



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 283 OF 2008

BONIFACE LIAKO MUSIMA

W.K.A

SAMUEL MURUNGAAPPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Onyancha & Kubo, JJ.) dated 1st December, 2003

in

H.C.C.R.A. NO.130 OF 1999)

JUDGMENT OF THE COURT

In this second appeal, **Boniface Liako Musima** (1st appellant), **W. K.A** (2nd appellant) and **Samuel Murunga Mururi** (3rd appellant), challenge their conviction and sentence, by the Chief Magistrate’s Court at Makadara, Nairobi, for the offence of robbery with violence contrary to section 296(2) of the Penal Code. The three appellants were charged before the aforesaid court with two others whose appeals are not before us, that on 2nd June 1998, jointly with others not before the court while armed with offensive weapons to wit simis robbed Guy Robin of several assorted items including motor vehicle No.KAH 175 W, a Mercedes Benz 260E, Kshs.43,000 in cash, 7000 French Francs, 30 US dollars etc and at or immediately before or immediately after the time of the robbery wounded Guy Robin.

Ten witnesses testified at the trial, and at the conclusion of the case, the trial magistrate acquitted Wilfred Laus Letolo who was the 5th accused, but found the remaining 4 accused guilty as charged and sentenced each of them to death. All the four filed appeals to the High Court but one of the appellants, Morris Madubi Mwanzi, died before the conclusion of the appeals. Consequently his appeal abated. The superior court, therefore pronounced judgment only on the appeals of the three appellants herein. In that judgment the superior court affirmed the decision of the trial court and therefore dismissed the appellants

respective appeals. As stated earlier the appellants have come to this Court on second appeal.

Section 361(1) of the Criminal Procedure Code provides that this Court's jurisdiction is confined to matters of law only. Looking through the appellants' respective memoranda of appeal three broad issues of law have been raised:

- 1) Evidence of identification was weak and does not show the appellants were correctly identified as having been part of the gang that robbed Guy Robin.**
- 2) The evidence on record does not support the application of the doctrine of possession of recently stolen property.**
- 3) The superior court erred in failing to properly analyse and re-evaluate the evidence before the trial court, which if it had done, it would have come to the conclusion that the offence of robbery with violence contrary to section 296(2) of the Penal Code was not proved.**

The background facts are straightforward. On 2nd June 1998, at about 8.15 p.m. an armed gang of robbers attacked Guy Robin and his wife Betty Robin at their residence along 78 Muthaiga Road, and after cutting Guy Robin (Guy) with a simi the robbers bundled him, his wife and house-help into a bedroom. While there the gang demanded and were given money which was in Kenya Shillings, French Francs and US dollars. They also demanded and were given the keys of the couple's Mercedes Benz 260E car, Reg. No. KAH 175W. The gang then ransacked the house and made away with several items whose value was estimated at over Kshs.6.8 million inclusive of the car and jewellery, electronic appliances and clothes. After tying together the hands of the couple as well as those of their maid, the gang shoved them into a bathroom and locked them therein. The gang then escaped in the Mercedes car, aforesaid. After a long struggle the couple and their maid freed themselves and came out. They found the other workers tied and grass stuffed into their mouths, presumably to prevent them from raising an alarm. Among those workers was Wilfred Laus Letolo. He was the watchman of the home. As we stated earlier, he was acquitted by the trial court under section 210 of the Criminal Procedure Code (CPC), on the ground that he did not have a case to answer.

Guy, his wife Betty and their house-help, Jane Kablanza (*Jane*) testified that the incident took over an hour. Bright electric lights were on and as a result they were able to observe the gang members who entered their house. The robbers who entered the house did not cover their faces and therefore the witnesses were able to identify them. We will revert to this aspect later on in this judgment.

The police were notified of the robbery. They visited the scene and recorded statements from witnesses. About 4 or so days later, the evidence on record is not clear on this, motor vehicle KAH 175W was seen in a certain home in Kakamega by members of the public. AP Vincent Gituma, and AP. Nicholas Aponi, both who were then attached to the D.O's office Ikolomani, visited the home. The owner of the home was one Peter Mulimo. The two officers found the car there and on questioning Mulimo about its presence there, the latter named Samuel Murunga Muruli (*3rd appellant*) as the owner of the car. The *3rd* appellant who was present explained that he had hired the car from Kisumu. The officers were not then aware the car was among items which had been stolen in the course of a violent robbery in Nairobi. Nonetheless they were not satisfied with the explanation they had been given and therefore arrested the two men. The two officers also arrested the *1st* and *2nd* appellants on suspicion of being criminals, and on being told that they were together with *3rd* appellant.

