REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 29 OF 2015

JACOB KINYUA NJERU

PAUL GITHINJI MAINA ……..APPELLANTS

VS

REPUBLIC ……RESPONDENT

JUDGMENT

(Appeal from the conviction and sentence in Nyeri CMCRC no. ……)

The two appellants Jacob Kinyua Njeru (1st appellant) and Paul Githinji Maina (2nd Appellant) were charged with two counts of robbery with violence c/s 296(2) of the Penal Code. The 1st appellant faced an alternative charge of handling stolen property c/s 322(2) of the same code.

It was alleged that on the 13th Day of August 2011 Michael Kiamba Kilungu (Kiamba) and Simon Mathenge Githaiga, (Mathenge) were travelling in motor vehicle registration number KPB 538 K, Nissan pick-up. Around 5:00pm they were at Game Rock Area within Nyeri District, Central province. The road there was in a bad state, they had a load of 60 crates of Kenya Cane, in the motor vehicle and hence going at a slow speed. Kiamba was driving. Two men appeared from the right ostensibly with the intention of crossing the road. Instead one went directly to the car while pointing a gun wrapped in black polythene paper at him, ordering him to stop. This one stood in front of the car. The other went to Kiamba's door. Kiamba stopped, switched off the engine and raised his hands. The gun man ordered them to give him their money and phones. Kiamba who was a Customer Relations Officer with East African Breweries at the material time had just been paid Ksh. 11, 450 for five cartons of Tusker cans he had delivered in Naromoru. He gave out that money and his Blackberry 8520 valued at Ksh 40000. The gun man ordered his colleague to go to Mathenge's side. Mathenge was at the time Depot Manager at Palmlands Company Ltd, an agent of East Africa Breweries. He gave out his phone Nokia 1680 valued ta Ksh 2999 and Ksh 4,050 from his wallet.

This incident took two to three minutes, after which the gun man ordered Kiamba to drive on. He could not start the car immediately. According to Mathenge, the two men had not covered their faces. As they walked away they looked back and that gave him a chance to see them properly.

Kiamba and Mathenge reported at Kiganjo Police Station but were referred to Nyeri Police station. Their report was that the 2nd appellant was the gun man while the 1st appellant collected the loot. Their case was dealt with by no. 47641 Sgt Rose Thungu. Their reports were booked and they recorded statements. She also visited the scene with them.

On 18th August 2011, no. 79662 PC Ngetich Sylvester and PC Richard Mwarumi from Nyeri Central Division, were deployed to patrol along Nyeri –Kiganjo Road following a spate of robberies. At about 3:00pm they lay ambush in a coffee plantation. While there,they noticed two young men emerge onto the road, walking towards Gamerock. They followed them to a spot where the road had many potholes. The two disappeared only to reappear behind the officers. Ngetich and colleagues changed tack. They took a matatu headed for Kiganjo and asked to be dropped ahead of the two. Upon alighting they decided to walk ahead of the two. At some point they confronted them and conducted a quick search. The Nokia 1680 was recovered from the 1st appellant, and the toy pistol from the 2nd appellant. They escorted the two to Gamerock AP camp and later to Nyeri Police Station where they handed over the suspects and the exhibits to the OCS.

Sgt Thungu interrogated them and took over the Nokia 1680. She also called the two complainants who identified the phone and the toy pistol.

On the 19th August 2011, no 232870 Chief Inspector of Police Hillary Langat from Kiawara Police station conducted the ID parade. He put together an ID parade and informed the suspects (the appellants) of the same. The 1st appellant was identified by Kiamba, the 2nd by Mathenge.

At the close of the case for the prosecution the trial magistrate put the two on their defence.

The 1st appellant in a sworn statement denied the charges. He said on the 18th August 2011 about 4:00pm he was from his place of work at Kangemi, Mbogo's farm when he met police officers who wanted to know where he was going. He said home. They searched him in vain. On 13th August 2011 he was on duty.

The 2nd appellant also made a sworn statement. He denied the charges saying that on the 18th August 2011 he had spent most of the day buying scrap metal from an un named Company. About 4:00pm he was walking along Kung'u Maitu when he met the police officers who arrested him and took him to the police station.

In her judgment the trial magistrate found that the 1st appellant had two versions of his defence on his arrest, that one, he was grazing cattle on the material day, and two, he was from work, hence it was untenable; that it was no coincidence that the two were arrested at the same time; that the complainants were consistent about the scene of crime, and though they did not put it in their statements that they could identify their attackers, they identified them in an ID parade; that the offence took place in broad day light and the complainants had the opportunity to identify their attackers; that the 1st appellant was found with one of the stolen phones. She discredited the evidence of the toy pistol because the police did not prefer any charge against the accused persons with regard to the same. In her own words, *"the evidence of the pistol is neither here nor there, the police chose not to bring up a charge on it, maybe they were not sure about"*.

