



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 122 OF 2012

SAMSON NYAGA MBUKO..... APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

**From original conviction and sentence in Criminal Case No.1046 of 2006 at the Chief Magistrate's Court at Embu by Hon. L.K. MUTAI – PM on 23/3/2013**

**J U D G M E N T**

**SAMSON NYAGA MBUKO** the Appellant was charged with two counts of robbery with violence contrary to section 296(2) Penal Code with an alternative count of handling stolen goods contrary to section 322 Penal Code. The particulars of the said offence were as follows;

**SAMSON NYAGA MBUKO:** On 7<sup>th</sup> day of July 2008 at Kagumori village, Nembure sub-location in Embu District of Eastern Province, otherwise than in the cause of stealing dishonestly handled one T.V set make Great wall, one battery make AP, one spraying pump, six iron sheets, two mattresses, two blankets, one kerosene lamp and one bed sheet all valued at kshs.22,000/= the property of HARRIET GICHUKU NYAGA knowing or having reason to believe them to have been stolen or unlawfully obtained.

The matter proceeded to full hearing and he was convicted of the alternative count of handling and sentenced to seven (7) years imprisonment. He was aggrieved with the Judgment and he filed this appeal challenging both the conviction and the sentence. He raised the following grounds;

- 1. That the learned trial Magistrate erred in law and fact in relying on evidence adduced by the entire witnesses amounting to inconsistency, untruthful incredible and full of contradictions.***
- 2. That the trial Magistrate erred in law and facts when he failed to observe that the fabrications were more of malice conspired to implicate the Appellant to an offence he had no knowledge about.***
- 3. That the key witnesses were not summoned to clear the shred of doubt i.e. police informer, sub-area and also the parent of the accused as a crown witness.***
- 4. That there was no inventory record in support of these allegations in commitment of the exhibits in question.***
- 5. That she failed to put due consideration that the exhibits were recovered in an incomplete halfway constructed structure in a different newly established homestead away from the***

- Appellant's dwelling/ compound being planted at the same by the robbers.***
- 6. That the evidence given was false and discrepancies in respect of prosecutions bundle and the proceedings itself.***
  - 7. That the honourable Magistrate misdirected herself in reaching to a premature judgment delivery which was determined after quitting and denying the Appellant a chance to spell his sub-visions and subsequent defence evidence.***
  - 8. That the evidence was biased, influential and in collusion by the PW corruption.***
  - 9. That the Appellant was denied issuance of an evidence of what he encountered to his severed leg and became harsh in sentencing him in a disjournment while discharging the actual perpetrate.***

The Prosecution case was that on the night of 6/7/2008 at 8pm, PW1 was in her house watching T.V with her ailing husband. Also in the same house was their daughter (PW2) with her three (3) year old son. They were attacked by six (6) people who they knew as neighbours. The attackers wore masks. They stole the items mentioned in the particulars of the robbery. PW1 and PW2 claimed to have known the Appellant and his co-accused but this was not exhibited in the evidence that was adduced in Court. This led to the acquittal of the Appellant and co-accused on the main counts of Robbery with Violence. After reports were made PW4 (sub-area), PW5 (member of County policing), PW9 (C.I. Mitacho), PW7 (P.C. Mwaniki) and others visited the home of the Appellant. From a house under construction they recovered a T.V set, mattress, Pump, 6 iron sheets and a battery belonging to PW1 (EXB.2-6). The Appellant was found hiding in the chimney of the said house under construction. In his sworn defence he denied the charge. He said he was home on 7/7/2008 at 10am when he heard movements of people towards his brother's house. On peeping he was asked about his brother's whereabouts, and that's how he was arrested.

When the appeal came for hearing the Appellant abandoned his appeal on conviction and proceeded with the one on sentence only. He asked the Court to consider reducing the sentence. The learned State Counsel M/s Ingahizu opposed the appeal on sentence saying it was lenient.

As a 1<sup>st</sup> appeal Court this Court has a duty to re-evaluate the evidence on record and arrive at its own conclusion. I also bear in mind that I did not see nor hear the witnesses.

- REF: 1. ***OKENO –VS- REPUBLIC [1972] EA 32***
2. ***OGETO –VS- REPUBLIC [2004] 2 KLR 14***
3. ***SOKI –VS- REPUBLIC [2004] 2 KLR 21***
4. ***KINYANJUI –VS- REPUBLIC [2004] 2 KLR 364***

Being guided by the aforementioned authorities, I have considered the submissions by the Appellant and the State. I have equally considered the evidence on record plus the grounds of appeal. The Appellant was convicted on the charge of handling stolen property. In the case of ***ARUM –VS- REPUBLIC [2006] 1 KLR 233*** the Court of Appeal in its judgment laid down some issues to be addressed when dealing with a case of recent possession. They are;

- 1. Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof.***
  - a. that the property was found with the suspect***

- b. that the property was positively the property of the complainant**
- c. that the property was stolen from the complainant**
- d. that the property was recently stolen from the complainant**

- 2. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot suffice, no matter from how many witnesses.**
- 3. In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence analyzing it and accepting that it considers it to be correct and honest version.**
- 4. In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence after analyzing it and accepting that it considers it to be correct and an honest version.**

The learned trial Magistrate keenly observed this. This is what she stated in her Judgment at page 173 lines 2-9);

***“PWIX IP Mitacho was also at the recovery point from where 5<sup>th</sup> accused was arrested and the said items recovered which he too identified before the Court and which PWVII P.C. Mwaniki the investigating officer exhibited before the Prosecution case. These items were well identified before the Court by the 1<sup>st</sup> complainant Harriet PW1, the 2<sup>nd</sup> complainant Jane PWII and Munene PWIII all who were at the scene of the robbery and when the said items were stolen. I was satisfied that indeed the second exhibits were from the 1<sup>st</sup> complainant. This identification which went undisputed by the defence and that they were sure of the items stolen from the status quo at all material time”.***

After evaluating the evidence I am satisfied that the Appellant was found handling these items belonging to the complainant. He did not give any explanation for his possession of the said goods. He was found with these items the next day after the said robbery. It's not clear why the learned trial Magistrate did not apply the doctrine of recent possession and convict the Appellant of the main Count. The people who stole from PW1 had been more than one and were armed with dangerous weapons namely pangas. The evidence is overwhelming and I am satisfied that the right decision was made. Considering the gravity of the offence and how lucky the Appellant was to escape with that light sentence I will only reduce his sentence to six (6) years from date of conviction. To that extent only does the appeal succeed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH DAY OF DECEMBER, 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**Mr. Miiri for State**

**Appellant**

**Njue CC**



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