



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 169 of 2004

DAVID LANGAT KIPKOECH

SIMON KIBET KORIR

JULIUS TERER NGENY.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nakuru (Musinga & Kimaru, JJ.)

dated 20th March, 2004

in

H.C.C.R.A. NOS. 239 - 241 OF 2000)

JUDGMENT OF THE COURT

DAVID LANGAT KIPKOECH, the 1st appellant, **SIMON KIBET KORIR**, the 2nd appellant and **JULIUS TERER NGENY**, the 3rd appellant, were after trial jointly convicted of robbery with violence contrary to **Section 296 (2)** of the Penal Code and sentenced to suffer death. The appellants' first appeal to the High Court of Kenya against conviction and sentence was dismissed by Musinga and Kimaru, JJ. on 20th July, 2004. This is therefore a second appeal.

On the night of 29th and 30th December, 1999 **B N** (PW1) and his wife **J M** (PW2) were asleep in their house at Likia Farm when there was a knock on their door by people who were claiming to be police officers and demanding that they open the door for them. When the couple hesitated to let them in, the attackers broke down the door and once inside the house they demanded a TV set, cassettes and money. When PW1 could not produce any money he was hit with a panga on the head and cut on the right hand. He was then covered on the head with a blanket and tied on to the bed. During the attack PW1 could count three people armed with pangas and crude weapons. After ransacking the house the assailants collected PW1's mattresses, clothes, bed sheets and other household goods and forced PW2 and her sister **M** (PW3) to carry them as they accompanied the assailants into the bush. When the gang left, PW1 managed to untie himself using his teeth. He then went to seek assistance from his neighbour **James Njenga** (PW5) who led other villagers to look for PW2 and PW3.

The robbery was reported to Likia Police Station which immediately commenced investigations. **IP. Dalmas Ongari** (PW7) the O.C.S. Likia Police Station, testified that on the night of 29th - 30th December, 1999 he was asleep when he was woken up by the constable on duty at the station who told him that there were shouts and screams in the area. The two officers went towards PW1's home and on the way they met PW2, PW3 and PW5. The next day at Likia trading centre PW7 got information that the 2nd appellant was among the group that was involved in the robbery and PW7 proceeded to arrest him pending further investigations. Later in the course of his investigation, he arrested the 1st appellant whom he found wearing a jeans trouser and a jacket which belonged to PW1 and which were among the clothes stolen from PW1's house. These were exhibits Nos. 5 and 10 in the trial court. Subsequently, PW7 arrested the 3rd appellant. These appellants then led PW7 and other police officers to a river bank where most of the stolen items had been hidden. After that, the 1st appellant led police officers to his house where a bed sheet (exhibit 9), a pullover (exhibit 7), a blouse (exhibit 4) and a spot light (exhibit 8) were recovered after a thorough search. These things had been hidden in a nearby maize plantation. The 1st appellant further volunteered to take the police to a

maize plantation in a different farm where a coffee table was recovered. This, too, was among the stolen property from PW1's house. All the recovered items were positively identified by PW1 and PW2 as belonging to them.

Thus, the sum total of the prosecution evidence is that the 1st appellant was on arrest found wearing PW1's jeans trouser and a jacket, and was also found with bed sheets, a pullover, blouse and a spot light which belonged to PW1 and PW2 and had been stolen from their house. The 1st appellant gave no explanation as to how these clothes and other property were found with him.

PW1, PW2 and PW3 were unable to identify any member of the gang and it was on the basis of this that the first appellate court quashed the convictions on rape charges which also had been preferred against the appellants. As there was no direct evidence to connect the appellants with the offence of robbery with violence, reliance was made on the basis of the doctrine of possession of property recently stolen.

In his defence, the 1st appellant claimed that he was at a friend's house during the material night when police woke him up and took him to Likia Police Station where an identification parade was conducted. He was not identified. Later he was taken to a certain room and told that the items that were there belonged to him but he refused. He denied having committed the offence with which he had been charged.

The 2nd appellant, also, gave his defence under oath and denied any knowledge of the offence which he faced. He said that on 31st December, 1999 he was at Likia trading centre drinking. He walked out to buy cigarettes and met with a police officer who arrested him and took him to the police cells where he saw two other people. An identification parade was carried out and he was not identified and later he was taken to a room where he saw some items which he knew nothing about. He also denied the charge.

The 3rd appellant, similarly gave a sworn statement of defence. He said he was arrested on 1st January, 2000 as he was sleeping in his home. At the police station an identification parade was conducted and he was not identified. On the 4th of January, he said, he was shown some items - the police exhibits. He denied the charge as well.

In convicting the appellants, the trial court (S. Muketi, Senior Resident Magistrate) held, *inter alia*, that:

“There was very strong evidence that the accused, for instance 1st accused, was found wearing some of the stolen items - a jeans trousers and a jacket. They later led the police to where further recovery was done. The items so recovered were identified by the complainants”.

The appellants as we have stated earlier on in this judgment were aggrieved by this decision and preferred an appeal against both conviction and sentence. The learned Judges in dismissing their appeal said:

“We are therefore satisfied that the trial court was right in convicting the appellants on the basis of the doctrine of possession of recently stolen property and consequently, there is no basis of interfering with the appellants' conviction on the charge of robbery with violence contrary to Section 296 (2) of the Penal Code. The sentence which was meted out is the only lawful sentence”.

And consequent to the dismissal of their first appeal, the appellants filed this second appeal.

Mr. Ombati, learned counsel for the appellants, presented a two-pronged submission. First, that both the trial and the first appellate courts erred in applying the doctrine of recent possession to convict the appellants without any basis or foundation in law; and second, that the prosecution evidence did not at all connect the appellants with the commission of the offence charged. On the other hand Mr. Gumo, the learned Assistant DPP supported the conviction of the appellants and urged us to uphold it.

We will dispose first of the appeal by the 2nd and 3rd appellants. No one identified them at the scene of the robbery, or in the house of PW1 and PW2, and it is not clear from the evidence whether the 1st appellant was with the 2nd and 3rd appellants when they accompanied the police to the river. Further, it would appear from the evidence on record that the 2nd and the 3rd appellants actually played no role in pointing out the stolen goods to the police. Again, it is manifest that the exhibits collected by the police from several places, namely the river, the house of PW1 and the maize plantations were mixed up and it is not possible to identify which ones were collected from the river and which ones were collected from the house of the 1st appellant. Accordingly, because of the confusion and the mixing up of the recovered exhibits the conviction based on recent possession cannot be sustained. In our view, therefore, the conviction of the 2nd and 3rd appellants is unsafe and we cannot uphold it. Thus, we allow the appeal of the 2nd and 3rd appellants. They shall be set at liberty forthwith unless otherwise lawfully held.

The case for the 1st appellant is, however, different. At the time of his arrest he was found wearing PW1's jeans trouser and jacket. These had been robbed of PW1. The 1st appellant had led the police officers to his house where they recovered a bed sheet (exhibit 9), a pullover (part of exhibit 7), a blouse (exhibit 4), and a spot light (exhibit 8). These things were hidden in a maize plantation. A coffee table was also recovered from another maize plantation in a different farm. All the above items were identified by the complainants as being part of the stolen articles. The 1st appellant has not at all given reasonable explanation as to how he came to be in possession of the said items. Such an explanation would have been vital to rebut the presumption that he was involved in the robbery.

In the well known case of **R. VS. LOUGHLIN 35 CRIMINAL APPEALS R 69**, the Lord Chief Justice of England stated as follows:

“If it is proved that the premises had been broken into and that certain property had been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the house breaker or shop breaker”.

This is the well known doctrine of recent possession.

Recently, this Court in **PETER KARIUKI KIBUE VS REPUBLIC**, *Criminal Appeal No. 21 of 2001* at Nairobi (unreported) dealt with a similar matter where the appellant was found in possession of the complainant’s leather jacket and jeans trousers shortly after a robbery and he failed to give a satisfactory explanation as to how he came by them. The court stated that:

“The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. Since he did not offer any explanation the rebuttable presumption in law raised, based on the provisions of Section 119 of the Evidence Act, is that he was one of the people who robbed Damaris of the items together with her car and also robbed Irungu of his car. It is a presumption of fact which courts often refer to as the doctrine of possession of recently stolen property”.

The decisions we have reproduced above aptly apply herein.

On our own re-evaluation of the evidence as a whole, we have come to the inevitable conclusion that the 1st appellant was convicted upon sound evidence based on recent possession of the property of PW1 and PW2.

For all these reasons, we find no merit in his appeal and the same is dismissed.

ORDER:

1st Appellant - David Lagat Kipkoech - Appeal dismissed.

2nd Appellant - Simon Kibet Korir - Appeal allowed.

3rd Appellant - Julius Terer Ngeny - Appeal allowed.

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