REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU
CRIMINAL APPEAL 45 OF 2006

FANUEL MAKENZIE AKOYO …….....……APPELLANT

AND

REPUBLIC …….....……RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu

(Tanui & Warsame, JJ.) dated 30th June, 2005

in

H.C.CR.A. NO. 10 OF 2004)

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JUDGMENT OF THE COURT

The appellant ***FANUEL MAKENZIE*** was convicted after a trial of three counts of robbery with violence contrary to ***section 296(2)*** of the ***Penal Code*** and sentenced to death in each count. His appeal to the superior court against conviction and sentence was dismissed hence this second appeal.

On 18th August, 2003 at about 1 a.m. ***Fred Ambani*** (Ambani), ***Justus Miroga*** (Miroga) and ***Joshua Kiptoo*** (Kiptoo) the complainants in count 1, 2 and 3 respectively went to Kiboswa to answer an alarm in a client's home. The three complainants were employed by the Securicor Company as security officers and driver respectively. They travelled to a client's house in a motor vehicle driven by ***Kiptoo***. On arrival at the client's home ***Kiptoo*** parked the vehicle at the gate and ***Ambani*** and ***Miroga*** went to the house. The security lights of the house were on. There were two security guards from another firm in the compound. Shortly thereafter the dogs started barking. About 20 people who were armed with metal bars and "rungus" raided the home. They broke the security lights of the house and chased away the security guards while throwing stones at them. They also hit the door of the house with stones. ***Ambani*** raised an alarm and ran away. He met two people who hit him on the legs, shoulders and head and he fell down. The robbers removed one bullet proof jacket which he was wearing – No. 394. There were gun shots and the robbers ran towards the house. ***Miroga*** also ran away when the robbers stormed into the house. He was chased and hit with a "rungu". He fell down and was hit on the head with a stone. His rain coat and a communications radio were stolen. Meanwhile six people went to the vehicle and told ***Kiptoo*** to alight and removed his bullet proof jacket- No. 395 which they took. ***Kiptoo*** got a chance to escape but he fell down as he was escaping and was injured by a stone on the leg. The robbery was reported at Kisumu Police Station.

On 31st August, 2003 ***PC Janarius Otieno*** (PW4) and ***PC Isaiah Ekasi*** (PW6) went to a house at Obunga Estate slums on information. They found the appellant and his wife inside the house and asked the appellant to produce a bullet proof jacket. The appellant denied that he had any. The police officers searched his house and recovered a green bullet proof jacket labelled "*Securicor 394"* hidden on the bed under the mattress. The bullet proof jacket recovered was later identified by ***Ambani*** as the one stolen from him.

The appellant testified in his defence that he was walking within Obunga Estate where his house is located on 1st September, 2003 when he was stopped by four police officers and interrogated. He denied that the bullet proof jacket was found in his house.

The trial magistrate believed the evidence of PW4 and PW6 that the bullet proof jacket was recovered from the house of the appellant, 13 days after the robbery and that the appellant did not offer any explanation as to how he came by the jacket. He concluded that the appellant was in recent possession of the jacket and drew an inference from the fact of recent possession of the jacket that the appellant participated in each of the three robberies. The learned trial magistrate summed up the evidence in part, as follows: -

"Each of them (i.e PW4 and PW6) testified to having known the accused persons before and added that he also knew the accused's house. Each confirmed that the house from which they recovered the said jacket indeed belonged to accused who was its tenant. Incidentally accused did not deny that he was known to the two (2) officers or that they had visited his house but he denied that he was found with the jacket……. I found their evidence on the recovery quite credible and the same left no doubt in my mind that indeed they recovered it in accused's house. Accused has offered no explanation as to how he came by this jacket."

The trial magistrate added:

"I am satisfied that in the circumstances of our case it would be right to apply the said doctrine of recent possession. I note that the three (3) robberies accused is charged with occurred at the same time and place and evidence shows they were committed by the same group of persons."

The superior court (Tanui and Warsame, JJ.) agreed with the finding of the trial magistrate on the recovery of the bullet proof jacket and on the application of the doctrine of recent possession in the following words:

"We are satisfied that the learned trial magistrate was correct in applying the doctrine of recent possession in view of the unchallenged evidence of PW4 and PW6 who recovered a green bullet proof jacket labeled securicor 394 reported to have been stolen earlier during the robbery and when the appellant was not able to offer any explanation of how he came by it. Having carefully reviewed the evidence, on our own we are satisfied that the evidence adduced against the appellant is overwhelming."

Mr. Nyawiri for the appellant first argued grounds 1,2,3 of the memorandum of appeal which state thus: -

"1. The learned Hon. Judges erred in law by failing to notice and appreciating that the information given by PW4 and PW6 by the alleged informer which led to the arrest of the appellant was hearsay hence inadmissible evidence.

2. The learned Hon. Judges erred in law by failing to recognise and/or notice or find that the prosecution failed to establish whether the alleged place of arrest (house) belonged to the appellant or not.

