IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 250 of 2006

BETWEEN

1. VINCENT OMONDI OBETO
2. STEPHEN MUTUA MASILA ……APPELLANTS

AND

REPUBLIC ……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Musinga & Kimaru, JJ.) dated 9th May, 2005

in

H.C.Cr.A. No. 170 of 2002)

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JUDGMENT OF THE COURT

Vincent Omondi Obeto and ***Stephen Mutua Masila,*** the appellants with others who were acquitted were charged at the Senior Principal Magistrate's Court Naivasha with various counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. They were also charged with alternative counts of handling stolen property contrary to ***section 322(2)*** of the Penal Code and being found with or retaining suspected or stolen property contrary to ***section 323*** of the Penal Code. They denied the charges but after a full trial they were both acquitted of counts 1 to 7 but found guilty of counts 8 and 9 of the charges wherein they were given the mandatory death sentence as provided by law. The 1st appellant was also found guilty of the alternative charge to count 3 while the 2nd appellant was found guilty of the alternative charge to count 2 of the main charges. In addition the 1st appellant was found guilty of having suspected stolen property in count 11 while the 2nd appellant was also found guilty of having suspected stolen property in count 10. As to sentence on the counts 10 and 11 and the alternative counts the learned trial magistrate rendered himself thus:

> ***"in respect to other counts Nos. 10 and 11 and the alternative to count Nos. 2 and 3, each is sentenced to two (2) years imprisonment. Sentence*** *(sic)* ***to run concurrently."***

Their appeals to the superior court were dismissed hence this second and final appeal. In this Court on 31st March, 2010 ***Mrs. Ndeda***, learned counsel for the appellant presented the appeals on behalf of her clients and relied on the memoranda of appeals filed by the appellants and her own supplementary memorandum of appeal. In particular she complained that the doctrine of recent possession relied on to convict the appellants was not proved.

Mr. Mugambi, learned State Counsel conceded the appeal on count 9 for lack of evidence but said nothing about counts 8, 10 and 11.

Count 8 and 9 on which the appellants were found guilty were framed as follows:

> ***"CT: EIGHT ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE:***
>
> ***(1) STEPHEN MUTUA MASILA (2) VINCENT OMONDI***
>
> ***On 18th January, 2002 at County Council Estate Naivasha Township in Nakuru District within Rift Valley Province jointly with others not before the court while armed with dangerous weapons namely pangas, rungus and iron bars robbed IRENE WAIRIMU MAINA of one T.V. set make JVC, table clothes curtains utensils, two jackets, four shirts, two trousers, two bags, bed sheets, pillow case and cash Kshs2,300/= all valued at Kshs.50,000/=***
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> ***CT. NINE: ROBBERY WITH VIOLENCE CONTRARY TOS ECTION 296(2) OF THE PENAL CODE:***
>
> ***1. STEPHEN MUTUA MASILA 2. VINCENT OMONDI OBETO:***
>
> ***On 19th January, 2002 at County Council Estate Naivasha township in Nakuru District within Rift Valley Province, jointly with others not before the court while armed with dangerous weapons namely pangas, rungus and iron bars robbed MARGARET WANJIRU of cash Kshs.10,000/= one T.V. – make Great Wall, utensils, clothing all valued at Kshs.20,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said MARGARET WANJIRU"***

In regard to counts 10 and 11 on which the appellants were also found guilty and convicted were framed as follows:

> ***"CT: TEN: HAVING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 323 OF THE PENAL CODE:***
>
> ***STEPHEN MUTUA MASILA: On 19th January 2002 at Kabati Estate Naivasha in Nakuru District within the Rift Valley Province, having been detained by No. 62312 Nicholas Omondi as a result of the exercise of powers conferred by section 26 of the CPC had in his possession one radio make Lasonic Senior No. 1027585 and a battery reasonably suspected to have been stolen or unlawfully obtained.***
>
> ***CT: 11 HAVING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 323 OF THE PENAL CODE:***
>
> ***VINCENT OMONDI OBETTO: On the 19th day of January 2002 at Kabati Estate Naivasha in Nakuru District within Rift Valley Province, having been detained by No. 6212 P.C. Nicholas Omondi as a result of the exercise of powers conferred by section 26 of CPC had in his possession one T.V. Sony serial No. 8111175 and two iron boxes make Phillips reasonably suspected to have been stolen or unlawfully obtained."***

