



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

(CORAM: O'KUBASU, GITHINJI & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 166 OF 2010

BETWEEN

PETER ODHIAMBO OKELLO 1ST APPELLANT
HARUN SITOTE WANGA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja & Aroni, JJ.) dated 18th May, 2010

in

H.C.C.R.A. NO. 307, 308 & 309 OF 2003)

JUDGMENT OF THE COURT

The two appellants and others were jointly charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, in that on the night of 8th and 9th December, 2001 at Marenyo sub-location Yala Township, Siaya District jointly with others not before court while armed with dangerous weapons, namely *pangas, iron bars, runqus, and torches* robbed **Francis Wasili Maganda** of one wrist watch, a pair of *sports shoes, a panga, sports radio, a photo album, a jembe* and *eight small tins (goro goros) of maize grains* all valued at **Kshs.1,820/=** and at or immediately before or immediately after such robbery wounded the said **Francis Wasili Maganda**.

There were additional counts of handling stolen property contrary to **section 322(2)** of the Penal Code and rape contrary to **section 140** of the Penal Code but these will not concern us in this judgment as the appellants were not convicted on these additional counts.

The evidence as accepted by the trial court and the first appellate court was that on the material night the complainant, **Francis Wasili Maganda (PW1)** and his wife **Mary Juma (PW3)** were asleep in their house at about midnight when they heard some movements outside. Maganda went out to inquire but as he opened the door a group of people suddenly confronted him, knocked him down and pinned him there as they entered the house and into his bedroom. He did not identify any of the intruders but he discovered that they had taken various items as specified in the particulars of the charge (as set out at the commencement of this judgment). Maganda reported the incident to the village elder **Nicholas Bolo**

Mola (PW2) who was involved in investigation of another incident involving a lady known as **Elizabeth Akinyi**. The village elder was in the company of an assistant Chief but this assistant Chief was not called to testify during the trial. It was the prosecution evidence that in the course of investigations a sum of **Shs.90/=** and a pair of shoes stolen during the robbery were found in possession of the 2nd appellant (**Harun Sitote Wangana**) and the 1st appellant (**Peter Odhiambo Okello**) was found in possession of a panga.

The appellants denied the offence and in their respective defences each said that he was arrested for an offence he knew nothing about.

In affirming the conviction of the appellants as regards the charge of robbery with violence, the learned Judges of the High Court (Karanja & Aroni, JJ.) in their judgment delivered on 18th May, 2010, stated inter alia:-

“There being no proper evidence of identification at the scene, it became apparent that the appellants were arrested and charged on account of their alleged recent possession of property which had been stolen from the complainant.

Possession of property recently stolen would invariably lead to the presumption that the person in possession was the thief. However, the presumption may be rebutted (sic) if reasonable and satisfactory explanation is given for the possession. The application of the doctrine of recent possession is therefore dependant on the following factors:-

Firstly, proof that the property was found with the suspect. Secondly, proof that the property is positively the property of the complainant (i.e. ownership). Thirdly, proof that the property was recently stolen from the complainant (see, Isaac Nanga Kahinga alias Peter Nganga Kahinga vs. Republic Criminal Appeal No. 272 of 2005).

In this case, there was sufficient evidence from the complainant and his wife showing that the goods stolen from them included a pair of shoes, a panga, a radio and a photo album.

These items were recovered by the village elder (PW2) and the chief (PW4) during the apprehension of the appellants.

Apparently, the village elder and the chief were led to the appellants by the escaped accomplice (accused four) who had been arrested on suspicion that he had stolen property from the lady called Elizabeth Akinyi.

The said accomplice did not testify in court against the appellants. He escaped from police custody while the trial was in progress. There was in the circumstances no issue pertaining to accomplice evidence.

The village elder and the chief said that they recovered a pair of shoes from the first appellant and a panga from the second appellant. They also said that a radio and photo album were recovered from the third appellant. All the said items were said to belong to the complainant (PW1). This fact was not disputed save for the panga. The second appellant contended that the panga belonged to him. As to the shoes, the first appellant said nothing about them except to imply that he was only found with some money and not shoes.”

The appellants were aggrieved by the judgment of the High Court and hence this appeal which came up for hearing on 15th September, 2011. Mr. P. Odhiambo, appeared for both appellants, while Mr. B.L. Kivihya, (Principal State Counsel), appeared for the State.

Through their advocate, the appellants filed a Memorandum of Appeal setting out the following grounds:-

- “1. *The 1st Appellate Court abdicated its statutory duty of examining and reanalyzing the evidence on record afresh and thus wrongly upheld the appellant’s conviction.*
2. *The learned and noble judges of the Superior Court gravely erred and misdirected themselves in law in largely basing the Appellants conviction on the evidence of an accomplice witness without its subsection to the stipulated legal requirement.*
3. *The 1st Appellate Court erred gravely in law in basing the Appellants conviction on the doctrine of recent possession and thus the said misapplication of the Doctrine occasioned a grave miscarriage of justice.*
4. *The learned and noble judges of the superior court totally neglected and failed absolutely in having due regard to the defence tendered by the Appellants and thus they were upheld to conviction of the Appellants.”*

Mr. Odhiambo abandoned the second ground of appeal and decided to argue the other grounds together. In his submissions, Mr. Odhiambo faulted the first appellate court in failing to re-evaluate and analyse the evidence. It was Mr. Odhiambo’s submission that had the first appellate court carried out its duty properly, then the appellants’ conviction would not have been upheld. It was further submitted that the recovered items were those stolen from Elizabeth Akinyi and not the complainant, **Maganda**, (PW1).

On his part, Mr. Kivihya supported the conviction of the appellants and submitted that the first appellate court had discharged its duty of analysing the evidence afresh and coming to its own conclusion. Mr. Kivihya further submitted that the appellants did not explain how they came to be in possession of the stolen items. He therefore asked us to dismiss this appeal by the two appellants.

In this appeal both appellants were convicted of robbery with violence in respect of an incident in which the complainant was **Francis Wasili Maganda** (PW1). Although the complainant did not identify any of the robbers, the appellants’ conviction was based on the doctrine of recent possession. Mr. Odhiambo submitted that the doctrine of recent possession was wrongly applied. According to the recorded evidence it was the village elder **Mola** (PW2) who testified on how the two appellants were found in possession of stolen items. The evidence of **Chief Jared Omondi Awere** (PW4) merely confirmed what the village elder told the trial court. But it was not clear as to what was found on which appellant. There was evidence of some 90/= and shoes. There was also a mention of a panga, which the first appellate court thought was a very common item to hold against any of the appellants. The appellants put forth an explanation on how they were arrested and how another person (not before court) had led the investigating team to a place where the items stolen from Elizabeth Akinyi had been found. We are not satisfied with the way the doctrine of recent possession was applied to the facts of this case. Mr. Odhiambo’s complaint was that the first appellate court had not discharged its duty of re-evaluating and analysing the evidence and that had it done so, then it would have come to the conclusion that both appellants were not found in possession of the items stolen during the robbery at the house of Maganda.

In **KIILU & ANOTHER V. REPUBLIC** [2005] 1 KLR 174 at pp. 180-81 this Court said:-

In the case of OKENO V. R. [1972] EA 32 at p. 36, the predecessor to this Court stated:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**PANDYA V. R.** [1957] EA 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (**SHANTILAL M. RUWALA V. R.** [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts’ findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see **PETERS V. SUNDAY POST** [1958] EA 424.

In our minds, what the superior court did in this case was merely to scrutinize the evidence and once it found that there was some evidence in support of the trial court's decision, it dismissed the appeal. Had it evaluated the evidence related to the conduct of Juma both before the incident when he involved himself in an illegal trade and after the incident when he apparently grew cold feet on reporting the alleged robbery and the effect that the alleged weapon used in threatening him was never recovered and no effort was made to recover it, the superior court might have come to a different conclusion from that arrived at by the trial court. Both Courts, upon such an exhaustive analysis of Juma's conduct might have considered whether Juma was a man whose evidence could be relied upon to convict the appellants."

We would reiterate the foregoing as regards the facts of this appeal although we think that the learned judges may have discharged their duty as a first appellate court to some extent but had they carefully scrutinized and analyzed the evidence, they may have come to the conclusion that the evidence of possession was not clear. The lady named Elizabeth Akinyi might have been robbed but she was not the complainant in this case. The complainant in this case was Muganda and not Akinyi. It would appear that some items stolen from Akinyi were recovered but that must be the subject of a different case.

We are of the view that had the two courts below exhaustively analysed the evidence relating to the doctrine of recent possession, they might have found that evidence rather shaky and doubtful.

That being our view of this matter, we allow this appeal, quash the conviction and set aside the sentence. The appellants are set free forthwith unless otherwise lawfully held.

Dated and delivered at KISUMU this 4th day of November, 2011.

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR