



IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 318 OF 2007

RONALD MWACHIA EZEKIEL APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbaluto & Kubo, JJ.) dated 4th August, 2003

in

H.C.CR.A. NO. 621 OF 1998)

JUDGMENT OF THE COURT

The appellant *Ronald Ezekiel Mwachia* was jointly charged with two others, namely, *Patrick Otieno* (1st accused) and *Jackson Mpenda* (3rd accused) with robbery with violence contrary to *section 296 (2)* of the Penal code in the Principal Magistrate's court at Kibera.

The appellant was the 2nd accused at the trial. The subordinate court after trial, convicted the appellant and the 1st accused and sentenced each to death but acquitted the 3rd accused. The appellant and the 1st accused appealed to the superior court against conviction and sentence. The superior court dismissed the appellant's appeal but allowed the appeal by the 1st accused.

The particulars of the charge of robbery stated in effect, among other things, that on 1st May, 1996 at Marula Lane, Karen, the three accused jointly with others not before the court robbed Peter Njuguna of various specified goods valued at Shs.850,000/=.

The appellant was employed as security guards by Morit Builders and Mechanical Engineers Ltd. which company is owned by Joham Singh (PW4). The company was at the material time constructing a private house for Karuna Holdings Ltd. whose managing director is Wolfgang Dietz (PW5). The complainant, Peter Njuguna was employed as security officer/ supervisor by Karuna Holdings Ltd. The complainant and the appellant were both housed at the construction site. The appellant was living at the construction site with his wife and child. The client company, Karuna Holdings Ltd. had also other employees at the site including Teresia Njeri (PW2), a cleaner and a day guard and Zedeus Mwamunge Malolwa (PW3). According to the evidence, on 1st May, 1996 which was a public holiday, Teresia Njeri

was supposed to be on duty at the gate as a guard from 8 a.m. to 5 p.m. She was supposed to hand over guard duties to the appellant at 5 p.m. According to the evidence of Teresia Njeri, the appellant left the compound on the morning of 1st May, 1996 and came back at 2 p.m. He went to his house and at 2.35 p.m. he went to the gate and told Teresia Njeri that he wanted to relieve her early. Teresia Njeri agreed and she handed over to the appellant the keys to the gate and left for her home at Dagoretti market.

At about 3 p.m. robbers who were wearing yellow security guards uniform and who were armed with axes and pangas raided the premises and attacked the complainant after which they hanged him with a wire upside down on the window. The robbers thereafter stole the complainant's money, clothing, shoes, radio cassette and many properties at the construction site including vibrating machine, building machines, batteries, spare wheels, hand drills, three carpentry tool bolts, grinding machine, electric plainer, sofa set, stools, trolleys and beds. The robbers also robbed Miriam Wanjiku (PW6) who had visited the complainant of her personal properties and tied her. According to her, the robbers left at 6.30 p.m. after which she heard a lorry leaving the premises. Miriam Wanjiku managed to untie herself at 7 p.m. after which she reported to neighbours who came to the compound and untied the complainant at 8 p.m. The complainant was wounded on the chin. Zedeus Mwamunge Mulowa (PW3) who was living at the construction site returned at 9 p.m. He did not find the appellant, his wife and child in the compound. The appellant's house was locked and when the police broke it open on the following morning, it was found empty. On 26th May, 1996, PC. Thomas Mutua (PW9) of Buruburu police station arrested the appellant at a house at City Centre with the assistance of Jane Aluoch, a suspect. The arrest of the appellant was communicated to Karen Police station and on 4th June, 1996 PC. Mutisya Nzioka (PW7) of Karen Police station went to Buruburu police station and interrogated the appellant. According to PC. Mutisya Nzioka, the appellant agreed to take police officers to where the stolen goods were. He first led them to Kariobangi Light Industries where a three-in-one machine for cutting timber was recovered. The third accused at the trial Jackson Mpemba Mkwabi admitted that he is the one who had sold the machine to owners of the workshop at Kariobangi for Shs.115,000/= but claimed that it was left to him by Jane Aluoch as security for a debt and was later instructed to sell it. The trial court believed the third accused and acquitted him.

