REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.88 OF 2016

AMOS KRISHNA WILLIAM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. J. N. Onyiego CM delivered on 10th March 2016 in Kiambu CM Cr. Case No. 1262 of 2014)

JUDGMENT

The Appellant, Amos Krishna William was charged alongside four others in the first count with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 27th March 2014 at Thigiri Rise Estate in Gigiri within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely AK 47 rifles, pistols and metal bars, the Appellant robbed Koen Walter Toonen of a Samsung smart TV 46" worth 4,350 US dollars, one computer Mac worth 4,120 US dollars, one iPhone make gold apple 5s worth 980 US dollars, iPhone 4 worth 850 US dollars, iPad air worth 929 US dollars, iPad 4G worth 929 US dollars, iPad 4G mini worth 729 US dollars, mac book air laptop worth 2,400 US dollars, sports watch GPS worth 725 US dollars, one fuel band make Nike worth 149 US dollars, two bracelets worth 139 US dollars, silver crystal earrings worth 69 US dollars and one camera make lumix worth 400 US dollars all valued at US dollars 16,769, and at the time of such robbery used actual violence on the said Koen Walter Toonen.

In the second count, the Appellant was charged alongside four others with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 27th March 2014 at Thigiri Rise Estate in Gigiri within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely AK 47 rifles, pistols and metal bars, the Appellant robbed Franklin Seth Kidisa of one mobile phone make Samsung galaxy worth Ksh.22,999/-, one iPhone worth Ksh.45,000/-, one iPad worth Ksh.24,500/- and a driving license all valued at Ksh.92,499/-, and at the time of such robbery threatened to use actual violence to the said Franklin Seth Kidisa.

In the third count, the Appellant was charged alongside four others with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 27th March 2014 at Thigiri Rise Estate in Gigiri within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely AK 47 rifles, pistols and metal bars, the Appellant robbed Paul Moite of mobile phone make Huawei worth Ksh.7,500/- and immediately after such robbery killed the said Paul Moite.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to all the charges. After full trial, he was convicted as charged on all counts. He was sentenced to death in count one. The sentences in count two and three were held in abeyance. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition for appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for overlooking the contents of the first report made by the complainant to the police. He was aggrieved that the trial court relied on the evidence of identification which was not sufficient to sustain a conviction. He faulted the trial magistrate for relying on the evidence of identification by voice recognition presented by PW2. He was of the view that the trial court erred in relying on the evidence of the doctrine of recent possession adduced by the prosecution. He took issue with the trial court's decision in allowing the P3 form to be admitted into evidence contrary to **Section 77(1)** of the Evidence Act. He was aggrieved that the trial court allowed the print outs into evidence contrary to **Section 65(8)** of the **Evidence Act.** He complained that his conviction was based on a mere suspicion. He was of the view that the prosecution failed to prove its case to the required standard of proof beyond any reasonable doubt. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentences that were imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Atina for the State opposed the appeal. She submitted that the Appellant was positively identified by PW2. PW1's room was

well lit with electricity lights. PW2 corroborated PW1's evidence. The robbery took about 15 minutes. After the Appellant was arrested, an identification parade was conducted. PW2 was able to identify the Appellant. He identified him by his physical appearance as well as through voice recognition. Learned counsel pointed out that the circumstantial evidence implicated the Appellant. He was found in possession of the stolen phone, the next day after the robbery. She submitted that ingredients of the offence of robbery with violence were established by the prosecution. With regards to sentence, she was of the view that the same was reasonable since a life was lost during the robbery. PW1 was also injured. In the premises therefore, she urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: The complainant, PW1 stated that he resided at Gigiri with PW2. On the material night of 27th March 2014, he was asleep at his house. At about 2.30 a.m., he heard dogs bark. He opened his bedroom door. The electric lights at the corridor were switched on. The lights in his bedroom were also lit. He saw a man, about two meters away facing him. He was dressed in a dark blue security guard uniform with a yellow belt on the shoulders. He asked the man who he was. The man did not respond. The man raised a stick ready to hit him. He retreated into his bedroom and locked the door. He demanded that PW1 open the bedroom door. The house was manned by two night security guards. PW1 started calling out to the security guards for help. Shortly after, a gunshot was fired through his bedroom door. The bullet hit him just above the knee. He fell down. His door was opened. The man he had seen outside his room entered. He pointed a gun at him. At the same time he was pointing a torch at him.