She found the arresting officer to be a credible witness, and concluded that the parade identification parade, the recovery of the phone, the arrest of the appellants together at the same place amounted to overwhelming evidence upon which she found the two accused guilty of the two counts of robbery with violence c/s 296(2) of the Penal Code, convicted them and sentenced each to death accordingly.

It is against this conviction that the appellants have brought this appeal.

As a first appellate court I am guided by the holding in **Kiilu and Another V. R (2005) 1 KLR 174** where the Court of Appeal expressed itself thus;

> *"…an Appellant in a first appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."*

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrates finding 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."

The appeal was argued by Wahome Gikonyo advocate for the appellants and Ms. Jebet for the state.

He relied on the grounds of appeal filed by the appellants which faulted the evidence on identification, the evidence on recovery of exhibits, contradictions in the case for the prosecution, and the failure by the court to address its mind on the appellants' alibis.

On **identification** of the appellants, he argued that the complainants PW1 and PW2 in their examination in chief testified that they had given descriptions of their attackers to the police. However, under cross examination they had conceded to not having given any descriptions of their attackers in their statements to the police to enable the ID parade where they claimed to identify them. That this amounted to contradictory evidence upon which the trial court misdirected itself, when it stated in the judgment;

"The witnesses claimed to have identified the accused persons on parade although their descriptions are not those in the statements to the police, at least after the robbery".

I was urged to find that the trial court did not address itself to this contradiction, leading to a miscarriage of justice. I was referred to **Wamunga vs. R [1987] KLR 424, Charles Brown Too &Anor vs. R Court of Appeal Criminal Appeal No 146 of 2011** in which the court made reference to **R vs. Turnbull (1976) 3ALL ER 549**, **Siro Kalume vs. R Court of Appeal Criminal Appeal 41 of 1998** on the danger of visual memory.

In response Ms. Jebet conceded that the record indeed demonstrated that the witnesses had not given any descriptions of their attackers in their statements to the police. However, her argument was that they gave those descriptions in court, on oath, and that it was these descriptions that led to the arrest of the two appellants.

The danger of this argument was pointed out in **Maitanyi vs. R (1986) KLR 198** where the court stated;

'the strange fact is that many witnesses do not properly identify another person even in broad daylight. It is at least essential to ascertain the nature of light available, what sort of light and its size and its position relative to the suspect … to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into…'

In **Wamunga**, just like in this case, the main complaint by the appellants was *'that the trial magistrate failed to analyse this evidence in the face of other evidence by other witnesses indicating that the appellant was not present at the scene of the robberies".*

The court's considered a situation where *'the only evidence against a defendant is evidence of identification or recognition'* and held that there was need for the trial court to *'examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from error or the possibility of error, before making it a basis of a conviction'.*

In **Charles Bowen Too** the Court of Appeal was not satisfied with the complainant's identification of the appellants because although the incident took three minutes, both the victim and the assailants were strangers to each other and PW1 did not anticipate the attack. The assailants distracted the complainants from paying attention to their surroundings during the robbery. From the testimony of the complainant, identification was by height and complexion;

"…features which are common. Features which were not reported to the police and booked in the OB at the earliest opportune time. In the absence of such reporting and booking in the OB there is nothing to rule out the possibility of the complainant having coined these descriptions at the

moment he was apprehending the appellants'.

This was the scenario in this case where the complainants though having the descriptions of their assailants in their minds the same were not recorded in the OB or in their statements despite the fact that the incident is alleged to have taken place at 5:00pm in broad day light. The parade officer PW5 in fact told the court that the complainants did not give him any descriptions of the suspects before he conducted the ID parade. In **Gabriel Kamau Njoroge vs. R (1982-88) 1KAR 1134** the Court of Appeal did hold that it was necessary for a witness to give the description of a suspect before the conducting of an identification parade. Hence in this case there was nothing upon which the identification parade could be conducted from, save the visual memory of the complainants. The Court in **Charles Bowen Too** citing **Ajode vs. R (2004) 2 KLR 81** held that,

> ***'****It is now trite that evidence of dock identification is weak, worthless, unreliable, and cannot be used to found a conviction'*
>
> .

Never the less not all dock identification is necessarily worthless. In **James Tinega Omwenga vs. R Criminal Appeal No 143 of 2011;**

> *"The law is settled, that in general, identification of the 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 to enable them organise 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" (emphasis mine)*

There are certain things that a trial must do when faced with a case of dock identification; test the evidence with the greatest care and warn itself of the possible danger of mistaken identification. This was the position of the Court of Appeal in **Muiruri &2 others vs. R (2002) 1 KLR 274**

> *'…courts have emphasised the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warned itself of the possible danger of mistaken identification.'*

There is nothing on the record to indicate that the trial court warned it self of the possible danger of mistaken identification due to the fact that no prior descriptions had been made to the police to corroborate the evidence of the arresting officers.