Thereafter, the appellant led PC. Mutisya Nzioka to a house at Eastleigh Section II where sofa sets, beds and machines were found and on the way to Karen Police station, the appellant pointed out a lorry Reg. No. KUA 711 as the one which transported the goods from the construction site at Karen. All the recovered items were identified by Joham Singh and Wolfgang Dietz.

The appellant made unsworn statement at the trial. He stated, among other things, that he was employed as a watchman at Marula Lane, Karen; that on 1st May, 1996 he closed work in the morning and left the compound with his wife and child at 7.30 a.m. to visit his relatives at Ruai; that he returned to the site on 2nd May, 1996 in the afternoon; that Moses who was guarding the gate met him about 50 metres from the gate and told him that things were bad and that he was not supposed to be seen at the place; that he returned to Ruai until he went to Buruburu Police station on 20th May, 1996 to see his cousin PC. Shadrack Nyambu when he was arrested, interrogated and subsequently charged together with people he did not know.

The conviction of the appellant was based on the evidence that he arranged to be on duty before the robbery was staged; that he disappeared from his work after the robbery and that he led police to the recovery of some of the stolen items.

The trial magistrate believed the evidence of Teresia Njeri saying:

“Njeri though told the court in her testimony which I found as credible and was not challenged by the second accused that the second accused had asked her whether he could release her early and that as she was staying far while the second accused was staying in the compound she agreed and she left at 2.55 p.m. the second accused guarding the place”.

The trial magistrate further believed the evidence that the appellant led the police officers to the

recovery of some of the stolen goods and identified the lorry which transported the stolen goods and made finding of facts as follows:

“The second accused did arrange to be on duty particularly before three p.m. when the robbers were to come.

Witnesses stated how he led the police to the recovery of the exhibits and even to the vehicle that they used to ferry the stolen items. The exhibits were recovered from where he led the police.

He had the opportunity to steal as he was on duty at the time. He was nowhere to be seen during the robbery and yet he was the watchman on duty and after the robbery as admitted even by him he was not there and he was not seen again till after a period of one month when he was arrested.

Witnesses clearly stated that he left with his family who despite having been staying on the compound and being there on that day were not seen after the robbery and their house was found empty.

The accused in his defence only stated that he had gone on off and that he returned but was cautioned by another person that things were not good and then he went back.

This defence I found as not worthy of a belief. The accused was a watchman and could not just be told by somebody that things were bad and he leaves his place of work without seeking permission”.

The superior court exhaustively re-evaluated the evidence regarding the evidence of recovery of stolen goods and made a finding thus:

“There is some muddle in the lower court’s record as regards the identity and ownership of a number of items listed in the charge sheet and also some muddle as to when suspect led the police and other witnesses to the discovery and recovery of those items. As far as the vibrating machine and sofa set alluded to above are concerned, however, the evidence is clear as to what they were, that the second appellant led the police to clear discovery and that PW4 identified them as belonging to his company”.

The superior court after evaluating the entire evidence with circumspection, concluded:

“In our view, there were far too many inexplicable coincidences about the second appellant’s apparent absence from the site when he should have been on guard duty and the simultaneous invasion of the site followed by his prolonged abandonment for such coincidences to have been accidental.

Indeed, the act of the second appellant leading police and PW3 to the place of discovery of the stolen sofa set and vibrating machine/ vibrator shown in photographs 1 and 3 respectively of Exhibit 1 shows that the presence of those items where they were found was within the knowledge of the second appellant, such knowledge can justifiably be deemed to constitute possession thereof within the meaning of section 4 of the Penal Code”.

There are six grounds of appeal which generally raise evidentiary matters. The appellant questions the weight of the circumstantial evidence and states that the judgment was against the weight of the evidence adduced. He also questions the veracity of the evidence particularly the evidence that he led police to the discovery of stolen goods. Lastly, he complains that his defence of alibi was not considered adequately. Mr. Oira, learned counsel for the appellant mainly submitted on evidential matters; among other things, that the evidence of Teresia Njeri and the evidence that the appellant led police to the recovery of stolen goods are not “tenable”; that the evidence was fabricated; that the evidence of the appellant that he had gone to see his cousin at Ruai was confirmed by a police officer who found the appellants child there. Mr. Oira asked us to reconsider the evidence independently and reverse the decision of the superior court.

It is trite law that a second appeal to this Court can only be on a matter of law and that this Court cannot hear an appeal on a matter of fact (see section 361 (1) of the Criminal Procedure Act).

It is also trite law that the duty to reconsider, re-evaluate the evidence and draw independent conclusions lies with the first appellate court (see *Okeno v. Republic* [1972] EA 32 which has been applied in numerous decisions of this Court.

Moreover, when the first appellate court is re-appraising the evidence it has to appreciate that it does not have the advantages enjoyed by the trial court of seeing and hearing the witnesses and has to make due allowance for that, (*Soki v. Republic* [2004] 2 KLR 21; *Kimeu v Republic* [2002] 1 KLR 756). For that reason, the first appellate court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court are erroneous in law. (*Republic v Oyier* [1985] 2 KLR 353; *Buru v Republic* [2005] 2 KLR 533).

Lastly, although the Court of Appeal on second appeal may upset a finding of fact by the trial or first appellate court, it will not lightly disturb concurrent findings of fact by the trial court and first appellate court unless it is shown that the findings were based on no evidence, misdirection or error of law which is the same thing as saying that no reasonable tribunal could, on the evidence adduced, have made such findings, *Karingo v Republic* [1982] KLR 213; *Kiarie v Republic* [1984] KLR 739; *Mwita v Republic* [2004] 2 KLR 60; *Buru v Republic* (supra).

In this case, there were concurrent findings of fact by the two courts below that the appellant offered to relieve Teresia Njeri and in fact relieved Njeri from duty prematurely at about 2.35 p.m. earlier than when he was supposed to take over duty at 5 p.m.; that shortly thereafter at 3 p.m. robbers raided the premises ; that a lot of goods including heavy machinery were stolen; that the appellant vacated his house and abandoned duty without permission of his employer until when he was arrested one month later; and that upon arrest, the appellant led police to Eastleigh where a sofa set and a vibrating machine belonging to his employer were recovered. The two courts below disbelieved the statement of the appellant that he had left his place of work to visit his cousin at Ruai; that he returned on the following day but was advised to go back; that he was arrested when he went to Buruburu police station to look for his cousin and that he did not lead police to Eastleigh where stolen goods were recovered.

The appellant in his grounds of appeal and in the submissions of his counsel has faulted the concurrent findings of fact by the two courts below. On our own analysis, we are satisfied that there was ample evidence to support the findings of fact and that there are no grounds for disturbing those findings.

The superior court directed itself correctly on the law regarding circumstantial evidence and relied on two well known cases, *R v Kipkering arap Koske & Another* [1949] 16 ECA 135 and *Simon Musoke v R* [1958] EA 715 on the correct approach to circumstantial evidence. We respectfully agree with the decision of the High Court in *Gathagu v Republic* [1984] KLR 652 that if an accused person goes into hiding immediately after the incident giving rise to the charge, that conduct amounts to circumstantial evidence that should be taken into account.

We are satisfied that there was not only strong circumstantial evidence which irresistibly proved that appellant was one of the persons who committed or arranged the robbery but also evidence of recent possession of stolen goods which raised a presumption, which was not rebutted, that the appellant was one of the robbers.

In the result, the appeal has no merit and we accordingly dismiss it.

Dated and delivered at Nairobi this 11th day of July, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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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