



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: O’KUBASU, AGANYANYA & NYAMU, J.J.A)

CRIMINAL APPEAL NO. 176 OF 2009

BETWEEN

LEONARD ODHIAMBO OUMA 1ST APPELLANT
MICHAEL ACHIENG ODONGO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Kericho (Apondi & Kimaru, JJ.) dated 3rd October, 2006

in

H. C. Cr. A. No. 2 of 2002)

JUDGMENT OF THE COURT

Before the Senior Principal Magistrate Kericho the two appellants together with three other persons, two of whom were subsequently acquitted were charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. After a full trial the two appellants were convicted and sentenced to death whereas the third accused was found guilty on the alternative charge of handling stolen goods. He was sentenced to 3 years imprisonment. They appealed to the superior court which dismissed the appeal (Apondi & Kimaru, JJ) and this is what provoked this second and final appeal.

The prosecution case in a nutshell was that **Hamadi Rashidi Gosori** or **Gessore** (PW 1) an accountant with a fuel transportation company, Fantom Group (Tanzania) Ltd, a holding company registered in Shinyanga, Tanzania, in the normal course of the company’s business, crossed over to Kisumu on 26th June, 2001 to purchase fuel. On 27th June, 2001 along Pipeline road in Kisumu, PW 1 while travelling in a motor vehicle KAK 460U driven by Lazaro Okongo Okoth (PW 2) at 10.00 am, also carried with him a total of US dollars 40,000. The Kshs.100,000/= (cash), T.shs.250,000 (cash) which funds were in his brief case, the brief case also contained a camera with a film inside, photocopy of a cheque No. 100130 for US D 38,000, encashment slip, travelling documents, camera receipt, a Rado watch, PTA cards, File covers album, two small bags, bigger hand bag and photographs. They were stopped by four men who had emerged from a side road. Two of the strangers were armed with pistols. They ordered PW 1 and his companions out of the vehicle and drove off in the stolen vehicle taking away with them PW 1’s brief case, motorolla mobile phone and a mobile phone belonging to PW

2. PW 1 got a lift in an attempt to trace the robbers. The vehicle was abandoned a short distance away but the brief case was missing. On information from an informer, IP Fred Odhiambo (PW 4) visited the 1st appellant home on 29th December, 2001 and found a brown brief case in which items belonging to the complainant (PW 1) were found and upon interrogation, the 1st appellant named the other accomplices who included the 2nd appellant. The 2nd appellant was thereafter identified by PW 1, PW 2 and PW 3 and when a search was conducted Kshs.88,000/= cash was found hidden in a deep freezer at a kiosk run by his wife, hence the charges preferred against the appellants.

In this appeal the appellants have raised nine grounds of appeal in a supplementary memorandum of appeal filed on 18th April, 2011. The grounds are:

1. ***THAT the learned Appellate Judges erred in law by upholding conviction and sentence of the trial court which conviction was based on the evidence of Identification yet the said by the witnesses could not be said to be free from possibility of error.***
2. ***THAT the learned Appellate Judges erred in law by upholding conviction and sentence of the trial court yet the conviction was based on dock identification as no Identification Parade was conducted as is required by the Forces Standing Orders Chapter 46.***
3. ***THAT the learned Appellate Judges erred in law and in upholding conviction and sentence of the trial court irrespective of the fact that the place of trial and subsequent proceedings generally contravened the provisions of part IV of the Criminal Procedure Code cap 75 laws of Kenya and specifically the provision of sections 67 and 71 of the said Act.***
4. ***THAT the learned Appellate Judges erred in law in upholding conviction and sentence of the trial court notwithstanding the fact that the said Judgment (and that of the superior court itself) contravened the provisions of section 382 of the criminal Procedure Code cap 75 laws of Kenya.***
5. ***THAT the learned Appellate Judges erred in law and in upholding conviction and sentence of the trial court despite the fact that the provisions of section 18 of the Police Act cap 84 laws of Kenya was violated in respect to arrest and detention of the Appellants.***
6. ***THAT the learned Appellate Judges erred in law in upholding conviction and sentence of the trial court irrespective of the fact that the conduct of the investigation in general and specifically the prosecution witnesses rendered the prosecution case wanting and created doubt as to its credibility.***
7. ***THAT the learned Appellate Judges erred in law in upholding conviction and sentence of the Appellants by the trial court which conviction was unlawful as it was based on possession of stolen items yet the said court did not make any finding on the alternative charge which contained the offence.***
8. ***THAT the learned appellate judges erred in law in upholding conviction and sentence of the trial court notwithstanding the fact that the said judgment violated the provisions of section 169 (1) of the Criminal Procedure Code cap 75 laws of Kenya and further erred by failing to abide by the provisions of that section.***
9. ***THAT the learned Appellate judges erred in law in upholding the conviction and sentence of the trial court despite the fact that the said court reached a finding of guilty as against the Appellants (the then 1st and 2nd Accused persons) without considering the evidence in their favour submissions made by them and the superior court further erred by failing and or ignoring its duty to so analyze the said evidence and consider submissions made by the Appellants.”***