The pit falls of visual identification were also pointed out in **Siro Kalume** where the Court of Appeal recalling from its own findings in **Patrick Nabisawa v R Criminal Appeal no. 80 of 1997** stated;

> *'this case reveals the problems posed by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in BLACKSTONE'S CRIMINAL PRACTICE 1997 section F 18.*
>
> *(a) some persons may have difficulty distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrator is only fleetingly, often in very stressful circumstances;*
>
> *(b) visual memory may fade with the passage of time; and*
>
> *(c) as in the process of unconscious transference, a witness may confuse a face he recognised from the scene of the crime (it may be of an innocent person) with that of the offender*

In view of the foregoing, it is evident from the trial court's judgment that it gave a cursory look to the evidence of identification, and despite pointing out the contradiction in the evidence of the two complainants went ahead to rely on the same.

The trial court considered the evidence on identification together with the evidence **on recovery of the mobile phone and the toy pisto**l. The prosecution argued that the applying the doctrine of recent possession placed the appellants at the scene of crime and proved that they committed the robbery.

The state citing the entire case of **Eliud Njure Gatura &Patrick Muchoki Mugambi vs. R HCCA 60 of 2014 (Nyeri)** relied on the doctrine of recent possession which was defined in the case cited therein of **Chaama Hassan vs. R (1976) KLR 10** where the court stated as follows;

> '*Where an accused person has been found in possession of property very recently stolen in the absence of an explanation by record for his position and assumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining)'.*

The prosecution must prove that the accused person was actually found in possession of the stolen item. According to the arresting officer PW3 PC Ngetich upon arrest of the suspects, he is the one who recovered the phone from the 1st appellant and the toy pistol from the 2nd appellant. Under cross examination he said that the 2nd appellant did not sign anywhere that he was found with the toy pistol. The investigating officer PW 4 stated under cross examination by the 1st appellant, that it was PC Mwarumi, who arrested the first accused. That he recorded in his statement that he recovered a pistol from one of the suspects. That he ought to have recorded from which suspect he specifically recovered the phone from; that an inventory was made and signed by the first appellant but at the time of the hearing it was not in the police file. She said that there was **no evidence that the first appellant was arrested with the phone**.

PC Mwarumi did not testify during the hearing of this case. Obviously his testimony would have contradicted that of PC Ng'etich.

Ms. Jebet counsel for the state submitted that the appellants did not challenge the evidence of recovery when they cross examined PW1, PW2 and PW3, and said nothing about the items in their defence. That this was a clear indication that they were not disputing that the items were recovered from them

It was argued for the appellants that the search and recovery of exhibits from arrested persons is provided for under section 25 of the Criminal Procedure Code, and with specific reference to this case;

> *Whenever a person is arrested—*
>
> *(a)……; or*
>
> *(b) without warrant……*
>
> *the police officer making the arrest, ……., may search that*
>
> *person and place in safe custody all articles, other than necessary wearing apparel,*
>
> *found upon him.*

Further that an inventory of whatever was found on the suspect would be made and signed by the suspect as a way of authenticating the said recovery; that the trial court did not examine the evidence to satisfy itself that the phone and the pistol were recovered on the suspects.

The trial court in dealing with the issue stated that it found the arresting officer to be a credible witness who had no reason to make up the case against the appellants and that the phone and the pistol were recovered only a few days after the incident.

To support their argument, the appellants relied on the case of **John Mutura Muraya vs. R Criminal Appeal No. 384 of 2009 (Nyeri),** where the Court of Appeal referred to its own decision in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. R Criminal Appeal no 272 of 2005** stating;

> *'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 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'.*

After that the court said,

> *'…in this case the prosecution did not prove that the torch in question was recovered in the appellant's house. This is because it APC David admitted that he did not take an inventory of items recovered from the appellant's house* ***therefore the doctrine of recent possession could not be invoked. The two courts below misdirected themselves in terms of evidence of the alleged recovery of the torch and concluded erroneously that the appellant failed to give an explanation of being in possession of the torch****. It was incumbent for the prosecution to 1st establish that the appellant was in possession of the stolen torch before the burden could shift to the appellant explained the possession'. (emphasis mine)*

In this case it was demonstrated that the mobile phone belonged to the second complainant. However, the arresting officer told the court that there was no inventory. The I.O said there was one but it was not in the police file during the trial. She also said the PC Mwarumi did not specify on which suspect he recovered the pistol or that the phone was specifically found on the 1st appellant. She also said there was no evidence that the 1st appellant was found with the phone. Without an inventory, with such contradictory evidence, there cannot be said to be sufficient proof that the two items were found on the appellants. In fact the trial court was also skeptical about the toy pistol, wondering why the police had not preferred the relevant charge against the appellants. This is why this case is distinguishable from the position in **Eliud Njura Gatura and Another** where the judge said;

> *'The appellants vehemently disputed the prosecution evidence linking them to possession of this particular item… the police…maintained that they not only found the weapon in the appellants' house but they also prepared an inventory which the appellants signed acknowledging that the items listed in the inventory including the offensive weapon were recovered from their house…the signed inventory was produced and admitted in evidence.' (emphasis mine)*

The judge proceeded to reject the explanation by the appellants that they were beaten and tortured to sign the said document because there was no evidence to support that claim. The inventory was proof that the items were recovered in the house of the appellants and hence the doctrine of recent possession was applicable.

Without proof that the phone and the toy pistol were recovered from the two suspects the doctrine of recent possession is clearly not be applicable in this case.

This brings us to the final issue of the **alibi.**

> In **Kiarie vs. R [1984] KLR 739** the Court of Appeal held that,
>
> *' an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because it was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.'* (emphasis mine)

In **Karanja vs. Republic [1983] KLR 501** it was held that '*It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution';*

The 1st appellant said that on the day of arrest he was coming from work. On the day of the alleged robbery he was on duty. He had worked in Mbogo's shamba. He was arrested at Kangemi and he was alone. During cross examination of the arresting officer the appellant indicated that he had come from grazing cattle. Ms. Jebet argued that both of these positions could not have been true. The trial court treated the 1st appellants defence as being contradictory. The 2nd appellant denied ever being at GameRock on the material day. He said he was arrested at Kung'u Maitu.

Each appellant gave sworn testimony and did not call any witnesses.

However, no one bothered to ask the 1st appellant what work he had been doing on the day of the robbery and the day of arrest. He could have been grazing cattle at Mbogo's shamba. With regard to the 2nd appellant there was just a denial by the arresting officer that he did not arrest him at Kung'u Maitu.

Ms. Jebet urged the court to find that the issue of alibi did not arise in the circumstances of this case.

The appellants denied the offence. They specifically denied having been arrested at the scene of crime as alleged by PW3. Each stated where he was when the alleged arrests which connected them with the robbery of 13th August 2011 were being conducted. These arrests are the key to the robbery. The prosecution had an obligation to dislodge the appellants' alibi. Neither the prosecution nor the court addressed itself to this new evidence. Section 309 of the Criminal Procedure Code which states,

'*If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.'*

The prosecution did not grab that opportunity leaving a gap in their case.

There were other gaps.

For instance, the 1st complainant produced no evidence at all to prove that he was robbed of anything. He said he had a phone valued at Ksh. 40,000. The money he alleged was robbed off him was proceeds from the sale of five cartons of Tusker Can somewhere in Naromoru. No evidence was tendered by this witness to support those claims.

The offence was committed at Gamerock area. The suspects were arrested within that area and escorted to Gamerock AP camp. The alternative charge against 1st appellant states that he was found with the stolen mobile phone on 18th July 2011 at Muringato area. This creates a gap in the case for the prosecution because their case was that the appellants arrest at the scene of the robbery was one the pieces of evidence connecting them to this offence.

The appellants were allegedly arrested with the weapon that was used to rob the complainants herein. No charges were preferred against the appellants for this and no explanation was given. The trial court also had issue with this but dismissed it saying that perhaps the police were not sure about it. It appears to me it is because the I.O found she did not have the requisite evidence to support the charge taking into consideration PC Mwarumi's statement saying that he had recovered the toy pistol *'from one of the suspects'.* All this ought to have been resolved in favour of the appellants.

Therefore, having considered each issue separately, the identification of the appellants, and the risk of miscarriage of justice, the alleged recovery of the exhibits, the lack of an inventory, and the failure by the court to consider the alibi, the gaps in the case for the prosecution, and the having taken into consideration the totality of the evidence on record, I am of the view that it is also clear that apart from simply taking over the suspects and the exhibits the I.O did not carry out further investigations.

Statements were recorded as a matter of routine without specific attention to the core ingredients of the offence, hence the poor standard of evidence placed before the trial court. In addition, the trial court did not analyse the evidence sufficiently. In the circumstances of this case, I find that the conviction was unsafe. The appeal must succeed.

The conviction is quashed. The sentences are set aside.

The appellants are to be set at liberty forthwith unless otherwise legally held.

It is so ordered.

Dated at Kiniu, Makueni this 3rd August 2017

Teresia Matheka

Judge

Delivered and signed this 28th August 2017 in open Court at Nyeri

Judge

In the presence of

1.

2.

3.

4.

Court Assistant Harriet.