The evidence on which the appellants were convicted in count 8 was that of ***Irene Wairimu Maina*** (PW2) was as

follows:-

> ***"I recall on the night of 18/1/2002 at 4 p.m. I was asleep with my family. I heard when the door was hit. I came out screaming. My husband also came out. Suddenly I saw men enter into the bedroom. I rushed to the children's bedroom. One of the men shouted that I gave*** *(sic)* ***him the mobile phone. They asked for a torch. He said that he had no torch. They asked for the shirt and trouser he was wearing yesterday. The thugs had torches which they were directing on my husband. They could not see me. I saw two of the thugs and identified them. They are the 3rd and 4th accused. It's the 3rd accused who first entered. He had an axe. The 4th accused was among others who were guarding us. They took my husband's long trouser and shirt and ransacked the pockets. They told my husband to cover his face. They took bed sheets two jackets. They started parking utensils, they took an umbrella. They took a big bag. The 3rd accused later came and asked where I was. He asked for money. Members of the public gathered and the thugs escaped. Upon checking we found that they had taken curtain, seat covers and other items. The following day we made a report to police. Two days later I was informed that some items had been recovered. I identified a jacket, cups and forks. The jacket belongs to my husband. It had a scratch on the neck which had not been mended (MFI 3) I had seen the jacket for six months. The cups are six in number (MFI 4) one of the cups had a mark. It's the one in court. The three forks are the ones before the court (MFI 5). I had seen the 3rd and 4th accused clearly."***

During cross-examination by 3rd accused she answered thus:-

> ***"You attacked us at 4.00 a.m. When you entered I jumped from our bed and went to that of the children. You were directing light on my husband. From where I was I could see you clearly between the children's bed and that of ours there is a curtain but you had pulled it down. I found the jacket at a house at Kabati. The officer's had keys. They were in company of a lady. It was said that she was your wife."***

And in cross-examination by the 4th accused PW2 answered:

> ***"We were attacked on 18/1/02. You did not enter but you stood at the sitting rooms door. You were wearing a hat but I saw your face clearly. I tolc*** *(sic)* ***police that I could identify the attackers if I saw them. I had gone to the police station severally. I did identify you at the parade."***

Though the evidence of PW2 on count 8 was that she identified the 3rd and 4th appellants herein during the robbery, she stated that when the robbers struck she ran to the children's bedroom. She did not say the robbers followed her there. She also said the robbers directed the torches they had at her husband and she did not tell the trial court by what means she was able to see the 1st appellant. In those circumstances we think that though the two courts below believed the witness on those points, the conviction was unsafe and he ought to have been acquitted. In respect of the jacket there was simply no evidence that it had been stolen from anyone and the 1st appellant gave a plausible explanation for his possession of it, namely that it had been left in his taxi by a customer known to him.

In respect to counts 10 and 11 it was ***Pc. Nicholas Omondi*** (PW11) who testified. In respect to the 2nd appellant PW11 testified as follows:-

> ***"We went to Kanu Youth Office and found a suspect Vincent Omondi who is the 4th accused. He had been found with one jacket which the owner identified. The jacket is the one before the court. The complainant identified the jacket positively for she had a secret jacket pocket (MFI 1) … In the house of the 4th accused. We recovered a sonny coloured***

> ***T.V. (MFI 12) iron box make Phillips (MFI 13). Two exhibits were not identified by the complainants. He showed us a permit but the serial numbers could not tally. The serial number of the TV is 8111175 but in the receipt is No. 811715. Receipt and permit MFI 14 and MFI 15. The 3rd accused wife brought a receipt for the radio cassette MFI 16. When I went to the Emirates Electronics they refuted the receipt saying that they had never stocked such make of radio. They also refused the receipt MFI 16. The receipts were brought to us after one week.***
>
> ***… I knew the 4th accused before as a taxi driver.***

And in respect of the 2nd appellant PW1 testified as follows:

> ***"… The two (4th and 5th accused) led us to the 3rd accused who was an accomplice. The residence of the 3rd accused is at Kabati. In the house of the 3d accused were recovered black and white T.V. which was identified by the, MFI 6. We recovered six cups and three spoons which were one black jacket which was also identified by one of the complainant. We also recovered a radio cassette with speakers MFI 9 but the accused could not prove ownership. We also recovered a car battery MFI 10."***

The alternative count to count 2 charged the 2nd appellant with dishonestly receiving and retaining a television make Phillips serial number 3140102. But when PW11 went to this appellant's house and searched it he recovered a black and white television set which he said was identified by a complainant, PW11 did not describe this television set or whether it had serial number 3140102. No particular complainant identified the television set and the evidence of this witness PW11 stood all by itself. In defence the 2nd appellant claimed the television and iron boxes and even produced receipts which were ignored by the investigating officer. The two courts did not consider these issues. We do not know if they would have come to the same conclusion if the issues had been considered.

In fact the evidence of PW2 in respect of count 9 involved a complainant, Margaret Wanjiru who is alleged to have been robbed of cash Kshs.10,000/= one television make Great Wall, utensils and clothing all valued at Kshs.20,000/=. Unfortunately in the record of proceedings, *Margaret Wanjiru* did not testify anywhere as a witness to make out a case against the appellant on this count. There is, however, a witness ***Margaret Wanjiku Kariuki*** (PW7) who testified in the case about being robbed of Kshs.6,000/= which had nothing to do with count number 9 at all. Moreover amongst the 11 charges filed against the appellants and their accomplices there was none involving PW7 as a complainant.