A second man entered the room and started kicking him. The men asked for keys and money. They took his valuables and put them in a bag. His housemate, PW2, was brought to his room. He was pushed into a wardrobe. The robbers ransacked the house. The robbers spent about 20 minutes in the house. PW1 stated that he saw the faces of the two men in his room. He stated that the two men were not among those arraigned in the trial court. When the robbers left, PW1 and PW2 went outside. They untied one of the security guards whose hands had been tied together. Police officers arrived. They informed him that the other security guard had been shot dead by the robbers. He thereafter sought medical treatment at Aga khan Hospital.

PW2 was PW1's housemate. He stated that on the material night, he was woken up by a man who was holding a torch and a gun. He was ordered to remain quiet. He could hear movements in the room. He heard a man ordering PW1 to open the door to his bedroom. He thereafter heard a gunshot. PW1 raised an alarm. The men were demanding for money. The man in his room took his two phones. After a few minutes, he was taken to PW1's room. He was seated down with PW1 as the men ransacked the room. The lights in PW1's room were on. PW2 stated that he saw four men when he was taken to PW1's room. One of the men had an AK 47 rifle. He was light skinned with curly hair. He was dresses in a security guard uniform, light green trousers and a heavy jacket.

The second man was holding a metal rod. He was short and dark. He was also wearing a security guard uniform, green sweater and light green trousers. The third man was standing next to where PW2 was seated. He stated that he was not able to identify him. The fourth man was ransacking the house. He was also not able to identify him. Three of the men left. The one who was holding metal rod came back. He took PW2 and ordered him to open the main door. PW2 was then taken back to PW1's room. After a while, the men left. He took PW1 to receive medical treatment. They also reported the matter to the police. PW2 was later informed that a suspect had been arrested in possession of his stolen phone. He went to Parklands Police Station on 12th April 2014 where an identification parade was conducted. He identified the Appellant during the identification parade.

PW8, Peter Macharia was one of the security guards manning the complainant's house. He confirmed how the robbery occurred. There were four assailants. One had a big gun and another had a pistol. He was however unable to identify any of the assailants as it was dark outside. He confirmed that his colleague was shot dead by the robbers. PW10 conducted the identification parade where the Appellant was identified by PW2. He narrated to the court how the parade was conducted. He stated that PW2 identified the Appellant by his physical appearance as well as through voice recognition. The investigating officer, PW12 stated that DW4, Angeline Ndunge was arrested in possession of PW2's phone. She led to the arrest of the DW2 and DW3 who traced the phone back to the Appellant. PW13, Francis Ngila was one of the arresting officers. He arrested DW4 in possession of one of the stolen phones. She stated that she bought the phone from DW2 (Simon Musyoki) through DW3 (Peter Njoroge). DW2 said that he got the phone from the Appellant. The Appellant on his part told PW13 that he was given the phone by someone named Kasamba.

When the Appellant was put on his defence, he denied the charges against him. He testified that on 28th January 2014 at 10.00 a.m., his customer by the name Kasamba came to his place of work. He needed a loan of Ksh.1,000/-. The Appellant informed him that he had no money. Kasamba requested him to get him a buyer for his Samsung phone. He called DW2 who agreed to buy the same. Kasamba left the phone with the Appellant. The Appellant took it to DW2 who bought it for Ksh.1,000/-. The Appellant took the money to Kasamba. When the Appellant was arrested, he informed the police officers that he got the phone from Kasamba. They were however unable to trace Kasamba. He denied being involved in the robbery.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32).** In the present appeal, the issue for determination is whether the prosecution proved its case on the charges brought against the Appellant of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification and the doctrine of recent possession to secure the conviction of the Appellant. With regard to identification, PW2 was the only identifying witness. Evidence of a single identifying witness must be examined carefully to ensure that it is watertight before a conviction is founded on it. In the case of **Kiilu & Another vs Republic [2005] 1 KLR 174** it was held that:

> ***"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that***

the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."

PW2 identified the Appellant during an identification parade conducted on 12th April 2014. PW10 conducted the identification parade. He stated that PW2 identified the Appellant by his physical appearance and voice recognition. He however did not state which physical features PW2 used to identify the Appellant, and if the same were given by PW2 before the identification parade was conducted. PW12, the investigating officer stated that PW2 identified the Appellant through voice recognition. He did not mention if PW2 identified the Appellant by any physical features. He did not state whether PW2 gave any description of the assailants in the first report he made to the police. PW2 stated in his testimony that the Appellant was short and dark. He however did not state whether he gave this description of the Appellant in his first report made to the police. This court notes that it is not clear from the trial court's record whether a description of the Appellant was given to the police prior to the identification parade. In addition, the description of the Appellant as ***'short and dark'*** is extremely vague. For the above reasons, this court is of the opinion that evidence of PW2 on identification on its own cannot form a basis for the Appellant's conviction. The same would require other direct or circumstantial evidence to corroborate it.

Regarding the evidence of voice recognition, PW2 stated that he wrote down statements that were uttered by the assailants during the robbery. He identified the Appellant by his voice which he claimed to recognize. However, PW2 in his testimony did not state whether it was the Appellant who uttered those words during the robbery. There were four assailants. PW2 stated that: ***"Those were the words they used."*** The court was not informed whether the Appellant specifically uttered those words, or if he spoke at all. In addition, PW2 was not acquainted with the Appellant prior to the robbery. He was therefore not familiar with the Appellant's voice prior to the robbery. The robbery took place for about 15 to 20 minutes. The identification parade took place fifteen (15) days after the material day when the robbery occurred. This court is not convinced that in the circumstance, that was enough time for PW2 to memorize the assailants' voices. **In the case of Libambula vs R [2003] KLR 683,** the Court of Appeal had this to say with regards to voice identification;

"Normally evidence of voice identification is receivable and admissible evidence and it can depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused persons' voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.

In the present appeal, PW2 did not state whether he was familiar with the Appellant's voice so as to recognize it during the robbery. In addition, he did not state whether it was the Appellant who uttered those words during the robbery. He stated in general that the statements were uttered by the assailants. Accordingly, this court is of the opinion that the trial court ought not to have relied on the evidence of identification by voice recognition presented by the prosecution.

The prosecution also relied on the doctrine of recent possession. PW2's mobile phone was one of the stolen items. PW13 was able to track the said phone. It was found in possession of DW4. This was on 10th April 2014, two weeks after the robbery. DW4 stated that she got the phone from DW3 on 30th March 2014. DW3 did not deny the same. He stated that DW2 gave him the phone on 28th March 2014. He asked him to look for a battery for the said phone. Later on DW2 informed him that the phone was for sale. His girlfriend (DW4) gave him money to buy her the phone. He gave DW2 Ksh.2,000/- for the phone.

When DW2 was interrogated, he stated that he met with the Appellant on 28th March 2014. The Appellant gave him a Samsung phone. He sent him to a shop in Eastleigh to get a battery for the phone. He passed by DW3's shop. He gave DW3 the phone and requested him to get the battery for the said phone. DW3 informed him that the battery cost Ksh.700/-. The next day, on 29th March 2014, the Appellant asked DW2 whether he wanted to buy the phone. DW2 told him that he did not need a phone. He however promised to ask around for a buyer. He informed DW3 that the phone was for sale. DW3 offered to buy the same. He gave him Ksh.2,000/-. DW2 gave the money to the Appellant.

The Appellant on his part stated that he got the phone from his customer known as Kasamba on 28th March 2014. Kasamba needed a loan of Ksh.1,000/-. However, the Appellant told him that he did not have the money. Kasamba gave the Appellant the phone and requested him to look for a buyer. That is when he sold the phone to DW2. DW2 gave him Ksh.1,000/- for the phone which he forwarded to Kasamba. However, the police officers were unable to trace the said Kasamba. The Appellant stated that Kasamba was accompanied by his friend Victor Mukamba when he delivered the phone to him. The said Victor was arrested but later discharged by the trial court after close of the prosecution case. The trial court therefore did not get a chance to ascertain from him whether he indeed took the said Kasamba to see the Appellant on the stated day. PW13 did not explain whether he interrogated the said Victor to ascertain whether the Appellant's claims were indeed true. Reasonable doubt was therefore raised by the Appellant with regards to the application of the doctrine of recent possession. The prosecution did not prove beyond any reasonable doubt that the phone originated from the Appellant and not the said Kasamba. The doctrine of recent possession can only apply if possession of the stolen item by the accused is satisfactorily proved. This court therefore holds that the doctrine of recent possession was not applicable in this case.

Fingerprints evidence presented by the prosecution did not implicate the Appellant in the robbery. Looking at the evidence in its entirety, this court is left with doubt as to whether PW2 correctly identified the Appellant as one of the assailants. From the aforegoing, the evidence of identification, taken into totality is not watertight and free of error to support the conviction of the Appellant.

In the premises therefore this court finds merit in the appeal lodged by the Appellant. The Appeal is hereby allowed. The conviction is quashed. The Appellant is acquitted. The Appellant is set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF MARCH 2019

L. KIMARU

JUDGE