



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: VISRAM, KOOME & OKWENGU, JJ.A.

CRIMINAL APPEAL NO. 372 OF 2008

BETWEEN

JOHN MAINA KARIUKI

ANTONY MWANGI KARIUKI

DANIEL CHEGE MUNGAI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Kimaru, J) dated 19<sup>th</sup> February, 2008

in

H.C.CR.A. NOS. 176, 177 & 178 OF 2005)

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**JUDGMENT OF THE COURT**

1. The three appellants were charged with two counts of committing robbery with violence contrary to **Section 296 (2) of the Penal Code**. They were tried, convicted and sentenced to death by the learned chief magistrate on 18<sup>th</sup> November, 2005. The evidence that led to their conviction and sentence was that on or about 30<sup>th</sup> January 2005, at about 3.00 a.m. **Kinuthia Kiarie** (PW1) and his wife **Leah** (PW2) were attacked by thieves. From their description of the attackers in their evidence, the attackers were two in number and they struck when Kinuthia had gone out to relieve himself. As he returned to the house, he found one assailant brandishing a *panga*. That assailant ordered Kinuthia and his wife to produce money and mobile phones. Kinuthia was cut with a *panga* on his hand. Meanwhile the other assailant was busy removing maize and they stole several other household items that were listed in the

charge sheet. Kinuthia and his wife managed to raise an alarm, but they were not able to identify the attackers.

2. Neighbours responded to the alarm and they pursued the robbers. One of the neighbours who responded was **James Gakuru Karuki** (PW4). Incidentally when they pursued the robbers, they discovered some of the stolen items were stored in a house which James said he had rented to Njoroge, one of the suspects who was subjected to mob lynching and was killed. According to James, although he had rented the house to Njoroge, he had stayed for a long time without seeing him and the house was being occupied by John Maina Kariuki the 1<sup>st</sup> appellant in this case. The 1<sup>st</sup> appellant was also beaten by the members of public until he was unconscious, and by the time the police arrived, they removed some keys from the 1<sup>st</sup> appellant's pockets which belonged to the complainants.

3. According to **Jimmy Mwangi Njoroge** (PW5) another neighbour who also responded to the alarm, they suspected **John Njoroge** who was killed by the members of public. Inside the house that was rented to Njoroge by James, they found some of the stolen items such as TV, radio cassette, solar battery, blankets, table clothes and plates. The neighbours did not find Njoroge in the house but PW4 told them that he regularly shared it with John Kariuki the 1<sup>st</sup> appellant. From the evidence of James especially during cross examination, he confirmed that he had not rented the house to the 1<sup>st</sup> appellant.

4. The neighbours continued to look for Njoroge, and they managed to find him inside the house of Jacinta Aoko Omondi who was the 4<sup>th</sup> accused person before the trial court. Inside the house of Aoko, they recovered table clothes and plates. They also found Njoroge in the house and he is the one who led PW4 and PW5 to the house of the 1<sup>st</sup> and 2<sup>nd</sup> appellants. They recovered a battery from the house where the 2<sup>nd</sup> appellant was found, a radio was also recovered from a house where the 3<sup>rd</sup> appellant was found.

5. The appellants were put on their defence, the 1<sup>st</sup> appellant gave unsworn evidence. He gave an account of how he was arrested early in the morning while he had gone to the house of the 2<sup>nd</sup> appellant to seek his hand in fetching water and supplying it to a customer. He was arrested by members of public who subjected him to mob beating. He was taken to where Njoroge who had been beaten senselessly was lying down but the said Njoroge denied that he knew the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant was arrested and taken to hospital where he was admitted for 4 days. He denied that he was arrested with the stolen items, particularly a batch of keys. The 2<sup>nd</sup> appellant also gave a similar account of how he was arrested and subjected to mob beating and was admitted to hospital for some days. Similarly the 3<sup>rd</sup> appellant was arrested by members of public subjected to beatings and he sustained a fracture of the arm. He denied any items were recovered from his house.

7. The learned trial magistrate reviewed the above evidence and rendered his opinion as thus:

*"The witnesses who testified as to how the complainants' properties were recovered were James Gakuru (PW4), Jimmy Mwangi (PW5), Veronica Wanjiru (PW 6) and Cpl Timothy Munyi (PW7). Their evidence supplicating the accused persons as analysed above. The question to ask is, were they telling lies against the accused persons, and if so why" I have considered the evidence of these witnesses vis vis that of the accused persons in their defence. I find no reason which would have made them want to lead (sic) lies against the accused persons. I am satisfied that they told the truth. I hold that the accused persons were found in possession of the complainants properties a few hours after the complainants were robbed of the same..."*

8. The appellants were all found guilty, convicted and sentenced to death. Being aggrieved by the conviction and sentence they filed an appeal before the High Court. However the appeals were all

dismissed by the learned Musinga and Kimaru JJ who concurred with the trial magistrate. The appellants are still dissatisfied and they have filed this appeal. All the appellants were represented by **Mr. Okeke** who in addition to the home made grounds of appeal filed by the appellants, relied on a supplementary memorandum of appeal which raised the following grounds of appeal:

1. *That the learned judges of the High Court erred in law by failing to independently evaluate, and come to their own conclusion upon, the evidence adduced at the trial of the appellants, thereby upholding convictions and sentences that were based on no evidence.*
2. *That the learned judges of the High Court erred in law by failing to resolve the glaring and inherent contradictions exhibited in the evidence adduced by the prosecution at the trial of the appellants, thereby upholding convictions and sentences that were based on no evidence.*
3. *That the learned judges of the High Court erred in law by finding and holding that the doctrine of recent possession applied, and was correctly applied, to the case against the appellants.*
4. *That the learned judges of the High Court erred in law by failing to properly consider and made a definite finding upon the defences raised by the appellants.*
5. *That the learned judges of the High Court erred in law by relying upon an exhibit recovered from the 1<sup>st</sup> appellant's person whilst the 1<sup>st</sup> appellant was unconscious and thus without his knowledge.*

9. In further arguments to support the grounds of appeal, Mr. Okeke learned counsel for the appellants, submitted that there was no evidence to support the conviction, and if the superior court had analyzed the evidence and dealt with the various contradictions on the identification and recovery of stolen property, the appeals should have been successful. He strenuously argued that the complainants did not identify the stolen items, for example, the number of plates stolen; whether the items were recovered in possession of the appellants was also not resolved. He made reference to the case of **Bernard Maranayu Aggrey v. Republic KAR [1982-88] 1 KAR** where this Court while determining a similar issue of possession of stolen properties held:

*"In view of the evidence of the two witnesses, the items of which the appellant was found in possession were not proved to have been the same in those stated to be missing, and the charge was therefore not proved as laid."*

10. On her part, **M/s Idagwa**, learned State Counsel, supported the conviction and the sentence as handed down by the trial court and upheld by the High Court. She argued that the contradictions regarding the number of skirts and plates could be cured by the provisions of **section 382** of the Criminal Procedure Code. The fact that the items were recovered from the houses occupied by the appellants was conclusive that the doctrine of recent possession was proved.

11. This is a second appeal, and perhaps the final, and by dint of section 361 (1) (a) of the Criminal Procedure Code, only issues of law fall for our determination. The main issue is whether the appellants were arrested with goods which were recently stolen and recovered from their possession. Possession of stolen property is crucial in this case; it is drawn from the doctrine of recent possession of stolen goods which are found with an accused person who fails to offer an explanation of how he came into possession of stolen goods.

12. We have been called upon to find that the Learned Judges of the High court failed to re-evaluate the evidence as required by law to find that inter alia the items were not identified and were not found in

possession of the appellants. The two complainants who were victims of robbery did not identify the robbers. The items that were stolen appear to have been recovered from many places according to the evidence on record, some items were found in the house of Njoroge. Njoroge was not at his house but James who was the land lord said he used to see the 1<sup>st</sup> appellant also occupying the same house. Other items were found in the house of the 4<sup>th</sup> accused person who died and her appeal was marked as having abated in the high court. Other items were recovered from the houses of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

**13.** The 1<sup>st</sup> appellant was arrested with a batch of keys which were identified by the complainants as part of their stolen items. We have considered this aspect with anxious minds because by the time the keys were recovered from the 1<sup>st</sup> appellant, he had been beaten by the members of public until he was unconscious, secondly although the evidence shows that the complainant produced a padlock that was opened with the keys, in our considered view, it was not entirely safe to base the appellant's conviction on this finding alone as there is a possibility that many padlocks can open with the same key and this possibility was not ruled out.

**14.** As regards the conviction of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, there was no evidence to prove that the items were recovered in their houses. The houses where the items were recovered were not positively identified as belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. This evidence when taken with the sworn statements of defence by these two appellants leaves doubts on whether the items were recovered from houses that were exclusively occupied by them. It is clear the learned judges of the High Court noted this in their judgment when they expressed themselves as follows:

*“Although the appellants submitted that the prosecution did not establish the owner of the houses where they were found by members of the public, the appellants did not adduce any evidence to challenge the evidence by the prosecution that they were the occupants of the said houses.”*

With tremendous respect, the appellants had no duty to prove that they were not the occupants of the houses where stolen goods were found. The burden did not at all shift from the prosecution.

**15.** In the result we find merit in the three appeals, we allow the appeals, quash the appellants' respective convictions for the offence of robbery with violence, set aside the death sentence and order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants be set at liberty forthwith unless otherwise lawfully held.

This judgment is delivered pursuant to the provisions of **Rule 32(2) of the Court of Appeal rules** as *Okwengu, JA*, a member of this Bench is not available.

**Dated and delivered at Nakuru this 27<sup>th</sup> day of September, 2012.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**



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