



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL 85 OF 2005

ERICK OTIENO ARUMAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisii(Tanui & Bauni, JJ.) dated 23rd February, 2005

in

H.C.CR.A. NO. 171 OF 2002)

JUDGMENT OF THE COURT

The appellant, in this second appeal, *Erick Otieno Arum*, was charged before the Senior Resident Magistrate’s Court at Homa Bay with the offence of robbery with violence contrary to *section 296(2)* of the *Penal Code*. The particulars of the charge were as follows:

“On the 15th day of October, 2002, at Homa Bay Town Location in Homa Bay District within Nyanza Province, jointly with others not before the court being armed with dangerous weapons namely timber, robbed Joseph Ogunyo Oula one mobile phone make siemens A36, one motor vehicle ignition key and cash 500/= all valued at Kshs.8,000/= at (sic) or immediately before or immediately after the time of such robbery wounded the said Joseph Ogunyo Oula.”

He pleaded not guilty but after full trial, the trial court found him guilty, convicted him and sentenced him to death. In convicting him, the learned magistrate found and stated as follows inter alia:

“PW4 and 5’s evidence was supported by the evidence of PW2 who was on duty at Report desk at the said station and who on rearresting the accused searched him and recovered the said items from him. He was hiding the items in his underwear and trouser turn-up. By then PW1, had not yet reported the incident to the police.

The production of the said items before the court as exhibits (Exh. 1-3 respectively) corroborated the aforementioned prosecution witnesses’ evidence. The same were positively identified before the court by PW1 as the items he was robbed of on the material night by the three suspects who had

attacked him though the cash was minus Kshs.100/= which apparently the accused must have spent between the time of the robbery and when the same was recovered.”

The appellant was not satisfied with the same conviction and sentence. He lodged an appeal in the High Court - ***Criminal Appeal No. 171 of 2003***. This appeal came up for hearing before the superior court (Tanui and Bauni, JJ.) and was after hearing dismissed it with the learned Judges stating partly as follows:

“The mobile phone and car keys were found with him. He had hidden them in his pants. He was arrested only a few hours after the robbery. Thus though the complainant did not identify him as one of his attackers there were no doubts that he took part in the robbery and infact kept all the loot of the robbery. He did not state PW5 had a grudge against him and as such there was no reason for him to give false evidence against him.

In his oral submission appellant again stated there was a fight at the door of the bar and he was arrested as one of those involved. He said the stolen items were found with one of those arrested with him. However he had not said this in his defence during the trial. He did not even talk of a fight. It is clear that he knew the stolen items were recovered that night. They were recovered from him and not from anybody else. They had set upon the complainant and injured him in the process of robbing him.

In the circumstances we find the appeal has no merit and the same is dismissed.”

As the facts of the case are in conflict as to certain material aspects and part of the petition of appeal is grounded on the said conflict of facts, we will give a very brief summary of what, according to the records before us did transpire.

The complainant ***Joseph Ogonyo Oula*** who was PW1 in the trial court was a driver with Ministry of Health at Homa Bay. On 15th October, 2002, he was from work at Kagan. He parked his motor vehicle registration No. GK 876A at the Homa Bay District Hospital and proceeded to go to Rodi Kopany by other means but he was unsuccessful and had to go back to the Hospital using the route behind Information building. When he reached Legacy Bar and Restaurant he met three people who asked him where he was going to but before he responded, one of those people hit him very hard with a piece of wood on his cheek and he fell down unconscious. When he came to consciousness, his mobile phone, make Siemens A36, keys to his motor vehicle, cash Kshs.500/= were all gone. He sustained injuries on his head and his elbow, the latter due to the fall. He immediately went to the hospital for treatment and stayed there for a night. Next day, he proceeded to Homa Bay Police Station where he reported to ***PC. Anthony Baraza*** (PW2) who was on duty at the Crime Branch Office. While still at the police station, he was told that a suspect had been arrested by the police the previous night and some things recovered from him (suspect). He identified the items which were mobile phone make Siemens A36, keys to the motor vehicle and Kshs.400/=. ***Oula*** could not identify his assailants. ***PC. Baraza*** recorded his statement and issued him with a P3 form having invited him to view the recovered items. ***Dr. Thomas Ogaro David*** (PW3) examined ***Oula*** and confirmed that he was indeed injured and the injuries amounted to grievous harm. The evidence of the appellant’s arrest, search and recovery of the stolen items is not altogether clear. For what we will state later, we set out the evidence of PW4 and PW5. PW4 ***APC John Mwangi*** says he was on patrol duties in company of ***APC Paul Mwita***, and ***PC Kamau*** (PW5) within Homa Bay Township. On reaching Akamba Bar they came across two young men who were fighting. On approaching them one ran away while the other was lying on the ground totally drunk. They did nothing about it and went on with their duty. Later they came across the one who had escaped. He was eating at a hotel near the bus stand. They arrested him and went for his colleague who was drunk and arrested him also. They escorted the two to the police station to have them charged with affray. At the police station the suspect who had run away was searched by ***APC Lunguchi*** and ***PC. Koech*** (not witnesses) and found with a mobile phone in his jacket pocket and a battery in his shirt pocket. He was also found with a mobile phone cover in his under pant and an Isuzu motor vehicle ignition keys in the turn-up of his trouser. This is a summary of evidence as given by ***APC John Mwangi***. His colleague ***PC Danson Kamau*** (PW5) with whom he was on duty throughout the material time stated in his evidence that as they

were on patrol duties with **APC Mwangi** and **PC. Mwita** near Akamba Bar they heard commotion and approached some people who were fighting. When those people saw them they scattered. They however managed to arrest one of them and escorted him to Homa Bay Police Station. That was the appellant. According to this witness, the appellant was arrested as a suspect after a drunk person at the scene had alleged that he had stolen from him. At the police station, **PC Danson Kamau** and others searched him and recovered a mobile phone, ignition key for a Suzuki motor vehicle and Kshs.400/= and he stated further:

“He had hidden them in his inner wear.”

The above, was the evidence that was before the trial court as adduced by the prosecution.

The appellant gave a sworn statement in which he admitted that on the material day he was at Akamba Bar with a friend of his who was drunk and staggering. As they were leaving for home, someone called him. On responding, he found it was **APC Mwangi** who was calling him. **Mwangi** told him, that he (Mwangi) would fix him for a past disagreement over a woman. He was arrested and was eventually charged with the offence.

It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same. There are now a myriad of case law on this but the well-known case of **Okeno v. Republic (1972) EA 32** will suffice. In this case, the predecessor of this court stated:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

In this case, the conviction of the appellant proceeded on the premises that the appellant was found with three stolen properties, namely mobile phone, ignition keys of complainant’s vehicle and Kshs.400/= believed to be part of the stolen Kshs.500/= which were stolen from complainant that night. His conviction proceeded, as we understand it, on the doctrine of recent possession as it is alleged that he did not explain his possession of the stolen goods.

In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion.

In the case before us, the only evidence of arrest, search and recovery of the mobile phone, motor vehicle keys and Kshs.400/= is given by two witnesses, **APC Mwangi** (PW4) and **PC Kamau** (PW5) whose evidence we have heretofore reproduced. Whereas **APC Mwangi** says that they found the appellant and another man fighting, and that the appellant ran away while the other man lay down totally drunk. They did not arrest either at that time but went about their duties normally and only later did they find the appellant at a hotel near a bus stand, and they then arrested the appellant, went with him and arrested the drunk man and took the two of them to police station to be charged with affray. **PC Kamau's** evidence is that when the appellant and the other person saw them they scattered, each on his own way so that only the appellant was arrested and taken to the police station. This he testified, was after a drunk person at the scene had alleged that the appellant stole from him. So that, whereas according to **Mwangi**, the appellant was fighting a drunk person, and the two were arrested, according to **Kamau**, the drunk person was not fighting the appellant as the man who was actually fighting the appellant ran away. Further according to **Kamau**, only the appellant was arrested and taken to police station and not the appellant and the drunk person. According to **Mwangi** the appellant was to be charged with affray together with the drunk person whereas **Kamau's** version is that the appellant was to be charged alone with theft from the drunk person. As if that is not enough, on the question of search, **Mwangi** says that the appellant was searched by **APC Lunguchi**, and **PC Koech** and the mobile phone recovered from the appellant's under-pant whereas the keys were on the turn-up of the trouser. **Kamau's** version is that they both searched the appellant and recovered a key, mobile phone and money all in appellant's inner wear. All these demonstrate that the evidence of possession which would be proved through evidence of arrest, search and recovery was absolutely contradictory. How did the trial court approach it? The learned magistrate, in his judgment stated inter alia, as follows:

"PW4 and 5's both stated in their respective testimonies that they came across the accused person the same night about midnight apparently fighting with a colleague and arrested him and escorted him to Homa Bay police Station. On being searched at the said station before being booked in the cells a mobile phone, motor vehicle ignition key and Kshs.400/= was recovered hidden in his person."

The rest of his consideration of the evidence is as reproduced above. It is clear to us, therefore, that the trial court treated the evidence of **Mwangi** and **Kamau** as non-contradictory and proceeded to base his decision on the same without examining the two sets of evidence and analysing it at all. Considering that the two police officers alleged by **PC Mwangi** to have carried out the search were not called as witnesses, the remaining evidence of **PC Mwangi** and **PC Kamau**, is conflicting and the same needed full and proper analysis before any conviction could be based on it. This was more so when the evidence of discovery failed to tally completely such that one would not know whether all the items were recovered from the underwear or whether some were recovered from the pants and others from trouser turn-up.

Further, the trial magistrate held that evidence of **PC. Anthony Baraza** (PW2) supported the evidence of **Mwangi** and **Kamau**. He also found as a fact that **Baraza** was on duty at the report office at Homa Bay Police Station and that he (**Baraza**) rearrested the appellant and searched him and recovered the stolen items. What **Baraza** said was as follows:

"On 16/10/2002 at about 8.00a.m. I was in the crime branch office when I received a report from the complainant herein one Joseph Ogonyo, who informed me that the previous night while he was heading to Homa Bay District Hospital he was confronted by 3 suspects who assaulted him and robbed him of a mobile phone (siemens A36) ignition key for GK Suzuki (MOH) as well as Kshs.500/=."

This evidence clearly deals with events of 16th October, 2002 from 8.00 a.m. onwards and what this witness found at the station when he reported on duty. Further, this witness did not search the appellant and common sense dictates that he could not do so as the appellant was taken to the police station after midnight but certainly before 8.00 a.m. when **Baraza** reported on duty. That being the case, and as the search and recovery were done before the appellant was put in the cells, **Baraza** could not have searched him. This was a serious misdirection by the learned magistrate. Unfortunately, he relied on this misdirection to convict the appellant.

The superior court, unfortunately, and with due respect, did no better job of the matter. All it did was to

set out the summary of evidence and then respond to every ground of appeal. That did not amount to an analysis required by law. It did not make any attempt to even enumerate on the contradicting pieces of evidence.

The appellant is entitled to the benefit of doubt. This appeal is allowed, conviction quashed, sentence set aside and the appellant is set free unless otherwise lawfully held. This is the judgment of the court.

Dated and delivered at Kisumu this 16th day of June, 2006.

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