Although ***IP. Doris Akinyi*** (PW14) held an identification parade in respect to the 1st appellant on 21/1/2002, where PW2 is said to have been the sole identifying witness; but when she (PW2) testified, she did not indicate she attended any identification parade at Naivasha on that day or that she identified any suspect at such an identification parade; leave alone the 1st appellant.

Indeed ***IP. Maurice Nzioka*** (PW12) held an identification parade in respect of the 2nd appellant where PW2 was the sole identifying witness; in respect of whom PW12 stated:

"She was able to identify the accused."

The two appellants, however, contested the propriety of the identification parades during cross-examination of the witnesses and in their defence on account of the fact that they were seen by the identifying witness before the parade. In spite of this the trial magistrate called their defence

"mere denials."

In fact according to PW12 only one witness was called to the parade in respect to the identification of the 2nd appellant while this appellant himself said they were four, two of whom he had seen at the D.C.I.O.'s office the previous day. These are the ones who purportedly identified him. The 3rd witness whom he had not seen at the office the previous day did not identify him. So was the 4th witness.

In regard to the alternative count to count 3, the 1st appellant was convicted of being in possession of a jacket "***navy blue."***

"Knowing or having reasons to believe them *(sic)* ***to be stolen property;"***

When PW11 testified he referred to the jacket recovered from this appellant's car and which was identified by the complainant positively

"for she had a secret pocket (MFI I). She told us she had some Kshs.200/= when we checked we recovered Kshs.200/=."

PW11 did not give the name of the complainant who identified this jacket. The appellant informed PW11 that the jacket was left in his taxi by two people whom he knew. However the witness who testified about a jacket with a secret pocket in which Kshs.200/= was kept was Lucy Njeri Nganga (PW1). But unfortunately there was no charge involving an offence of robbery committed against this witness. And if this alternative charge related to the jacket in count 3 and according to PW11 the complainant Margaret Wanjiku Kariuki positively identified it, then the 1st appellant was acquitted of this charge. And as stated earlier, there was no charge involving Margaret Kariuki as a complainant. It appears to us there was some mix-up in the evidence adduced against the 1st appellant regarding the alternative to counts 3 and count 8.

On counts 10 and 11 on which the appellants were convicted, there was no evidence upon which PW11 suspected that the television serial number 8111175 and two iron boxes Phillips and radio make Lasonic serial number 1027585 had been stolen. In the evidence of PW11, he had this to say about possession of a Sony television serial number 8111175 and two iron boxes Phillips:

> ***"In the house of the 4th accused we recovered a Sony coloured television MFI 12, iron box make Phillips MFI 13. The two exhibits were not identified by the complainants. He showed no permit but the serial members (sic) could not tally. The serial number in the television is 8111175 but in the receipt is 8111715 receipt and permit MFI 14 and MFI 15."***

PW11 testified about the recovery of one iron box from the house of the 1st appellant in this appeal. It is not clear where two iron boxes came from in count 11. The 1st appellant did not attest to the recovery of the iron box from his house but as regards the television he claimed it to be his. That the appellant produced a permit for television number 8111715 when the number on the television was 8111175 was not sufficient to convict him, particularly when the 1st appellant claimed the television to be his. After all the television was taken on the basis that it was one of the items robbed of the complainants on the night of 18th January, 2002 but none of the complainants identified it as his/hers. In any case the permit number 8111715 and number 8111175, on the television could be a case of mixed numbers. Added to this is the evidence that the 2nd appellant claimed the same iron boxes as his. If the superior court had considered all these issues it is unlikely it would have dismissed the appellants' appeals and/or confirmed the sentences imposed upon them.

Before we come to the conclusion of these appeals, and though no complaints were raised on this issue, we are rather perturbed by the manner the trial magistrate recorded the evidence. Nowhere in his record did he record the language in which witnesses testified. This is contrary to the provisions of ***section 77(2)(b***) of the Constitution and ***section 198*** of the Criminal Procedure Code. The trial magistrate should be sent a copy of this judgment in order for him to appraise himself of the requirements of the above quoted sections so as to avoid unnecessary complaints about the language of the court in future.

It is also the practice of the court that where an accused person is charged with a capital offence and other offences carrying prison terms, he/she should be sentenced to death on the capital offence while other sentences of imprisonment meted out to him remain in abeyance; see ***Muchiri vs R. [1980] KLR. 70***.

The upshot of all we have said and in view of the concession by learned State Counsel on count 9 is that the appellants' appeals are allowed, the convictions quashed and the sentences imposed upon them set aside. Unless the appellants are otherwise lawfully held they should be set at liberty forthwith.

Dated and delivered at Nakuru this 28th day of May, 2010

R. S. C. OMOLO
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JUDGE OF APPEAL

E. O. O'KUBASU
……..
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.

PRINCIPAL DEPUTY REGISTRAR