3. The learned Hon. Judges erred in law by failing to find there was no independent evidence by any witness or any other source that corroborated the evidence of PW4 and PW6 that the house where the appellant was arrested belonged to the appellant."

Mr. Nyawiri in addition argued grounds 1 and 2 of the supplementary memorandum of appeal which state:

"1. The learned Hon. Judges erred in law by failing to notice and/or come to a finding that the trial magistrate in the subordinate court erred in law by relying on the doctrine of recent possession alone to convict and sentence the appellant.

2. The learned Hon. Judge erred in law by failing to come to a finding that the doctrine of recent possession relied on by the trial magistrate in the subordinate court was inapplicable in itself in this case."

The 1st, 2nd and 3rd grounds of appeal contained in the memorandum of appeal all relate to the credibility and sufficiency of the evidence of the recovery of the yellow bullet proof jacket from the house of the appellant. We will consider them together.

Mr. Nyawiri submitted that the information given to PW4 and PW6 by the informer leading to the recovery of the bullet proof jacket was hearsay evidence which was wrongly admitted. He relied on two authorities namely, Maina & 3 others v. Republic [1986] KLR 301 and Kinyati v. Republic [1985] KLR 562 to support his contention that the evidence was hearsay evidence which should not have been admitted. In this case all what PW4 and PW6 said is that as a result of information that appellant was in possession of a bullet proof jacket they went to the house of the appellant. That is the "*hearsay evidence"* complained of.

In *Maina's case* (supra) the prosecution did not offer evidence to show the mental element to constitute an offence of preparation to commit an offence contrary to *section 308 (1)* of the *Penal Code*. The trial magistrate quite erroneously relied on the hearsay evidence of police officers that an informer had told them that five people had planned to commit a robbery to provide the *mens rea* of the offence without which the charge could not have been sustained. In this case the evidence referred to as hearsay evidence did not constitute an element of the charge and is not the basis on which the trial magistrate made a finding that the appellant was in possession of the bullet proof jacket. The material evidence on which the trial magistrate relied is the solid evidence of PW4 and PW6 that upon searching the house of the appellant they recovered a bullet proof jacket hidden under the mattress.

On the question of the ownership of the house where the bullet proof jacket was recovered Mr. Nyawiri contended that it was necessary to prove the ownership of the house in order to establish possession of the jacket and that the evidence of PW4 required corroboration by other independent evidence.

The ownership of the house where the bullet proof jacket was recovered, with respect, was not material in the circumstances of this case. Both PW4 and PW6 testified that they knew the house as the appellant's which he had rented. It was not the appellant's case that he was not living in the house in which the bullet proof jacket was recovered or that it belonged to somebody else.

The contention that the evidence of PW4 and PW6 should have been corroborated by independent evidence has, respectfully, no legal basis. By *section 143* of the *Evidence Act*:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact."

Further in Abdalla bin Wendo and Another v. R [1953] 20 EACA 166 the court said in part at page 168:

"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness……."

The cases in which the corroboration of evidence is required as a matter of law are provided by law and are well known. There is no provision of law that the evidence of police officers should be corroborated by independent evidence. After all what matters in each particular case is not the quantity but the quality

of evidence -see **Kihara v. Republic [1986] KLR 473**. And whether the sole evidence of police officers in any particular case will be sufficient ultimately depends on the credibility of the police witness.

It is the trial court which is best suited to assess the credibility of the witnesses and the superior court could not have interfered with the trial magistrates findings that PW4 and PW6 were credible witnesses unless on the well known principles - see **Republic v. Oyier [1985] KLR 353**.

Lastly, the recovery of the bullet proof jacket was a matter of fact. This Court cannot interfere with the concurrent findings of fact unless those findings are based on no evidence - see **Karingo vs. Republic [1982] KLR 213**.

The doctrine of recent possession is clearly enunciated in the case of **Andrea Obonyo v. Republic [1962] EA 542** and in many other decisions of this Court. It is a presumption of fact and not an implication of law from evidence of recent possession of stolen property unaccounted for -see page 549 para B). Whether the doctrines applies depends on the circumstances of each and;

"Factors such as the nature of the property stolen, whether it be of a kind that readily passes from hand to hand and the trade or occupation to which the accused person belongs can all be taken into account – (Andrea Obonyo supra - page 545 para B – C)."

In this case the trial magistrate relied on the case of **Thathi v. Republic [1983] KLR 354**, a relevant decision of the High Court - where possession of stolen articles within 12 days of the theft was found to be recent. The superior court agreed that the doctrine of recent possession applied to the circumstances of the case.

The appellant has not shown that the two courts below fell into error in so finding. On our part we are satisfied that the two courts below reached the correct decision in the circumstances of this case. We find no merit in this appeal which we accordingly dismiss.

Regarding sentence the appellant was sentenced to death in respect of each of three counts of robbery with violence. That was, in our view, erroneous as the appellant cannot logically suffer death twice or thrice. We accordingly correct the error by setting aside the sentences in count 2 and 3. The result is that the appellant shall suffer the sentence of death in count 1 only.

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

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

……..

JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR