



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 158 OF 2013

MARTIN MWEMA MUTUKU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara delivered by Hon. J. K. Ng'eno, CM on 25th October, 2011).

JUDGEMENT

Background.

The appellant, **Martin Mwema Mutuku**, was charged with the offence of **robbery with violence** contrary to **Section 295 as read with Section 296 (2) of the Penal Code**. The particulars were that on the 15th of October, 2010 at around 4.40 a.m. at Majengo Digo within Nairobi County, together with others not before court while armed with dangerous pistols being a toy pistol and knives robbed Peter Musau Nzioka of a mobile phone Nokia T368, Equity Bank ATM Card and a National ID card all valued at Ksh 3,500/- and at or immediately before or immediately after the time of the said robbery threatened to use actual violence on the said Peter Musau Nzioka.

The appellant was found guilty and sentenced to death. Being aggrieved by the conviction and sentence, he preferred this appeal. It was premised on the following grounds, that the doctrine of recent possession was not established, that the evidence of identification was not sufficient to found a conviction and that the circumstances leading to his arrest were tainted with doubt.

Submissions.

The appellant's submissions are dated 11th May, 2017. He submitted that the doctrine of recent possession as explained in the case of **Arum versus Republic [2006]** was not established satisfactorily. He submitted that identification was flawed since PW1 testified that he was not able to identify at the scene the persons who robbed him. Besides, it was at night when the conditions of identification were not conducive. The appellant also submitted that the circumstances preceding his arrest were questionable in that he was arrested at a time when he was going to work.

Learned Counsel, M/s Sigei in opposing the appeal submitted that the case was proved beyond reasonable doubt. She submitted that the appellant was identified by PW1 as well as PW2 and PW4 at the scene and that PW1's mobile phone was found in possession of the appellant; a phone which was switched off by the police for PW1 to unlock so as to prove its identity at the time. She added that it was ascertained that there were street lights at the scene which would remove any doubt as to the identity of the Appellant.

She urged that the conviction and sentence be upheld.

Evidence.

In summary, on the 15th day of October, 2010 while on his way home, PW1, Peter Musau was accosted by three men along Digo Road at around 4.40 a.m. The men were armed with a toy pistol and knives. They demanded for his belongings and he handed over his phone a Nokia T368, an Equity Bank ATM card and a National ID card all valued at Ksh 3,500/-. The assailants then ran away from PW1 where they stumbled on PW2 and PW4 who were police officers from Shauri Moyo Police Station. They flashed the toy pistol at the police who then shot one of them dead after a brief tussle. PW2 then radio called other officers patrolling in the area to help track the two other assailants who fled the scene. PW3, PC Antony Njogu also of Shauri Moyo Police Station was attracted to the incident after hearing gun shots from around Digo Road. He called PW2 and PW4 whom he knew were patrolling the road. They briefed him about the incident. PW3 who was with PC Kiama proceeded to the scene. On their way they saw a man running very fast towards them. They stopped and arrested him. Apparently, it was the Appellant. They took him to where PW2 and 4 were. PW1 said the suspect was one of the robbers. Police recovered from him a mobile phone which PW1 positively identified as his.

PW1 then headed to the Police Station to report the incident and that is when the police walked in with a phone and they switched it off and PW1 was able to switch it on and enter the passcode. At the station, PW1 positively identified the appellant as the person apprehended by the Police patrolling the scene.

Determination.

Having summarized the submissions by the respective parties, it is the duty of this court to reevaluate the evidence on record and come up with its own independent findings. See the case of **Pandya vs. Republic [1957] EA. 336.**

I have carefully analyzed and examined the entire evidence on record and the rival submissions. I have deduced the issues for determination to be whether the doctrine of recent possession was properly established, whether the identification of the appellant was sound enough to support of a conviction and whether the circumstances of the arrest would support the conviction.

On identification, the appellant was not only charged on the basis of identification but also because he was found in possession of the appellant's phone. The crime took place at approximately 4:40 a.m. at a time when it was dark. PW1 testified that he saw the assailants running away with the help of street light at the scene. He however adds that he did not see them as they had dark coats covering them. PW4 testified in court that there was a floodlight at the scene. PW2 and 4 claim to have been accosted by 3 assailants about 30 metres ahead of PW1 who saw their altercation and one of them being shot and the others fleeing. PW3 on the other hand saw a man running away from the scene on Digo Road while he was on Lamu Lane in Majengo Estate where he proceeded to apprehend and search him before communicating with PW2 and returning to the scene of crime.

A few issues seem to bring doubt as to the sound nature of this identification. One is the nature of the light at the time the offence took place. According to PW1, there was a street light at the scene of the incident that took about 6 minutes. PW4 described it a floodlight. These two lighting sources are in no way one and the same thing. In such a traumatic incident where a person had a gun pointed at him, it is safe to suffice that proper identification would be difficult. Notwithstanding this fact, the assailants were covered in dark coats. This therefore rules out any form of visual identification as confirmed by PW1 himself.

The second issue would be identification as alleged by PW2 and PW4 who testified that they shot the robber who was found with a toy pistol whilst two others fled. This altercation took barely a minute which time in my view was not sufficient for a positive identification. The investigating officer failed to assemble an identification parade that would settle any doubts that PW1 positively identified the Appellant at the scene. PW3 took the appellant to the scene of crime where PW2 and 4 were. They did

not show PW1 the phone they retrieved from the appellant and neither did they ask him if that was one of the assailants. The phone was given to PW1 at the Police Station yet all of them were at the scene. The same case applied for the toy pistol. PW1 did not see the toy pistol recovered from the person PW2 and PW4 gunned down. Furthermore, PW1 stated that while at the station, he identified the appellant as the one who was apprehended by the Police and not as one of the assailants. It is then clear that the identification of the Appellant was doubtful.

This drives me to re-examine whether the doctrine of recent possession would found a conviction against the appellant. This is inter-twined with the issue on the manner of the arrest of the appellant. The factors to be considered in the application of the doctrine of recent possession were set out by the Court of Appeal in the case of **Isaac Ng'ang'a Kahiga and Another vs. Republic (2006) Eklr (Cr Appeal No. 272 of 2005)**, thus;

“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, first; that the property was found with the suspect, secondly that; 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses”

The police alleged that the phone was found in possession of the appellant. It was retrieved from him at the Police Station. PW1 positively identified it as his by unlocking it with its sim card code. It was also recovered within a very short time after the robbery. The appellant did not also give a reasonable explanation of how he may have found himself in possession of the phone. It is therefore very easy to conclude that the doctrine of recent possession was applicable and therefore this court ought to uphold the conviction.

However, the manner of the arrest of the appellant cast a doubt on whether he is the one who stole the phone from the appellant. Firstly, PW3 testified that when he apprehended the appellant, he searched him and found a mobile phone on him. The appellant was then brought to PW2 and 4 who were in the company of PW1. At this point, the phone was not shown to PW1. It was shown to him at the police station. It begs why the arresting officers withheld such crucial evidence at a critical point. Proper investigations demand that the goods recovered at the scene of crime should be shown to the persons at the scene. This becomes an added advantage when at a later stage evidence is adduced that an exhibit was recovered at the scene. It erases doubts to allegations that an exhibit was planted on a suspect. It also dislodges an accused's assertion that he was not at the scene where exhibits were recovered.

The chain of events in the instant case do not point that the appellant stole the phone from PW1 for the afore stated reason. Furthermore, PW1 did not mention seeing a toy gun next to the body of the person shot by the Police. Again, no weapons were found on him in terms of knives or any form of pistol. It is indeed possible that the Police arrested an individual who was not involved in the robbery in any way. It is then safe to conclude that the appellant was arrested purely on suspicion and that he was arrested as he was rushing to work. The Appellant was most likely a victim of the circumstances; a person who was at the wrong place at the wrong time.

In the end, I find that the prosecution did not prove its case beyond a reasonable doubt. The appeal succeeds. I quash the conviction, set aside the sentence and order that the appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated And Delivered at Nairobi This 27th Day of July, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

Appellant in person.

Miss Sigei for the Respondent.