession was not adequately evaluated and that the defence of the appellant was not considered obviously have no merit. The two courts below having believed the evidence of Cpl. Peter that the deceased appellant led him to the house of the complainant as the house from which recovered goods were stolen from and that the description of the goods stolen from the house of the complainant before she saw the recovered goods tallied with the recovered goods coupled with the complainant's identification of goods left no doubt that the goods recovered were some of the goods that the complainant was robbed of.

The complainant was robbed of the goods at about 10.00 p.m. and the goods were recovered at about 3.00 a.m. – an interval of about five hours. It is improbable that the goods could have changed hands at night and so fast. In the circumstances the two courts below correctly, in our view, applied the doctrine of recent possession.

In the final analysis, there are no grounds for interfering with the concurrent findings of fact by the two courts below. We are satisfied that the appeal was properly dismissed by the High Court.

Accordingly we too dismiss the appeal by the 1st appellant.

Dated and delivered at Kisumu this 23rd day of June, 2011

S. E. O. BOSIRE

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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