The two officers conducted a body search on all the suspects they arrested. W.K.A (*2nd appellant*) was found with three 500 French Franc notes and 2 US one dollar notes. Those were produced in evidence. Likewise the recovered car was produced as an exhibit. Betty identified it to the police at Kakamega, as the vehicle which was stolen from them on 2nd June 1998.

P.C. Samuel Githinji Muriithi (*Muriithi*) was one of the officers who collected the appellants from Kakamega Police Station and transferred them to Muthaiga Police Station. On the way they passed

through Kangemi where one of the suspects, Maurice Madubi Mwanzi, had a house. A TV set, Sony Video set, Hitachi, with two remote controls, one of Sony type and the other Hitachi were recovered. A fan-light and one Philips speaker serial No.0070402298 were recovered from the 2nd appellant's house, and from the house of Boniface Liako Musima, at Embakasi a cassette deck, Philips disc player, Philips amplifier and 2 speakers were recovered. All these items were identified by Guy and Betty as some of the items which were stolen from their house on the night of the robbery.

The jurisdiction and powers of an appellate court were succinctly enunciated in the old case of Peters v. Sunday Post Ltd [1858] EA 424. Sir Kenneth O'Connor P authoritatively stated, and the other two members of the court agreed, that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

The court cited the House of Lords decision in Watt v. Thomas [1947] AC 484 in which Viscount Simon L.C. said, as material, as follows:

“If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instant can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration.”

As we stated earlier the main issue in this appeal is identification. Guy, Betty and Jane testified that at the time they were attacked electric lights were on. They were bright and as a result they were able to observe their attackers. They were able to identify them in identification parades which were held subsequently. The trial magistrate as also the superior court on first appeal believed these witnesses. The trial magistrate after going through the evidence rendered himself thus in his judgment.

“The evidence against the accused persons is candid and overwhelmingly implicating the four accused to the said offence. I cannot award them the benefit of the doubt. I am satisfied and convinced the prosecution has prove its case beyond reasonable doubt.”

In coming to that conclusion the trial magistrate relied on evidence of visual identification of each appellant, identification parade evidence and the fact that in the possession of each of these appellants some items which both Guy and Betty identified as part of the properties stolen from them during the robbery were found.

In its judgment the superior court held thus in respect of each appellant;

“Having undertaken our own independent evaluation of the entire evidence, we also find as the learned trial magistrate found, that the prosecution proved its case ... beyond reasonable doubt.”

We affirm. The offence took place at night time. There was ample electric light which aided Guy, Betty and Jane to observe and identify their attackers. Their attackers were close to them, and remained with them for long. 2nd appellant had been Guy's gardener, albeit for a short time. So all the three witnesses knew him well before. Besides the witnesses were able to pick all the appellants in identification parades which both courts below were satisfied were properly conducted.

Besides, a cassette deck, Philip disc player, Philips amplifier and 2 speakers were recovered from the house of Boniface Liako Musima (*1st appellant*). The items were positively identified by Guy and Betty as part of the items which were stolen from them in the course of the robbery in issue. From W.K.A, (*2nd appellant*) some money, to wit, three 500 French Franc notes and two 1 US dollar notes were recovered. And from Samuel Murunga Muruli (*3rd appellant*) the Mercedes car, a fan-light and Philip speaker were recovered. All those items were positively identified by Guy and his wife as their property which was stolen in the course of the robbery in issue.

In view of what we have stated above submissions by Mr. Maina Njuguna for *1st* and *3rd* appellants that evidence of identification is weak, is clearly untenable. Identification parade evidence and the items recovered removed any doubt regarding the correctness of visual identification of the appellants by Guy, Betty and Jane. Each of the *1st* and *3rd* appellants was required under the law to explain how they came to be in possession of the various items which Guy and his wife positively identified as their property stolen on the material night of the robbery. The possession raises a rebuttable presumption of fact that they were the thieves. The *1st* and *3rd* appellants could only escape if they each gave a plausible explanation as to how they came to be in possession of those items. Such an explanation would have rebutted the presumption. We do not agree that the doctrine of possession of recently stolen property does not apply to this case. The *1st* and *3rd* appellants were found with the respective items less than a week after they had been reported stolen. That was a short enough period for the doctrine to be invoked. The items in their possession and the circumstances under which they were arrested leave no doubt that they were in the gang that robbed Guy.

