



IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Criminal Appeal 1 of 2005

ALMAIDA KIPYEGON SAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Musinga & Kimaru, JJ.) dated 19th October, 2004

in

H.C.C.R.A. NO. 47 OF 2000)

JUDGMENT OF THE COURT

ALMAIDA KIPYEGON SAINA, the appellant herein, was after trial convicted by the Principal Magistrate at Kericho, on 31st October, 1998 on six counts of robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced to suffer death as is mandatorily required by law. The appellant's first appeal to the High Court of Kenya at Nakuru against conviction and sentence was dismissed by Musinga and Kimaru, JJ. On 20th July, 2004 and hence this is a second and final appeal.

The prosecution's case was as follows. The complainant **Simon Arap Kosgei** (PW1) was a tea-picker at Saramek Tea Estate near Kericho Township. On 27th February, 1998, at about 7.30 p.m. he was walking home together with six of his work-mates when, at a foot path near a forest they were accosted by a group of about eleven people who claimed that they were police officers and they ordered them to lie down. The gang proceeded to relieve them of cash and all personal items in their possession. In the process PW1 and his colleagues **William Bore** (PW2), **James Emuron** (PW3), **Julius Kiprono** (PW4), **Aggrey Kaboya** (PW5) and **Ezra Adera** (PW7) were assaulted with sharp and crude objects including whips. They all suffered injuries and were treated by **Joseph Ngetich** (PW6); a clinical officer at Kericho District Hospital, who also duly filled P3 forms which were produced in the trial court as exhibits.

PW1 further testified that during the attack he was able to identify the appellant by the light of the torches that the assailants had. He had known him as a cobbler who had previously mended his shoes. Also, PW1 knew the house of the appellant. Immediately after the attack, PW1 went and reported the incident to the police whom he led to the house of the appellant. Another significant piece of evidence touching on the appellant was the evidence of PW2 who testified that during the robbery, a pocket radio was stolen from him. A search carried out by **P.C. Tanui** (PW8) led to the recovery of the said radio from the appellant's house. During the trial, PW2 produced the receipt that was issued to him when he purchased it.

It is common ground, therefore, that the prosecution rested its case mainly on the basis of identification by recognition and on the basis of the doctrine of possession of property recently stolen. The appellant in his defence denied committing the offences charged.

He testified that on the material day after work at about 6.00 p.m. he went straight to his house and did not go out the whole night until the police arrested him at about 3.00 a.m. He knew nothing about the robbery and averred that the radio was not recovered from his house.

In convicting the appellant, the Principal Magistrate held, *inter alia*, that:

“The evidence against the 1st accused (appellant) is both direct and circumstantial the 1st accused had a knife On the whole, I find that the 1st accused was found in possession of the stolen radio (Exhibit 3) Accused did not give a reasonable explanation of his possession of it. I find him to be the thief. I find him guilty robbing PW1 and PW2 ...”.

and also that:

“In the final analysis I find the 1st accused (appellant) guilty of robbery contrary to S. 296 (2) of the Penal Code in Counts I, II, III, IV, V and VI and convict them (sic) accordingly”.

Following his conviction, the appellant filed an appeal in the superior court. He attacked his convictions mainly on the ground that he was not positively identified due to what he termed “*obtaining circumstances*” and that the application of the doctrine of recent possession was erroneously applied in the case against him in that he was not found with any radio. The court reviewed the entire evidence and in the course of their judgment the learned Judges, (Musunga and Kimaru, JJ.) sated, *inter alia*:

“PW1 testified that he was able to identify the Appellant having known him prior to the robbery incident. He testified that he knew the Appellant as a cobbler whose services he had utilized prior to the robbery incident. He testified that he was able to recognize the Appellant from the torch light that the Appellant and the other assailants were carrying. After the robbery, PW1 made a report to the police. He led the police to the house of the Appellant where upon a search being conducted a knife, similar to the one that PW1 was stabbed with was recovered. A radio, which was later identified as belonging to PW2, was also recovered. We have re-evaluated this evidence and find that indeed PW1 positively identified the appellant”.

And also that:

“On our re-evaluation of this evidence it is our finding that PW2 proved that he owned the radio, which radio was robbed from him at about 7.30 p.m. on the material night and recovered at about 3.00 p.m. on the following day in the house of the Appellant. The doctrine of recent possession was correctly applied in this case”.

The superior court then upon reaching that conclusion dismissed the appeal before it and hence this second appeal.

The grounds of appeal as argued by Mr. Makomere, learned counsel for the appellant, are in substance first, that the appellant was not positively identified as the member of the gang that robbed the complainants of property and assaulted them during the material evening; that the evidence of PW1 was not corroborated and that it was not firmly established who was actually in possession of the stolen radio. Another complaint raised by Mr. Makomere, but feebly, was that the first appellate court ought to have disregarded the evidence of the prosecution witnesses since they were present in court when PW1 was testifying.

We have no difficulty in disposing of the last two complaints raised by Mr. Makomere. In our view, we are unaware of any rule of law which mandates that corroboration is desirable before convicting on the evidence of one witness alone. The mere absence of corroboration of PW1’s evidence per se does not

make the evidence of PW1 unreliable. We reiterate that a court may convict on such uncorroborated evidence if it is certain of the truth and reliability of that evidence. See **Dusara v. Republic** [1981] KLR 139. However, in the case before us, the testimony of PW1 was amply corroborated by the evidence of PW2, PW3 - PW6.

We have carefully checked the record of the trial court and we have not seen any indication that any of the prosecution witnesses were present in court when PW1 testified. We accordingly reject this complaint.

We now revert to the main ground of appeal. It is plain that the appeal to this Court turned entirely on a scrutiny of the evidence of PW1 and PW2 when considered in the light of other testimony and on the evaluation of the evidence as a whole by the trial court.

There is sufficient evidence on record to show that PW1 had known the appellant before the incident and that the stolen radio was found in the possession of the appellant. Moreover, the evidence relevant to identification is all carefully set out in the judgment of the Principal Magistrate and fully considered by him before arriving at his conclusion as to the guilt of the appellant. Further, the records laid before us show that the superior court as the first appellate court looked at the evidence adduced before the trial court afresh, re-evaluated it and re-assessed it and reached its own independent conclusion whether or not to uphold the conviction and in fact, it upheld the conviction. It is sufficient for us to say that having carefully considered the judgment and the evidence on the record, we see no ground for interfering with the conclusion reached.

In view of the foregoing, we are satisfied that the charges against the appellant were proved beyond all reasonable doubt and we uphold his conviction. The sentence is lawful and it must stand. Accordingly the appeal fails and is dismissed in its entirety.

Dated and delivered at Nakuru this 6th day of March, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR