REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: OMOLO, O'KUBASU & WAKI, JJ.A.

CRIMINAL APPEAL 17 & 56 OF 2004

BETWEEN

1. MICHAEL KIONGA

2. ESOGON KIONGA…….……..…….…….APPELLANTS

AND

REPUBLIC…..……...……..……..RESPONDENT

JUDGMENT OF THE COURT

The appellants before us are ESOGON KIONGA and his son MICHAEL KIONGA. They were among four persons charged before Nanyuki Senior Resident Magistrate with various offences under the Penal Code including robbery with violence, rape and handling stolen goods. The other two persons do not concern us as one was only convicted for handling stolen property and, as far as we know, preferred no appeal, while the other died before his appeal to the superior court could be heard.

It was alleged in the two counts of robbery with violence for which the appellants were convicted that on the 3rd day of June, 1999 at Kijabe area of Ngobit in Laikipia District of the Rift Valley Province, while armed with offensive weapons namely a rifle, they robbed John Peter Nguthiru (PW1) and Veronica Njeri (PW2) of an assortment of household goods and personal effects listed in the charge sheet, and in the course of the robbery threatened actual violence. The evidence that was accepted by both the trial and superior courts was that on the evening of 3rd June, 1999 Veronica Njeri was in her house with her daughter, Margaret Warukira Ndirangu (PW3), son, Joseph Nderitu Ndirangu (PW4), and a visitor when a gang of four persons burst therein. The robbers had covered their faces leaving only their eyes. One held a gun, one a bolted club, another a panga and the last one a bow and arrows. They ordered everyone to lie down and soon after issued orders to Veronica to give them money which she said she did not have. They proceeded to collect and pack various household items and then commanded Veronica, Joseph Nderitu and the visitor to slaughter and cook two chicken for them. As they waited for the chicken, the gun – bearing robber took Margaret outside the house, raped her, and returned her to the house. When the chicken was ready, the robbers started eating as they sang in Turkana language. They also danced. From there, the robbers went to the home of John Peter Nguthiru (PW1) where they found his son Joseph Kamau Nguthiru (PW5) watching T.V. with another man. They whipped them and tied them up as they collected more property. Moving further to where PW1 was in a separate house, the robbers had little luck since he hit the one with the gun with burning firewood before escaping through a window to hide behind a latrine. From there he pelted the robbers with stones until they left without stealing anything from that house.

The robbery was reported to Ngobit Police Station the following morning and investigations commenced.

They led to neighbouring Mutara A.D.C. Farm where two days later the robber who had the gun was identified and was arrested. He was ultimately convicted for robbery with violence and rape but died while his appeal was pending in the superior court. A woman who was found in that farm was also found in possession of some of the goods stolen from the complainants and was arrested. Her conviction, as stated earlier, was for handling stolen goods. But she also led the police to the neighbouring Ol Pajeta Farm where the appellants Esogon worked as a security officer and Michael as a guard, respectively. On concurrent findings of fact made by both courts below, more of the goods stolen in the course of the robbery were found in possession of the two appellants. It was also a concurrent finding of the two courts, and correctly so, that there was no identification of the robbers made by any of the witnesses at the scene of the serial robbery. The only basis for conviction of the appellants was therefore the unexplained possession by them of goods recently stolen in the course of the robbery. The learned Senior Resident Magistrate (S.M. Kibunja), held:-

"The fact that 3rd (Esogon) and 4th (Michael) accused were found with these goods belonging to PW1 and PW2 only two days after the goods were stolen during the robberies of 3/6/1999 leads the court to only one conclusion that both 3rd and 4th accused must have been among the robbers who robbed the home of PW1 and PW2 on 3/6/1999. Their defences therefore holds (sic) no water and are rejected. Those not found with any of the identified goods were not arrested and they includes wife to 3rd accused and the boy found with 4th accused. There is no way then 3rd and 4th accused could have been arrested if not found with the goods identified by PW1 and PW2 as among those stolen." (the italics are ours)

The superior court (Khamoni & Okwengu, JJ) after re-evaluating the evidence also held:-

"The second appellant (Esogon) was found covering himself with a blanket PW2 identified as hers which had been stolen at the robbery. The first appellant (Michael) led the witnesses to a place in a hole where a number of the items identified as having been stolen at the robbery were recovered. That was on 5th June, 1999 after the robbery had taken place on 3rd June, 1999. It was recent possession clearly linking the two appellants with the robbery. No explanation was given, before the trial magistrate, by any of these two appellants how he (sic) came to be in possession of the items recovered from him (sic)." (the italics are ours)

The appellants were not satisfied with those findings and now come before us on a second appeal. As such, only matters of law may be raised and considered. Those are the provisions of section 361(1) of the Criminal Procedure Code. Both appellants presented identical grounds of appeal in the two memoranda of Appeal drawn by them in person. Before us however, they were represented by learned counsel Mr. George Morara Gori who essentially argued one ground on a matter of law that the superior court did not re-evaluate the evidence tendered before the trial court otherwise it would have easily established that there was no evidence to prove that no stolen goods were found in possession of the two appellants and that the goods were not identified beyond any doubt by the complainants. The doctrine of recent possession did not therefore apply. As relates to the appellant Esogon, Mr. Gori submitted that there was nothing recovered from him. What was on record, in his submission, was a contradictory account by some witnesses that the police took a radio from Esogon while others said several blankets were recovered from him. For his part learned Senior State Counsel Mr. Orinda found no material contradictions since there was a concurrent finding by the two courts below that Esogon was found in possession of a blanket which was positively identified by Veronica (PW2) as hers. Esogon knew the defence open to him but failed to explain the possession of the blanket in his defence.

We have carefully examined the record on that aspect of the appeal and it is clear to us that there is a concurrent finding of fact that a blanket that was identified by PW2 to be hers was found in possession of the appellant Esogon. We have no reason to disturb that finding. The issue is whether there was any explanation given by the appellant on that possession.

The trial court was of the view that there was no explanation given at all, while the superior court stated:

"The second appellant (Esogon) on the other hand never said anything about the blanket, in his defence before the trial Magistrate. He concentrated upon a radio taken from him, which was never claimed by

any of the witnesses".

It is indeed so, that Esogon did not refer to the blanket in his unsworn statement of defence. But there is evidence on record from prosecution witnesses that he gave an explanation for such possession at the time of his arrest. Such was the evidence of Joseph Nderitu Ndirangu (PW4) who stated:- "This red blanket is the one we found 3rd accused covering himself with and he told us it had been taken to him by his sons."

And later in cross-examination by Michael:- "……..your father, 3rd accused told us it was you and your brother who had given him the red blanket". None of the two courts below directed their minds to such evidence and the finding that there was no explanation at all made in relation to Esogon's possession of the stolen blanket was a clear misdirection in law. It matters not whether such evidence is available through the defence or prosecution witnesses. It is for consideration. There was no other evidence on record to connect Esogon with the offence of robbery with violence. For those reasons we think his conviction was unwarranted and we allow the appeal, quash the convictions and set aside the sentences imposed on him. He will be set at liberty forthwith unless he is otherwise lawfully held.

As for Michael, the contention by Mr. Gori, as stated earlier, is that he was not found in possession of any stolen property. We have reproduced above the findings of the two lower courts in that respect and in our view they are fully supported by cogent evidence. The appellant led the police to a hole where the stolen goods were hidden. Only he had special knowledge of that hole. There was no explanation offered at any stage for possession of the stolen items save for a feeble attempt to shift the blame to his co-accused. On this attempt the superior court stated:-

"Before us in this appeal now the first appellant is trying to blame the second accused in her absence. In her presence during the trial he never uttered any word blaming her". We agree that the attempt was belated and was not a reasonable explanation capable of exculpating Michael from the offence as charged. The superior court was right to uphold the application of the doctrine of recent possession and in confirming his conviction. We find no merit in the appeal against the convictions which must be, and is hereby, dismissed. On sentence, we set aside the sentence of death imposed on the second count as it was not necessary to impose two sentences of death on him.

DATED and DELIVERED at NYERI this 28th day of October, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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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