REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL 83 OF 2009

WINSOR SOGERO CHESORI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Bungoma (Sergon & Kariuki, JJ)

dated 25th May, 2005

In

H.C.Cr. A. No. 203 of 1997

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JUDGMENT OF THE COURT

The appellant **WINSOR SEGERO CHESORI** was the 1st accused in Criminal Case No. 62 of 1997 before the Senior Principal Magistrate's Court at Bungoma. He was jointly charged with three other persons on two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, one count of assault causing actual bodily harm contrary to ***section 251*** of the Penal Code, one count of malicious damage to property contrary to ***section 339 (1)*** of the Penal Code, one count of having suspected stolen property contrary to ***section 323*** of the Penal Code and lastly two counts under the Firearm Act in that they were in possession of AK 47 firearm and six rounds of ammunition.

The prosecution relied on the following facts.

On 2nd January, 1997 at Kimabole Trading Centre in Mt. Elgon District, George Situma Sitati (PW1), David Sululi Mauka (PW2) and Wycliffe Barasa Masakari (PW3) were in a bar when robbers attacked the patrons at about 9.00 pm. Situma (PW1) who was a worker in the bar heard footsteps outside the bar and decided to check. He took a lamp to assist him in checking but the lamp was hit by a bullet and the lamp burst into flames and then went off. There was total darkness in the bar. Situma fell down as he heard people in the bar being forced to lie down. He regained consciousness after the robbers had left so that he never identified any of the robbers. Mauka (PW2), a primary school teacher was one of the patrons ordered to lie down. He testified that he was able to identify the appellant as one of the robbers through the torch light. This witness (PW2) later identified the appellant at an identification parade. Masakari (PW3) supported the evidence of the other two witnesses as regards the robbery but did not

identify any of the robbers. On the following morning at about 5.00 a.m. Sgt. Wawire (PW5) together with other police officers flashed out the appellant and his co-accused in the appellant's house. A search in the house resulted in the recovery of property belonging to Masakari (PW3) and Chebus (PW4) who had left his property to Masakari. Also recovered in the appellant's house was a firearm and six rounds of ammunition. In his defence the appellant stated that the police found him going to his shamba when they planted the stolen goods on him.

It was as a result of the foregoing that the trial Magistrate found the appellant guilty on the first two counts of robbery with violence and on the last two counts under the Firearms Act. In concluding his judgment delivered on 29th October, 1997 the learned trial Magistrate stated:-

"Only P.W.2 David Sululi Mauka identified one of the robbers. Only he was able to pick one suspect on the identification parade. He stated that he identified the first accused as the person who removed his shoes and took his watch. He identified him with the help of the light from the torch which the first accused had held in the armpit in order to be able to use both hands. It is the same first accused who was found with the other accused persons in a house which turned out to (sic) house the stolen items recovered soon after the robbery.

All those put together show that the first accused participated in the robbery. Those whose items were robbed identified them in court. The 1st accused defence does not hold any water. It would be a miracle that the police forced him to carry a hand bag which turned out to have the stolen or robbed items. According to the evidence of 2nd accused, the police went towards the direction of accused 1's house and came back with him together with the 2 handbags. Even though this is evidence of a co-accused, it selves (sic) to show that when the accused was arrested, it was not the police who had the handbags. The issue of planting them on him does not arise. Even though P.W.1 never identified him, he was found with the items that were stolen from the Bar.

The court is satisfied that he was in possession of the firearm and also the ammunition. He had the key to the kitchen where the gun and ammunition were found. He is found guilty of count 6 and 7. As pointed out earlier counts 3 & 4 cannot succeed. The accused person is acquitted under section 215 of Criminal Procedure Code. As for count 5, the prosecution seemed confused. There is no evidence to show that the accused persons were stopped, searched and detained. The 1st accused is acquitted under section 215 of Criminal Procedure Code.

The other accuseds are 2, 3 and 4 may have been found in the house of the first accused but there is nothing in the evidence to show that they were connected with the robberies. They could have been visitors. None of the robbery victims identified them. There is no evidence that they participated in the offence charged under count 5. Count 3 and 4 as pointed earlier must fail. There is no evidence that they were involved in the 6th and 7th count. The 2, 3 and 4 accused are acquitted under section 215 of all the counts facing them. First Accused found guilty on count 1, 2, 6 and 7 and convicted accordingly."

The learned trial Magistrate then proceeded to sentence the appellant as follows:-

"***COURT: 1st Accused is sentenced to death on count 1 & 2 as provided by law.***

Counts 6 - Sentenced to 7 years imprisonment

Counts 7 - Sentenced to 7 years imprisonment

SENTENCE on count 2, 6 and 7 to be held in abeyance."

Being aggrieved by the foregoing the appellant filed an appeal to the High Court and that appeal came up for consideration before Sergon and Kariuki, JJ.

The learned Judges of the superior court went over the evidence before the trial court and came to the conclusion that the appellant had been properly convicted on the evidence of identification and recent possession of stolen property. In their judgment delivered on 25th May, 2005 the learned Judges expressed themselves thus:-

"***In the present appeal, the robbery was on 2/1/97 at 9.00 p.m. The stolen items were found in the house of the Appellant on the morning of 3rd January, 1997. There was no time lag. It is reasonable to hold that the Appellant was one of the robbers who stole from the Bar on 2/1/97. This inference is reinforced by the evidence of PW2, David Sululi Mauka who said he saw the Appellant as the latter had robbed him of his wrist watch and shoes. We find on the basis of the doctrine of recent possession, that the appellant was the robber who stole the items in the charge sheet. He was properly found guilty and convicted. His appeal has no merit . We uphold the conviction and sentence by the trial court."***

Still dissatisfied with the foregoing the appellant now comes to this Court by way of second and final appeal. That being so only matters of law fall for consideration –see ***section 361*** of the Criminal Procedure Code. That is the appeal that came up for hearing before us on 22nd September, 2009 when the appellant was represented by Miss Linda Kosgei while Mr. J.K. Chirchir (Senior State Counsel) appeared for the State.

Miss Kosgei took issue with the language used during the trial in that the learned trial Magistrate did not indicate what language was used during the trial. She also took issue with the charge sheet in that there was no reference to weapons used. She then took issue with identification of the appellant, and, lastly, she addressed us on the fact that the evidence was not clear as to who among the four people was in actual possession of the stolen items, the firearm and the ammunition.

To counter the foregoing Mr. Chirchir submitted that the record shows that Swahili language was used and that the appellant cross-examined the witnesses. On the issue of the ingredients of the offence Mr. Chirchir pointed out that the robbers were more than one and that they had a gun which they used in ordering the patrons in the bar to lie down. It was Mr. Chirchir's submission that the appellant was properly identified during the robbery and soon thereafter found in possession of items stolen during the robbery.

On the issue of language we note that the trial court's record shows that the charge was read over and explained in Kiswahili. The appellant and his co-accused pleaded "*not guilty*" to all the counts. The trial was conducted in Kiswahili and the appellant cross-examined all the witnesses and finally defended himself in Kiswahili. In our view there is no basis for the appellant, through his counsel, to complain that he did not understand what went on in the proceedings. That ground of appeal is therefore rejected.

The charge sheet gave the particulars of the offence in that the appellant was with others and that they threatened to use personal violence. This was reflected in the evidence of the victims who testified how the robbers ordered the patrons to lie down. These orders were obeyed. Even before embarking on the actual stealing of items the robbers had shattered the lamp by hitting it with a bullet. The fact that the robbers were more than one and threatened to use actual violence on the victims was sufficient for purposes of definition of robbery with violence contrary to ***section 296 (2)*** of the Penal Code.

The issue of identification had to be considered together with the evidence of recent possession of the property stolen during the robbery. This was a case in which the robbery took place on 2nd January, 1997 at 9.00 p.m. and on the following morning the appellant is found in possession of the items stolen during the robbery. As correctly pointed out by the learned Judges of the superior court "*there was no time lag*."

There was submission by Miss Kosgei that the appellant was arrested on 3rd January, 1997 but taken to court on 24th March, 1997 . We are unable to understand that argument since the record of the trial court clearly shows that the appellant appeared before the Senior Principal Magistrate on 10th January, 1997.

The appellant having been arrested on 3rd January, 1997 it cannot be argued that his constitutional rights had been violated.

In view of the foregoing we are satisfied that the appellant was convicted on very sound evidence and that the sentence imposed on counts 1, 2, 6 and 7 are lawful. The learned trial Magistrate cannot be faulted in any way. Likewise the learned Judges of the superior court properly considered the matter in accordance with their mandate. They went over the evidence afresh and came to their own conclusions as per this Court's decision in **OKENO V. R. [1972] E.A. 32**. That being our view of the matter we find no merit in this appeal. We order that the same be and is hereby dismissed. Order accordingly.

Dated and delivered at ELDORET this 23rd day of October, 2009.

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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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.

DEPUTY REGISTRAR.