During the hearing the appellants were represented by Mr. Maragia Ogaro, advocate and the State was represented by Mr. V. O. Nyakundi, State Counsel I.

In his submissions Mr. Maragia argued the above listed grounds in a seriatim manner. As regards the 1st ground he contended that the identification was not free from doubt because the alleged attack was sudden and the visual identification was faulty because PW 1 described the 2nd appellant as a short and slender man although he was 6 feet 2 inches as the evidence of the other witnesses revealed. He further submitted that the trial court did not properly warn itself concerning the danger of relying on one identifying witness. He also contended that although twenty people were allegedly connected with the alleged offence, only five people were arrested and eight people were still at large and therefore the chances of the charges having been fabricated as against the two appellants were high.

On ground 2, Mr. Maragia submitted that the conviction was based on dock identification because no identification parade was held and that the parade was necessary in the circumstances.

As regards ground 3, the appellant counsel's submission was that as the alleged offence was committed in Kisumu and the trial conducted in Kericho part IV of Criminal Procedure Code and in particular **sections 67 and 71** were violated and on ground 4 counsel contended that the judgment of the superior court contravened **section 382** of the Criminal Procedure Code in that the court failed to weigh incriminating evidence against the evidence exonerating the appellants.

The challenge on ground 5 was that **section 18** of the Police Act was contravened in that the police did not maintain an inventory of the items recovered from the appellants. On ground 6, counsel contended that the investigations were not properly conducted and as a result this created doubts in the prosecution case which raised doubts touching on the credibility of the evidence. To illustrate the point Mr. Maragia pointed that the stolen vehicle and other items were not dusted by police.

On ground 7, learned counsel submitted that the trial court and by extension the first appellate court had erred in not finding that failure by the trial court to make a finding on the alternative charge was fatal to the case.

Finally on grounds 8 and 9 learned counsel submitted that the provisions of **section 169 (1)** of the Criminal Procedure Code were not complied with as regards the contents of the judgment as no reasons were given and further that the conviction was erroneous in that the defence evidence was not taken into account and hence the first appellate court did not discharge its duty of reevaluating the evidence and had it done so the outcome could have been different.

Turning to the application of the doctrine of recent possession by the two courts learned counsel submitted that the appellants had given a reasonable explanation of the items allegedly found in their possession and that in any event the items were not found in the house of the 1st appellant but in possession of one John Odindo who occupied a rental house and also as regards the recovery of Kshs.88,000/= from the second appellant, the recovery per se did not point to his guilt as money had no distinctive features and in any event the appellant had explained that he was a businessman.

In his submissions, Mr. Nyakundi submitted that following the robbery and upon information of an informer a search was conducted and in the first appellant's house the investigator found personal photos of PW 1 which upon processing were confirmed to belong to him. PW 1 was a Tanzanian. After the arrest of the 1st appellant he led the investigators to the 2nd appellant's kiosk where Kshs.88,000/= was found in a deep freezer although both the 2nd appellant and his wife had prior to the finding of the money, denied that there was money at their kiosk in Narok.

The learned State Counsel further submitted that the 1st appellant could not satisfactorily explain how they came into possession of several items belonging to PW 1 two days after the robbery.

Touching on the alleged lack of jurisdiction by the trial court Mr. Nyakundi submitted that the issue of jurisdiction was not raised in the trial court or the superior court although the appellants were represented by counsel and in any event the appellants had not shown that they had suffered any prejudice as a result of the conduct of the trial in a different area since they could have applied for transfer under

section 81 of the Criminal Procedure Code. On the failure to prepare an inventory of the recovered items, Mr. Nyakundi submitted that the omission did not affect the substance of the evidence that was adduced in court.

On our part, we must at the outset state that the first ground on identification is not meritorious in that the two courts below did make concurrent findings of fact that PW1, PW2 and PW11 did positively identify the two appellants as the robbery took place in broad daylight and we cannot in the circumstances re-open the findings. In addition, the recovery of the stolen items in their exclusive possession clearly placed both appellants at the scene of crime. For these reasons we think that the identification of both appellants was safe. With respect to counsel, his submission that the charges against the appellant were fabricated against them because the group of suspects numbered 20 and only five were arrested, does not in any way support the contention and we outrightly reject the ground. Similarly the challenge raised in respect of ground 2 fails for the same reasons. The incident took eight minutes which time was sufficient for safe identification. Moreover, the evidence in support of identification was further buttressed by the recovery of items belonging to PW 1 from the 1st appellant's house and 2nd appellant's kiosk. As regards the alleged lack of jurisdiction of the trial court it is clear to us that as one of the accused persons was a police officer in the jurisdiction of the Kisumu court, the transfer was done on the basis it was convenient to have the trial conducted in Kericho and for this reason we note that an appropriate warrant was issued to the trial Kericho Resident Magistrate's court, which in turn had a territorial jurisdiction. We reject this ground as well.

Regarding grounds 4 and 9 that the two courts did not correctly weigh the incriminating evidence against the exonerating evidence before coming to the verdict we find no basis for the contention since no vital evidence was disregarded contrary to the assertion of the appellant's counsel.

Failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial. We find no substance in this ground as well. We further think that the contention in ground 6 that the case was not properly investigated and therefore the evidence ought not to have been relied on by the trial court, we think this relates to an issue of credibility of the witnesses and therefore was a matter for the trial court and in the circumstances, we cannot as the final appellate court entertain the challenge as we cannot fault the trial court on credibility. For this reason the ground cannot be sustained and the same is rejected.

The challenge contained in ground 7 is summarily rejected in that there is no requirement in law for a court to make a finding on an alternative charge where it has already made a finding on the main charge.

Finally, the challenge in ground 8 based on **section 169 (1)** of the Criminal Procedure Act lacks any substance in that the judgment of the trial court is very well reasoned and indeed satisfies all the requirements set out in the section. As regards the appellant's counsel's contention that the trial court misapplied the doctrine of recent possession the same cannot succeed in that the recovery of the items was effected only two days after the robbery in a situation where the appellants could not explain how they came by the items, one of which included a film which when developed in the studios, turned out to be the complainant's photo!

We consider that the appeal before us does bear some similarities with the situation prevailing in the case of ***Odhiambo vs Republic [2002] 1 KLR 241*** in that the evidence of identification in the matter before the Court was also strengthened by a proper application of the doctrine of recent possession of the stolen items.

In the ***Odhiambo case*** this Court held inter alia:-

“(4) Evidence of recent possession is circumstantial evidence which depending on the facts of each case may support any charge. The appellant was found in possession of the stolen motor vehicle within hours of the robbery which were positively identified.

(5) The appellant was properly convicted. The evidence of recent possession did not stand alone as there was evidence of identification and the applicant's confession."

We say the same here that the evidence of identification was strongly reinforced by the recovery of the stolen items.

In the result, we find no merit in the appeal and the same is hereby dismissed.

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

.....
JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR