



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: OMOLO, GITHINJI & WAKI, JJ.A.)

Criminal Appeal 238 of 2004

BETWEEN

JUMANNE MOHAMED HASSAN APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from Judgment of the High Court of Kenya at

Mombasa (Mwera & Khaminwa, J.J.) dated 11th November, 2004

in

H.C.CR.A. No. 13 of 2004

JUDGMENT OF THE COURT

The appellant JUMANNE MOHAMED HASSAN and one KASSIM MWIJO MWADZILA (co-accused) were jointly charged before the Senior Resident Magistrate Kwale with the offence of Robbery with Violence contrary to **section 296 (2)** of the Penal Code. The appellant was the second accused while the co-accused was the first accused. The particulars of the charge alleged that on 30.4.2003 the appellant and the co-accused, jointly with others robbed Ali Juma Mafimbo of cash shs.30,000/-, computer screen, T.V., Radio cassette make Hitachi , 2 mobile phones, one big sufuria, one suitcase, two brief cases, one electric box, a torch, and assorted clothes all valued at shs.120,000/-. The appellant was convicted of the offence of robbery and sentenced to death being the sentence authorized by the law. The co-accused was acquitted of the offence of robbery but found guilty of the offence of handling stolen property contrary to **section 322(1)** of the Penal Code and sentenced to 2 years imprisonment. It is not apparent that he appealed. The appellant appealed to the superior court against conviction and sentence. His appeal was however dismissed in its entirety.

The complainant's house was broken into on the night of 30.4.2003 at about 1.30 a.m. when he and his wife were asleep. He had heard a bang and when he went to the sitting room to check he found ten people. One placed a *panga* on his neck. He was taken back to the bedroom. They demanded money and ransacked the house and stole shs.30,000/- and assorted goods including a radio cassette, make, Hitachi, a suitcase, a Kaunda suit and grey trousers all valued shs.120,000/-. It was dark inside the house and the

complainant and his wife did not identify any of the robbers. The complainant reported the robbery at Diani police station on the following morning. On 24.7.2003 a person who had been arrested as a suspect led police to the house of co-accused where the Hitachi radio cassette was recovered. The same suspect also led police to the house of the appellant where the suitcase, kaunda suit and a grey trousers were recovered.

Those items were identified by the complainant as some of the things stolen from his house. The appellant stated that the police took a bag containing clothes belonging to his wife from his house and that he found the suitcase identified by the complainant, a T.V. and a radio cassette in the police vehicle.

The learned trial Magistrate believed the evidence of P.C. Issah Said of C.I.D. Kwale (PW3) that the appellant was found in possession of the suit case, the kaunda suit and the grey trousers and that they belonged to the complainant. The trial Magistrate deduced from the fact of recent possession of stolen goods that the appellant was one of the robbers. The superior court concurred with those findings.

The appellant has in this appeal questioned the veracity and the credibility of the evidence of P.C. Issah Said that the complainant's goods were found in his possession. A second appeal to this Court can only be based on questions of law. There are concurrent findings of fact by the two courts below that P.C. Issah Said recovered a suitcase, a kaunda suit and grey trousers from the house of the appellant and that the complainant and his wife identified them as some of the goods stolen from their house. The appellant has not shown that the circumstances which would justify the interference with the concurrent findings of fact exist in this case and we do not see any.

The only substantial ground of appeal raised by the appellant is that the superior court erred in upholding the appellant's conviction on the charge of robbery while the evidence on record showed that the appellant could have been a mere "**handler**" of the stolen goods. Mr. Magolo for the appellant contended in support of this ground that there was no evidence available to distinguish the case of the appellant from the case of the coaccused and that the difference in the quantity of the goods recovered could not have made a difference.

The conviction of the appellant was solely dependent on the unaccounted recent possession of the complainant's goods stolen during the robbery. Where an accused person is found in possession of recently stolen property and in the absence of any reasonable explanation to account for his possession a presumption of fact arises that he is either the thief or a receiver (see **ANDREA OBONYO v. R** [1962] E.A. 542 at page 549. In this case the trial Magistrate inferred that the appellant was the thief rather than a handler. The trial Magistrate distinguished the case of the co-accused from appellant's case thus:-

"However, from the first accused person's house only the radio was recovered. This was almost 3 months after the robbery.

Since nobody saw the 1st accused during the robbery and since three months is relatively lengthy from the time of robbery, there is a possibility that accused may not have been one of the robbers.

However, the 2nd accused was not, unlike the 1st accused a mere handler. It is my find (sic) that he was one of the people who robbed the complainant. This fact is explained by fact that not one, but several of the complainant's stolen items were found in his possession namely, a suit case, kaunda suit and 1 grey trouser. It cannot be a mere coincidence that several of the complainant's belongings which were stolen from him the same day should be recovered in the same house."

In dealing with the disparity in sentencing, the predecessor of this Court said, in **FATEHALI v. R** [1972] **E.A. 158** at page 160 para 1 inter alia;

"We agree that care should be taken not to discriminate between two accused persons where all the circumstances and facts are the same."

This Court, recently in **PETER NGIGE WERU v. REPUBLIC**, Criminal Appeal no. 51 of 2000 (unreported) applied that principle to the identification of several accused persons by the same witness and said:-

“Where one witness purports to identify two people under very similar circumstances and purported identification of one is rejected, then it would require very special circumstances to accept his identification of the other person.”

The same principle should be applied with full force to the presumption to be drawn from the unaccounted possession of recently stolen goods by two or several accused persons where the circumstances and the facts are the same.

The appellant and the co-accused were found in possession of the goods stolen during the robbery on the same day. There is not much difference in the quantity of goods in respective possession of the appellant and the co-accused as the co-accused had one item while the appellant had three. It cannot justifiably be said that the appellant was in possession of a considerable quantity of goods stolen from the complainant.

There was no appreciable distinction between the appellant’s case and the case of the co-accused. The learned Magistrate having concluded that a presumption that the coaccused was not among the robbers could not be drawn from the fact of recent possession of recently stolen goods, she erred in drawing a different presumption in respect of the appellant when the circumstances and the facts were essentially the same. **Section 179(2)** of the Criminal Procedure Code authorized the trial Magistrate to convict for a minor offence. The superior court did not consider this aspect of the case and misdirected itself in upholding a conviction for robbery. For those reasons we allow the appeal to the extent that the conviction for the offence of Robbery contrary to **section 296 (2)** of the Penal Code and the sentence of death is set aside and substituted with a conviction for the offence of Handling Stolen Property contrary to **section 322 (1)** of the Penal Code for which the appellant is sentenced to 2 years imprisonment with hard labour, to run from the date when he was sentenced by the Magistrate.

Dated and delivered at Mombasa this 22nd day of July, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.