



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 145 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. A.R. Kithinji – SPM

delivered on 21st September 2017 in Makadara CMC. Cr. Case No.3185 of 2013)

JAMES MAINA WAINAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, James Maina Wainaina was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 7th July 2013 at Eastleigh Section III in Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons namely pangas and knives, robbed Ann Wairimu Mugo of her mobile phone make Nokia C3 valued at Kshs.10,000/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Ann Wairimu Mugo (hereinafter referred to as the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification that did not stand up to legal scrutiny. He was particularly irked that the trial magistrate had relied on contradictory and inconsistent evidence of the prosecution witnesses to convict him. He complained that his plausible defence had not been considered before the trial magistrate reached the impugned verdict. He took issue with the fact that he was convicted on insufficient evidence of the prosecution witnesses in circumstances where crucial witnesses were not called to testify in the case. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He also made oral submission urging the court to find that the evidence of identification that was adduced by the complainant was insufficient to secure his conviction on its basis. He stated that the evidence adduced by the complainant did not support all the elements of the charge and therefore his conviction was erroneous. He further submitted that his right to be informed of the options to be exercised under **Section 200(3)** of the **Criminal Procedure Code** was not complied with before the convicting magistrate took over the proceedings from the magistrate who commenced the proceedings.

Ms. Atina for the State opposed the appeal. She submitted that the complainant was accosted and robbed of her mobile phone after being threatened with a knife. She explained that the complainant identified the Appellant in the course of the robbery. She made a report to the police. Two days later, the complainant was called to the police station after the Appellant's arrest. She identified the Appellant as the person who robbed her. The Appellant was escorted by the police to his house, where upon a search being conducted in the house, a mobile phone that was robbed from the Appellant was recovered. The doctrine of recent possession applied in his case. On whether **Section 200(3)** of the **Criminal Procedure Code** was complied with, learned state counsel submitted that the section was complied with as evidenced at page 18 of the proceedings. On sentence, Ms. Atina submitted that taking into consideration the circumstances of the robbery, and the fact that the Appellant was a first offender, she did not mind if the Appellant's sentence was revised and substituted with a custodial sentence. However, she urged the court to dismiss the appeal on conviction.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In so doing, the court is mindful that it neither

saw nor heard the witnesses as they testified and therefore cannot give an opinion as regarding the demeanour of the said witnesses (see **Okeno -vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant for the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission made by the parties before this court on this appeal. From the submission made, it was clear that the Appellant was convicted on the basis of the evidence of identification and on application by the trial court of the doctrine of recent possession. This is an interesting case where only two witnesses testified on behalf of the prosecution: the complainant and the investigating officer. The complainant testified that on 7th July 2013 at about 5.00 p.m. while outside a supermarket at Eastleigh, she was robbed of her mobile phone make Nokia C3 by a person who threatened her with a knife. After the robbery, the robber ran away. The complainant reported the robbery incident to the police at Eastleigh Police Post. Importantly, the complainant did not give the description of the robber in the first report that she made to the police. However, she told the police that she would be able to identify the robber if she saw him again. Three days later, on 10th July 2013, the complainant was summoned to the police post. She was exposed to the Appellant who had been arrested for allegedly committing an unrelated offence. The complainant told the police that the Appellant was the person that robbed her. Again, it was not clear from her evidence how she was able to be positive that it was the Appellant who had robbed her. She did not state the physical features or the clothing that Appellant wore that enabled her to be categorical that it was the Appellant who had robbed her. She was shown a mobile phone which was allegedly recovered from the Appellant. The phone was produced as an exhibit in court. She told the court that the particular phone was the one had been robbed from her. Again, she did not produce any documents or receipt or point out any identifying features to establish beyond any reasonable doubt that indeed the phone allegedly recovered in the Appellant's possession was the one that was robbed from her.

The investigating officer who testified as PW2 PC Bethwel Sang stated that on 10th July 2013 while at Eastleigh Police Patrol Base, members of the public brought the Appellant to the police station on allegation that he had attempted to steal from one Alman Mohamed. He was armed with a panga. He placed the Appellant in police custody. He recalled that a report had earlier been made by the complainant to the effect that she had been robbed of a mobile phone. Accompanied by other police officers, he requested the Appellant to escort them to his residence at Kinyago slums. After conducting a search in the house, they recovered a Nokia mobile phone make C3. She called the complainant who positively identified the mobile phone. Unfortunately, PW2 did not state whether he prepared an inventory before searching the Appellant's house. He did not tell the court how the complainant was able to be positive that the mobile phone that was recovered from the Appellant's house was hers. The complainant did not present any documentary evidence to the investigating officer to establish beyond any reasonable doubt that she was the owner of the particular mobile phone. Alman Mohamed, whom the Appellant is alleged to have attempted to rob, was not called to testify in the case. None of the members of the public who are alleged to have escorted the Appellant to the police station were called to testify in the case. When the Appellant was put on his defence, he denied committing the offence that he was charged with.

From careful analysis of the evidence adduced, it was clear to this court that on the basis of the evidence of the two prosecution witnesses, the trial court did not have sufficient and credible evidence to convict the Appellant. The evidence of identification that was adduced by the complainant fell far short of the threshold which a court can convict on such evidence of identification. The complainant did not give the description of her assailant in the first report that she made to the police. Other than stating that she recognized the Appellant as the person who robbed her when she was exposed to him at the police post, the complainant did not tell the court how she was positive that she had identified the Appellant as her assailant. In **Kennedy Orange Wamuremba & 2 Others -vs- Republic [2014] eKLR**, the Court of Appeal emphasized the importance of a victim of crime giving the description of the perpetrator of the crime in the first report to the police. This is what the court said:

“The purpose of giving the description of an assailant in the initial report is to test the accuracy of the identification evidence of the witness...doubts arises as to whether Janet (complainant) was able to get the physical impression of the said assailant during the robbery or was her description based on what she observed of the first appellant after he was arrested. We find that there was no way of testing the accuracy of Janet's identification of the first appellant. In James Tinega Omwenga -vs- Republic Criminal Appeal No.143 of 2011, this court expressed itself as follows:

“The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is dock identification which in some cases is regarded as worthless.”

In the present appeal, in the absence of a description given by the complainant to the police setting out the physical features or the clothing that the assailant is alleged to have worn during the robbery, the purported identification of the Appellant by the complainant upon his arrest was worthless and could not be given credit by the court. This court is not persuaded that the Appellant was properly identified by the complainant as the person who robbed her.

As regard the application of the doctrine of recent possession, this court is not persuaded that the Nokia C3 mobile phone that was produced in court was positively identified by the complainant as her property. This was because the complainant did not produce any documents or receipt to prove her ownership of the mobile phone. She did not give any distinguishing mark or feature in the mobile phone that made her to be positive that the mobile phone produced in court was indeed the one that was robbed from her. There was doubt whether in fact the particular mobile phone was recovered from the Appellant's house. This was because the police who allegedly conducted a search in the Appellant's house did not prepare an inventory to establish that indeed the said mobile phone was recovered from the Appellant's house. Such inventory, which in any event would have been signed by the Appellant, would have established to the required standard of proof that the particular mobile was recovered from the Appellant's house. This court therefore holds that the threshold for the application of the doctrine of recent possession was not met.

The upshot of the above reasons is that the appeal lodged by the Appellant is for allowing. The prosecution failed to establish, to the required standard of proof, the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof

beyond any reasonable doubt. The Appellant is acquitted of the charge. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

DATED AT NAIROBI THIS 25TH DAY OF MAY 2018

L. KIMARU

JUDGE