IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 324 & 329 of 2006

GEOFREY MUTUMA …….. 1ST APPELLANT

JOHN KIREMA ……. 2ND APPELLANT

AND

REPUBLIC …… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Sitati, JJ) dated 16th November, 2006

In

H.C. Cr. A. 198 & 207 of 2005)

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JUDGMENT OF THE COURT

The two appellants in this second and last appeal, Geoffrey Mutuma Tharimba and John Kirema Muthama, the first and second appellants respectively, were charged together with another person in the Principal Magistrate's court at Maua with two offences of robbery with violence contrary to *section 296 (2)* of the Penal Code and one alternative offence of handling stolen property contrary to *section 322 (2)* of the Penal Code. They pleaded not guilty to the two counts and to the alternative count. About two months after the plea was taken, the third person died while in custody. The case proceeded against the two appellants. After full hearing, the learned Acting Principal Magistrate found them not guilty on the first count of robbery with violence contrary to *section 296 (2)* of the Penal Code, acquitted them of that count under *section 215* of the penal Code. However, they were each found guilty on the second count of robbery with violence contrary to *section 296 (2)* of the Penal Code, convicted and sentenced to suffer death as by law established. Although the learned Acting Principal Magistrate did not express himself in the alternative charge of handling stolen property contrary to *section 322 (2)* of the Penal Code as he should have done, it nonetheless goes without saying, that as it was an alternative to count 2, once an adverse decision has been made on that count against the appellants, the alternative count automatically ceases to be available for any decision.

The appellants felt dissatisfied with the decision of the learned Principal Magistrate and moved to the superior court in Criminal Appeal No. 198 of 2005 at the High Court of Kenya at Meru. That appeal was in turn dismissed by the superior court and hence this appeal. The particulars of the charge in respect of which both appellants stand convicted reads as follows:-

"***On 7th May, 2004 at Akiriangondu Location Meru North District in the Eastern Province jointly with***

others not before court while armed with a rifle robbed Douglas Muriki, two Jack Plane (sic), one radio make Sunny, one clamp, one pliers, one panga, cash Kshs.8000/- and assorted shop goods all valued Kshs.16,700/- and at or immediately before or immediately after time of such robbery threatened to use actual violence to the said Douglas Muriithi."

Brief facts as relates to the evidence adduced in support of the above charge in respect of which both appellants were convicted may be stated as follows: On 8th May, 2004 at about 4.00 a.m. Douglas Muriki Kamathi (PW2) (Douglas) who had a kiosk at Tuku market was asleep in one room of his kiosk. His wife Grace Kairuthi (PW8) (Grace) together with children were sleeping in another room. The door to the kiosk was hit with stones and it opened. Two people entered , the kiosk. One of the intruders removed him from where he was sleeping and laid him on the floor. One man pointed a gun at him while the other removed merchandise from the kiosk. Once on the floor, the other person slept on Douglas and asked him for money. When Douglas responded by saying he had no money except silver coins, that man told him that he (that man) would kill him. Upon that, Douglas told him that he would show him where money was and on hearing that Douglas was released. He pointed to him where the money was in the other room where Grace was. As Douglas was pointing where the money was, the other man came with a torch and directed the torch light onto Douglas's hand so as to be sure of the direction Douglas was pointing. In doing so, the torch light beamed onto the other person who had a gun and Douglas immediately recognized that person as the second appellant whom he knew as Kirema and who was a fundi for power saw and used to pass by Douglas place where Douglas used to work as a carpenter. Douglas said in evidence that the said appellant was to his left when the torch light was flashed at him. The two thugs proceeded to Grace's room where they took Kshs.8000/- in a bag. They also took several shop goods namely, cigarettes, mini pack beers, batteries, a radio, a pair of pliers, two jack planes, a panga, and a clutch clamp. The two then went away having locked Douglas, Grace and children in the house from outside. Douglas screamed and neighbours opened for them. Douglas was taken to Laare police station by the neighbours. He reported the incident to the police and told the police that he recognized one of the attackers but he did not know where that person lives. He asked police for time to trace where the robber he recognized lives. On his way back he saw the second appellant. He called him and asked him to return to him his clutch clamp (Karambe) and the jack planes. The Second appellant denied having taken the same items and started to run away, but he was arrested by members of the public who had accompanied Douglas. They took second appellant to police station where he was received by P.C. Peter Ng'ang'a (PW6) (PC Peter). The second appellant was interrogated at the police station and he offered to take the police, and Douglas to where the stolen goods were. Douglas hired a vehicle and second appellant took them to a home where they found the first appellant together with another. First appellant and that other man James Mutua were arrested. Police searched the house referred to in evidence of Douglas and P.C. Peter as that of the first appellant, and they found clutch clamp (Karambe) , eight packets of cigarettes, a pair of batteries, sachets of mini packs, one plier, one radio, one panga, and a pair of shoes. In the shamba nearby a bag was found. The other goods were not recovered. The police arrested first appellant and James. Grace also gave evidence stating that she also recognized the second appellant as one of the thieves who was at her house but her evidence in that aspect was rejected by the trial court and in our view rightly so. On the same day early in the morning, Justus Mungathia (PW3) (Justus) was going home from his kiosk. He saw three people ahead of him. The people, on reaching the junction turned towards him. They knocked him down, threatened him with a gun, took his shoes, a hat and Kshs.4,000/-. He did not identify any of them but after a few days when he heard some people had been arrested, he went to police station, and found his shoes which were stolen had been recovered from those arrested. He identified the same shoes which were among the items recovered from the house to which the second appellant took the police and which was alleged to be the house of the first appellant. Jacob Meeme (PW4) (Jacob) was operating a canteen near that of Douglas. He heard screams that early morning from Douglas's canteen. He had a torch. He went towards the kiosk of Douglas. On the way, he met three people one of whom he identified through torch light as the second appellant. The second appellant told him to lie down but he ran away towards Douglas's kiosk. He met Douglas who told him he had been robbed, and that he (Douglas) had identified one of the robbers. He went with Douglas to Laare police station to report the attack and robbery. Jacob, together with Douglas met second appellant who, on seeing them started to run away. They ran after him and arrested him. They, together with other members of the public took the second appellant to police station. Thereafter, his evidence was a replica of evidence of Douglas up to the recovery of stolen items

which were made in his presence. He confirmed that second appellant took them to where the stolen goods were.

On being charged with the offences as we have stated above, and after prosecution case, the first appellant, in his short defence stated that on 8th May, 2004 at midday he left his home and started to go to his shamba at Nganda, (Whatever that means). He then went to a certain home to drink beer. As he was drinking together with other people, police officers came to that home, searched and found beer there. He was forced to carry a jerican. The police officer slapped him. He (first appellant) held policeman's jacket and it got torn. The policeman then told him he would be charged with a case from which he would never escape. He was taken to police station and charged with the offences as have been stated. The second appellant gave a sworn statement in his defence. He stated that he was working as a shoe cobbler at Laare market. On 8th May, 2004, he left home to go to work at 7.00 a.m. At the market he met a vehicle and he was arrested. He was taken to police station and was locked up for three days. On 17th April, 2004 (?) he was taken to Maua police station. Douglas was in the vehicle when he was arrested. He had fought with Douglas previously. He knew him. As a result of the fighting he asked Douglas to pay him Kshs.3000/- damages which Douglas had not paid. We understand him to say that Douglas implicated him in the robbery complaint as a result of grudges between the two of them. He denied having taken police to where the goods were recovered.

The above were the facts that were before the subordinate court and the superior court. In convicting the appellants the subordinate court had the following to say inter alia:-

"***I am convinced that Douglas saw the 2nd accused during the robbery by aid of the torch light when a colleague flashed a torch on him. It is Douglas himself who arrested the 2nd accused on the following day after the robbery. I am thereby satisfied that he had recognized him.***

It is the 2nd accused who led the witnesses to the house of the first accused where the complainant's stolen clutch clamp and a panga were recovered. I have no doubt that the said items belonged to the complainant (Douglas). He identified them to the satisfaction of the court.

The 1st accused was found with the stolen items on the following morning after the theft. He was therefore in possession of recently stolen goods. The inevitable conclusion the absence (sic) of an explanation, is that he was the thief. The prosecution has proved beyond all reasonable doubts that the two accused were in the gang that robbed Douglas Muriki. They were armed with gun and threatened to use actual violence on the said complainant. The charge of robbery with violence has been proved in count 2. The accused are found guilty as charged in count 2 and they are convicted under section 215 of Criminal Procedure Code.."

As we have stated, the appellants appealed against that decision to the superior court. The superior court , analysed the evidence afresh and evaluated it as is required of it in law – see the case of ***Okeno vs. Republic [1972] EA*** **32** and **Achira vs. Republic [2003] KLR 707** at page 710. Having done so, it dismissed the appeal stating in conclusion:-

"***We have said enough, we think, for us to now conclude by saying that the positive recognition of the 2nd appellant at the scene in favourable circumstances by PW2 and PW4 as well as PW8 coupled with the application of the doctrine of recent possession as we have applied above would leave no doubt in our minds that the appellants were the ones who robbed PW2. The conviction on count 2 in the charge sheet and the sentence of death imposed by the trial court cannot in the circumstances be interfered with.***

22. The Appeal is hereby found to be lacking any merit and is dismissed."

Before us, the appellants through their learned counsel, Mr. Muhoho Gichimu, have raised two main points being a summary of their home-made grounds of appeal filed by each of the two appellants. These points are that as to the first appellant, none identified him and his conviction was based on the

doctrine of recent possession of stolen items which doctrine was not properly applied as there was no proper evidence led as to the ownership and exclusive control of the house in which the alleged stolen items were recovered. As to the second appellant, the complaint was that the evidence of his identification which was by recognition partly was not strong enough to sustain a conviction, and as to the recent possession of the alleged stolen properties, he was beaten and did not offer to show the witnesses where the stolen properties were voluntarily. On his part, Mr. Orinda, the learned Senior Principal State Counsel, conceded that the conviction of the first appellant, having been based on the evidence of recovery offered by the second appellant who was a co-accused was evidence of the weakest kind. He submitted that the conviction of the first appellant was "*tricky*". We understood that to mean that conviction of first appellant was, according to Mr. Orinda, based on non cogent evidence and was therefore not based on proper legal principles. As to the second appellant, he was of the view that conviction was based on firm grounds as he was properly identified and he showed the witnesses where stolen goods were and the same were recovered as directed by him, meaning he knew where stolen goods were.

We have anxiously considered all the above. The second appellant was recognized at the scene by Douglas who in fact knew him and readily gave the police his name within very short time after the incident. That was evidence of identification or recognition by a single witness and caution was still required to act on such evidence – see the case of **Abdalla Bin Wendo & another vs. R [1953] 20 EACA 166**. However, soon after Douglas was attacked and robbed of his goods by three people, one of whom he recognized as the appellant; Jacob who heard screams from the canteen of Douglas and responded to the screams by walking towards Douglas's canteen with a torch met the said appellant together with two others. That was few minutes after the robbery occurred and the second appellant and his colleagues were escaping from the scene of robbery. The second appellant did not spare Jacob. He told him to lie down but Jacob ran away and later went to the canteen of Douglas. That was in the night of the same robbery. That in effect put the second appellant at the scene and clearly displaced his defence ***alibi***. If that was not enough on identification and on recognition, when apprehended by members of the public and taken to police station, the second appellant offered to and did take the police together with Douglas and Jacob to where the stolen goods were. That place was at a house which allegedly belonged to the first appellant. On reaching that place, first appellant, together with another called James Mutua together with whom the appellants were originally charged were outside the house taking tea, according to P.C. Peter and on searching the house, some of the items stolen that previous night were successfully recovered, in confirmation of the second appellant's direction as to where the stolen items were. Most of the items belonged to Douglas and he immediately identified them. One of the items recovered was clutch clamp, an item that was for carpentry and Douglas was a carpenter, the other item recovered of importance was a pair of shoes. The recovery of that item is important in that that pair of shoes was at the hearing identified by Justus Mungathia (PW3) to be his shoes. Those shoes were stolen from Justus together with Kshs.4000/- by people he did not know. That the shoes were recovered among the items which were found in or near the house pointed out by the second appellant clearly confirmed that the second appellant was one of the thieves. Under the doctrine of recent possession of stolen goods, second appellant was constructively either the receiver of the goods recovered at the house to which he directed the police or he was the thief - See the case of **Odhiambo vs. Republic [2002] 1 KLR 241** . As there was no explanation as to how he came to know where the goods were and therefore how he came to be a constructive receiver of the same goods, the presumption that he is the thief was properly made by the trial court and the superior court

- See the case of **Andrea Obonyo & others vs. R [1962] EA 542**. Thus on the recognition and identification of the second appellant and his being in recent constructive possession of the goods that were stolen that very night and his successfully leading the police to where the same goods were, we have no doubt in our minds that the trial court and the superior court arrived at a proper and the only inevitable conclusion that the second appellant was one of the robbers that attacked and robbed Douglas of his properties that night and used threats in carrying out the same robbery. We have no reasons to disturb their decision and the second appellant's appeal cannot stand.

As to the first appellant, no evidence of identification or recognition was adduced against him by either Douglas or his wife Grace. Neither did other witnesses give positive evidence of his presence at the

scene of robbery that fateful night. The main evidence that connected him to the second count was that of the second appellant coupled with discovery of the allegedly stolen items at a house alleged to be his house. That evidence, we note does not emanate from the second appellant directly. In fact in his defence, the second appellant, as we have stated, maintained he was not at the scene of robbery. However, evidence of Douglas and P.C. Peter which were credible and were accepted was that the second appellant took them to where the goods were. Douglas stated:-

"***We took him to the police station . At the police station, he was interrogated. He was beaten. He said he will show us where the goods were. I hired a vehicle, he took us to the house of Mutuma the first accused in the dock. We found Mutuma with James. They were arrested.***

P.C. Peter said in his evidence as follows:-

"***We interrogated the 2nd accused. He offered to show us the members of his gang. He led us to Mariri village at the home of the 1st Accused Geoffrey Mutuma. We found Geoffrey Mutuma at his house with James Mutua (deceased). They were outside house taking tea. We arrested them. We searched the house of Geoffrey."***

Thus whereas the stolen items were indeed found in that house alleged by police and Douglas to be that which second appellant told them belonged to first appellant, there is no any other evidence that the first appellant was indeed the owner of that house where stolen items were found. He, in his defence, denied it stating that he was arrested at a changaa den and not at his house. It is noteworthy that Douglas, in cross examination by the first appellant stated:-

"***I do not know you. Kirema said that he had stolen the goods with you."***

In short, Douglas did not know the first appellant and by extension did not know his house for certain. He relied on what second appellant said. Further, we may ask, had the first appellant exclusive control of the house where the goods were found? P.C. Peter says:-

"***There were other goods in the house a part from the exhibits. There were people at the house. We arrested your wife for possession of changaa."***

Thus, the answer to that question as to whether the first appellant had exclusive control of the house must be in the negative. Indeed his wife, it would appear had changaa in that house. Again, one is not clear as to what role the late James Mutua who was found with the first appellant at home taking tea was to play in the entire saga. If the first appellant was the sole exclusive owner of the relevant house then why was James Mutua also arrested? Could he, have been arrested in an attempt by police to spread their net wide as a result of doubt as to who was the owner of that house? There was no evidence that the first appellant was found in that house. He was found taking tea outside the house. There was no evidence, for example, that he had key to that house. All there was, was evidence of Douglas and P.C. Peter as to what second appellant said and did. In law, the second appellant was a co-accused. Whatever he said that led to discovery was admissible but what he said as to who was with him at the time of the robbery could not be admissible the same having been given to P.C. Peter, a police officer below the rank of Inspector. In any case, even the admissible part of his evidence was evidence of the weakest kind that required other evidence in order that the court could act on it . In the case of **Anyangu & others vs. R [1968] EA 239** at page 240 , the predecessor to this Court stated:-

"***A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused it may, in a joint trial be "****taken into consideration"* ***against that co-accused. It is, however not only accomplice evidence but evidence of the "weakest kind" (Anyuna s/o Omolo and another vs. R [1953] , 20 EACA 218); and can only be used as lending assurance to other evidence against the co-accused (Gopa s/o Gidamebanya & others v. R (1953), 20 EACA 318)."***

In law, the evidence of the said appellant, even if we were to accept that he said the first appellant was

part of the gang that robbed Douglas, could wrongly be used to lend assurance to other evidence but could not on its own be relied on for conviction. What other evidence was there? None, as the allegation that the home or house where goods were recovered belonged to the first appellant could not stand in view of what we have stated. That being the case, we are not convinced that the conviction of the first appellant was based on proper evidence in law. We feel the superior court and the trial court would have reached a different conclusions in view of the above.

In conclusion, the first appellant's appeal succeeds. His appeal is allowed, conviction quashed and sentence of death set aside. He is released forthwith, unless otherwise lawfully held. The second appellant's appeal fails and is dismissed. Judgment accordingly.

Dated and delivered at Nyeri this 23rd day of May 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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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.