REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 27 of 2016

LAWRENCE THINGURI WAKARIA..……..APPELLANT

VERSUS

REPUBLIC …….…….....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrates Court at Kiambu Cr. Case No. 3567 of 2014 delivered by Hon. J. Kituku, PM, on 7th January 2016.)

JUDGMENT

Background

Lawrence Thinguri Wakaria the Appellant herein 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 4th December, 2014 at By Pass Junction within Kiambu county, jointly with another not before the court, armed with a dangerous weapon, namely; a toy pistol, robbed George Kariuki Wanjiru of his Tiger Motor Cycle registration number KMDG 483 H, a city call mobile phone and Kshs. 3,000/= in cash all valued at Kshs. 95,000/= and immediately before such robbery used actual violence against the said George Kariuki Wanjiru.

The Appellant was convicted accordingly and sentenced to death. He was dissatisfied with both the conviction and sentence and he thus preferred the present appeal. He filed amended grounds of appeal together with written submissions on 15th March, 2017. On grounds of appeal, he was dissatisfied that the learned trial magistrate erred in relying on dock identification, observing that the failure to carry out an identification parade was not fatal to the case, in not upholding that his right to a fair trial was infringed and in not considering his defence.

Submissions.

On his submission that he was not accorded a fair trial, the Appellant submitted that the trial began without being furnished with the first report despite his request for the same. He also took issue with the fact that he was incarcerated in police custody for more than 24 hours which is the maximum period that an accused person can be held in police custody. He went on to submit that the learned trial magistrate failed to inform him of his right to legal representation and to avail him the same contrary to Article 50 (2)(g) and (h) of the Constitution. His view was that the failure to do so meant that he was not able to mount a strong defence against the prosecution case. He also took issue with the fact that the learned trial magistrate did not consider his defence in arriving at a guilty verdict against him.

With regard to the proof of evidence, he submitted that he was not properly identified. He took issue with the fact that the robbery took place at night during which time the conditions for identification were difficult. Further, he faulted the learned trial magistrate who held that both PW1 and 2 positively identified him in such difficult circumstances. Moreover, that the learned trial magistrate upheld that he was properly identified by his mode of dressing. However, the evidence adduced by PW1 and 2 on how the robber was dressed at the time of robbery was contradictory. According to PW1, the robber wore a red jacket while PW2 testified that the robber was dressed in a black trouser and sandals. This meant that each of the witnesses was referring to a different person, the culprit.

The Appellant went on to submit that the learned trial magistrate misapplied the doctrine of recent possession. He particularly took issue with the fact that neither the arresting nor the investigating officer testified to prove and establish that he was arrested in possession of the stolen motor cycle. As such, there was no evidence that he is the one who had robbed PW1. He urged that the appeal be allowed.

The learned State Counsel, Miss Sigei opposed the appeal. She submitted that the Appellant was properly identified by both PW1 and 2. Her submission was that although the robbery took place at night, the scene at which the Appellant hired PW1 to ride him was well lit with security lights which enabled the witnesses to clearly see the Appellant. The scene was outside a bank and a Petrol Station which was well lit thus giving conducive environment for a positive identification. Furthermore, PW1 gave the description of the Appellant by the mode of his dressing when he went to report the matter to the Police Station. According to the counsel, the Appellant was arrested in the same clothes PW1 said he was dressed in at the time of robbery. Furthermore, the Appellant was arrested in possession of the stolen motor cycle which PW1 positively identified as his. As such, the learned trial magistrate properly applied the doctrine of recent possession. She was of the view that the failure of the arresting and investigating officer to testify in the circumstances was not fatal to the trial.

On whether the Appellant was accorded a fair trial, Miss Sigei submitted that the Appellant did not inform the court that he required any legal representation before the trial began. In any case, he ably cross-examined all the prosecution witnesses which was an indication that he had no issue conducting the trial in person. She also submitted that all the necessary documents were furnished to the Appellant before the trial began. She added that the Appellant's defence was properly considered in the judgment of the trial court. She urged the court to dismiss the appeal as it lacked merit.

Evidence.

The prosecution called a total of 3 witnesses. **PW1 Gorge Kariuki Wanjiru** was the complainant. He was a boda boda rider based in Kiambu Town. On the material date, 4th December, 2014 at about 10.00 pm, he was approached by a young man who asked him to ferry him to Windsor. They settled on transport fee of Kshs. 500/=. When he approached a round-about near Windsor, he slowed down. That is when the Appellant produced a pistol and pointed it at the back of his neck. The Appellant then ordered him to stop and he pulled to a curb on the roadside. He saw another man approach and the Appellant ordered him to part with his motor cycle failing which he would kill him. Fearing for his life he obliged. The man on the roadside boarded the motor cycle and together with the Appellant spend off leaving PW1 behind alone.

