



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

(CORAM: TUNOI, WAKI & AGANYANYA, J.J.A)

CRIMINAL APPEAL NO. 456 OF 2007

BETWEEN

KENNETH OTIENO ODHIAMBO1ST APPELLANT
GEOFFREY OMONDI OMWARE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Warsame, JJ) dated 24th April, 2007

in

H.C.CR.A. No. 50 & 51 of 2005)

JUDGMENT OF THE COURT

This is a second appeal against both conviction and sentence.

KENNETH OTIENO ODHIAMBO, the 1st appellant and **GEOFFREY OMONDI OMWARE**, the 2nd appellant, respectively, were convicted by the Principal Magistrate, Kisumu, on four counts of robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced to death. Their appeals to the High Court of Kenya at Kisumu were dismissed on 24th April, 2007 by Mwera and Warsame, JJ and hence this appeal.

The prosecution through 19 witnesses presented the following facts to the trial court. On 23rd December, 2003 at about 8.30 p.m. a bus registration No. KAR 898M belonging to Global Alliance Group (EA) Ltd. left Nairobi for Kisumu with 51 passengers. Just before reaching Ahero town along Nairobi – Kisumu highway, a gang of about seven robbers which had masqueraded as passengers seized the bus at gun point and diverted it to an isolated location between Yala and Luanda towns. The bus was driven for about three hours during which period the gang threatened the passengers with pistols, cut and injured several of them with pangas and beat them up with rungas before robbing them of money, cell phones and other valuables. After robbing the passengers the gang abandoned the bus and fled. The matter was reported to Luanda Police Station where and investigations were started.

The passengers, the driver and the conductor testified that they could not identify any of the robbers since it was at night and no lights were switched on during the robbery. However, I.P. Sumba (PW 16) and

other police officers who had started investigations were informed by Nakuru Police Station that the two appellants and three other suspects had been arrested at Salgaa along Nakuru – Kericho road, armed with pistols and carrying mobile phones. PW16 went to Nakuru and after interrogating the appellants and their colleagues, took them to Kisumu for further investigations.

Some days later while the investigations were still going on, PW16 received further information that the robbers had shared the money and the cell-phones they had robbed from the passengers but the rest of the robbed items had been kept in the homes of the appellants in Siaya. The police rushed there but on seeing them, the members of the appellant’s family fled into a maize shamba. A search carried out in the houses identified as belonging to the appellants resulted in the recovery of bags of clothes, suitcases and other valuables identified by the passengers as their property.

In their defence before the trial court, the appellants denied that anything was recovered from their houses. They also denied that they led police to their homes. It is worthy of note that the police, too, deny being led by the appellants to their homes in Siaya.

The trial court appreciated that there was no evidence of identification but, convicted the appellants on the basis that they were found in possession of the complainants’ stolen property the possession of which they failed to explain. The conviction was thus based on the well-known doctrine of recent possession.

There are two main grounds of appeal which were argued together by Mr. Onyango, the learned counsel for the appellant.

These are:-

***“1. The Learned Judges of the first Appellate Court erred in law in affirming the Appellants’ conviction on the charge of robbery with violence contrary to section 296 (2) of the Penal Code relying solely on the alleged ground that the Appellants led police to recover some of the stolen items, which evidence was not admissible both at the time of trial and during the hearing of the appeal.*”**

2. The Appellants’ conviction was based on law that had been repealed at the time the offence was allegedly committed.”

In support of these grounds, Mr. Onyango submitted that **section 31** of the Evidence Act which made information from an accused person leading to discovery of a fact admissible was repealed by **Act No. 5 of 2003**.

Section 31 of the Evidence Act before it was repealed provided:-

“Notwithstanding the provisions of sections 26, 28 and 29, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.”

Section 31 of the Evidence Act was repealed by **section 102** of the Criminal Law (Amendment) Act 2003, No. 5 of 2003 which commenced on **25th July, 2003** in the following words:-

“Section 102: The evidence Act is amended by repealing section 31.”

It is plain that the appellants were solely convicted on the basis of recent possession of the complaints’ stolen property. According to the evidence, the property was recovered from the appellants’ houses and they gave no evidence as to how the property found its way into their houses. The prosecution and the appellants agreed that the appellants did not lead the police to their houses. Nor was the stolen property recovered in consequence of information received from the appellants. The Property was recovered in consequence of the information given by an informer. The repealed **Section 31** of the Evidence Act, therefore, has no relevance to the evidence that was presented before the trial court.

Thus, in our view, the submissions of Mr. Onyango are, with due respect, misplaced and we reject them.

Having considered the entire evidence on record we are of the firm view that the conviction of the appellants is safe. We uphold it.

In the result, this appeal fails and is accordingly dismissed.

Dated and delivered at Kisumu this 16th day of September, 2011.

P.K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR