REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 47 & 48 of 2007

JOSEPH MUTETI KINGOO …….…….…….. 1ST APPELLANT

PAUL KIKUMU KINGOO ……...……2ND APPELLANT

VERSUS

REPUBLIC …...…….…….…..RESPONDENT

(From the original conviction and sentence in Criminal Case No. 4816 of 2004 of the Chief Magistrate's Court at Machakos by S. A. Okato – Principal Magistrate)

JUDGEMENT

The appellants herein Joseph Muteti Kingoo and Paul Kikumu Kingoo were charged in Machakos Chief Magistrate's court criminal case No.4816 of 2004 with the charge of robbery with violence contrary to section 296(2) of the Penal Code. The particulars thereof are that on the night of 1st and 2nd October 2004 at Kithangathini village, Githangathini sub-location in Makueni District of Eastern Province jointly with others not before court while armed with offensive weapons namely pangas, rungus and

iron bars robbed Kamuya Ndolo of cash kshs.5,000/=, one television make great wall, one solar power controller, 4 sufurias, 1 radio cassette make National, 4 bed sheets, 10 table cloths and 2 fluorescent tubes all valued at Kshs.31,500/= and at or immediately before or immediately after the robbery wounded Jackson Kilonzo Katua. They were also charged with an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code in that the 1st appellant was found in possession of one radio cassette make national knowing or having reason to belief it to have been stolen or unlawfully obtained while the 2nd appellant was found in possession of one solar power controller in a manner to suggest it was stolen or unlawfully obtained.

The prosecution called 5 witnesses in support of the charges against the appellants. PW1 John Musyimi Mutaki testified that on 2nd October 2004 he received information from one Mutungi that thugs had broken into his rural home and injured his watchman who was guarding the house. He reported the matter to Kilome Police Station and went to the scene the following morning in order to check the extent of the attack against his watchman. Upon reaching home he confirmed that the items mentioned in the charge sheet were missing from his house. He visited his watchman who had been admitted at Nunguni Health Centre and transferred him to Machakos General Hospital. He says that on 17th he was called by police officers from Kilome Police Station who showed him several items that were recovered and he was able to identify the radio cassette make National and a solar controller as among the items that were at the police station.

PW2 Kilonzo Katua states that on the material date at about 8.00 p.m. while on duty as a watchman at the home of PW1 he was attacked and cut thrice on the forehead by unknown persons. He fell to the ground and from that time he could not remember what had happened until he was informed at Machakos General Hospital that he had been injured by gangsters.

PW3 on his part confirmed that he was in the house of PW1 on the material day when a group of intruders gained entry and went away with items indicated in the charge sheet. He also says he lost a sum of Kshs.4,000/= to the robbers but could not remember or identify any of the attackers.

PW4 is the doctor who filled the P3 form in respect of PW2 and confirmed that PW2 was actually injured on the material night when robbers raided the home of PW1.

PW5 Sgt. Thomas Odenyo stated that on 14th October 2004 he received information that certain people operating a kiosk were in possession of stolen goods. He proceeded to Kilome market in the company of PC Ooko and PC Kinyua where they were shown the kiosk that was allegedly selling stolen items. The kiosk they went to belonged to the appellants herein who are brothers. The appellants were arrested and taken to Kilome police Station where they were locked in police cells. On 15th October 2004 the two appellants were taken to the houses where several items which were not related to this case were recovered. However, from the house of the 2nd appellant police recovered a solar controller which was taken to the police station. Again on 16th October 2004 police returned to the kiosk of the 1st appellant where radio cassette make National Star was recovered. The items recovered from the two appellants were identified by PW1 as the ones stolen on the nights of 2nd and 2nd October, 2004.

After the close of the prosecution case the two appellants were put on their defence and each gave sworn testimony denying the offence that was preferred against them. The 1st appellant stated that on 14th October 2004 while at his shop, 4 people who were looking suspicious came to his kiosk and arrested him together with his brother. They w ere escorted to Kilome Police Station and the next day he was taken to his house where nothing was recovered from him. He says he was taken to court on 27th October 2004 and on that date he made an application to the Chief Magistrate for his release of his property which was in possession of the police officers. He says that the magistrate ordered the goods to be returned to him. In short he stated that the radio cassette that was allegedly found belongs to him and that he had nothing to do with the allegations that were put forward against him by PW1 and PW5. The 2nd appellant also stated that the solar panel belonged to him and that he produced a receipt to show that he purchased the same for his own use.

After analyzing the evidence of the prosecution and the defence by the two appellants, the trial court was of the view that there was sufficient evidence to link the two appellants with the robbery that took place on the night of 1st and 2nd October 2004. In his judgement, the learned trial magistrate found that the charges has been proved beyond reasonable doubt and he proceeded to convict the two appellants for the main charge of robbery with violence contrary to section 296(2) of the Penal Code and sentenced each of the them to death hence this appeal.

In our mind there is no doubt that on the nights and 1st and 2nd October 2004 a robbery took place in the house of PW1 where several items were stolen during the time of the said robbery. There is evidence to show that at the time of such robbery PW2 who was the watchman was seriously injured by the attackers. There is also evidence from PW3 that the items mentioned in the charge sheet were taken forcefully and by means of threat from him. Further the evidence by PW1 is that upon receiving the information that his employees were attacked and his property stolen he made a report to Kilome Police Station where an investigation was put in place.

PW5 and other police officers received information that certain persons were selling or were in possession of items earlier stolen from PW1 at Kilome market. PW5 together with other officers acting on the tip off proceeded to the kiosk where the alleged items were being held. They found the two appellants operating the said kiosk and they immediately arrested them and took them to police custody. The following day, police took the two appellants to their houses where a solar controller belonging to PW1 was recovered from the house of the 2nd appellant. There is also evidence that on the 16th October 2004 police went back to the kiosk together with the appellant where a radio cassette belonging to PW1 was recovered from the said kiosk. PW1 positively identified the radio cassette by stating that it had marks of his initials JMM inscribed on the battery holder. PW1 says that JMM stands for John Musyimi Mutaki. He also identified the radio cassette because the battery cover was not fitting well and the trial court confirmed the battery cover was not fitting well. As regards the solar controller, PW1 identified it by initials JMM which were inscribed on the solar controller. This piece of evidence was also confirmed by PW5 who arrested the two appellants and made the recoveries.

The trial court after considering the defence by the two appellants and the evidence tendered by the prosecution was of the

view that the radio cassette and the solar controller were property of PW1. He made a finding that the two items were among the goods that PW1 lost during the robbery. He also made a finding that the two appellants were required to have a reasonable explanation as to how they came into possession of the said exhibits.

On our part we have re-evaluated the evidence of the prosecution and we come to emphatic conclusion that there was no misdirection or error committed by the trial court. We are satisfied with the evidence given by PW1 that the two items that were recovered from the appellants had his initials inscribed on them and that there was no possibility of another person inscribing the said initials onto the said exhibits. As was rightly pointed out by the trial court the two items that were found on the appellants were among the items earlier stolen from the house of PW1. The law is that where a suspect is found with recently stolen property and he offers no plausible explanation why he or she had in his possession or her possession, then he is considered to be either the thief or a guilty receiver thereof. In our humble view the two appellants were in law duty bound to give a reasonable explanation as to how they came to be in possession of the items earlier stolen from the hose of PW1. The items were positively and correctly identified by PW1 who narrated how he inscribed his initials on the said items. Under such circumstances the appellants are duty bound to offer an explanation that they were not one of the people who robbed PW2 and PW3 of the items mentioned in the charge sheet. In essence the two appellants have not rebutted the doctrine of the recent possession which in law requires a person or persons like the appellants to give a rebuttable presumption which displaces the case put forward by the prosecution. We are in total agreement that the explanation offered by the two appellants falls short of the expectation of a reasonable tribunal or mind directing its mind to the facts in this case. We therefore think that the two appellants jointly with others not before court robbed PW2 and PW3 of the items stated in the charge sheet. They cannot escape the conclusion that a person found with recently stolen goods with no explanation is either the thief or a guilty receiver. We think they are the thieves who had attacked the house of PW1 on the material night and by use of force they injured PW2 resulting in severe injuries to him.

Having considered the evidence tendered by the prosecution against the defence offered by the two appellants, we think that there is no merit in the appeals that were lodged by the two appellants. The prosecution proved its case beyond reasonable doubt and that there is no merit in the defences put forward by the two appellants. In the circumstances we have no reasons to disturb the decision of the trial court. We find the appeals have no merit with results that the death sentences in respect of each appellant is hereby affirmed.

Dated signed and delivered at Machakos this 17th day of December 2009.

ISAAC LENAOLA

JUDGE

M. WARSAME

JUDGE