The Appellant then started walking towards Kiambu town when he met **PW3, Peter Ndungu Wanjiku** also a boda boda rider who lifted him to Kiambu where he made a report of the robbery at Kiambu Police Station. PW3 thereafter dropped PW1 at his work station near KCB Bank.

According to PW1, he was able to identify the Appellant because his work station was outside a bank and a petro station which was well lit with electricity. He testified that at the time the Appellant hired him, he was dressed in a red jacket. He testified that he informed the police of this fact but the police failed to indicate it in his first report. His further testimony was that on the following day after the robbery, he received a call from one Jack who had sold a motor cycle to him informing him that the motor cycle had been recovered in Machakos. Based on this information, police went to Machakos and recovered the motor cycle which he positively identified. He was also able to identify his mobile phone with the

contacts he had saved in it. He testified that he found the Appellant at the police Station after the recovery of his motor cycle.

PW2, Kelvin Shikuri was also a boda boda rider in Kiambu operating from the same station as PW1. His evidence was that he was present when the Appellant approached PW1 to ferry him to Windsor. He recalled that the Appellant was then wearing sandals and a black trouser. He later learnt that the person who had approached PW1 had robbed him of his motor cycle and he *identified him as the Appellant at the Police Station.*

DW 1, Appellant *recalled that on 5th December, 2014 he had gone to Machakos for a wedding preparation. He met his clients and worked until the next morning when he traveled back to Nairobi. At Kabati stage he was approached by traffic officers who asked about the contents of his briefcase. They also asked for his client's contact details. They then arrested and escorted him Kabati Police Station. Thereafter he was transferred to Kiambu Police Station where he was informed that he had stolen a motor cycle. He said that he furnished the investigating officer with a receipt to prove that the he had travelled to Machakos by public transport.*

Determination.

After considering the evidence on record, I have deduced the issues for determination to be: whether the Appellant's right to a fair hearing was violated, whether the case was proved beyond a reasonable doubt and whether his defence was considered.

On the first issue, the Appellant submitted that he was not supplied with the first report made at the police station by the complainant (PW1). A look at the proceedings shows that the trial came up for hearing on 30th April, 2015. The prosecution was ready to proceed but the Appellant informed the court that he had not been furnished with the first report. Although he did not indicate that he would not proceed for want of the first report, my view is that the court ought to have pursued with him whether he nevertheless would have proceeded with the trial. Unfortunately, this did not happen. Instead, the court admitted the evidence of PW1, 2 and 3.

It is gainsaid that a first report is a crucial piece of evidence to an accused person because it gives details of what the complainant reported was the offence perpetrated him/her. The report further corroborates the particulars of the offence as charged and where it contrasts the particulars, may create a doubt on the evidence of the complainant if both the report and the evidence do not tally. In cases where identification is crucial in establishing a case against an accused person, the first report holds key information in corroborating the evidence of the complainant on whether he was able to identify the assailant. It presence sieves admissible evidence from hearsay evidence. It is a valuable piece of evidence because it aids the accused person when impeaching the evidence of a witness thereby serving as a crucial weapon in his defence. Therefore, the failure to supply the first report to an accused person when a request has been made infringes on his right to a fair trial because it curtails his ability to combat a strong defence. The purpose of a first report was further emphasized in the case of **Rex v. Shabani bin Donaldi [1940] EACA 60**, to wit:

> ***"We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such report (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness…, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all."***

It follows then that the Appellant not having been supplied with the first report, his right to a fair trial as envisaged under **Article 50(2)(c) & (j) of the Constitution** was violated. The test then is then whether the trial was rendered a nullity by the failure to supply him with the first report. I will reserve this

determination until I have considered all other issues raised in this appeal.

The Appellant further submitted that his right under **Article 49(1)(f) of the Constitution** was infringed in that he was kept in the police custody for more than 24 hours as provided therein. Although he was not specific on the timings of his incarceration, it is now settled law that the mere fact that an accused has been kept in police custody for more than 24 hours would not render the trial a nullity. The accused person can pursue compensation from the person he thinks is liable for his detention for a period longer than acceptable under the Constitution.

Still under this head, the Appellant submitted that his right to legal representation under **Article 50(2)(g) &(h) of the Constitution** were violated. For avoidance of doubt, the said provisions provides as under:

> ***(2) Every accused person has the right to a fair trial, which includes the right-***
>
> > ***(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;***
> >
> > ***(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***

Under 2(g) above, I concur with the Appellant that the court was obligated to inform him of his right to be represented by an advocate. However, under (2) (h), although he would be entitled to free legal representation given that he was facing a serious charge, the applicability of that provision had not come into effect as at the time he was charged and tried. The operation of **Article 50(2)(g) & (h) of the Constitution** was to be effected within 4 years of the promulgation of the Constitution as outlined in the 5th Schedule of the Constitution. The **Legal Aid Act No. 6 of 2016** was enacted much after the Appellant had been tried. Therefore, the Appellant's right to free legal representation was dependant on this legislation which was not in force then.

I now determine whether the case was proved beyond a reasonable doubt. The learned trial magistrate convicted the Appellant upon upholding that he was positively identified and on account of being arrested with recently stolen property. The magistrate observed that although the identification was at night, there was sufficient lighting at the point that the Appellant hired PW1 to ferry him to Windsor. The court properly addressed itself on the issue of identification in difficult circumstances citing the case of **Juirus Kalewa Mutunga vs R [2006] eKLR** in which it was held that:

> ***"the law on identification is well stated, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from error, the surrounding circumstances must be considered… among the factors to be considered is whether the one witness gave a description of his attacker or attackers to the police at the earliest opportunity or at all.."***

Apart from observing that there was sufficient lighting outside KCB Bank where the Appellant boarded PW1's Motor cycle, the learned magistrate went on to uphold that the Appellant was also identified by the clothes he wore at that time. However, the trial magistrate failed to properly evaluate the contradicting evidence of both PW1 and 2 in this respect. According to PW1, the Appellant wore a red jacket but PW2 testified that he wore sandals and a black trouser. This should have raised doubt in the mind of the magistrate that probably the two witnesses were referring to two different persons. Otherwise, they should have described the mode of dressing that was similar. Whereas the mode of dressing may be used in instances of recognition, the same may not necessarily form a basis of a positive identification unless it is corroborative or acts as an aid to other factors on positive identification. That is to say, that, other factors ought to corroborate favourable conditions for a positive identification. In my view, clothes alone would only best suit a positive identification where an assailant is arrested so soon after committing an offence that there would not be an opportunity for him to change clothes between the time of commission of the offence and the time of arrest.

In the instant case, although it is alleged that the Appellant was arrested still dressed in a red jacket, the corroborative evidence called by the prosecution in that respect was contradictory. I need not repeat myself on this. That said though, the arresting officer did not testify so as to support the assertion that the Appellant was arrested while wearing a red jacket. In that respect I hold and find that the evidence on identification was not sufficient to found a conviction against the Appellant.

The learned trial magistrate also upheld the doctrine of recent possession as applicable in this case. She cited that the Appellant was arrested in possession of the stolen motor cycle in Machakos. Interestingly, PW1 was not present at the time of his arrest and only went to the Police Station where he found him together with the recovered motor cycle. It is now settled law that certain criteria must be met before the doctrine of recent possession can be applied. See the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic, Nyeri Criminal Appeal No. 272 of 2005** as quoted in **Lango v. Republic[2015] eKLR,** that:

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of a 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 person to the other."***

I need not emphasize that the first criteria was not satisfied. That is to say that it was never established that the recovered property was found in possession of the Appellant. As I have noted above, PW1 was not present when the motor cycle was recovered. The only person who would have confirmed that it was recovered from the Appellant was either the investigating or the arresting officer. None of the two testified thereby discrediting the prosecution case that the motor cycle was recovered from the Appellant. It follows then that although the Appellant positively identified the motor cycle as his and that the same had been recently stolen were not sufficient factors on which the court would have convicted the Appellant. Accordingly, the conviction of the Appellant was not safe.

From the facts of the case, the attackers who finally fled with the motor cycle were two in number; one of whom is said to have been armed with a toy pistol which was used to threaten PW1 to part with his motor cycle. The evidence does not however disclose the use of actual violence as envisaged under Section 296(2) of the Penal Code. Therefore, had the court found that there was positive identification, would have made a finding that the offence established is of simple robbery as defined under Section 295 of the Penal Code.

In sum, upon reevaluating the evidence, I find that the prosecution did not prove the case beyond a reasonable doubt. The appeal is allowed. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 27th April, 2017.

G.W. NGENYE-MACHARIA

JUDGE

<u>In the presence of;</u>

1. Appellant present in person.

2. Miss sigei for the Respondent.