IN THE COURT OF APPEAL
AT NAKURU
(CORAM: O'KUBASU, AGANYANYA & NYAMU, JJ.A.)
CRIMINAL APPEAL NO. 152 OF 2009

BETWEEN

JOHN KAMAU WAMBUGU ……..…….…. 1ST APPELLANT
ISAAC NJENGA NJONJO ……..…. 2ND APPELLANT
GEOFFREY NJUGUNA WANJIRU ……....…. 3RD APPELLANT

AND

REPUBLIC …… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Mugo, JJ.) dated 10th July, 2009
in

H.C.CR.A. NO. 118 OF 2008)
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JUDGMENT OF THE COURT

The genesis of this appeal is a charge sheet presented to the Senior Resident Magistrate's Court at Narok in which the three appellants ***(JOHN KAMAU WAMBUGU, ISAAC NJENGA NJONJO*** and ***GEOFFREY NJUGUNA WANJIKU)*** and one, ***BONFACE MBUGUA WANGOI*** were jointly charged with robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars of the offence were as follows:-

"1. ISAAC NJENGA (2) JOHN KAMAU
(3) GEOFFREY NJUGUNA (4) BONFACE MBUGUA

On the 19th day of December, 2004 at Sakutiek Trading Centre in Narok District within the Rift Valley Province, being armed with dangerous or offensive weapons namely a Toy pistol, robbed Rachael Wanjiku Sukuma of her cash Kshs.250,000/=, two packets of sportsman cigarettes and a Maasai sword all valued at Kshs.250,600/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said RACHAEL WANJIKU SUKUMA."

The appellant, ***JOHN KAMAU WAMBUGU,*** (who was the second accused in the trial court) was separately charged with being in possession of a homemade gun contrary to ***section 4 (1)*** of the Firearm Act (***Cap.114 Laws of Kenya***) but he was eventually acquitted on that separate count.

The trial of the appellants commenced on *3rd August, 2005* before the learned Senior Resident Magistrate at Narok (S.M. Githinji).

The prosecution case was that on *19th December, 2004*, ***Rachael Wanjiku Sukuma*** (PW1) was at her place of business when a gang of robbers struck. She was confronted by three men with one of them pointing a pistol at her neck. Although PW1 was not able to identify the robbers her step-son ***Solonek Nkoimboni*** (PW2) was able to identify the robbers when they were arrested a short distance from the scene of the robbery. There were witnesses who testified on how the robbers entered a vehicle which was later stopped by the pole officers who on searching the suspects each of them was found in possession of the items stolen during the robbery. When put to their defence each appellant explained how he was not connected with the offences but in the end the learned trial magistrate rejected the appellants' defences.

In the course of his judgment delivered on *8th June, 2007*, the learned trial magistrate said:-

"This court must now determine as to whether the offence(s) against the accused persons is proved by the prosecution beyond reasonable doubt. The evidence of PW1 reveals beyond doubt that the offence of robbery with violence was committed against her on 19th December, 2004. She was accosted by three men in her sitting room, and pointed to on the neck by one of them with a pistol. She was then ordered to give them money and there were threats made to kill her. She gave them 250,000/= and from her shop they picked a Maasai sword in its sheath, and two packets of sportsman light cigarettes and a red torch. There was solar powered light in the premises and outside there was moonlight. She was however terrified and was not in a position to identify the assailants. Immediately the men left she raised an alarm, which was picked by neighbours. The scream attracted various people, among them two Ap's from Sakutiek chief's camp. Investigations commenced immediately. On the material night PW3 had met a stranger in his hotel, who had scars on his lips. The said stranger was in the hotel a few minutes before the offence was committed, and given that the hotel is within PW1's premises, the stranger was thought to be a suspect. At 4:00 a.m. the search team stopped a mini bus matatu at Ngondi and among the passengers PW3 picked the said stranger. He had with him the robbed Maasai sword which PW2 easily identified as it belonged to his grandfather and he is the one who had kept it in the shop at his request, at a time when he was being ferried to hospital. The evidence that 3rd accused had the said sword is well corroborated by other witnesses who witnessed its recovery. PW1 also identified the said sword in court as the one taken by the robbers from the shop. The 3rd accused offered no reasonable explanation as to how he got into possession of the said sword, a few hours after it had been robbed. Considering this evidence in line with the evidence that he was present at the scene a few minutes before the robbery, and its strange on how he left the area, I am left with no doubt that he was one of the culprits, though no money was recovered from him. 3rd accused was questioned about the rest of suspects and said they had left in the mini bus. Police at Kongoni Police Station where the matatu was to pass were alerted about the offence and the suspects. They laid ambush along the road outside the police station and when the mini bus arrived, stopped it. They searched passengers; the 2nd accused was therein and was with a homemade pistol. He was questioned and pointed at 1st and 4th accused as the other suspects. A thorough search was conducted on the three. 2nd accused was also got with two sportsman light cigarettes and 80,000/= hidden inside his pant, infront. The first accused had 45,250/= hidden at a similar place. The 3rd accused was availed at Kongoni Police Station and pointed at 1st, 2nd and 4th accused had nothing which could be connected to the said offence. The 2nd accused did not offer a reasonable explanation as to where he was taking such an amount of money, and how he had obtained it. His defence that he had only 65,000/= of which he had obtained after selling maize and beans cannot be true. It's in want of details and it also raises reasonable doubts as to where the extra 15,000/= was got from to make it 80,000/=. He was simply not truthful. He also had the homemade pistol of which he did not touch on in his defence, and the two packets of sportsman light cigarettes. Considering that a pistol was pointed at the complainant's neck during the said robbery, and that money and two packets of sportsman light cigarettes were stolen, it can't just be a coincidence that the 2nd accused was arrested in possession of similar items just hours after the robbery. The evidence points irresistibly to his guilt even though the toy pistol was not strictly identified as the one used, and the two packets of cigarettes and money. Strictly identified to be the ones stolen or robbed from the complainant."

The learned trial magistrate considered the evidence relating to the separate count in respect of appellant

John Kamau Wambugu and found that there was no sufficient evidence to convict this appellant. The learned trial magistrate then concluded his judgment thus:-

"The bottom line is that the first count of robbery with violence is established against the 1st, 2nd and 3rd accused persons beyond a reasonable doubt and the three are convicted of it under *section 215* ***of the Criminal Procedure Code. It's however not established to the stated standard against the 4th accused person. He is accorded the benefit of doubt and acquitted of the offence under the said section. As regard the 2nd count, against the 2nd accused person, he is acquitted of it on earlier (sic) on stated reasons, under section 215 of the Criminal Procedure Code."***

Having so stated the learned trial magistrate proceeded to sentence each appellant to suffer death as stipulated by the law.

Being aggrieved by the foregoing, the appellant's filed appeals to the High Court, which appeals were consolidated and heard together. The learned judges of the High Court (*Koome and Mugo, JJ.*) heard the appeals and dismissed them. In their judgment delivered at Nakuru on *10th July, 2009* the learned judges said:-

After carefully analyzing the evidence tendered before him the learned trial magistrate concluded, first of all, that PW1's evidence had proved beyond doubt that a robbery with violence had been committed against her on 19th December, 2004, by three armed men, one of whom placed a gun on her neck and threatened to kill her. In the process they took off with a sum of money, a Maasai sword and two packets of cigarettes. She was able to see her assailants in the solar powered electricity lighting and bright moonlight, although she was too terrified to identify them. She raised an alarm and a neighbor who ran a hotel in the same business premises (PW3) came to her aid, as did some administration policemen and members of the public. PW3 informed those gathered at the scene that there had been a stranger at his hotel just before PW1 raised the alarm. PW3 described the stranger as having scarred lips. PW3's suspicion led to the arrest of the 3rd appellant who, when arrested from a matatu, told the arresting officers that his accomplices had proceeded in their escape bid in the same matatu he was removed from. He himself was found in possession of a Maasai sword which had been taken from PW1's shop. The matatu was apprehended and the 1st and 2nd appellants were found ferrying huge sums of money hidden in the strangest places – their underpants. In the seat where the 1st appellant was seated a toy pistol was recovered.

The learned trial magistrate considered the circumstantial evidence adduced against the 3rd appellant as regards his having been at the scene of the robbery just before the same was committed and being found with one of the stolen items as providing proof beyond doubt that he was one of the culprits. The 3rd appellant's pointing out of his co-appellants, taken together with the fact that they too were found with items stolen from the complainant left no doubt in the learned trial magistrate's mind that they were also culprits. We find no fault in his findings.

Our careful analysis and re-evaluation of the entire evidence adduced at the trial, the sequence of events, and the corroborated evidence as to the attack, theft, pursuit of the robbers, leading to the recovery of items stolen from the complainant, leaves us with no doubt at all that the appellants were indeed the persons who violently robbed the complainant herein. We are of the considered view that there was no likelihood of mistaken identity. We share the learned trial magistrate's view that their respective defences did not hold and consider them to have been properly rejected. We see no material contradictions in the evidence adduced against them by the various witnesses.

Accordingly the appeals herein are hereby dismissed in their entirely."

