IN THE COURT OF APPEAL

AT KISUMU

(CORAM: BOSIRE, GITHINJI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 404 OF 2009

BETWEEN

GEORGE OTIENO DIDA ALIAS STEVO.....1ST APPELLANT
STEPHEN ODHIAMBO OCHIENG.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja & Aroni, JJ) dated 9th February, 2010

In

H.C. Cr. A. No. 441 of 2003)
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JUDGMENT OF THE COURT

On 18th May, 2003 at about 2.00 a.m., a gang of robbers invaded various homes at Nyalenda Estate in Kisumu District, broke into them and after gaining entry they stole several items from each house, after which they escaped. Among the houses affected were those of Joseph Odenyo Ooko (PW1), Aska Achieng Odoyo (PW2), Evans Ochieng Otieno (PW3) and Peter Otieno Ogola (PW4). From the house of PW1 they stole Kshs.2,200/- in cash, a black and white television set, and a radio. From PW2 they stole a radio and a radio cassette. From PW3 they stole a bicycle. From PW4, the robbers stole a Panasonic radio cassette, mobile phones – Erickson and Pupmilla. The robbers then escaped.

At about 5.30 a.m. George Otieno Dida alias Stevo, 1st appellant, was allegedly arrested along a road carrying a television set. PW2 identified the television set as hers, and one of the items stolen from her house a few hours earlier. She produced a receipt and permit for it. Evidence was adduced that the 1st appellant led the police and members of the public to a certain house. The 2nd appellant was found in that house. A search was conducted in that house which led to the recovery of another television set, a radio, two mobile phones and a bicycle. The 2nd appellant had partially dismantled the television set. PW2 identified the television set and radio as hers and produced in evidence the respective permits for them. PW3 produced a cash sale receipt for the bicycle to show he was indeed the owner. He testified that the bicycle was one of the items which were stolen from his house a few hours before its recovery. PW4 identified one of the mobile phones recovered as his.

Following the recovery of all the foregoing items, the police concluded that both appellants were part of

the gang which broke into and stole various items from the respective houses of PW1, PW2, PW3 and PW4. Accordingly they charged the appellants with four counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code , charges which both appellants denied. Consequently, they were tried for the offences before the Principal Magistrate's Court at Kisumu and at the end of the trial they were each found guilty in all the four counts, were convicted and thereafter sentenced to death on each count.

It should, however, be noted that a person cannot die more than once. That being the case, the trial court should have sentenced the appellant to death in one count but order any other sentence against them to be in abeyance.

The conviction of the appellants was based on their identification in the course of the robberies by PW1, PW2, PW3 and PW4, and also the recovery of stolen items from each of the appellants a few hours after the robberies. The trial court considered the possession of the recovered items to have been recent and therefore invoked the doctrine of recent possession of stolen property. He was satisfied the respective complainants positively identified the recovered items as theirs.

On first appeal the appellants raised several issues namely, that the circumstances at the alleged places of the robberies did not favour their proper identification, the evidence against them was contradictory in material respects, there were material witnesses who were not called to testify, possession was not proved and that their respective defences were not considered.

The High Court agreed with the appellants that their respective visual identification by PW1, PW2, PW3, and PW4 was not satisfactory. That court was, however, satisfied that ample evidence had been adduced to prove that each of the appellants was found in possession of property which was positively identified by the named complainants as theirs. The possession was recent and therefore sufficient to invoke the doctrine of possession of recently stolen property. The court expressed the view that the appellants had a duty to explain reasonably how they came into possession of the property but that they failed to do so. And after citing with approval a passage from this Court's decision in **Isaac Nanga Kahiga alias Peter Nganga Kahiga vs. Republic** ,Criminal Appeal No. 272 of 2005 (unreported) the High Court concluded that both appellants had been properly convicted on sound and credible circumstantial evidence based on the doctrine of recent possession. That court therefore dismissed the appellants' respective appeals and thus provoked this appeal.

In the appeals before us, Mr. C.L. Kasamani for the both appellants, raised two main issues, firstly, that the appellants having offered some explanations as to how they came into possession of the items allegedly recovered from them, there was no basis for invoking the doctrine of recent possession. It was his view that the explanations were believable as there was no challenge to them. Secondly, Mr. Kasamani submitted that the evidence did not disclose use of violence against the complainants. That being so, he said, the appellants could only be properly convicted and sentenced under ***section 296 (1)*** of the Penal Code.

Mr. Gumo, Assistant Deputy Director of Public Prosecutions, for the Republic, expressed the view that possession of recently stolen property was proved against both appellants, and because the trial and first appellate courts believed the prosecution witnesses, the appellants' respective convictions for the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, was proper.

We have considered the submissions of counsel against the evidence on record. There is no gainsaying that the alleged robberies did occur and several items were stolen. It cannot also be denied that the items allegedly recovered from the appellants belonged to the respective complainants. They produced receipts and other documents which when carefully looked at leave no doubt as to the ownership of those items. Whether or not those items were stolen, and whether or not the appellants were found in possession thereof is a question of fact. There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies. Can we interfere with those findings of fact? Findings of fact are based on exercise of judicial discretion. An appellate Court may only interfere with exercise of judicial discretion

in clear circumstances. In **Mbogo & Another vs. Shah [1968] EA 93**, the Court of Appeal for East Africa, while considering such an issue rendered itself thus:-

"For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice." (per Newbold, P)

It may be argued that the above cited decision does not directly relate to findings of fact. The principles are more or less the same. In this Court's decision of **Republic vs. Oyier. [1985] KLR 353** at p. 358, the Court expressed itself as follows:-

"As to the count on assault causing actual bodily harm the complainant's evidence of being beaten by the respondent and the injury to her back testified to by the doctor who examined her were not seriously challenged and the trial Magistrate believed that evidence. It was a finding based on credibility of the witnesses and unless no reasonable tribunal could make such finding, the first appellate court had to respect it. It was not shown that the Magistrate erred in his findings; or that he acted on wrong principles."

A finding by a court of law must be based on evidence and sound legal principles. For us to interfere with such a finding, it must first be shown that the lower court, either had no legal basis for such finding or that no reasonable judicial tribunal could have reached such a finding.

There is also another aspect to the matter. The trial court, unlike an appellate court, has the benefit of seeing and hearing witnesses testify. It is better placed to assess credibility of those witnesses. (See **Ogol vs. Murithi [1985] KLR. 359**.

In the matter before us, the decisions of the trial and first appellate courts were based on credibility of witnesses. The trial court believed the complainants that they were robbed and also that the items the police recovered were theirs. Both courts were clearly right as there was documentary evidence to support the respective evidence of the complainants. The two courts below believed Police Constable, George Ouko (PW5) who was among the police officers who made the recovery of those items.

In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under ***section 119 of the Evidence Act,*** Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands.

Regarding the finding on the charges under ***section 296 (2)*** of the Penal Code, Mr. Kasamani, appears to think that in each case under that section actual violence has to be proved. That section sets out different modes of committing the offence. Firstly, if the accused is in company of one or more persons. The evidence on record shows that more than one person attacked each of the complainants. Secondly, if the offender is armed with an offensive or dangerous weapon. Evidence was adduced to the effect that the attackers were armed with a panga. A panga is certainly an offensive and dangerous weapon. Thirdly, and this is the aspect Mr. Kasamani had in mind, if the accused beats, strikes or causes actual bodily injury or threatens violence to his victim.

Each of the counts on record alleges all the three and proof of one only is sufficient to establish a charge under ***section 296 (2)*** of the Penal Code.

In the result, we agree with Mr. Gumo, Assistant Deputy Director of Public Prosecutions, that all the ingredients of the charges against both appellants were proved by cogent and sufficient evidence. Consequently, this appeal lacks merit and it is accordingly dismissed.

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

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

E. M. GITHINJI
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.