



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CRIMINAL APPEAL 78 OF 2004

JOSEPH ODHIAMBO OYIENDAAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu (Gacheche, J.) dated 13th November, 2002

in

H.C.CR.A. NO. 233 OF 2002)

JUDGMENT OF THE COURT

This is a second appeal from the decision of the superior court, Gacheche J., made on 13th November, 2002 in which the appellant's first appeal against conviction and sentence on three counts of burglary and theft was dismissed. As such, only matters of law may be raised and learned counsel for the appellant Mr. Mwamu raised two issues before us:

- (1) *That the admission of a ballistic expert's report at the trial was legally erroneous.*
- (2) *The appellant's defence was not critically evaluated.*

We shall revert to those issues presently.

On the night of 8th and 9th March, 2001, the houses of three police officers at Lumumba Estate in Kisumu Township were broken into and various items were stolen. One house was occupied by **Inspector Stephen Kemboi** (PW1) together with **Pc. Hillary Kipkosgei Bor** (PW2), the other was occupied by **Pc. David Sang** (PW3). A pistol serial no. F 2935, a Ceska, loaded with 15 rounds of 9 millimeter ammunition which was lawfully issued to **IP Kemboi** was stolen. His Police Certificate of appointment was also stolen. **Pc. Bor's** radio, make Sharp and **Pc. Sang's** Raja bicycle, Nova radio cassette, safari boots, handbag and compacts were also stolen. No one saw the burglars.

Four days later on 13th March, 2001, on information received in respect of a robbery incident, police officers arrested another suspect who led them to the house of the appellant at Manyata Siany. They found the appellant and his wife in the house which was admittedly his. They searched the trousers the appellant was wearing and found a wallet which contained the Certificate of Police appointment belonging to **IP Kemboi** (PW1). When the officers asked the appellant where the pistol was, the appellant

pointed to a coat in the corner of the house and the officers recovered it. They also recovered other items from the house including a radio, whose make was Nova, video, radio cassette, video deck and a T.V. **IP Kemboi** positively identified the Certificate of Police appointment and the pistol to be his while **Pc. Sang** positively identified the recovered Nova radio. The appellant was subsequently, with another who was acquitted at the trial, arraigned in court on three counts of burglary and theft of the pistol, Police Certificate of appointment, two radios and a bicycle. The appellant on his own was additionally charged with three more counts of being in possession of the firearm, firearm magazine and ammunition without relevant certificates but these counts were properly dismissed by the trial magistrate as there was a substantive charge for the theft of the same items. In his unsworn statement in defence, the appellant stated that he had been staying in his house with a nephew whose name he did not give, and that the pistol and cassettes were recovered from a coat and handbag belonging to the nephew. The nephew, he added, had committed suicide three days after the appellant's arrest. Upon his trial and conviction, the appellant was sentenced to serve 10 years in jail with two strokes of the cane for each limb on the three counts of burglary and theft, the sentences to run concurrently.

As stated earlier, the appellant's first appeal was dismissed, hence this final appeal in which he raised two legal issues. On the first issue Mr. Mwamu contended that there was no proof that the item referred to in the charge sheet as a pistol was indeed such an item. In that event no offence could have been committed by the appellant as alleged. It was not proved, he submitted, because a ballistic expert's report which was accepted in evidence was improperly admitted under **section 77** of the **Evidence Act** although the maker of the document was not called to produce it. Instead, the court purported to accept the statement of the appellant that he did not object to the production of the report by the investigating officer (PW8) without appreciating that the appellant had no benefit of legal representation by counsel. In Mr. Mwamu's view, the ballistic expert's report could only have been admissible if **section 35** of the **Evidence Act** was complied with. He did not elaborate on that submission, but we assume that he meant **section 33** of the **Act** since **section 35** relates to admissibility of documentary evidence in civil proceedings. It is **section 33** which has reference to statements, written or oral, made by persons, *inter alia*, who cannot be found or whose attendance cannot be procured. In his submission, the ballistics expert's report should therefore have been ignored with the result that there was no proof that a pistol was stolen.