Besides Samuel Murunga Muruli, (*3rd appellant*) made a statement under inquiry after a caution. He made a clean-breast of the robbery. Although he retracted it at the trial the magistrate accepted it and relied upon it. He was satisfied that it was true in view of its detailed nature regarding the planning and execution of the robbery. The statement placed all the appellants at the scene of the robbery. We, of course appreciate that it is evidence of the weakest kind against a co-accused. However, it is not the only evidence against the co-accused. It lends support to the evidence against them.

Regarding the *2nd* appellant namely W.K.A, his advocate, Mr. Ombwayo, submitted that there is no evidence on record to place him at the scene of the robbery. Guy testified that he did not see him in his house. Likewise Jane did not see him. Only Betty testified that she saw him in the course of the robbery but did not explain exactly where in the house she saw him. Her evidence on this aspect was as follows:-

“We were tied up. They took the Mercedes. We were tied up in the bathroom. The leader was *2nd* accused. He spoke and supervised everything. The one I knew was W.K.A. *1st* accused. He had worked with us as a shamba boy.”

The witness picked the *2nd* appellant in an identification parade.

The *2nd* appellant was arrested in Kakamega in the home at Bulimo along with the *3rd* appellant. The latter was said to be the person who took Guy’s car to that home. However, the driver of the car was *2nd* appellant. Aponi testified as follows:

“I was informed that you were the driver. You were in hiding. The homestead owner did not know you.”

A.P. Vincent Gituma also testified as follows on that issue:

“You said you were the driver.”

Apart from what is stated above the *3rd* appellant in his inquiry statement named the *2nd* appellant as having been with him. As we stated earlier that statement is evidence of the weakest kind against the

2nd appellant. However, the statement has to be considered along with the 2nd appellant's conduct. He was in the company of people whose evidence show participated in the robbery in question. He was in possession of French Francs and US dollars and such money, although less than what had been stolen, could have been part of the money which had been stolen in the robbery.

The 2nd appellant was not arrested from his own home. He explained that he is a general fitter and works at Donholm in Nairobi. On 4th June 1998, he attended a funeral ceremony at Tiriki. He accompanied his brother to Kamumani, where they arrived at night time. He was forced to sleep there. It should be recalled that the owner of the homestead told police that he did not know the 2nd appellant. That could be regarded as hearsay. However, under section 111 of the Evidence Act Cap 80 Laws of Kenya, the 2nd appellant had a duty to explain why he was at the place from which he was arrested. His duty is evidential. The reason for being there was a matter especially within his own knowledge. His explanation when looked at vis-à-vis the circumstances as explained by witnesses is unbelievable. It should also be borne in mind that Betty testified that she saw him in the course of the robbery in issue.

We have analysed the evidence to deal with the 2nd appellant's complaint that the superior court did not re-evaluate and analyse the evidence. The complaint has clearly no basis. The superior court did actually meticulously analyse and consider the evidence against each appellant and came to the conclusion that the appellants' respective appeals are baseless. We have come to the same conclusion.

The result is that the appellant's respective appeals have no basis. We agree with Mr. Kaigai, Principal State Counsel, that all the three appellants were properly convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

On sentence, Mr. Njuguna submitted before us that the 1st appellant's death sentence was illegal. In his view the 1st appellant told the trial court, he was 17 years old on the date of sentence. Upon conviction appellants were asked to offer mitigation. The 1st appellant who was the third accused is recorded as having said:

“I am 17 years old.”

The other accused persons did not say anything in mitigation. The trial magistrate appears to have been incensed by this because he remarked thus:

“Court:- It is surprising that none of the accused are remorseful of their heinous act. They therefore deserve to suffer death penalty. Each is sentenced to death by hanging.”

He did not inquire as to the actual age of the 2nd appellant. There is no evidence on record to show a different age from that which the 1st appellant gave. The issue was not raised before the superior court. In the circumstances the order which commends itself to us to make is that appeals by the 1st and 3rd appellants are dismissed. The 2nd appellant's appeal against conviction is also dismissed but on sentence the sentence

of death passed against him is hereby set aside, and in lieu thereof we order that he shall be detained at the President's pleasure. Order accordingly.

Order accordingly.

Date and delivered at Nairobi this 16th day of April 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR