



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 26 OF 2017

LUKAS MBURU THUKU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence from a judgment of

Hon. P. Gesora CM delivered on 28th March 2017 in Naivasha CMCR No. 62 of 2017)

JUDGMENT

1. The Appellant was charged, with others not before the court, with five (5) counts of robbery with violence contrary to **Section 295** as read with **Section 296** of the **Penal Code**. He was also charged with one count of burglary and stealing contrary to **Section 304 (2)** and **297 (b)** of the **Penal Code**; and one count of handling stolen property contrary to **Section 322 (2)** of the **Penal Code**.

2. After a full hearing in which the Appellant gave an unsworn statement, the trial magistrate found that he committed the offences and convicted him. He was sentenced to death on Count 1, and the sentences in the other counts were left in abeyance.

3. Dissatisfied with the lower court's judgment, the Appellant has appealed on the grounds that:

- *the charge sheet was defective as a duplex charge.*
- *the conviction was based on the evidence of a single identifying witness.*
- *the trial court erroneously applied doctrine of recent possession.*
- *the sentence of death awarded was applied in a mandatory form.*

4. The facts of the case are as follows. The charges involving the counts for robbery with violence concern a single incident which occurred on 26th December, 2015. The five complainants, Rosemary Njeri Kamau (PW3), Jane Wambui Muiruri (PW4), Leah Wangari Mwangi (PW5), Peter Muchiri Kamau (PW6) and Fredrick Kiarie Wambui (PW7), had met at PW4's home for a family Christmas gathering and celebration. Some had their children with them. Jane Wambui Muiruri (PW4) was hosting the families.

5. At around midnight, they decided to retire for the night. Some of them, largely the men, slept in a neighbour's house and in the car, whilst the ladies retired into the house. At around 1.00am, three men broke into the house, attacked the homes and cars where the complainants were sleeping. One of the assailants wore police uniform or a jungle jacket, one of them had a gun, others had a panga or metal bars.

6. The assailants robbed the complainants in the houses and cars, they threatened and beat the victims; they ordered the complainants to give them money and their mobile phones. Each of the complainants gave evidence of what occurred on the material night.

7. In Count I, PW5 Leah Wangari Mwangi testified that she was robbed on the material night whilst at the home of her aunt. She testified that the items taken included her finger ring, a bag with clothes and merchandise, and a gas cylinder. Other items listed in the charge sheet were a Samsung Galaxy mobile phone, two travelling bags all valued at Shs 34,800/= and cash of Kshs 700/=. They later reported to the police station. Subsequently, she participated in an identification parade and picked out the Accused.

8. In Count II, Peter Muchiri Kamau (PW6) testified that on the material night he slept in his vehicle KBN 117S. At about 1.00am he awoke

to the sound of his door being opened. Shortly after, three men appeared, one in front and the others on both sides. He started hooting frantically and the ladies were screaming. One of the robbers showed him a gun, so he surrendered and opened the doors. They pulled him out of the car, pushed him into the house and robbed him. They were using a torch which lit the area. He was robbed of a Samsung Galaxy grand duos mobile phone make 9082 valued at Kshs 28,000/=. In the morning, the complainants reported at Naivasha Police Station. PW6 was not able to pick out any suspect at a later identification parade.

9. In Count III, Rosemary Njeri Kamau, PW3, testified that on the material night she was in the house of PW4, when she heard a commotion outside. She saw PW6, Peter Muchiri, being pulled out of the car by an attacker armed with a panga. The occupants were screaming and the attackers came to the house saying they were police officers. One was wearing a uniform and carried a gun. When they opened the door, PW4 was shoved in. The assailants ordered them to put on the lights, and she put on her mobile phone light. Her phone was snatched from her. The attackers demanded Kshs 800,000/= or they would kill them. They went into the other rooms searching for things and terrorizing the victims for over one hour, even ordering them to pray. They took her mobile phone one of which was an 'OBI' make and walked away casually. In the morning she went with the others to report at Naivasha Police Station. Later, she was unable to identify her attackers at an identification parade, but identified her 'OBI' mobile phone (MFI 2) which the police had recovered.

10. In respect of Count IV, PW4 Jane Wambui testified that on the material night she woke up to answer a call of nature, when she heard a bang against the steel door. She looked out and saw three men, one wearing a police trench coat and carrying a gun, another in police uniform. They dragged PW6 Peter Muchiri and PW7 Fred Kiarie on the ground. When the assailants got to the door of the house those inside opened the door. The attackers threw Muchiri in the house and stole things inside. In the bedroom where the girls were, the attackers robbed them of their mobile phones. Back in the sitting room an attacker threatened to cut PW6 but PW4's mother intervened. In the morning the victims reported to the police station. Later, the police asked PW4 to go to identify a mobile phone which she could not identify, although she identified some of the contacts in it and some messages. At an identification parade later, she was unable to identify any of the suspects.

11. In respect of Count V, Fredrick Kiarie Wambui testified as PW7. He stated that on the material night he slept in the car, in the co-driver's seat. At about 1.00pm he was awoken by PW6, who said someone had appeared outside. PW6 hooted. The assailants appeared. One was wearing a jungle jacket, the others wore jackets. After one attacker pointed a gun at PW6, the car occupants surrendered. The other assailants were carrying metal bars. The moon was bright and PW6 said he saw the robbers clearly. The assailants pushed them into the house which has been opened by the ladies. Once inside, they were frisked and robbed of mobile phones, cash, clothes merchandise bag and a gas cylinder. He did not attend an identification parade. However he identified the accused at the dock as the one who was carrying the gun.

12. In respect of Count VI, PW1 Salat Hassan Bonaya testified that he worked with Save the Elephant, that on 8th January, 2016 at 3.00pm he received a call from his brother, Adan Hassan. Adan told PW1, that his (PW1's) house door in Kayole Naivasha, was ajar, and goods in the house were missing. He told his brother to confirm the information and report to the police. As PW1 was in Nairobi, he rushed to Naivasha. He found that his Sony TV, LG CD Charger, DVD, Gas Cooker, Bag with clothes, Food and 3 sufurias were missing and his door padlock was broken. He went to Kayole Police Post to confirm the report made there by his brother.

13. On 12th January, 2016 he was at Naivasha Bus Stage, when he saw a man wearing a T-shirt emblazoned with the words "Save the Elephant" his employers organization name. The T-shirts were given by his employer as samples so he suspected it was his T-shirt. He called members of the public who arrested the suspect, and took him to Naivasha Police Station. The suspect was unable to explain the source of the T-shirt which had the name of his employer on its front and the word SATAO on its back. He identified the T-shirt (MFI 1) in court.

14. In cross-examination, PW1 said the T-shirt was only available for sale to foreign tourists; that the accused was unable to take him to the hawker who allegedly sold it to the accused. In re-examination PW1 said his employer sells other T-shirts with a different logo.

15. PW2 Adan Hassan, said that he lived with his brother PW1. He had securely locked PW1's house and whilst on duty he received a call from a neighbour that the house had been broken into. He rushed to the house and confirmed the report. He called PW1 who instructed him to report to the police. He reported the items stolen. The police came to the house and confirmed the report.

16. On 12th January, 2016, PW1 called him and told him he had spotted someone wearing his company's logo. He went and joined his brother and they got members of the public to arrest the suspect. The other goods were not recovered.

17. PW8 Inspector Alvine Matara of Naivasha Police Station. He testified that he conducted an identification parade on 13th January, 2016. He produced the Identification Parade Form as P. Exhibit 3. He said he observed all the rules for conducting identification parades; that the accused signed the form and was satisfied with the parade. He said that Leah Wangari Mwangi PW5, was able to identify the accused. The other witnesses did not identify the accused.

18. PW9 Corporal Nicholas Kogo was the Investigating Officer. He recorded the complainants' statements; He took the serial numbers of stolen phones so as to track them; that on 12th January, 2016 one Salat Hassan (PW1) came to the station having arrested accused who was wearing his T-shirt. As the Accused could not explain his possession of the T-shirt, they did a quick search and recovered a mobile serial number 911382350058475. PW9 called one of the numbers and the receipt said it was one of the items stolen and belonged to Rosemary Njeri (PW3). He charged the accused in the dock. In an Identification Parade Leah Wangari (PW5) positively identified the accused. He produced the T-shirt as P. Exhibit 1 and mobile phone (OBI) as P. Exhibit 2. In cross-examination PW9 said he did a search of the accused and found the mobile phone handset on him.

19. The Appellant gave an unsworn statement in his defence. He said he was a potato vendor. That on 7th January, 2016 at 3.30pm he met a hawker who sold him a T-shirt. He then went to meet a friend at the bus stage wearing the T-shirt. Some people accosted him, and members of public gathered and took him to Naivasha Police Station. He was then framed with the charges.

Identification

20. PW5 Leah Wangari Mwangi identified the accused at the identification parade. Her testimony on identification was:

“I saw him at the scene. He had a mark on his face and I identified it.”

In cross-examination, she said:

“I saw and identified you when you came to the room and I was in. I did not indicate the same in the first report.”

21. There is no indication as to how PW5 got to see the accused and by what light. The learned trial magistrate found, and the prosecution has submitted, that the house was well lit with electric light enabling PW5 to identify the accused. However, it was 1.00am and there is no evidence on record that any lights were on. In fact, PW3 Rosemary Njeri, testified that the assailants ordered the victims to put on the lights. That confirms that they were off. Then PW3 put her mobile phone light on, and immediately it was snatched from her by one robbers. Did anyone else put on the lights? That question is not answered by the evidence. PW7, Fredrick Kiarie, who was in the car, said the moon was bright and he saw the robbers clearly. He identified the accused at the dock but did not attend the identification parade. In my view the probative value of the dock identification is low.

22. In **Gabriel Kamau Njoroge v Republic [1982-1988]1KAR 1134**, this court observed:

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

Further in **Muiruri & Others versus Republic (2002) 1KLR 274** where it held:

“It is believed because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused’s presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of...we do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo versus Republic (1953) 20 EACA 166, Roria versus Republic (1967) EA 583 and Charles Maitanyi versus Republic (1986) 2KLR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases the courts have emphasised the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification.” (Emphasis added)

23. I also have serious doubts on the certainty and veracity of the circumstances of identification by PW5. In **Wamunga v Republic (1989) KLR 424** the Court of Appeal said:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.” (Emphasis added)

24. In the present case the recorded evidence does not show that PW5 had the advantage of good light with which to see the accused. The prosecution relied on **John Kasyimi Kakiti & Another v Republic [2014] eKLR** where the Court of Appeal held that recognition of an assailant is more assuring more satisfactory and more reliable than identification. In the same case, the Court stated:

“We agree with their counsel that basing a conviction solely on the evidence of visual identification can easily cause a miscarriage of justice as witnesses have been mistaken even in the identification of their relatives or close friends--Kiarie v Republic [1984] KLR 739. It is for this reason that this Court further held in the said case of Kiarie v Republic [1984] KLR 739 that for a conviction resting entirely on the evidence of visual identification to be upheld, that evidence must be watertight. It must be shown that conditions at the scene including lighting and the time taken in the commission of the crime were favourable for a positive identification-- Ogeto v Republic, [2004] 2 KLR 14.” (Emphasis added)

25. In **Kasyimi’s case**, the complainant saw the accused in moonlight. However, there, they chased the accused persons without losing sight of them and arrested one of them. Here, the assailants robbed the complainants, and fled altogether out of sight.

26. Accordingly, I think it was unsafe to rely on identification evidence in respect of the charges for murder, notwithstanding that accused was found with the mobile handset of PW3 Rosemary Njeri. I think this is a proper case in which the alternative charge of handling stolen property contrary to **Section 322 (2) of the Penal Code** in respect of Count III may be properly applied.

Recent Possession

27. In respect of the alternative count to Count III, it is noted that the accused was on 12th January, 2016 found with the mobile phone of PW3 which had been stolen on 26th December, 2015, seventeen days earlier.

28. In respect to Count VI, the burglary charge against the accused cannot be supported merely on account of the fact that the accused was found with the T-shirt of PW1. However the evidence clearly suggests that, being unable to explain how he got the complainant's logo T-shirt which had scarce limited circulation he improperly had it in his possession. When asked to identify the alleged seller, he said it was from a hawker, but he could not identify the hawker. In this case, however, the alternative charge of handling stolen property is therefore tenable and supportable.

29. The essence of the doctrine of recent possession is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation as to how he came to be in possession of that property, a presumption of fact arises that he is either a thief or receiver. See *Hassan vs. Republic [2005]2 KLR 151*. The circumstances under which the doctrine will apply were considered in Isaac *Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic [2006] eKLR* where the Court of Appeal stated:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.” [Emphasis added.]

30. In the present case, clear evidence was led that the mobile phone found on the appellant was stolen as well as evidence as to whom it belonged. Accordingly, I find that the trial court erred in convicting the accused of murder in all the counts instead of the charges in respect of handling stolen property. I therefore quash the convictions and sentence for murder and hereby convict the accused with the two charges for Handling stolen property contrary to section 322(2) of the Penal Code, for which charges the accused was arraigned in the alternative to Count III and Count VI.”

31. The file is remitted back to the trial court for a hearing to consider mitigation and sentence. It shall be placed before the Hon. Chief Magistrate within 14 days of today's date for consideration and further directions.

Administrative directions

32. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

33. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

34. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 12th Day of November, 2020.

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R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Mogoi holding brief for Ms Maingi for the DPP
2. Luka Mburu Thuku - Appellant present in person in Naivasha Maximum Prison
3. Court Clerk – Quinter Ogutu