



IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO. 52 OF 1999

BETWEEN

IBRAHIM LEKARTELOTARGET LOKONYOKIE.....APPELLANTS

AND

REPUBLICRESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nakuru

(Justice Rimita and Justice Mulwa) dated 4th June, 1999)

in

H.C.CR.C. NO. 85 AND 86 OF 1998)

JUDGMENT OF THE COURT

IBRAHIM LEKARTELO, the first appellant and TARGET LOKONYOKIE, the second appellant, were convicted by the Senior Resident Magistrate, Naivasha, on a charge of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to suffer death as is mandatorily required by law.

The appellants' first appeal to the superior court against conviction and sentence was dismissed by Rimita and Mulwa, JJ. on 4th June, 1999. This is therefore a second appeal.

On the night of 26th and 27th September, 1996, the complainant, Zakaria Kinyua (PW1) who operated a shop at Brizia Farm, Naivasha, was asleep inside the shop. His wife, Anna (PW3), slept in the couple's house nearby. At about 1.00 a.m. the complainant heard some noises emanating from the direction of that house. He woke up and called out to inquire what was wrong. A group of people, whose number he could not estimate, threw stones at the door and ordered him to open the shop for them. The complainant blew his whistle but the attackers did not relent. They persistently hurled more stones at the door which eventually caved in and broke into pieces. The attackers had bright torches which they shone here and there within the shop. They grabbed the complainant and bit him severely occasioning him serious injuries on the hands, head and back. They then pushed him into the bed and covered his head with a blanket. PW3 was under guard with a warning not to scream. The thugs also warned the members of the public not to go near as they were armed and would shoot if any one of them attempted to approach. They then loaded shop goods into sacks and left. Those articles included blankets, lesos, baby shawls, soaps,

shoes and cigarettes amongst many others. From the room PW3 slept in, a Television Set (TV) and a radio make National Star were stolen. As we shall see soon herein in this judgment, the recovery of these two articles is very important in the conviction of the first appellant.

The complainant and his wife were unable to identify any member of the gang. However, they reported the robbery to Naivasha Police Station which immediately commenced investigation. Acting on an information P.C. Julius Omari (PW2) tracked the first appellant to Solai where he arrested him the following day. The first appellant volunteered to lead PW2 to a place near Cereals Board where he had allegedly hidden the TV and other articles. The first appellant however denied doing so. The TV and other goods were recovered in a manila sack. The complainant promptly identified the TV as his.

The first appellant led the police to the house of the second appellant wherein some shop goods were recovered. The second appellant was not in the house but the police broke into it. He claimed the goods belonged to him.

At the trial the prosecution rested its case entirely on the basis of the doctrine of possession of property recently stolen. The first appellant denied the offence. In his defence he claimed that he was implicated for nothing. He knew nothing about the shop goods or the TV. The second appellant averred that the articles with which he was found were his and had bought them some while ago.

Accordingly, the appeal to this Court turned entirely on a scrutiny of the evidence of PW2 when considered in the light of other testimony, and on the evaluation of the evidence as a whole by the trial and the first appellate court.

We have no difficulty in disposing of the appeal by the second appellant. No one identified him at the scene of the robbery. The articles recovered from him were goods of common usage and which are generally available everywhere. They had no distinct marks peculiar to the complainant. Moreover the witnesses, Monica Wanza (PW5) and Ngarioki Lefura (PW6) testified that they had bought the articles from the second appellant a month before the commission of the robbery. In the circumstances we consider the second appellant's conviction unsafe and cannot be sustained. The conviction based on recent possession is a fatal defect. We allow the appeal, quash his conviction and set aside the sentence of death. He shall be set at liberty forthwith unless otherwise lawful held.

The case for the first appellant, we must confess, has given us great anxiety. Though PW2 says that the TV was recovered in the presence of the complainant, the latter denies so. Again, the other articles recovered together with the TV could not be said with certainty to belong to the complainant. This issue was not sufficiently considered by the two courts below. Again, there were rampant contradictions in the evidence of the complainant and PW2. It cannot legitimately be inferred by virtue of the doctrine of recent possession that the first appellant was guilty of robbery. It would be unreasonable in the particular circumstances and facts of this case to infer from the possession of the articles not proven clearly to have been stolen that the first appellant was guilty as charged.

The material discrepancy in the evidence of the complainant and the police witness, PW2, as regards the recovery of the TV was not satisfactorily resolved by the trial magistrate nor the first appellate court which, in our view, formed an unbalanced view of the evidence and reached a decision which was insupportable in law.

Accordingly, we come to the conclusion that the conviction of the first appellant ought also not to be upheld. His appeal, too, is allowed and the conviction quashed. We set aside the sentence. Like in the case of the second appellant, he is also entitled to his liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nakuru this 29th day of September, 2000.

J. E. GICHERU

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.