



**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: OMOLO, O’KUBASU & VISRAM, J.J.A)

CRIMINAL APPEAL NO. 88 OF 2009

BETWEEN

**S.M.T
D.M.M
J.M.G..... APPELLANTS**

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisii (Karanja & Musinga, JJ) dated 21st October, 2008

in

H. C. Cr. A. Nos. 177 of 2005, 129 of 2006 & 130 of 2006 (Consolidated)

JUDGMENT OF THE COURT

The appellants, **S.M.T (S)**, **D.M.M (DI)** and **J. M. G (J)** were tried and convicted by the Senior Principal Magistrate, Migori (Ezra O. Awino, Esq.) on the charge of robbery with violence contrary to **section 296 (2)** of the Penal code. The particulars of the offence were that on the 12th day of May, 2005 at Nyabasi North Location in Kuria District within Nyanza Province, jointly with others not before court and while armed with swords and rungus robbed Daniel Moi Ginono of a camera, sport light, clothes and cash, Kshs.300/-, all valued at Kshs.9,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Daniel Moi Ginono.

At about 11.00 pm on the material day, the complainant, Daniel Moi Ginono, was fast asleep in his house, when a gang of robbers struck; broke down the door; and entered his bedroom. He was alone in the house. He woke up immediately, grabbed his torch, which he later testified was a very powerful torch, and flashed the same in the direction of the robbers. He recognized S , D and J, the three appellants herein, all of whom he had known from his childhood. They carried rungus, swords and simis, and demanded money, threatening to kill him should he not comply with their demand. He pointed out a table on which he had placed Kshs.3,000/=. The intruders grabbed the money and still proceeded to hit the complainant, hurting his head in the process, and chopping off his fingers. They then proceeded to rob him of his torch, camera, radio and several items of clothing.

Soon after the robbers left, neighbours came running to the complainant’s house, took him to the

Kehancha Hospital, and eventually reported the incident to the police, giving the names of the intruders to the police. S was arrested the following morning and several stolen items, including six pairs of trousers, a skirt, two shirts, a kaunda suit, a torch and camera were recovered from him. D and J were also arrested later on the same day, and a kaunda suit and radio, were recovered from them respectively. All these items were identified by the complainant as belonging to him. The three appellants were unable to explain how they came to be in possession of the same.

In the course of the trial, after five prosecution witnesses had testified, S elected to change his plea of not guilty to guilty, and the learned Senior Principal Magistrate, after satisfying himself that the plea of guilty was unequivocal, proceeded to convict him of the offence stated before, and sentenced him to death.

With regard to D and J, both elected to make statements under oath, and claimed that they were not present at the scene of crime on the material day. D stated that he had gone to Masaai land to plough land at the material time, while J swore that he was with his family at his home. The trial magistrate carefully evaluated the evidence before him, considered and rejected the defences put forward by D and J, and found them guilty of the offence charged.

The appellants then appealed to the High Court which, after evaluating the evidence afresh, dismissed the three appeals. They are now before us in this second, and perhaps the last appeal. Being a second appeal, only points of law fall for consideration of this court – see **section 361 (1)** Criminal Procedure Code.

The three appellants drew up home-made memoranda of appeal, and later their learned counsel, Mr. Nyawiri filed supplementary memoranda of appeal, raising essentially issues of identification, doctrine of recent possession and defective charge sheet.

At the hearing before us, Mr. Nyawiri argued, in respect of S, the first appellant, that his plea of guilty was not unequivocal; and that the plea was changed because of frustration and confusion. With respect to all the three appellants, Mr. Nyawiri submitted that the incident having taken place at night, the conditions were not favourable for positive identification; that the charge was defective in that the date of the alleged incident is shown as 12th May, 2005, while the complainant's testimony indicated that he was robbed on 15th May, 2005; and finally that the doctrine of recent possession was incorrectly invoked.

Mr. B. L. Kivihya, learned Principal State Counsel, for the respondent, opposed the appeals, arguing that the conviction was sound and based on the evidence of identification by "recognition"; that the stolen items were recovered from the appellants within a short time; and, finally, in the case of S, the first appellant, his plea of guilty, having come after five witnesses had testified, was unequivocal, and in any event the evidence against him was over-whelming. Mr. Kivihya brought to the attention of the Court that D and J were under the age of 18 at the time of the offence, and that the High Court erred in sentencing them to death instead of ordering that they be detained at the President's pleasure.

With regard to identification, both courts below recognized that the identification in this case was based on the complainant's "recognition" of the three appellants whom he had known from his childhood. Both courts also found that the doctrine of recent possession applied in the case, as most of the items stolen from the complainant were recovered from the three appellants shortly after the robbery.

On our part, we completely agree with both the courts below that the identification here was not that of a stranger, but of persons previously known and therefore it was identification by recognition. As this Court has stated before in ***Anjononi vs Republic (1980) KLR 59*** at page 60:-

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger

because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs Republic (unreported)."

In considering that issue, the learned Senior Principal Magistrate stated as follows:

"In his evidence, the complainant stated that he saw and recognized the 1st, 2nd and 3rd accused, these accused persons were known to him before and he used his torch to see them. The same torch was stolen and recovered from the house of the 1st accused."

He continued:

"However the 2nd and 3rd accused were found with kaunda suit and radio. The 2nd and 3rd accused were found with items on 19.5.2006. And the complainant also saw them in his house and it is on that basis that they were being sought. These items were properly identified by the complainant with the receipts as he buys and sells clothes."

Similarly, upon re-evaluation of the evidence on record, the High Court stated as follows:

"In any event, there is ample evidence that the first appellant was properly recognized by PW1 at the time of the said robbery."

With regard to the second and third appellants, they were also recognized by PW 1 on the night of the robbery. PW 1 knew them very well as they were his neighbours. He was able to recognize them because of a powerful torchlight which he shone on them. Evidence of recognition of an assailant is much more satisfactory, assuring and reliable than evidence of identification of a stranger, See Anjononi vs Republic [1980] KLR 59. The two appellants were also found in possession of items, which had been stolen from the house of PW 1. The recovery was made shortly after the robbery. Applying the doctrine of recent possession, we are satisfied that the two appellants were properly convicted."

There are, therefore, concurrent findings made by the two courts below that the appellants were properly identified as the robbers. We have re-examined the evidence upon which that conclusion was made and we find that it was well founded.

With regard to the doctrine of recent possession, Mr. Nyawiri's argument that the doctrine did not apply in the absence of two witnesses, one Chacha and one Magige, the alleged owners of the house where the stolen goods were found, has no basis in law. The stolen items were clearly found in the possession of the appellants in the house in which they lived, irrespective of who owned that house. They failed to explain how they came to be in possession of those items, which the complainant identified and proved as belonging to him. We are satisfied that the doctrine of recent possession was properly applied in this case.

With regard to the complaint that S's plea of guilty was not unequivocal, we have examined the record, and not unlike the High Court, we also come to the conclusion that the plea having been taken after five witnesses had testified, and the learned magistrate having explained the consequences of the plea to S, there is now no basis of any complaint that the same was made in confusion or after frustration. In any event, we agree with the learned Principal State Counsel that the evidence of guilt of all the appellants is overwhelming, based on identification and the doctrine of recent possession.

Finally, with regard to the complaint that the charge is defective because the date of the alleged offence is in variance with the evidence of the complainant, we have once again checked the record and are satisfied that the correct date is as stated on the charge sheet, that is the 12th May, 2005. The date 15th May, 2005 shown in the second line of the complainant's testimony is a recording error, as clearly in cross-examination the same witness talks of 12th May, 2005 as the date of the incident.

In sum, we are of the view that the offence charged was proved beyond reasonable doubt, and the conviction of the appellants was safe in all the circumstances. However, with regard to sentence, we agree with the learned Principal State Counsel that D and J, the second and third appellants respectively, were indeed under the age of 18 at the time of the offence, and accordingly we substitute their sentences of death, with an order that they be detained at the pleasure of the President. To that extent, the appeals in respect of the 2nd and 3rd appellants, succeed.

Dated and delivered at Kisumu this 2nd day of November, 2011.

R. S. C. OMOLO

.....
JUDGE OF APPEAL

E. O. O’KUBASU

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.