With respect, we do not find any substance in those submissions. The record shows that the recovered pistol, firearm magazine and ammunition were submitted to a ballistics expert who made out a report confirming that the pistol was real and the ammunition was live. It is true that the appellant was not represented by counsel at the trial or in the first appeal, but the law says nothing about preferential treatment to unrepresented persons. The record shows that the prosecution sought to produce the ballistics expert's report through the investigating officer who had possession of it and the appellant had no objection. There was a proper legal basis for admission of the report under **section 77** of the **Evidence Act** which provides as far as is relevant:

“(1) In criminal proceedings any document purporting to be report under the hand ofany ballistics expert, upon any matter or thing submitted to him for examination or analysis may be used in evidence

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the..... ballistics expert,, and examine him as to the subject matter thereof.”

In our view, the above section is not subject to **section 33** of the **Act** and may be acted upon independently by the court. The report was properly admitted in evidence. At all events, the finding of the pistol and ammunition was not the only incriminating evidence against the appellant. No complaint has been raised about the concurrent finding of fact by the two courts below that the Certificate of Police appointment belonging to **IP Kemboi** was found on the person of the appellant and was stolen at the same time as the pistol. That ground of appeal does not therefore avail the appellant and is dismissed.

The second issue raised by Mr. Mwamu is the failure to consider the appellant's defence evidence. In his view, the evidence by the appellant that he was not in exclusive possession of the items recovered from his house and that his nephew had brought the items was believable but was not analysed or considered by the two courts below. The appellant had attempted to show the police the whereabouts of his nephew only to hear that the nephew had committed suicide whereupon the police decided to charge him with the offences instead.

Once again we think, with respect, that the complaint raised is not meritorious. The trial court examined the defence put forward by the appellant and dismissed it as follows:

“1st accused in defence admitted having been found in his house. He further admitted that the pistol and radio cassette were found in his house, thereby corroborating the prosecution case. Only, he denied he was possessed of them. He said that items were found in a bag and a coat which had been left in his house by his nephew. He added that the said nephew has since committed suicide.

This court found the bit about the “Nephew” committing suicide quite convenient to accused case in the sense that he now asks court to take his word for it.”

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“The four (4) witnesses further told the court that the 1st accused himself who showed them the coat from where he was to get the gun. Again their evidence on this was well corroborated and court believed them on this and on the fact of the recovery of the radio cassette. The fact that accused had the Certificate in his pocket which Certificate had been stolen along with the pistol, the 15 rounds of ammunition, the firearm magazine and a radio cassette from PW1 and 2's house left no doubt in my mind that he was well aware of the other items and it actually led the police to recovering them. Accused defence about his cousin therefore didn't create a reasonable doubt in my mind that it is accused who was in possession of them.”

On the same issue the superior court stated:

“In his unsworn statement, the appellant had stated that he had been staying with his nephew and that the pistol and cassettes had been recovered from the nephew's belongings. It was also his evidence that the nephew who was then working in Kisumu had committed suicide three days after the date of the recovery of the items.

It is important to note that PW1's identity card was found in the wallet of the appellant which was found on his person and that it was he who had readily informed the police where the pistol was to be found, and from which place the ammunition was also found. In my opinion, had the items been inside his nephew's belongings, and not in his possession he would not have been too quick to point out their location. They would have been found only after a search. He did not deny that it was his house, but his efforts to show that he did not have its exclusive possession came to naught.”

We are in no doubt that the defence of the appellant was sufficiently considered but was discounted in view of the overwhelming and credible evidence from the prosecution. That ground of appeal also fails.

Senior Principal State Counsel Mr. Musau supports the decision of the superior court on the basis that it fully re-evaluated the entire evidence, and found that the appellant was in recent possession of the stolen items.

The upshot is that the appeal lacks merit and is dismissed in its entirety.

Dated at Kisumu this 23rd day of June, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR