IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 256 OF 2002

DUNCAN MUHORO WACHIRA ....APPELLANT

AND

REPUBLIC ....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi

(Patel & Tuiyot, JJ.) dated 20th February, 2002

in

H.C.Cr.A. NO. 747 of 1999)

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JUDGMENT OF THE COURT

The appellant, *Duncan Muhoro Wachira,* with three others were charged in the Senior Principal Magistrate's Court at Kitale with the offence of robbery with violence contrary to *section 296(2)* of the Penal Code. The particulars of the charge were that on the 29th day of May 1998 at 10.00 p.m. at Kanamkemer Catholic Parish in Turkana District within the Rift Valley Province jointly with others not before the court armed with dangerous weapons namely an AK-47 Rifle, a pistol and a knife, robbed Fr. Desmond Miller of one motor vehicle, Toyota Hillux registration number KAJ 980B, two radios make Philips and Sanyo, one wall clock, one cash box, two sheets, one red bucket, two wrist watches, 6 Kgs of sugar, 12 Kgs of rice, two sufurias all valued at Kshs.600,000/= plus cash money Kshs.2,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said *Fr. Desmond Miller*.

In the alternative the appellant was charged with handling stolen goods contrary to ***section 322(2)*** of the Penal Code. The particulars of that charge were that "***on the 11th day of June 1998 at California Market in Turkana District within the Rift Valley Province otherwise than in the cause of stealing dishonestly received or retained one cash box knowing or having reason to believe it to be a stolen good***" (sic).

The acting Principal Magistrate (Mrs. O. A. Sewe) who heard this case delivered her judgment on 9th July 1999 in which she convicted the appellant on the main count of robbery with violence contrary to ***section 296(2)*** of the Penal Code and sentenced him "***to suffer death in the manner authorized by law."***

The appellant was not satisfied with this conviction and the sentence and he appealed to the superior

court but that appeal was dismissed by V.V. Patel and W. K. Tuiyot JJ, (*both now deceased*). He now comes to this Court on his second and last appeal and as such the appeal must be confined to points of law as expressly provided by ***section 361(1)*** of the Criminal Procedure Code. This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by the two courts below unless they were based on no evidence or a misapprehension of the evidence or the trial Judge is shown demonstrably to have acted on wrong principles in reaching the decision – ***Chemagong v. Republic* [1984] KLR 611** and ***Kiarie v. Republic* [1964] KLR 739**.

The test to be applied is whether there is any evidence on which the trial court found as it did – ***Reuben Karani s/o Karani v. Republic* [1950] 17 EACA 146.** And in ***M'Riungu v. Republic* [1983] KLR 455** the court held:-

"Where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v. Glyneed Distributors Limited (T/A MBS Fastenings – The Times of March 30, 1983)".

In what the appellant calls supplementary grounds of appeal, though there is no indication on record that he had filed any earlier grounds of appeal, he listed four grounds of appeal. They all question proof of his guilt on the case.

Appellant's Counsel (***Mr. Njoroge***) said nothing about these grounds but filed further supplementary grounds of appeal which also listed four grounds of appeal namely:-

1. The learned Judges erred in law in upholding the judgment and conviction of the appellant basing their decision on the doctrine of recent possession even though the same was inapplicable.

2. The first appellate court erred in law in failing to evaluate afresh the entire evidence in the case and failing to note that the complainant was not the owner of the recovered cashbox.

3. The first appellate court failed to appreciate that the appellant's rights under *section 77* ***of the constitution were violated and that the subsequent trial was therefore a nullity.***

4. The first appellate court erred in law in upholding the judgment of the trial court and the conviction of the appellant despite the fact that the case was not proved beyond reasonable doubt.

We shall turn to these grounds of appeal shortly. But what were the facts of the case narrated and accepted by the two courts below? On the day and time in question Fr. Desmond Amos Miller – herein the complainant, was at the Parish playing cards with Sr. Martha Kavutha (PW3) and Sr. Philomena Koki (PW4). PW3 left to prepare some tea but when she brought it she found someone pointing a gun at the complainant from behind and she ran away to alert Fr. Patrick Wamukoya (PW5).

The complainant noticed this and when he looked behind he saw three people, one was pointing a pistol to his head and two others holding rifles. He was forced to lie down and ordered to produce money. He gave out his wallet in which there was Kshs.200/=.

One of the robbers frisked the complainant's pockets and removed car keys of his motor vehicle Toyota Hillux Registration number KAJ 980B which the robbers later drove away.

In the meantime, two other robbers had ordered Sr. Teresia Wangari (PW2) to lead them to the house of the Sister in-charge and she led them to the convent which they ransacked and took away a cash box, two radios a wall clock and some foodstuffs. They joined their colleagues in the complainant's motor vehicle which was driven off. Amongst the witnesses in the case was the complainant himself who said he lost his motor vehicle, keys to it, a wrist watch and a jack.

PW2 was just a visitor to the Parish from Kakuma and had gone to sleep when the robbery took place but was woken up by the screams. When she went out to check, she met three people who ordered her to take some of them to the house of the Sister in-charge where they stole the items we have enumerated above.

PW3 testified and enumerated items stolen from her room and the kitchen. They included radios, a wall clock, the cash box, some money amounting to about Kshs.200/=, a table clock and foodstuffs. She stated that the cash box was hers and was removed from her room.

The evidence of PW4 was that she saw when PW3 looked surprised as she approached the complainant with the tea. When she looked round to see why PW3 looked surprised, she saw a man with a gun and she ran towards the Father's residence screaming. She reported the incident to PW5.

PW5 was one of the Father's at the Parish and was also attacked by the robbers and robbed of Kshs.120/= and a wrist watch when he went out to investigate why PW3 and PW4 were running away and/or screaming. None of these witnesses was able to identify any of their attackers as they were said to have masks on their faces.

Mary Lokuye Lopili (PW6) William Kama Lopili (PW7) and Francis Ebongon Ekal (PW9) testified about an attack at their homes on the same day at 9.00 p.m. or midnight where they alleged to have seen and identified/recognized the first accused in the Principal Magistrate's Court; who is not a party to this appeal.

No. 47324 Sgt. Richard Maube (PW10) testified how Pc. Magunga asked him to accompany him to Lodwar District Hospital where a robbery suspect was to be arrested.

While at the hospital the appellant was shown to them. They introduced themselves and then arrested him. According to the evidence of this witness, the appellant led the two to California Estate into an almost empty room where they found a cashbox which they collected and took to Lodwar Police C.I.D. Headquarters, together with the appellant, for further investigations. It was later found that the cash box had been stolen from Kanamkemer Catholic Parish. The appellant was charged with the offences as herein before stated.

The appellant denied these offences in his unsworn statement which he made on 21st June 1999. In it he said that on 10th June 1998 he left Lokichoggio to escort his colleague, John Ndungu, who was very sick, to Lodwar District Hospital where he was admitted.

Then on 12th June 1998 he went back to the hospital to check on the condition of Ndungu but before he checked on the patient, he was arrested by C.I.D. officers and taken to Lodwar Police Station.

He testified further that at the station he was searched and Kshs.7,800/= which he had on him was taken away as well as his identity card and a driving licence and then he was placed in police cells where he remained until 7th July 1998 when he was taken back to the C.I.D. Office where he found the complainant. The complainant denied knowing the appellant.

He said that he believed the aim of the officers who arrested him was to keep the money they found on him because they had trailed him from Nature Phase 1.

In respect of the cash box he said that it was not found with him but from a deserted house at California.

On that evidence, the trial Magistrate had this to say:-

"***As for accused 3, there's the issue of the cash box. He on his part denied having been found with it. As such the prosecution contention that that cash box (P Exh.1) belongs to Sr. Martha (PW3) and that it comprised the items the robbers took from Kanamkemer Parish is uncontroverted. It was duly***

identified by PW2 – PW4. It was recovered according to PW10 on 10.6.98 (or 11.6.98) according to the charge sheet). This was within 2 weeks of the robbery and as such it is reasonable to conclude that the person found with it was one of the people who committed the Kanamkemer Convent robbery. Although accused 3 denied having been found with it the evidence of PW10 is clear on this and is one that is believable. .....

... I considered his defence very painstakingly and I find that it is not credible in the circumstances and so I instead accept and go by the prosecution contention that he voluntarily led the policemen to his place of residence where the cash box was found in a sack. I therefore have no doubt that that fact proves beyond reasonable doubt that accused 3 was among the people who attacked and robbed Fr. Desmond Miller at Kanamkemer Catholic Diocese on 29.5.98. He is found guilty and is convicted of count I (main) as charged."

The Magistrate then proceeded to sentence him as already stated herein before.

The appellant was not satisfied with this decision and filed an appeal to the superior court where, as a first appellate court, V.V. Patel and W. K. Tuiyot JJ, after evaluating the evidence afresh, had this to say in concluding their judgment:-

"Upon reading the appellant's written submissions as well as the petition of appeal and upon hearing the learned State counsel Mr. Monda's submissions we found no (sic) a fact that the appellant led police officer to his house on the 10th June 1998 where upon search a cash box was recovered. According to the proceedings there was nobody else in the appellant's house when police officers were taken there by the appellant. According to lower court proceedings the robber were wearing masks and was difficult for the complaints to identify them. It is our believe (sic) that the appellant in this appeal on the (sic) robbers who committed robbery at Lodwar Catholic Mission on 29th May 1998 at about 10.30 p.m. while armed with dangerous weapons, a pistol and rifles. We also found that the robbery took place on the 29th May 1998 and the cash box was recovered on the 11th June 1998 from the appellant's house and for this a doctrine of recent possession is applicable. The prosecution witness proved at the lower court trial that appellant jointly with others robbed the complainant of the items stated in the police charge sheet. We do not believe with the submissions of the appellant that he did not commit the offence as the prosecution established at lower court trial that he did so jointly with others. We have read the lower court proceedings as well as the judgment of the learned Magistrate. We found that the trial Magistrate addressed the issues regarding the law and facts and arrived at the right decision in convicting the appellant with the offence of robbery with violence as charged by the police.

For the above stated reasons, we hereby dismiss the appellant's appeal in conviction and sentence. We confirm the conviction and sentence imposed on the appellant by learned trial Magistrate."

We now revert to the legal issues raised before us by counsel for the appellant. When the complainant testified in the lower court and, contrary to what was said about all the items enumerated in the charge sheet, he stated that he was only robbed of Kshs.200/=, car keys and the motor vehicle. When this motor vehicle was recovered, the complainant discovered its jack was also gone.

The other items the robbers took away, including the cash box, radios, wall clock, wrist watches, table cloth, some other money and foodstuffs were taken or removed from PW 5, the Sister's rooms and the kitchen. Of these, PW3 claimed the cash box to be hers. She was not one of the complainants in the charge sheet.

Neither the complainant, PW2 to PW5 identified any of their attackers as they were masked. The complainant did not even refer to the cash box in his evidence.

Given that the owner of the cash box was one of the witnesses and not the complainant, we feel it was an error on the part of the trial magistrate to enter a conviction against the appellant on the main charge on the basis that the complainant was its special owner. We do not even find evidence that all the other

items which were the subject of the charge against the appellant and the three other accused were found in the cash box as the trial magistrate found.

If the superior court had correctly re-evaluated the evidence adduced before the trial magistrate, we think, it would have come to a different conclusion. See ***Okeno v. Republic* [1972] E.A. 32** and ***Ngui v. Republic* [1984] KLR 739**.

In our view the main reason why the trial magistrate convicted the appellant on the main charge was because, in her view, the finding of the cash box in the house presumed to be that of the appellant proved beyond reasonable doubt that he was among the people who had attacked and robbed Fr. Desmond Miller at Kanamkemer Catholic Parish on 29.5.98.

Even when the learned trial magistrate referred to possession of the cash box by the appellant she was of the view that this was one of the factors to prove ***"that he was indeed one of the people who robbed Fr. Miller."***

We note that the appellant denied before the trial magistrate that the cash box was found in his house and he maintained this defence in the superior court. He also questioned why the investigating officer, one Pc. John Magunga, was not called to give the trial court the grounds which led him to suspect the appellant as one of the robbers in this case.

And when learned State Counsel Mr. Monda, submitted before the superior court he supported the conviction of the appellant on the evidence though he said it was circumstantial. He also showed concern why Pc. John or any other officer who investigated the case was not called to testify.

In the circumstances, we are of the view that the question of recent possession which culminated in the conviction of the appellant on the main charge of robbery with violence cannot be converted by this Court to that of handling stolen property as urged before us by learned State Counsel, Mr. Kaigai, since we feel it is an afterthought on his realization that the evidence adduced before the trial court did not prove the main charge framed against him beyond any reasonable doubt.

And since the appellant maintained throughout that the cash box was not found in his house, and without evidence to show that he knew or had reason to suspect the same to have been stolen, he had no duty or burden to explain his possession of it as required under ***section 111*** of the Evidence Act.

We allow this appeal, quash the appellant's conviction and set aside the sentence of death. We now order his release from prison custody forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 16th 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

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR