



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, AKIWUMI & O'KUBASU, J.J.A.)
CRIMINAL APPEAL NO. 72 OF 2000

BETWEEN

HAMISI SALIM MUNYOKI APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a Judgment of the High Court of Kenya at
Mombasa (Waki, J. & Commissioner Tutui) dated 21st
January, 2000**

in

H.C.C.R.A. NO. 121 OF 1998)

JUDGMENT OF THE COURT

The Appellant, who was the 1st Accused in the trial before the learned Senior Principal Magistrate, Malindi, was convicted on 16th October, 1997, by that Senior Principal Magistrate, of the offense of robbery with violence and sentenced to death.

The background to this was that at about 10:00 p.m. in the night of 2nd June, 1997, some people broke into the house of Alice Wieland, a retired Swiss nurse, at Timboni, Watamu, and during the course of which, she was beaten, threatened with a knife and her pistol, tied up with a rope and pushed onto her bed. Among her things that were stolen by these people were her pistol and bullets, money consisting of about Kshs.72,000/- and some Swiss Francs, a camera, a gold bracelet, gold chain necklaces, a ring and two wrist watches.

Alice Wieland in her evidence said that she was able, during the burglary, to see one of the burglars by means of the light of her torch-light which the burglars were using to look for her things. She identified the Appellant in the dock as that person. This type of evidence which by itself, is unreliable, was according to the learned Senior Principal Magistrate, corroborated by the following: Some ten days after this burglary, on 12th June, 1997, the police, Constable Fred Makhanu and others, acting on a tip off, raided the house occupied by the Appellant's uncle who was the 5th Accused and in that house they found Alice Wieland's pistol and some bullets. When the Appellant who was not there at the time arrived home, Constable Makhanu arrested him. His uncle who was also there, gave Constable Makhanu 44,000/- saying that it had been given to him by the Appellant who did not deny this. The next day after his arrest, the Appellant led Cpl. Maina and other policemen to his uncle's house where thirty four additional bullets

were found. The Appellant then took the policemen to his mother's house, where she gave Cpl. Maina Alice Wieland's gold bracelet and chain necklaces, ring and two wrist watches, 3,000 Swiss Francs and Kshs.50,000/- all of which she said had been given to her by her son. The Appellant again did not deny this.

In his defence, the Appellant denied the charges then facing him namely robbery with violence, handling stolen property and being in possession of firearm and ammunition without a firearm certificate. He merely said that on 12th June, 1997, when he was arrested, he had sold some things for a friend for Kshs.150,000/- which the police, upon arresting him that day, had found on him. The police suspected that the money was stolen and when he refused to bribe them, he was charged with the offences facing him.

In his assessment of the facts, the learned Senior Principal Magistrate made the following significant finding. "There was no evidence to establish that the fifth accused was in actual control of the said items.

However, given the circumstances and all the relevant underlying factors it strongly appears that the items (Ex 2 and Ex 8) were in the control and hence possession of the first accused. Similarly, the items handed to the police by the mother of the accused one (i.e. Ex 3,4,5,6,9 and 11) were under his control and hence in his possession.

This court does not have any reason to doubt the police with regard to the handing over of those items by the mother of the accused who fortunately was spared this present charge. The first accused led the police to his mother and to the recovery of the said items.

His being in direct or indirect possession of some of the complainants stolen goods a few days after they had been stolen is strong indication that he was involved in the material robbery.

The factors implicating him are credible, watertight and more consistent with his guilt rather than innocence. His defence is therefore overruled and unsustainable."

The Appellant appealed to the High Court against his conviction by the learned Senior Principal Magistrate for robbery with violence. The High Court as it could, assessed the evidence adduced before the learned Senior Principal Magistrate and came to the conclusion that even if the dock identification of the Appellant was to be disregarded, there was sufficient circumstantial evidence to clearly establish the guilt of the Appellant of the offence of robbery with violence. Accepting the evidence of Alice Wieland that she was subjected to violence during the burglary, the High Court accepted as did the learned Senior Principal Magistrate, that the particular circumstances surrounding how the stolen items already referred to, and the Swiss Francs came into the possession of the Appellant's uncle and mother, amounted in law, to their being in the possession of the Appellant. In support of this, the High Court made the following observation with which we agree:

"The learned trial Magistrate considered the circumstances of such recoveries and concluded that the Appellant had possession of the property. Although he did not so state, we think he applied the definition of 'Possession' obtaining in the Penal Code, that is:

'be in possession of' or 'have in possession' includes not only having in one's own personal possession, but also 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 or benefit of oneself or of any other person.'

We think with respect that the definition covers the Appellant and we find that he had possession of part of the stolen property."

Having come to this conclusion, the High Court, we think rightly, held, and citing the case of Kennedy Kawai Abdallah v R Criminal Appeal No. 42/99 (unreported), in support thereof, that the fact that the Appellant, only ten days after the burglary, had voluntarily led the police to his mother's house

where she handed over to the police, as having been brought to her by her son, the Appellant, some of the items that had been stolen during the burglary of Alice Wieland's house and which the Appellant did not deny, amounted to circumstantial evidence of the Appellant's guilt of the offence of which he was convicted.

Apart from this, the High Court also considered another circumstantial evidence which the learned Senior Principal Magistrate did not refer to in his judgment. This is the evidence of Francis Kenga Mwandara, a fisherman who lived at Timboni and who gave evidence for the prosecution. He said that at about 8:00 p.m. on 2nd June, 1997, when he came home, he had seen the one he shared the house with, the Appellant and another man talking. They left and came back after midnight. They had torch lights and something that looked like a small radio. They sat down and shared among themselves, some money that they had also brought with them. After this they left and he was interviewed by the police a few days thereafter.

The Appellant's cross examination of this witness amounted to no more than this:

"I have seen you on several occasions. Accused three and myself shared one house. I saw him, you and accused four sharing money. I was told by the police that you were involved in a robbery."

In our view, and considering what Francis Mwandara said that the sharing of money took place in Timboni where Alice Wieland also lived, and which was shortly after she had been robbed, this circumstantial evidence together with the evidence regarding the recovery of some of the stolen items from the Appellant's uncle and mother, supports the conviction that the Appellant was guilty of the offence of which he was convicted.

But now, the Appellant has appealed to this Court. Apart from his dock identification being unreliable, it has been urged by Mr. Kiarago, counsel for the Appellant, that there were serious inconsistencies between the evidence of Cpl. Maina and Constable Makhana; that none of the stolen items were found in the Appellant's actual possession; that the statement made by the Appellant's accomplice that is the 3rd Accused in the trial before the learned Senior Principal Magistrate, was relied upon in convicting the Appellant; and that the report of the ballistic expert did not prove that the pistol that was recovered from the Appellant's house belonged to Alice Wieland.

These grounds can be quickly dealt with. As already shown, the High Court did not rely on the dock identification of the Appellant by Alice Wieland. It relied on weighty circumstantial evidence that it rightly concluded proved the Appellant's guilt beyond all reasonable doubt. There was also no inconsistencies between the evidence of Constable Makhana and Cpl. Maina. It is clear from the evidence that Constable Makhana went on 12th June, 1997, with other police officers, not including Cpl. Maina, to search for Appellant and to arrest him. It was subsequent to this that Cpl. Maina who was investigating the crime, went with the Appellant to the houses of his uncle and mother where they each surrendered to Cpl. Maina, further stolen items. When their evidence is considered in this proper manner, no inconsistencies exist. We see nothing to support the allegation that the confession statement made by the 3rd Accused was relied upon by the learned Senior Principal Magistrate or the High Court in the conviction of the Appellant and the support of that conviction by the High Court. The report of the ballistic expert which is really irrelevant in this respect, may not prove that the pistol he examined belonged to Alice Wieland, but Alice Wieland herself, identified the pistol that was recovered from the Appellant's house as hers, and which no one denied. That is what matters.

We have considered all the authorities cited by Mr. Kiarago, counsel for the Appellant, and fear that there is nothing more for us to say but that the Appellant's appeal fails, and it is hereby dismissed.

It is so ordered.

Dated and delivered at Mombasa this 27th day of July, 2000.

R. S. C. OMOLO

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR