



IN THE COURT OF APPEAL

AT NYERI

Criminal Appeal 124 of 2004

ROBINSON MWANGI MAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Onyancha & Okwengu, JJ) dated 1st July, 2004

in

H.C. Cr. Appeal No. 368 (B) of 2001)

JUDGMENT OF THE COURT

The original charge sheet in Criminal Case No. 3424 of 1999 shows that the appellant in this appeal, **Robinson Mwangi Maina**, was the second accused before the Chief Magistrate’s Court at Meru. There was another charge sheet in respect of Criminal Case No. 506 of 1999 before the same court as the record shows that on 15th October, 1999, the two cases were consolidated and heard together as Criminal Case No. 3424 of 1999. The record also shows that the first accused in that case died before the hearing started so that by the time the witnesses started giving evidence before the subordinate court, the appellant was the first accused although original charge sheet was substituted before the first witness completed his evidence. In that charge sheet, the appellant together with four others, were jointly charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of that charge read:

“On the 17th day of February, 1999 at Kithirune market in Meru Central District of the Eastern Province with others not before court, while armed with dangerous or offensive weapons namely pistol, axes, runigus and simis, robbed JOSEPH MWERIA of motor vehicle Reg. No. KAB 976P make mazda pick up, cash Ksh.32,000/=, five cartons of assorted ciraggets (sic), five boxes of batteries all valued at Ksh.702,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said JOSEPH MWERIA.”

The appellant alone faced an alternative charge of handling stolen property contrary to **section 322(2)** of

the Penal Code. Because of its importance to the entire case, we will reproduce its particulars also. These were:

“On the 19th day of February 1999 at Nkunga area in Meru Central District within Eastern Province, otherwise than in the course of stealing dishonestly received or retained 329 pairs of batteries, 300 packets of champion cigarettes, 50 packets of embassy cigarettes, 210 packets of Rocket cigarettes, 260 packets of Roaster cigarettes and motor vehicle Registration No. KAB 976P Mazda Pick up.”

When the charge and its alternative charge were put to the appellant, he pleaded not guilty to both but after full hearing, the learned Senior Resident Magistrate (D.K. Gichuki, Esq.) in a lengthy judgment, found him and another who was the third accused guilty of the offence of robbery with violence under **section 296(2)** as charged and convicted them of the same. The trial court found that the alternative charge was part of the robbery and therefore acquitted them of the same charge of handling stolen property. That was not really correct. Where an accused person is convicted on the main charge, the usual practice is to make no findings on the alternative charge so that if on appeal the court thinks that the main charge was not proved but the alternative one was, the court can substitute a conviction on the alternative charge which would still be available on the record. They both appealed to the superior court against the conviction and sentence but the appeal by the other appellant (third accused in the trial court) abated as he died in prison before that appeal could be heard. The superior court (Onyancha & Okwengu, JJ) heard the appellant’s appeal and again in a detailed and lengthy judgment dismissed it stating in part as follows:-

“Even without the identification of the appellant by the complainant, the mere recovery of the complainant’s motor vehicle and other goods through the appellant only hours after the robbery led to the irresistible conclusion that he must have been one of the robbers. The trial magistrate was right in rejecting the appellant’s denial and defence that P.W 3 and 4 framed him because they had a grudge against him. This defence clearly had no substance. The appellant had no explanation for his actual and constructive possession of the stolen items and the trial magistrate was right in invoking the doctrine of recent possession.

Finally the detailed statement under inquiry made by the appellant which explained how he was recruited and how the robbery was executed left no doubt that he did indeed participated (sic) in the robbery.”

It is from that judgment of the superior court that the appellant has now come to this Court on second and final appeal. He filed, on his own, nine grounds of appeal. His learned counsel, Mr. Murithi, limited his argument to five grounds namely 1, 2, 3, 5 and 8 submitting in brief that the learned Judges of the superior court erred in fact and in law in failing to consider that some parts of the case in the trial court were prosecuted by an unqualified person who, though he only appeared in court during the mention dates was nonetheless a prosecutor and that being the case, the trial was a nullity; that the charge was altered but the provisions of **section 214** of the Criminal Procedure Code were not complied with by the trial court and that omission was prejudicial to the appellant; that the superior court erred in convicting the appellant without any evidence that his (appellant’s) finger prints were on the vehicle he was allegedly in possession of or which he had allegedly received; that the police officer who made the report in the OB to the effect that the appellant had the motor vehicle was not called and that being so, the conviction was not sound; that as no identification parade was conducted for the prosecution witnesses to identify the appellant, the identification of the appellant was flawed; that as the appellant and others were acquitted of the offence of handling stolen property, they could not be convicted of the offence of robbery of the same property and that the appellant’s constitutional rights were infringed as he was not produced in court within the time required by **section 72** of the Constitution.

Mr. Orinda, for the State, opposed the appeal stating what is now well settled law that as this was a second appeal, only points of law should be considered as issues of fact were settled by the concurrent findings of the trial court and the superior court and as such, should not be disturbed. Mr. Orinda felt that the superior court fully re-evaluated the evidence that was on record and went on to state that the

unqualified prosecutor only appeared in the trial court in the case on mentions and not during the trial; that the amendment of the charge was inconsequential as it only affected the numbering of the accused persons after the death of the original first accused in the trial court and that was done before the witnesses gave their evidence, and after the death of the original first accused in the trial court, and so no prejudice was occasioned to the appellant and his co-accused. He submitted lastly that finger prints were not necessary in the case as the conviction was properly based on the doctrine of recent possession and that there was no proof that the constitutional rights of the appellant were infringed.

Joseph Mwembia M'Anampiu (PW 1) (Joseph) was a businessman and was operating a shop and "matatu" business at Kithirune market in Meru Central District. On 17th February, 1999 at 3.00 a.m., he was asleep in the rear room of his shop together with his wife. He was attacked by people who approached his shop in a motor vehicle. He woke up. His wife climbed into the ceiling and hid herself there. People entered the shop with stones, axes, swords, a gun and other weapons. Joseph entered into the store in the shop. The thugs put on all electric lights in the building. The person with a somali sword went to where Joseph was and cut him across the left side of the face along the cheek bone from the ear towards the mouth and ordered him to produce money. These people, who according to Joseph, included a person he identified as the appellant led Joseph to the sleeping room where there were more people ransacking the room and turning everything upside down. The keys to Joseph's vehicle were taken by one of the thugs and Joseph heard his vehicle being started. The appellant and others remained with Joseph and demanded money from him and Joseph gave him Ksh.32,000/=. Other people took other properties such as cigarettes in carton boxes, torch and battery cells also in carton boxes. Joseph was thereafter taken to the shop verandah through the main shop. He saw his vehicle, Mazda pick-up, KAB 976P, turned with headlights which were on facing the shop. People guarding Joseph left and went into his vehicle which was driven away towards Meru Town. After the thugs left, Joseph observed that a vehicle, KSM 060, Land Rover was left outside the main door to his shop with lights on. He went to his shop and found that several items including cigarettes had been stolen. Joseph thereafter had his wife called from the ceiling and called other nearby neighbours one of whom was David Kariuki Mbui (PW 2), who bandaged the wound on the face. He then reported to the police at Nkubu Police station by telephone and told them what had happened.

At 6.00 a.m. the police reported to Joseph's shop. The police at Meru had also been alerted of the same robbery by the police at Nkubu. The police from Nkubu told him to go to the hospital. He did so and was issued with a P3 form which he produced in court. In his evidence, he said he was able to identify, at the time of the robbery, the appellant and two others who are not before us. He described what each of the thugs he could identify did to him and what each took from his shop. He told the police that he could identify the robbers if he saw them again.

David Kariuki Mbui (PW 2) (David) was a neighbour of Joseph. His plot was No. 43A at Kithirune market. He heard what was going on in Joseph's shop but could not assist him immediately at the time of the robbery because the door to his shop was bolted from outside. He called one Maijau to unbolt the door and once that was done, he went to Joseph's shop, found Joseph bleeding from a cut near the left ear and he dressed the wound. Joseph told him the details of the theft plus the theft of his vehicle KAB 976P. He also witnessed for himself the damage to Joseph's shop. Other than what Joseph told him, he did not himself witness the actual robbery and did not see the robbers.

On 17th February, 1999 at about 4 p.m. Pc Jason Kimathi (PW 4) (Jason) together with one corporal Charles Maluki and two other police constables proceeded to Gituro area of Meru town where they met a gangster who was armed and who on being challenged and chased fired at them till his round of ammunition got finished. They shot the gangster dead. That gangster was called Oirire. After that, again on information, they went through the forest but did not find any suspects and they took the body of the gangster that they had shot to the mortuary. On 18th February, 1999, on further information, they went to the home of one of the accused – the third accused in the trial court. They found the appellant in that house and the wife of the third accused who was lighting a fire but the third accused fled. Although the dates given for the visit are different, with corporal Jamlick Nyaga (PW 3) (Jamlick) saying it was on 19th February, 1999 and Jason saying it was on 18th February, 1999, the visit seems to be the same as the two

witnesses gave the same evidence on the visit and they both said it was in the morning. They said they entered the house and found the appellant in the house. On searching the house, Jason said as follows in his evidence in-chief:

“We searched the house. We found cartons of eveready torch batteries; both red and yellow, packets of cigarettes inter alia embassy, rocket and champion plus rooster. We recovered 21 packets of rocket cigarettes (MF1-2), ten packets of embassy cigarettes (MF1-3), 26 packets of roaster cigarettes (MF1 4), 30 packets of champion cigarettes MF1 5, 45 pairs of eveready torch (MF1-6) which are yellow in colour, 287 pairs of eveready torch batteries (MF1-7) which are red in colour. Some of the property recovered were under the bed. The others were beside the bed. This is the bed where 1st accused was. We took possession of the property.

The 1st accused said on interrogation that the property was his jointly with Raichau. We arrested 1st accused and wife of 3rd accused. The 1st accused led us to Nkunga forest where a stolen vehicle Mazda registration KAB 976P Mazda Pick Up (sic). The battery of the vehicle was stolen. Some glasses were broken. Imenti forest past Gitoro Nkunga forest is part of Imenti forest. By then, we had not known where offence was committed..... We liased with Meru Police Station.... The vehicle and suspect were brought to the police station.”

The recovered items were carried to the CID headquarters at Meru. The vehicle had no battery and so was collected later and taken to the same CID headquarters. Joseph was called to Meru CID headquarters. He went and identified the recovered items as those which had been stolen from his shop on the fateful night. He also identified the motor vehicle as his. He also said in evidence that he attended an identification parade where he identified the appellant who had been arrested at the house of the 3rd accused in the trial court. On 24th February, Inspector Muclus Mwara (PW 6) took a charge and cautionary statement from the appellant. At the trial, the appellant repudiated that statement but after a properly conducted trial within trial, the statement was admitted in evidence. In that statement, he admitted the offence and explained that one Oirire who had been gunned down after the robbery is the one who recruited them and that they first stole a Land-Rover which they used to break the door of Joseph’s shop and later took Joseph’s vehicle and other items like cigarettes and torch batteries. The appellant and others were then charged in court with this offence. It would appear from the record that some of the thugs arrested earlier were charged in court in Criminal Case No. 506 of 1999 whereas others arrested later were charged in Criminal Case No. 3424 of 1999. On 15th October, 1999 the two cases were consolidated and heard together under Criminal Case No. 3424 of 1999. Put on his defence, the appellant denied the offence and stated that he was arrested on 18th February, 1999 for another matter altogether. He was a businessman. He had a vehicle. The police wanted to check on the vehicle, Pc Jason and Cpl Jamlick had taken his Ksh.45,000/=. He demanded the same and that is when a conspiracy to charge him with the offence for which Oirire had been shot dead was hatched. He denied having been identified at the scene of the crime.

The learned Senior Resident Magistrate in his lengthy and detailed judgment delivered on 14th June, 2001 found that Joseph was robbed on the night of 17th February, 1999 by a group of people who had dangerous and offensive weapons. He was injured in the course of the same robbery. The Magistrate rejected the identification of the appellant by Joseph as the same identification was no more than dock identification, no identification parade having been arranged. He however accepted the evidence of Pc Jason and Cpl. Jamlick and found that the goods found in the house of accused 3 in the presence of the appellant were stolen property and that they were goods stolen from Joseph’s shop, theft of which the appellant was arrested. The occurrence book of 18th February, 1999 confirmed that the appellant was arrested on the same day from Nkunga forest area. The learned Senior Resident Magistrate also found the appellant had admitted the offence in his statement. Lastly, he found that the appellant, together with the 3rd accused, were found in possession of recently stolen property namely cigarettes, torch batteries and the vehicle the whereabouts of which the appellant was aware. He therefore convicted him on those grounds and under the doctrine of recent possession of stolen goods.

The superior court, likewise, in a detailed fresh analysis of the evidence that was adduced before the trial court and, in our view, in full compliance with the law as enunciated in the well known case of **Okeno vs. Republic (1972) EA 32**, arrived at the same conclusion. These were the concurrent findings of the two courts below on matters of fact and also of law. Whereas in law we can interfere with the findings on matters of law, we cannot so interfere with the matters of fact unless the facts are so contradictory as to amount to a legal issue. In any event, in our view, there was ample evidence to necessitate the same conclusion both in law and in fact. The appellant readily admitted the offence in his statement which was properly admitted after trial within trial. He was also found in possession of the stolen property in the house of the 3rd accused but under and also next to the bed of the appellant. The appellant also led the police to a place where Joseph's vehicle was abandoned in the forest. Any of these pieces of evidence, on its own, if believed by the court as was believed by the trial court and the superior court, was enough to prove beyond any reasonable doubt, the offence the appellant was facing. In our view, the totality of the evidence adduced before the trial court clearly dislodged the *alibi* the appellant raised. We are satisfied that the conviction of the appellant was inevitable and the two courts below rightly convicted him.

We were urged by the appellant's counsel to accept that part of the prosecution before the trial court was conducted by an unqualified person, and he referred us to pages 10, 11, 12 and 13 of the record which all show that one Sgt. Kirima appeared in court for the prosecution on those days. The record shows that on all those days, the matter was mentioned but no hearing took place. This Court has stated on several occasions that a qualified prosecutor, as spelt out by **section 85** of the Criminal Procedure Act, is only necessary for purposes of the hearing of a case i.e. when the conduct of the case would affect the result of the case and not at mentions. The provision could not have been meant to be invoked even on mention days of a criminal case as that would completely disrupt the administration of the cases on a date when such cases come up for mention and no qualified personnel i.e. magistrate and/or prosecutor is available. In our view, we repeat it here for avoidance of any doubt that there is nothing illegal for an unqualified prosecutor to appear for a mention of a criminal case though it would have been better if a qualified prosecutor attended.

There was also a complaint that the charge sheet was amended but the court did not comply with **section 214** of the Criminal Procedure Act. The amendment was only in recognition of the fact that the person who appeared in the charge sheet as the first accused had died and was no longer the first accused. That original accused No. 1 was not there at the time of hearing this case and so Joseph who was the only witness giving evidence when the amendment was done had not been misled by the original charge sheet. That amendment was merely to regularize the charge sheet and non compliance with **section 214** did not, in our view, occasion any prejudice to the appellant. There was no need for the finger prints of the appellant to be taken when he took the police officers to the forest where the stolen motor vehicle was, nor was there need to call the police officers who made entries in the OB of the appellant having been taken to the police station from the forest. The evidence of Pc Jason and that of Cpl. Jamlick were consistent and were rightly accepted by both courts after full analysis.

Lastly, we have stated that Criminal Case No. 3424 of 1999 was consolidated with Criminal Case No. 506 of 1999. The proceedings of Criminal Case No. 506 of 1999 were not before us. The effect of that is that the appellant who alleged, through his counsel, that his constitutional rights were infringed was unable to prove that allegation.

From what we have stated hereinabove, we do find there was overwhelming evidence before the trial court to warrant the conviction for the offence charged. We also find that the superior court applied sound principles of law in confirming the conviction. We, likewise, confirm it. In the result, this appeal fails. It is dismissed. Judgment accordingly.

Dated and delivered at Nyeri this 27th day of October, 2006.

R.S.C OMOLO

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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