



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(CORAM: OMOLO, GITHINJI & WAKI, J.J.A.)
Criminal Appeal 185 of 2004

BETWEEN

SAMUEL MUCHERU KARIUKI..... 1ST APPELLANT
GEOFFREY MUGO KINUTHIA 2ND APPELLANT
AND
REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at
Nakuru (Musinga & Kimaru, JJ.) dated 13th July, 2004**

in

H.C.C.R.A. NO. 340/341 OF 2001)

JUDGMENT OF THE COURT

The first appellant, **SAMUEL MUCHERU KARIUKI**, and the second appellant, **GEOFFREY MUGO KINUTHIA**, were convicted by the Senior Principal Magistrate Nakuru for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code and each sentenced to death being the mandatory sentence under the law. The second appellant was the first accused at the trial while the first appellant was the second accused. Their respective appeals which were consolidated at the hearing were dismissed by the superior court. This is a second consolidated appeal.

The particulars of the charge alleged that on the night of 15th June, 2001, the two appellants and another who was acquitted jointly with others not before the court, being armed with dangerous weapons namely a Somali sword, metal bars and a rungu robbed **Jacinta Wairimu Njoroge** of her video camera make Samsung serial Nos. 67N807904L, a camera make Kodak serial Nos. 0384041, a mobile telephone make Ericsson T10S and cash Shs.7,000 all valued at Shs.120,000/= and at or immediately after the time of such robbery, used personal violence against her.

On 15th June, 2001 at about 9:00 p.m., **Jacinta Wairimu Njoroge (Jacinta)** (PW 1) was in her house in the outskirts of Nakuru Town. She was in the company of three people - her two workers, namely Grace

Atieno Nyahu (**Grace**) (PW2), Jane Cheron Kibet (**Jane**) (PW5) and a visitor. At about 9:00 p.m., the two workers opened the door and went out for a short call. Thereafter, Jacinta heard a loud bang on the door. She took a big and powerful torch and went towards the door. She met three people at the door of her sitting room; two of whom were later identified as Geoffrey Mugo Kinuthia (second appellant), and Samuel Mucheru Kariuki (first appellant). The first appellant was armed with a panga while the second appellant was armed with a sword. The second appellant pushed Jacinta and forced her to lie down. He placed a panga on her neck and demanded money. She was then pushed into the bedroom where she produced a video camera, mobile phone and shs.7,000/=. She was taken back to the sitting room where she found two other people (not among the three who first entered into the house). The first appellant took two boxes of clothes after which the robbers disappeared. The robbery was reported to the police. **P.C. Kipchumba Ruto** (PW3) and other police officers went to the scene at 1:00 a.m. He recovered a Somali sword and a cap which were abandoned at the scene. P.C. Kipchumba returned to the scene. On the following morning, an old cap was recovered outside the gate. On information P.C. Kipchumba went to Berir farm, which was about 1 km from the scene of robbery and arrested the first appellant. On interrogation, the first appellant led police to the house of the second appellant at 11 a.m. The second appellant attempted to run away but was arrested. On interrogation, the second appellant removed a Kodak camera and a mobile phone from the house and gave them to P.C. Kipchumba. The second appellant was asked about the video camera. He said that it was with somebody else whom he named. While outside the house, P.C. Kipchumba saw a place outside the house where the soil was disturbed. He dug up the place and recovered a battery of a video camera. On further search, a video camera was found hidden in the flower garden. Thereafter, the appellants led police to another house where two masks used during the robbery were recovered. On 18th June, 2001, each of the two appellants was identified by Jacinta, Grace and Jane at respective identification parades conducted by **LP. Lucy Mbatia** (PW6). The properties recovered in the house of the second appellant were identified by Jacinta as hers at the trial.

The first appellant made a brief unsworn statement at the trial that he was arrested by two people who took him to the police station where an identification parade was conducted.

The second appellant also made unsworn statement at the trial. According to him, he was arrested by five people who searched his house and removed a hammer and a saw. He was then taken to the house of the complainant where he stayed for half-hour. He then saw a police officer with goods. He was taken to the police station where an identification parade was conducted.

The trial magistrate made a specific finding that the complainant was robbed of the goods listed in the charge sheet. The first appellant was convicted on the basis of the evidence that upon arrest he led police to the second appellant where stolen goods were recovered and further that he was identified by Jacinta and Grace. The second appellant was convicted on the basis of two pieces of evidence, viz, he was in possession of a video camera, mobile phone and a Kodak camera and that he was identified by Jacinta and Jane.

Mr. Karanja, who appears for the first appellant in this Court, argued the appeal on behalf of both appellants in the superior court.

The appellants' challenge in the superior court against the finding that they were identified at the time of the robbery was sustained. Nevertheless, the superior court dismissed the appeal of the first appellant because:-

"The 1st appellant was also connected to the robbery by the cap that was found at the scene of the robbery that was identified to belong to him. He also led the police to the house of the 2nd appellant where the stolen items were recovered and further to the Menengai house where the masks used in the robbery were recovered":

The appeal of the second appellant was also dismissed. The superior court was satisfied that the second appellant was found in recent possession of video camera, mobile phone and Kodak camera belonging to the complainant, which led to the inference that he was involved in the robbery. It is convenient to deal with the appeal of the second appellant first. He states in his grounds of appeal that the superior court

erred in law in finding that he was in possession of stolen properties and in applying the doctrine of recent possession to him. In support of the grounds of appeal, Mr. Simiyu, for the second appellant, submitted, among other things, that the doctrine of recent possession did not apply to the second appellant for two reasons: Firstly, the complainant did not conclusively identify the recovered properties as hers as the complainant failed to proclaim the goods as hers in the evidence and to produce relevant receipts and secondly, the stolen properties were not recovered in the house of the second appellant. On the question whether or not the stolen goods were recovered in the house of the second appellant, the appellant stated in his defence that when his house was searched only a hammer and a saw were recovered.

He tacitly admitted that the goods alleged to have been recovered from his house belonged to the complainant for he stated that they were removed from the complainant's house by a police officer. It is the identification of stolen goods by concrete evidence which matters and not the public proclamation of ownership in Court. Mr. Simiyu submitted that the house where the goods were allegedly recovered was not proved as belonging to the second appellant and that there is a possibility that the house belonged to somebody else. The second appellant did not deny in his defence that the house where he was found and which was searched did not belong to him. To the contrary, he admitted that his house was searched but denied that the goods were recovered from his house. The ownership of the house where the stolen goods were recovered, and the question of recovery of the goods, are matters of fact which are not normally the concern of a second appellate court. The trial court made a finding that the stolen goods were recovered from the house of the second appellant. The superior court as required by law re-considered, and re-evaluated the evidence and reached a concurrent finding. It has not been shown that the two courts below misdirected themselves in any material way or that there was no evidence to support the concurrent finding. There are no reasons for interfering with the concurrent findings of fact.

Similarly, the two courts below were satisfied that Jacinta had identified all stolen goods as hers. They were recovered within 24 hours of the robbery. Their serial numbers were stated in the charge sheet. Neither the prosecution case, nor the defence of the second appellant, raised any doubt about the ownership of the recovered goods. The statement of the second appellant supported the evidence that the goods belonged to the complainant as he said that a police officer recovered the goods from the complainant's house. The accessories (bags) of the video camera and Kodak camera recovered were still in the complainant's house and were produced in Court. The case of ***GICHINA V. REPUBLIC [1970] EA 105*** has been quoted out of context. There, the court rejected the bare statement of a person found in possession of stolen goods that she had bought them from another person in the absence of documents evidencing the sale transaction. This is not the case here. Nor can it be said as it was, in ***IBRAHIM LEKALERO & ANOTHER V. REPUBLIC Criminal Appeal No. 52 of 1999*** (unreported) that the goods found in possession of the second appellant were shop goods or goods of common usage which are generally available everywhere.

We are satisfied, like the two courts below, that the second appellant was found in possession of goods recently stolen from the complainant and that a presumption that he was one of the robbers, was properly drawn.

The possession of the video camera, mobile phone and Kodak camera belonging to the complainant leads to the inference that he was involved in the robbery. The 1st appellant complains in his grounds of appeal that the superior court erred in law and in fact in finding that the cap recovered at the scene belonged to him; in upholding his conviction on the basis of recent possession of the stolen goods and in finding that he led police to the arresting of the second appellant and to the recovery of the stolen goods. Mr. Karanja, for the 1st appellant, further submitted in support of the appeal that what the second appellant told P.C. Kipchumba about the identity of the person who robbed the complainant is a confession which is inadmissible; that first appellant did not say where the goods were and therefore did not lead police to the discovery of the stolen goods and that the doctrine of recent possession does not apply to the 1st appellant. We readily agree that the two courts below erred in law in finding that the cap connected the 1st appellant with the offence. The person who claimed that the cap belonged to the 1st appellant was not called to give evidence. The evidence of P.C. Kipchumba regarding the ownership of the cap therefore, was hearsay. Furthermore, there was no evidence that the 1st appellant was wearing the cap at the time of the robbery. It is true that what the 1st appellant told P.C. Kipchumba about the identity of the people

who robbed the complainant was essentially a confession which was not admissible. However, neither the trial magistrate, nor the superior court, relied on such evidence as connecting the 1st appellant to the offence.

The conviction of the 1st appellant was upheld mainly because he led police to the house of the 2nd appellant where stolen goods were recovered. The 1st appellant was convicted at the time section 31 of the Evidence Act was operative. That section

provided:-

"Notwithstanding the provisions of sections 26, 28 and 29, when any fact is proved to as discovered in consequence of information received from a person accused of any offence, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved":

That section was however replaced by The Criminal Law (Amendment) Act 2005

- Act No. 5 of 2005 which commenced on 25th July, 2005.

According to P.C. Kipchumba, the second appellant told him that he could lead him to the home of Mugo (first appellant) with whom he was (at the time of the robbery). There were concurrent findings of fact by the two courts below that the 1st appellant led police to the house of the 2nd appellant where 2d appellant was arrested and some of stolen goods recovered. We have no reasons for interfering with those concurrent findings of fact.

The phrase "be in possession of" or "have in possession " is defined in section 4 of the Penal Code at page 16 as:-

"includes not only having in one's own personal possession, but who knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit of

oneself or of any other person'

Furthermore, according to the second definition of "**possession** ", also in **section 4** (supra) if the first appellant was in possession of the stolen goods with the knowledge and consent of the second appellant, the second appellant would in law be deemed to have possession of such goods.

It is the information which the 1st appellant gave to P.C. Kipchumba which led to the arrest and recovery of most of the stolen goods. That evidence was admissible by virtue of section 31 of the Evidence Act as it then stood.

From the evidence that the 1st appellant led police to the house of the 2nd appellant where the 2nd appellant was arrested and stolen goods recovered, it can be inferred that he knew that the 2nd appellant was involved in the robbery and that he was in possession of the stolen goods. In the circumstances, he is deemed to have been in constructive possession of the stolen goods jointly with the 2nd appellant. An inference that he was also involved in the robbery was correctly drawn by the two courts below. We similarly find no merit in the appeal of the 1st appellant.

For those reasons, we dismiss the appeal of the first and second appellants.

DATED and DELIVERED at NAKURU this 30th day of September, 2005.

R.S.C. OMOLO

JUDGE OF APPEAL E.M. GITHINJI

JUDGE OF APPEAL P.N. WAKI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR