



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 80 OF 2013

FRANCIS GITAU MWAURA.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence I the Chie magistrate's Court at Makadara Cr. Case No. 5898 of 2011 delivered by Ho. E. Nyongesa on 18th March, 2013).

JUDGMENT

Background.

The Appellant, Francis Gitau Mwaura, was charged with counts of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars of count I were that on 8th November, 2011 at Kariobangi Light Industry in Nairobi within Nairobi Area province, jointly with another not before the court while armed with dangerous weapons namely a knife and hammer robbed the first complainant, LINDA WANGECHI NGANGA, of Cash (Kshs 360), a mobile phone make Nokia 6100 valued at Kshs. 3,500 and a jacket all valued at Kshs. 4,360/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the complainant.

The particulars of count II were that on 8th November, 2011 at Kariobangi Light Industry in Nairobi within Nairobi Area province, jointly with another not before the court while armed with dangerous weapons namely a knife and a hammer robbed the second complainant, ALICE NJERI MIUMI, of her mobile phone make Nokia 1100 valued at Kshs. 2000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the second complainant.

He was convicted in both charges and sentenced to life imprisonment. Being dissatisfied by the court's decision he decided to exercise his constitutional right and lodge an appeal to this court.

In the Appellant's Amended Supplementary Grounds of Appeal filed on 16th March, 2016, he was dissatisfied that the prosecution did not adduce sufficient evidence on his identification, that the trial court did not properly apply the doctrine of recent possession, that crucial witnesses were not called and that on the whole the prosecution did not prove their case beyond a reasonable doubt

Submissions.

The Appellant filed written submissions while the Respondent which was represented by learned State

Counsel, Ms. Wario decided to canvass the appeal orally.

*The Appellant's submissions were that his identification was not safe and as such the learned magistrate erred in relying on it. Further, that Section 150 of the Criminal Procedure Code had been violated by the failure of the prosecution to call the arresting officers as witnesses. He also submitted that the doctrine of recent possession was not applicable in the circumstances surrounding the case and finally that the prosecution's case was not proved to the required standard. He therefore urged this court to allow the appeal, quash the conviction and set aside the sentence. Amongst the cases cited were, **Oketh Okale vs Republic[1965] EA 555, Mwaura vs Republic[1987] KLR 645, Cleophas Otieno Wamunga vs Republic[1989] KLR 424, Ali Ramadhani vs Republic Criminal Appeal No. 79 of 1985) and Woolmington vs The DPP[1935] A.C 462.***

Ms. Wario, for the state, submitted that the State had proven beyond doubt the charges. She submitted that the evidence of PW1 was corroborated by PW2 regarding the manner in which the robbery was executed. She submitted that the place where the attack took place was well lit by security lights and as such the identification of the Appellant was foolproof. She further submitted that the trial magistrate properly applied the doctrine of recent possession. Further, that there was no need for a police identification parade as the Appellant was arrested at the scene. Her contention was that the prosecution called sufficient witnesses in proof of their case. In this regard, she submitted that under Section 143 of the Evidence Act, no particular number of witnesses should be called in prove of an offence so long as the prosecution sufficiently establishes their case. She urged that the appeal be dismissed.

Evidence.

The prosecution's case at the trial was that on 8th November, 2011, at around 11.30 p.m., the first complainant (PW1), Linda Wangechi Nganga, was walking home in the company of the second complainant, Alice Njeri Miumi when they were accosted by two young men who were armed with a knife and a hammer. They asked for their valuables which they handed over. The men then led them towards Korogocho but before they could cross the road police men in a patrol car spotted them and the thieves took off. The complainants started shouting, "Thief! Thief!" which alerted the patrolling officers who chased after the thieves and arrested one of them who was the Appellant. They then took the him to Dandora Police Station where the complainants who were in their company reported the matter. The complainants went back on the following day and were referred to Kariobangi Police Station, which was the *locus in situ*, where the Appellant was charged and consequently brought to court.

PW1, Linda Wangechi Nganga in her testimony stated that the thieves had robbed her of Kshs. 360/, her Chinese model Nokia phone and a jacket. She was being held by one of the thieves while the other had held PW2. When the patrol car appeared the robbers ran away but one of them was caught by the police officers who gave a chase. At the time of the arrest the Appellant was wearing the jacket that had been robbed from her. She also testified that there was light at the scene of the robbery. She stated that the scene of the crime was a 20 minutes walk distance from her place of work.

PW2, Alice Njeri Miumi in her testimony entirely corroborated the evidence of PW1. She added that the robbers stole her mobile phone Nokia 1100 valued at Ksh. 2000/. Her evidence was that the phone was stolen by the robber who was armed with a hammer and that the Appellant was arrested whilst wearing PW1's jacket.

PW3, Police Constable Benard Achola was the investigating officer. He summed up the evidence of PW1 and 2. He stated that on 9th November, 2011 he was at Kariobangi Police Station when at around 8.00 a.m. the complainants, PW1 and PW2, arrived and reported that they had been referred from Dandora Police Station where the Appellant was first held. He also transferred him from Dandora to Kariobangi Police Station. He recorded the statements of all the witnesses and preferred the charges against the Appellant. He testified that the arrest had been effected by Administration police officers from Kangundo D.O's office and since they were in a hurry they had handed over the Appellant and the complainants to Dandora Police Station and left without giving their details. He identified and produced a jacket the Appellant was found wearing that allegedly belonged to PW1. He further testified that when he

interrogated the Appellant he informed him that the phones and money stolen from PW1 and 2 was taken away by his co-perpetrator.

After the close of the prosecution case the court ruled that a *prima facie* case had been established and the Appellant was required to answer to the charges. He gave an unsworn statement of defence.

The Appellant stated that he lived in Kariobangi Light Industries and he used to sell coffee at the Kariobangi roundabout until around the midnight of the fateful day. He stated that he had just finished selling coffee and was on his way home when he ran into two (2) people who pushed him aside and passed by him. He continued with his journey when he came across six (6) police officers who he later learnt were looking for the two people. The officers arrested him and took him to where PW1 and 2 were and told them they had effected the arrest. He was then taken to Dandora Police Station where he was left with the complainants before being charged the next day. He stated that no jacket had been found on him and the charges were not true.

Determination.

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusion. See *Okeno Vs Republic (1972) EA 32*.

Having summarized the evidence on record and the respective submissions, I narrow down the issues for determination as follows;

1. ***Whether the identification of the Appellant was sufficient.***
2. ***Whether the doctrine of recent possession was properly applied.***
3. ***Whether the prosecution failed to call crucial witnesses.***
4. ***Whether the charges were proved to the required standard.***

I will first address myself on the issue of identification. Undoubtedly, the offence took place at night between 11.00 and 11.30 p.m. Both complainants were on a road when two youths stopped them. Apart from PW1 who was the complainant in count I, PW2 did not describe the nature of the lighting at the point they were confronted by the youths up to the time the police on patrol emerged. In her words PW2 testified as follows;

‘ At the scene there was light. It is the first accused who was armed with a knife’

Thereafter, the prosecution did not prod PW1 to further explain and shed light as to the nature of the lighting at the scene. Indeed, on cross examination she only insisted that it was at night. The evidence of PW2 did not make things better. She only stated that the assailants were armed. Her further scanty evidence was that the robber who was arrested was armed with a knife and was at the time of the arrest wearing the jacket that had just been stolen from PW1.

Given therefore, the nature of the evidence on identification of the key witnesses, the only persons who would have shed light and elucidated the fact that the arrested robber was one of those who had robbed the complainant were the arresting officers. They would have told the court, for instance, the point at which they started chasing the robbers and whether at any one time they lost sight of them. Unfortunately, the arresting officers only dumped the suspects at Dandora Police Station and left. Certainly they were officers within the reach of the investigating officer who knew they worked at Kangundo D.O.’s Office but who never bothered to seek them. The said arresting officers would have formed the link between the complainants and the arrest of the actual robbers. That chain was broken by the failure to call the crucial witnesses. This created a huge gap in ascertaining whether the arrested suspect was indeed the robber. I will shift that gap in favour of the Appellant’s case. A similar observation was made in the Case of **Wamunga vs Republic [1989] KLR 424** where the court stated that:

“This Administration Policeman formed ...(the) first link with the forces of law and order after the event and whose testimony we would have thought was not only crucial but absolutely

obligatory,””

On this point, I do not agree with the statement of PW3, the investigating officer, that the arresting officers could not be called because they came from another locality. It is trite to observe that not all witnesses in a trial come from the same locality. The duty of an investigating officer is to ensure that he bonds all the necessary witnesses from wherever they may be. He failed in this noble duty which has struck the case a fatal blow in the respect of identification.

Still on identification, I have cautioned myself that the mere fact that the complainants testified that the Appellant was arrested on the spot after a chase by patrol Police Officers, did not guarantee the prosecution a conviction. The prosecution was still bestowed with the onerous task of establishing the involvement of the arrested suspect in the crime. In the present case, given the fact that it was dark, there lay the possibility of a mistaken identity. As the persons who would have shed light on the circumstances under which the Appellant was arrested did not testify, I have cast doubt in my mind that the Appellant was involved in the robbery. This is buttressed once again by the case of **Wamunga vs Republic (Supra)** in which the Court of Appeal delivered itself thus:

“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 a conviction.”

Having addressed myself on identification, the only other link of the Appellant to the robbery was his alleged possession of PW1's jacket. According to PW1, she was robbed of her Nokia mobile phone and a jacket she was wearing. When the Appellant was arrested, she testified, he was wearing the same jacket. In convicting the Appellant, the learned trial magistrate applied the doctrine of recent possession in holding that the Appellant must have been one of the robbers as PW1's jacket was found in his possession. The magistrate further observed that the Appellant did not make an attempt to explain that the jacket belonged to him. In relying on the doctrine of recent possession, the court must be satisfied that the property was found in the possession of the accused, that it was positively identified as belonging to the complainant, that the property was stolen from the complainant and that the same was recently stolen. See **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic NYR Criminal Appeal No. 272 of 2005** as quoted in **Lango vs Republic[2015] eKLR** where it was stated:

“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. 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 the present case, all that PW1 testified was that a jacket was stolen from her and that it was found in possession of the Appellant after his arrest. That was reiterated by PW2. A look at the evidence of PW1 is a testimony that she did not attempt to describe how her jacket looked like and why she would have convinced the court that what was produced was indeed her jacket. There was also no evidence from the investigating officer that PW1 had described how her jacket looked like. Her evidence was led by the prosecution in a very casual manner because she ought to have first described her jacket before it was shown to her. This would have left no doubt in the mind of the court that indeed the jacket that was stolen and was presented to the court was hers. In contrast, her testimony was that the jacket which was stolen was before the court after which it was marked for identification. Her evidence was in the following words:

The accused is before court (identified) the jacket is before court (identified) marked MFI-1. It is mine I was wearing it on the material day. Police kept it as an exhibit to date.”

That was not in my view sufficient evidence that would have convinced the court that proof of ownership had been established. No doubt PW1 testified that she lost a jacket in the robbery. There is also no doubt that the Appellant was arrested minutes after the robbery. However, given the difficult circumstances of identification, and having upheld that the identification of the Appellant was not established, it was difficult to find that the jacket the Appellant was arrested wearing belonged to PW1. For these reasons, it is my finding that the criteria set out in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic (Supra)** was not met.

The Appellant further raised a concern that crucial witnesses, namely the arresting officers were not called to buttress the prosecution's case. I have already addressed myself of this issue and upheld the fact that they did not testify was a fatal blow to the prosecution's case.

There is no doubt that PW1 and 2 were robbed by two men who were armed with a knife and hammer respectively. They also lost their valuables in the robbery under threats. That sufficiently established the necessary elements for the offence of robbery with violence. However, for the reasons I have enunciated, there is doubt that one of the perpetrators of the robbery was the Appellant. I shall accord him that benefit of doubt.

In the result, this appeal succeeds and the same is allowed. I quash the conviction and set aside the life imprisonment penalty. I order that the Appellant be and is forthwith set free unless otherwise lawfully held.

DATED AND DELIVERED IN NAIROBI this 25th DAY OF MAY, 2016

GRACE NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.
2. Miss Akuja for the Respondent