Still dissatisfied by the foregoing, the appellants have now come to this Court by way of second and final appeal. This is the appeal that came before us on *19th April, 2011* when the appellants had the

privilege of being represented by Dr. G.K. Kuria Senior Counsel, while Mr. V.O. Nyakundi (State Counsel I), appeared for the State.

Dr. Kuria, was, as usual, thorough in his submissions and at the outset submitted that the appeal turns only on two points:- *(1) was there a robbery on 19th December, 2004? (2) If there was a robbery was circumstantial evidence sufficient to convict the appellants?*

On the first issue of the actual robbery incident, Dr. Kuria submitted that there were two versions as to what took place and that the accounts of what took place were disjointed. Dr. Kuria went on to submit that it was upon the prosecution to prove that the recovered items were the same as what had been stolen.

Dr. Kuria faulted the superior court in that it failed to re-evaluate the evidence. It was Dr. Kuria's view that the superior court arrived at unreasonable conclusion in that it failed to consider the leading authorities on identification.

Finally, Dr. Kuria submitted that the appellants' case had been poorly investigated as it was not clear what role witnesses like ***PW2, PW3*** and ***PW4*** played and which led to the arrest of the appellants.

On his part, Mr. Nyakundi supported both conviction and sentence. He submitted that the 3rd appellant was identified by PW3 and that it was the 3rd appellant who led the police where his colleagues (*the other two appellants*) were. When these two were searched, each was found in possession of the items stolen during the robbery.

We have considered the background to this appeal, the rival submissions by counsel and we can now consider the matter before us. It must be pointed out that this being a second appeal only points of law may be considered – see section 361 of the Criminal Procedure Code.

On the issue of whether there was a robbery on *19th December, 2004* we must go back to the trial Court's record. The key witness on this point was the complainant herself. She testified before the trial court what happened that evening. She explained in some detail how the entire episode happened. Her evidence was corroborated by that of her step son (PW2). The two courts below dealt with this issue and they both concluded that a robbery had, indeed, taken place that evening in which the complainant was the victim.

In view of the foregoing we have no reason to differ from the concurrent findings of fact by the two courts below – See ***M'RIUNGU V. R (1983) KLR 455.***

We must now move on to the second aspect of this appeal which relates to circumstantial evidence. *Dr. Kuria* was of the view that circumstantial evidence was not sufficient to convict the appellant. We must point out that the appellants' conviction was not based on circumstantial evidence only but rather on evidence of identification coupled with evidence of recent possession of the property stolen during the robbery.

If we are to consider circumstantial evidence it may be safely stated that the chain of events linking the appellants with the robbery is that one of them was seen in rather suspicious circumstances and later he was found in a vehicle where the other two were. Upon being searched, these two were found in possession of some of the items stolen during the robbery. These two could not give a satisfactory explanation as to how they came to be in possession of the items.

In ***R V. TAYLOR WEAVER AND DONOVAN*** **(1928) 21 Cr. App. R *20*** the principle as regards the application of the circumstantial evidence was enunciated in these words:-

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

In the present case, the appellants were traced from the scene of crime to the point of arrest. While one of them was clearly identified at the scene, the other two were found in possession of some of the items stolen during the robbery. Hence even if we were to consider only circumstantial evidence, we are of the view that indeed, there was sufficient circumstantial evidence against the three appellants. But as we have already stated the appellants were not convicted solely on circumstantial evidence. There was the evidence of identification and being found in possession of goods which had just been stolen from the complainant during the robbery. In ***HASSAN V. R [2005] 2 KLR 151 at p 154*** this Court said:-

The conviction of the appellant was solely dependent on the unaccounted recent possession of the complainant's goods stolen during the robbery. Where an accused person is found in possession of recently stolen property and in the absence of any reasonable explanation to account for his possession a presumption of fact arises that he is either the thief or a receiver (see Andrea Obonyo v. R. [1962] EA 542 at page 549)."

In the present case, the conviction of the appellants was not solely dependent on the recent possession of the complainant's goods stolen during the robbery but also on identification and circumstantial evidence.

We are grateful to *Dr. Kuria* for his usual industry in research as he has provided us with numerous decided cases and other sources in a bid to buttress his submissions. We have considered the list of authorities which we found most helpful.

Having considered the entire record of appeal the trial magistrate's conclusions and those of the superior court, we are of the view that the three appellants were convicted on very sound evidence. That being our view, it must follow that this appeal must fail. Accordingly, we order that the appeal be and is hereby dismissed in its entirety.

DATED and DELIVERED at NAKURU this 10th day of June, 2011.

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

…….
JUDGE OF APPEAL

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