



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU

(CORAM: KWACH, TUNOI & KEIWUA, JJ.A.)

CRIMINAL APPEAL NO. 3 OF 2002

BETWEEN

MUSA BARRACK CHEBII APPELLANT

AND

REPUBLIC RESPONDENT

Appeal from a Judgment of the High Court of Kenya at Kisumu
(Justice Tanui) dated 23rd November, 2001

in

H.C.CR.A. NO. 189 OF 2000)

JUDGMENT OF THE COURT

Musa Barrack Chebii , the appellant, was convicted of robbery with violence contrary to **section 296(2)** of the **Penal Code** and sentenced to death on a charge which alleged that on the night of 22nd/23rd August 2000 at Nyalenda Estate in Kisumu Town jointly with others not before the Court armed with dangerous weapons robbed Benson Ingano of Shs.6,000/= , a bicycle and some items of clothing and used violence on Benson Ingano. In count 2 the appellant was alleged to have robbed Kenneth Injendi of a bicycle, a television set and some cash and to have used violence on him as well. His appeal to the superior court against both conviction and sentence was dismissed by Tanui and Gacheche JJ. on 23 November, 2001, giving rise to this second appeal.

The trial magistrate correctly rejected the evidence of recognition by the victims but based the conviction on the evidence of an assistant chief of Kaloleni sub-location one Abdalla Musuma (P.W.7.) . He testified that on 23rd August, 2000 he was on patrol duties and he met with a crowd of people at about 5:00 a.m. They were all male and when he asked them to identify themselves, they dispersed and ran in different directions. He chased them and arrested one of them (the appellant). According to him the appellant was the one in possession of all these 3 items. But in cross-examination he admitted that these items were dropped by the gang.

The appellant gave evidence on oath and denied involvement in the robbery. He told the court he was a **jua kali** artisan at Kibuye and resided at Nyalenda Estate. On 23rd August, 2000 at 5:40 a.m. he was arrested while on his way to work. He saw people running away. He was stopped and arrested. He denied

being a robber. He denied knowing any of the persons who were running away. The appellant's defence was contemptuously dismissed by the trial magistrate as the kicks of a dying horse. We think this was unfortunate as no attempt was made by the magistrate to consider the merits of the defence advanced by the appellant. The learned Judges also rejected the appellant's defence and remarked that-

"In our opinion the evidence by the assistant chief was clear. He had testified that while he was on patrol duties at around 5 a.m. he had met a group of men who were carrying some items and upon asking them to identify themselves they dispersed and ran away but he had followed them and managed to arrest the appellant."

No evidence was led as to the number of people who were in the gang. The learned Judges confirmed the conviction on the ground that the appellant had been positively identified by the complainant. But this could not be correct because the trial magistrate had found as a fact that the victims could not recognise their attackers and based the conviction on the doctrine of recent possession.

Mr. Menezes, for the appellant, submitted that the concurrent finding by the trial and first appellate courts that the appellant was found in possession of the two bicycles and a television was clearly erroneous and not supported by any evidence. We are inclined to agree with Mr. Menezes because no attempt has been made to show how the appellant could possibly have been carrying these heavy items singlehanded and running at the same time.

The defence raised by the appellant was credible. A jua kali artisan's day starts early and to be out at 5 a.m. going to work is not unusual. Quite apart from this, there is no evidence that the appellant was found in actual or constructive possession of the articles alleged to have been stolen and therefore the doctrine of recent possession was wrongly invoked. Mr. Gacivih, for the Republic, quite properly conceded the appeal.

In the result, we allow this appeal, set aside the conviction and sentence and order that the appellant be released from prison forthwith unless he is otherwise lawfully held.

Dated and delivered at Kisumu this 13th day of March, 2002.

R.O. KWACH

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR