REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CRIMINAL APPEAL 211 OF 2006

WILLIAM OKUNGU KITINYA …….…… APPELLANT

AND

REPUBLIC ……..…..……..…….…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Warsame,

JJ.) dated 6th July, 2004

in

H.C.CR.A. NO. 205 & 206 OF 2004)

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JUDGMENT OF THE COURT

This is a second and last appeal arising from the conviction and sentence of death awarded by the Principal Magistrate at Kisumu (K. L. Kiarie) in the Chief Magistrate's Court at Kisumu *Criminal Case No. 181 of 2004*. The appellant *William Okungo Kitinya* (appellant in this judgment) was the fourth accused in the trial court. He was, together with three others charged with four counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. We may state here for what it is worth that the record shows that earlier all the four of them, together with one Beatrice Awuor Ogendo had been charged with the same four robbery counts and Beatrice was further charged with alternative count of handling stolen goods contrary to ***section 322 (2)*** of the Penal Code, but a retrial was ordered in the matter. Further, just to wrap up the history of the case, we also note that the retrial started before Senior Resident Magistrate (W. B. Mokaya), on 13th April 2004. Beatrice Awuor Ogendo was no longer one of the accused persons on the retrial. After she heard the first prosecution witness, one of the three accused persons applied apparently on his own behalf and on behalf of the other accused persons for the case to be started de novo before another Magistrate. No reasons were availed for that application and no definite order was given in response to the application but the matter preceded a fresh before Mr. Kiare, the Principal Magistrate. After full hearing, the appellant and another were found guilty and convicted on count four which was that of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. They were acquitted of the first three counts. The other two accused were acquitted of all the four counts and were released. The particulars of the count in respect of which the appellant together with another were found guilty, convicted and sentenced to death by the trial court read as follows:

"***On the 30th day of December 2001 at Arena Estate in Kisumu District of the Nyanza Province, jointly while armed with an offensive weapon namely a home made pistol robbed Norah Adhiambo Magak of***

a 20' coloured TV make DAEWOO, a video deck make siemens, two compact disco, one air-fan, a remote control devise valued at Kshs.90,000/= and at or immediately, before or immediately after time of such robbery used actual violence on the said Norah Adhiambo Magak (sic)".

In convicting the two, the learned Principal Magistrate had this to say:

"***From the evidence on record, I find that the prosecution has failed to establish a case against accused 1 and accused 2 in all the four counts. I acquit each one of them under section 215 PCP.***

The prosecution has however proved its case against accused 3 and accused 4 in respect of count four. I find each one of them guilty and accordingly convict them. The 1st, 2nd and 3rd counts were not proved against them and I accordingly acquit each of them thereof under Section 215 PCP".

Both appellants felt dissatisfied with that decision and moved to the superior court on appeal. That appeal was heard by Mwera and Warsame, JJ. who after full hearing allowed the appeal by the appellant's colleague but upheld the appellant's conviction and sentence. In dismissing the appellant's appeal the learned judges stated, *inter alia*, as follows:

"***Having carefully reviewed the whole evidence on record, we are amply satisfied that the evidence adduced against the appellant is overwhelming to sustain his conviction. We have accordingly no hesitation in finding that the possession of the stolen items was so recent as to involve the doctrine of recent possession so as to raise a presumption, in the absence of credible explanation that the appellant was among the robbers.***

On our part, we have come to the inevitable conclusion that there is sufficient and adequate material to prove that the appellant was involved in the robberies which occurred on 30th December 2001. He was arrested shortly after police received a report from PW1 and PW3. And upon arrest he led police officers to a house where the stolen items were kept. These were goods stolen from PW3 and PW4. The police came in to answer the distress calls about the various robberies which occurred within Kondele area. That sort of facts is incompatible with the innocence of the appellant. The exhibits received were incriminating him and it is him who knew the geographical location of the stolen items. We think he was properly convicted therefore we decline to disturb this conviction.

The appeal of the second appellant is dismissed."

The appellant is still dissatisfied and hence this appeal before us premised on four grounds which were preferred in the supplementary memorandum of appeal filed on behalf of the appellant by his learned counsel Mr. Njuguna Maina and upon which the same counsel relied in his submission before us. Those grounds were that:

"***1. The learned trial Magistrate erred in law in convicting the appellant despite the prosecution having not proved its case beyond reasonable doubt.***

2. the learned Magistrate misdirected herself when he stated in his judgment that the 4th accused was identified by PW4,

3. The superior court Judges erred in law in upholding the judgment against the 4th accused before warning themselves on the safety of relying on identification evidence especially at night in view of contradicting evidence tendered by the prosecution.

4. The learned judge of the superior court erred in law in not appreciating the legal effect of non-appearance to testify by the investigating officer".

Before us, Mr. Maina submitted that the appellant was convicted notwithstanding that Augustine Ngige Kamau (PW4) one of the complainants did not identify him; that the woman in whose house the goods

were recovered should have been charged as well; that the taxi driver in whose taxi the appellant and others were intercepted should have been charged; that Norah Adhiambo (PW3) did not mention the appellant; that the appellant's alibi defence was not considered; that there was no evidence connecting the appellant to the toy gun produced in court and that all these were not properly analysed by the superior court, for had it analysed the whole evidence properly, it would have found that the evidence could have only led to a conviction for handling stolen property rather than robbery with violence contrary to ***section 296(2)*** of the Penal Code. In a short submission in reply, Mr. Musau, the learned Senior Principal State Counsel maintained that the appellant was convicted mainly on the evidence of PC. John Loshkwe (PW5) and that of Cpl. Wilson Muita which was to the effect that the appellant led them to where the stolen property was recovered together with evidence of PW1 which was that the appellant was one of the occupants of a vehicle which was ferrying thieves and other stolen goods and which was intercepted by PW5 and PW6 on the night of robbery on Norah Adhiambo Magak (PW3). The appellant never explained his possession of the goods forcefully stolen from Norah Adhiambo Magak, that same night by more than one person. He stated further that the woman in whose house goods were recovered Beatrice Awuor was charged with the offences according to the records. Mr. Musau concluded his submissions by stating that the appellant was convicted on sound evidence.

We will address ourselves to the above, but first brief facts.

It would appear that on the night of 30th December 2001, thieves raided Kondele Trading Centre and Arina Estate of Kisumu town. We take judicial notice of the fact that these places are not far apart. Two complainants in particular gave evidence and in law, we are duty bound to ignore the other allegations of robbery which were not supported by evidence and/or in reference of which the appellants were acquitted. Augustine Ngige Kamau (PW4) was the son of David Kamau Kariuki (PW1). He was a student at Moi University but on 30th December 2001, he was at his father's business place, Lucy General Stores where he was helping his father selling beer. He retired to bed at about 6.00 p.m. At 1.00 a.m. he heard some noises outside and he heard a knock at the door which he refused to open. The door was broken and three people entered the shop brandishing a gun. He was beaten and then taken outside to a stationary lorry belonging to his father. The lorry was broken into and a safe inside broken and money taken from that safe. After taking the money the attackers took off. However, on going back, Ngige was told by one, Stephen Kimeli and the watchman that they too were beaten by the people and the same people took a mattress, some ranger and trophy tee shirts from the reception. Ngige's shs.1,000/= and Identity card were also taken. He telephoned his father who rushed to the shop within 30 minutes. Ngige claimed that he identified one person among the thieves and that was the appellant. It is worthy of note that the appellant did not cross-examine this witness. Be that as it may, Ngige's father, David Kamau, after receiving the report of robbery on his son, said in his evidence that he reported the incident to Kondele Police Station and was accompanied in his car by two police officers one of whom was Pc. John Loshkwe (PW5). They visited the shop which was the scene of robbery on Ngige, and took down the report of robbery from Ngige. Then they left in David Kamau's car on their way back to Kondele Police Station to drop the police officers. As they were going back, they saw a motor vehicle - saloon coming from Kondele side. David Kamau looked at the back of the vehicle and saw a trophy cap at the rear of the motor vehicle. They followed the vehicle. David Kamau, flashed for the vehicle to stop but it sped away and Kamau's vehicle gave chase, they overtook that vehicle and blocked it. The police officers ordered the driver of that vehicle to stop. They stopped and the occupants were ordered out of the vehicle and ordered to lie down. PC. Loshkwe called for reinforcement and Cpl. Wilson Muita (PW6) of flying squad Unit Kisumu who was a police officer on patrol duties with Kisumu Unit, PC. Obura and PC. Nzioka who had received information from 999 control room went to reinforce PC. Loshkwe and his foot patrol team. The police then searched the vehicle and recovered a trophy cap and black ranger. The police took the suspects to Kondele Police Station. On interrogation, the appellant led the police to a house in Manyatta where the police recovered nine black ranger T-shirts, about seven trophy T-shirts, black ranger and trophy caps. They also recovered a T.V. set, a mobile charger and other items. That same night at about 2.00 a.m. Norah Adhiambo Magak was in her house. She heard footsteps at her door. She put on light and enquired who were the people. They said they were police officers and asked her to open the door for them. She refused to open and she started to scream. The attackers kicked the door. It fell down. Six people entered her house. Those people had a sword and a pistol. They took Kshs.200/= from Norah. They also took a suit case, a fan, a Daewoo T.V. set, a remote control, Panasonic video deck, top sonic

radio and two speakers, two mobile chargers, two CDs, black cap and siemen's mobile phone. She informed her daughter who in turn informed the police. Later she went to the police station where she found and identified her Daewoo TV set, Panasonic video, remote control, a suit case, a fan, a top sonic, siemens mobile, two CDs and two mobile chargers. Her son's cap was also recovered. She stated that at the first hearing all these items were produced in court and were returned to her. She disposed of some of them but she produced in court at the retrial the items that she retained.

The appellant in his sworn defence stated that on 29th December, 2001, he was in Kisumu for shopping. He went to Highway Bar near Kondele Police Station for drinks. He took alcohol till 1.00 a.m. when he decided to go to bed at Entebbe Hotel nearby. As he was walking to his Hotel to sleep he met two police officers who were dog handlers. Those police officers were not satisfied with his answers to questions on his identity and so arrested him and took him to Kondele Police station. On 30th December, 2001, he was taken to Central Police station and on 8th January, 2002, he was charged together with other people whom he did not know. He was not found in any motor vehicle. In cross – examination, he said, he did not do any shopping and he felt he was implicated by police because he answered them rudely.

The above are the salient facts of the matter before us. We say of the matter before us because as we have said, there were other offences of which none was convicted and the facts relating to those other offences are not relevant in this appeal.

This is a second appeal, as we have stated above. In law, all we need to consider at this stage are matters of law and not matters of fact unless it is demonstrated to us that the trial court or the first appellate court in its fresh analysis of the case failed to consider certain facts; that such failure resulted in injustice to the appellant in which case such a failure would cease to be a matter of fact but would be treated as a matter of law.

It is clear to us, that the two courts below did not base the conviction of the appellant on any alleged visual identification of the appellant by any witness at the scene of either robbery upon Ngige or robbery upon Norah. The conviction was based upon the fact that Norah was robbed of her properties at about 2.00 a.m. of the night of 30th December, 2001/31st December, 2001; that her properties taken by the thieves who were more than one, included Daewoo TV set, Panasonic video, remote control, suit case, a fan, a top sonic, siemens mobile, 2 CDs and mobile chargers; that at the time of such robbery her door was broken, she was beaten and threatened with a pistol which was pointed at her head and was warned that she would be killed if she made noise; that on same night she was robbed, Ngige had been robbed earlier and Ngige's father had alerted the police; that as the police and Ngige's father were returning to the police station after visiting the scene of robbery of Ngige's property (which were held by Ngige as special owner, for his father who was the actual owner), they spotted a vehicle approaching from Kondele area; that that vehicle was intercepted and stopped; that the police officers PC. Loshkwe, Cpl. Wilson Muita and David Kamau, all said in evidence that the appellant was one of the occupants of that vehicle and that on interrogation he led them to a house where Norah's goods robbed from her about one hour before were found. He was thus convicted on grounds, as stated by the superior court, clearly that he knew where or had recent possession of goods recently stolen and so he was either the thief or a handler. In order for him to be treated as an honest handler, he needed to give explanation as to how he came by them. Thus, the argument by Mr. Maina that he was not visually identified by David Kamau or by Norah are in our considered view and with respect neither here nor there.

The law is now well settled and we need not belabour it, that a person found in possession of recently stolen item is presumed in the absence of any reasonable explanation, to be either the thief or the handler of the stolen item. In this case, the appellant was seen in a vehicle that carried other suspects and in which some stolen goods were found by David Kamau, who said in evidence:

"***There were five occupants in the saloon motor vehicle we stopped. Accused 3 in the dock had a scar. The other occupants of the motor vehicle that I can be able to remember are accused 1, accused 3 and accused 4. I was far and I was not able to see exactly who was taken away by the police at Kondele police station".***

That evidence that David Kamau saw the appellant in the vehicle they intercepted that night and which had some stolen items belonging to Ngige was accepted by the trial court and superior court. PC. Loshkwe who arrested the appellant stated on that aspect, as follows:

"***Before we reached the station, we met a motor vehicle KLU 787 Daihatsu. We stopped it but the driver sped away. We chased them for about 100 metres and blocked their way. They stopped. It had six occupants. I ordered them out and ordered them to lie down. …… We took them to the station. We escorted them to the station. William Kitinya took us to the house in Manyata to the house of Beatrice Awuor where we found Beatrice. On searching the house, we recovered a 4x6 mattress, a TV set, a video deck, a radio, two speakers, a remote control, a blue suit case containing a mobile phone, two mobile chargers and two caps. We took the items to Kondele police station together with Beatrice".***

In cross-examination, PC. Loshkwe described the appellant as the person who was wearing grey kaunda suit. This evidence was also accepted by the trial court and first appellate court. Lastly, Cpl. William Muita who joined PC. Loshkwe as reinforcement team said:

"***We rushed there and found PC Loshkwe who was guarding motor vehicle KLU 787 and which had six occupants. He said they were robbery suspects and should be arrested. I ordered all to come out and lie down. …… We went back to Kondele police station. Kitinya led us to Manyata to another house where we recovered nine black ranger tee shirts, about seven trophy tee shirts, black ranger and trophy caps. We recovered a TV set, a mobile charger and other items I cannot remember. We escorted him to Kondele police station".***

There was thus overwhelming evidence to demonstrate that the appellant was in the motor vehicle KLU 787 that had six occupants and he was one of the occupants. The appellant's defence of alibi was clearly, in our mind, ousted as there was enough evidence adduced by the prosecution to show that he was in the vehicle. The vehicle was moving within Kondele area which is near Arina Estate that night. The evidence accepted by the court was that he led thee police officers that very night to a house where goods stolen that night were found. He had thus, special knowledge of how the goods came to be there. Under ***section111*** of the *Evidence Act*, Chapter 80 Laws of Kenya, the burden of proof as to how he came to be in possession of the goods or in the knowledge of the whereabouts of the same goods shifted to him and although it was not as heavy a burden as that on the prosecution, he had to discharge it. It was only to give an explanation as to how the goods stolen that night found their way in to the place he knew. He never gave that explanation and the inevitable inference is that he was the thief.

Mr. Maina, submitted that Beatrice who was found in that relevant house was not arrested. That is not correct. The record shows she was arrested and charged as we have stated above. It is not clear as to what happened to her but we must consider that this was a retrial and it is not surprising that the record does not clearly show what happened to her. Secondly and in any event, her presence would have been important if the appellant gave explanation involving her. This was not the case here. The appellant was not saying for example, that Beatrice is the one who gave him those recently stolen properties nor was he saying that he came to know where the properties were through Beatrice. We emphasize that for purposes of the doctrine of being in possession of recently stolen property to be proved, it is not necessary that the house in which such property is recovered belonged to the accused person. What is necessary is that the accused knew, like in this case the appellant knew where the properties were and had no explanation as to his possession or his knowledge of the existence of such properties at such a place. On the same view, the fact that the taxi driver whose taxi was occupied by the appellant and others was not one of the people charged with the same offence is neither here nor there for he might have been found on interrogation to have been an innocent driver and in any case, even if he was also involved, that would only make them two offenders but would not in any way, absolve the appellant from being himself involved in the offence.

We have carefully perused and considered the judgments of the trial court and the superior court. In our view, the two courts analysed the evidence that was before them properly as is required by law and came to proper concurrent decisions on points of facts. They, thereafter, proceeded on the legally acceptable

principles of law and each came to the only conceivable conclusion that the appellant was guilty of the charge of robbery with violence contrary to ***section 296 (2)*** as charged in count 4. We have no reason to disturb those decisions. They will stand.

In the result, this appeal is dismissed.

Dated and delivered at Kisumu this 20th day of June, 2008.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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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