



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 95 OF 2011

(Being an appeal from the original conviction and sentence in Criminal Case No.2717 of 2010 at the Chief Magistrate's Court, Eldoret (Hon. A.Ong'injo, SPM) dated 8 June 2011)

MICHAEL AMALEMBA.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

JUDGMENT

[1] The Appellant herein, **Michael Amalemba**, was the accused before the Court of the Senior Principal Magistrate, charged Robbery with Violence, contrary to **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. The particulars of the offence were that on the **28th day of April 2010**, at **Eldoret Township** in **Uasin Gishu District** within **Rift Valley Province**, while armed with a pistol, he robbed **Wycliffe Barongo** of his motor cycle **Registration No. KMCH 468L**, make **TV Star**, red in colour, valued at **Kshs. 82,000** and that at the time of such robbery he threatened to use actual violence on the said **Wycliffe Barongo**.

[2] The Appellant denied that charge and, after trial, in which the Prosecution called 5 witnesses, he was found guilty and convicted by the Senior Principal Magistrate in a Judgment delivered on **8 June 2011**. He was accordingly sentenced to suffer death as by law provided. Being aggrieved by that decision, the Appellant lodged this appeal on **16 June 2011**, contending that:

[a] He was arrested by Administration Police officers who were not called to testify; and therefore that his arrest was not clarified by credible independent witnesses, granted that **PW1** and **PW2** were friends, while **PW3** was out to save himself from prosecution;

[b] That the Trial Magistrate erred in fact by determining that **PW3** testified was employed as a cyclist yet he did not produce a driving licence or any documentary evidence as to the contractual relationship between him and his employer;

[c] That the search for the motor cycle was indicative of prior knowledge and existence of a prior relationship and conspiracy between **PW1** and **PW3**, which could only be allayed by the testimony of the Administration Police officers who arrested him;

[d] That he was a victim of circumstances as the charge was not proved beyond reasonable doubt.

[3] With leave of the Court, the Appellant filed Amended Grounds of Appeal on **10 May 2017** pursuant to **Section 350(2)(v)** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya**. He accordingly thereby proffered the following Grounds:

[a] That the Trial Magistrate erred in both law and fact in convicting him on the evidence of a single identifying witness without observing that no provision of the law allows a police officer to take a suspect and complainant to arrest and identify a second suspect;

[b] That the Trial magistrate erred in both law and fact by convicting and sentencing him to suffer death while relying on the evidence of dock identification without considering that dock identification is worthless;

[c] That the Trial Magistrate erred in both law and fact by convicting him without observing that the person who recovered the motor cycle was not called to testify, which amounts to breach of the rules of natural justice;

[d] That the Trial Magistrate erred in both law and fact by convicting him without observing that the colour of the motor cycle indicated in the charge sheet and that given in court by investigating officer is different, hence doubts on the exhibit.

[4] Accordingly, the Appellant prayed that his appeal be allowed, the conviction quashed, and the death sentence set aside. He urged his appeal by way of written submissions, which he filed herein on **27 July 2017**. The appeal was opposed by **Ms. Kegehi**, Counsel for the State, in her oral submissions made on **21 June 2018**. I have given careful consideration to the appeal and taken into account the written and oral submissions made herein by Learned Counsel, being mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. Hence, in **Okeno vs. Republic [1972] EA 32** this principle was expressed thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

[5] Before the lower court, the Prosecution called 5 witnesses in proof of the charge of robbery with violence that was levelled against the Appellant. **PW1**, the Complainant herein, stated that at all times material to the case, he was operating a motor cycle taxi at **Petresha Building in Eldoret Town**; and that on the **28 April 2010**, at about **7.00 p.m.**, while at **Kipkaren Estate in Eldoret Town**, he was approached by a customer with a request to be taken to **Lions Primary School in Elgon View Estate**. Hence, the customer boarded the motor cycle; but upon reaching the destination, the customer removed a pistol and menacingly required him to choose between his life and the motor cycle. It was the evidence of **PW1** that he let go of the motor cycle which the attacker rode away.

[6] **PW1** further stated that he tried to raise alarm but no one responded; that thereafter, a certain woman came along who offered him the use of her mobile phone. He was thus able to call his employer to whom he reported the occurrence; and who advised him to report the incident to the police. He accordingly reported the matter to **Eldoret Police Station** and thereafter to his colleagues. They then mounted a search for the motor cycle and got to learn that it had gone towards **Huruma Estate**. The following day, with the help of a colleague called Solomon, he searched for the motor cycle on the **Ndalat Route** and emerged at **Turbo**, where they found many motor cycles. There they were able to see a motorbike which he identified to be the one he had been robbed of because, adding that though the number plate had been removed, he was able to identify the motorbike because it had a hole near the ignition which was caused by an accident.

[7] **PW1** told the lower court that he then locked the steering and inquired to know who had the custody of the motorbike; whereupon someone claimed ownership who then said he had been given the motorbike by the Appellant. The suspect was arrested and taken to the Police Station; and he thereafter led the Police, in the company of **PW1**, to where the Appellant was. **PW1** stated that he recognized the Appellant to be the person who had robbed him the previous evening. The Appellant was consequently arrested and escorted to **Eldoret Police Station**.

[8] **PW2** was **Jared Nyaweth Atuya**, a matatu driver and the employer of **PW1**. He confirmed that he had employed **PW1** to ride his motor cycle **Registration Number KMCH 468L** for hire. His evidence was that, on **28 April 2010**, he was on his way to **Eldoret** when **PW1** reported to him that he had been robbed of the motor cycle; and that he advised **PW1** to make a report of the occurrence to **Eldoret Police Station**. The following day, he received a report from **PW1** that the stolen motor cycle had been found at **Turbo**.

[9] **PW3**, **Abdi Mwarani**, a trainee-mechanic testified that, on the **28 April 2010** at about 9.00 pm, he was at **Makutano Stage** when the Appellant came along riding a motorbike and asked to be given directions to his sister's place; and that as his sister's home was far away from **Makutano**, he offered to accommodate the Appellant in his house. That in the morning of the following day, the Appellant removed the number plate of the motorbike and asked him to go with the motorbike to **Turbo** for fuelling and painting. He added that while at Turbo with the motorbike some people came and asked to know who had the motorbike; and that he owned up and explained that the motorbike had been given to him by someone else. He was arrested and taken to **Turbo Police Post** and thereafter led the police in search of the Appellant who they found in a busaa-drinking den. He also confirmed that the number plate and a helmet were recovered by the police from his house.

[10] **PW4** before the lower court was **Solomon Esogen**, a motorbike rider in **Eldoret Town**. It was his evidence that at about **7.00 p.m.** he was at the stage waiting for hire when a person unknown to him reported to him that one of their riders had been robbed of his motorbike. They proceeded to the scene and endeavoured to search for the motorbike but without success. The following day, he accompanied **PW1** to **Turbo** where they recovered the stolen motor cycle and arrested a suspect, who he identified as **Abdi (PW3)** herein). He was handed over to the Police and thereafter **PW3** led the Police to **Mautuma** where he identified the Appellant as the person who had employed him to ride the motorbike for him for hire. The Appellant was also arrested and taken to **Eldoret Police Station**. He too confirmed that the motor cycle's number plate and a helmet were recovered afterwards from the house of **PW3**.

[11] **PW5**, **Cpl. Robinson Naitipa** was the Investigating Officer. He received **PW1's** initial report on **28 April 2010** and thereafter circulated the report to nearby police stations. That the following day on **29 April 2010** he was informed that the motor cycle had been found in the possession of **Abdi Mulayani (PW3)** who led the arresting officers to the Appellant. The two suspects were escorted to **Eldoret Police Station** together with the motor cycle.

[12] In his defence, the Appellant told the lower court that he was at his place of work on **29 April 2010** after which he went home. That his aunt then asked him to assist her sell *busaa*, which he did up to about 3.00 p.m. when he was arrested for being in possession of 10 litres of *busaa*. He was then escorted to **Eldoret Police Station** where he was beaten up on allegations that he had employed someone to ride a motor cycle which was suspected to have been stolen. He was thereafter charged and taken to court.

[13] The offence of robbery is provided for in **Section 295 of the Penal Code**, which stipulates that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery. **Section 296(2) of the Penal Code**, the provision pursuant to which the Appellant was charged, provides that:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

[14] Hence, the aforesaid provision being disjunctive, the Prosecution was under obligation to prove any of the following key ingredients of the charge:

[a] That the offender was armed with a dangerous or offensive weapon or instrument; or

[b] That he was accompanied by one or more other persons; or

[c] That immediately before or immediately after the time of the robbery, he wounded, struck him or used any other personal violence against him.

[15] There can be no doubt that the evidence adduced by the Prosecution Witnesses before the lower court proved beyond reasonable doubt that **PW1** was robbed of the motorbike **Registration No. KMCF 468L** valued at **Kshs. 82,000/=** at gun-point on the evening of **28 April 2010**. Accordingly a dangerous weapon was used to threaten **PW1** into parting with the motorbike. That evidence was entirely uncontroverted. There was similarly no dispute that the motorbike was recovered the following day in the possession of **PW3** who immediately disclosed that the motorbike had been given to him by the Appellant. The motorbike's number plate had been removed and, according to **PW3**, the Appellant's instructions to him was to have it painted.

[16] Accordingly, what remains for verification is the issue of identification. It is manifest from the evidence adduced before the lower court that the offence occurred at about 7.00 p.m. and that **PW1** was the only identifying witness. It is now trite then when this is the case, the trial court is expected to test the evidence of identification with greatest care to ensure that it was free from mistake and therefore reliable and safe to support a conviction. Hence, in **R. vs. Turnbull & Others [1973] 3 AllER 549**, it was held that:

"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

[17] In **Wamunga vs. Republic [1989] KLR 426**, the same principle was restated thus:

"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 conviction."

[18] The Appellant took issue with the evidence of identification that was presented before the lower court. In his written submissions, it was his contention that **PW1** did not state how he managed to identify him; and therefore that the Trial Magistrate erred in relying on the evidence of **PW1** without warning herself of the danger of so doing. He also took issue with the fact that **PW1** accompanied the Police to arrest him contending that it was prejudicial to him. He posited that most probably **PW1** would not have been able to identify him had he not accompanied **PW3** and the arresting officers. Then there was the failure by the Prosecution to call any of the Administration Police Officers who arrested him, in respect of which the Appellant urged the Court, in his written submissions, to draw an inference that had they testified, their evidence would have been unfavourable to the Prosecution.

[19] A perusal of the Judgment of the lower court does confirm that no inquiry was made by the Learned Trial Magistrate in the manner set out in the case of **R vs. Turnbull** (supra). Other than acknowledging that **PW1** was the only identifying witness, and that it was risky to rely on the evidence of a single identifying witness, there was no inquiry done to determine for how long **PW1** had the Appellant under observation, or at what distance, or whether there was any source of light at the scene. Hence, there is no indication as to whether the observation of the Appellant impeded in any way.

[20] More importantly, the it is manifest that the officers who arrested the Appellant did not take the precaution to keep **PW1** away from the Appellant so as not to jeopardize the subsequent conduct of an identification parade. The need for such precaution was underscored in **James Tinenga Omwenga vs. Republic, Criminal Appeal No. 143 of 2011** thus:

"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 a dock identification which in some cases is regarded as worthless."

[21] Given the indubitable facts aforementioned, all the Prosecution was left with in terms of identification was the dock identification of the Appellant by **PW1** in respect of which the Court of Appeal observed thus in **Gabriel Kamau vs. Republic [1982-88] KAR 1134**:

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

[22] While I note the Submission of Counsel for the State, **Ms. Kegehi**, that apart from the evidence of identification the doctrine of recent possession would apply to the circumstances of this case. No doubt the stolen motorbike was recovered only the following day. Hence it would be in order to presume that the person from whom it was found was the very person who robbed **PW1** of the motorbike the previous evening. In the case of **Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005** this doctrine was explicated thus:

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof:

- i) that the property was found with the suspect;**
- ii) that the property is positively the property of the complainant;**
- iii) that the property was stolen from the complainant;**
- iv) 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 person to the other."

[23] However, as pointed out by the Appellant, the motorbike was not found in the possession of the Appellant. It was recovered from **PW3**. It was therefore imperative for the Prosecution to adduced watertight evidence that would link the Appellant with the motorbike, noting that **PW3** appears to have had reasons to believe that the motorbike had been stolen. The number plate was removed and he agreed to have the motor cycle taken for painting in that stated. He was therefore an accomplice whose evidence ought to be treated with caution. In **Republic vs. Kipkering Arap Koske & 2 Others (1949) EACA 135**, the Court of Appeal made this point thus:

"That in the present case, as witness Chepkwony was an accomplice, it would be wholly unsafe to accept his evidence without corroboration, and corroboration could only remove the taint of suspicion as to his credibility from an otherwise credible witness."

[24] Instead of supplying the needed corroboration, several discrepancies can be picked from the evidence adduced by the Prosecution. From the record of the lower court, there are contradictions and discrepancies in connection with the recovery of the motorbike' the first of which has to do with the particulars of the motorbike in terms of its Registration No. and colour. While the particulars of the charge refer to motor cycle **Registration Number KMCH 468L**, red in colour, **PW1's** evidence was in connection with motorbike **Reg. No. KMCH 468M**; while **PW5** testified that the motor cycle was black in colour. Whereas there is clear evidence that one of the reasons why **PW3** took the said motor cycle to Turbo was "to paint it" it was not clarified by the Prosecution whether the purpose was to completely change the colour from red to black or some other colour; or whether by the time **PW1** and **PW4** confronted **PW3** it had been so painted; or whether the painting was only partial or just decorative in nature.

[25] Although the motor cycle was exhibited in before the lower court, no note was made of its colour, and no indication was given by the trial court that to the effect that the specific identifying marks mentioned by **PW1** were extant. More importantly, there was no mention that the number plate, which was recovered separately from the house of **PW1** was put back on the motorbike. There is equally no indication whether it was on the motorbike at the time it was produced before the lower court. There is no indication that the number plate was produced before the lower court. Hence, as the evidence stands, it cannot be said that it was proved beyond reasonable doubt that the motorbike that was recovered from **PW3** was the motorbike **Reg. No. KMCH 468L** which **PW1** had been robbed of on the evening of **28 April 2010** so as to invoke the application of the doctrine of recent possession.

[26] To complete the chain of custody, it would have helped had the Administration Officers who recovered the motorbike attended the lower court to testify on the matter. None of them did and no explanation was given. Whereas the record shows that several opportunities were given by the court to have them testify, ultimately the Prosecution Case was closed without any explanation as to why their evidence was dispensed with. Under those circumstances, the inference to draw is that had they been called their evidence would have been adverse to the Prosecution Case.

[27] In the light of the foregoing unresolved inconsistencies and omissions, it cannot be said that the Prosecution proved beyond reasonable doubt that it was the Appellant who violently robbed **PW1** on **28 April 2010**. Accordingly, I would allow the appeal, quash the conviction recorded against the Appellant and set aside the death sentence that was imposed on him on **8 June 2011**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF JULY, 2018

OLGA SEWE

JUDGE