



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.302 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. D.A. Okundi – SPM

delivered on 16th November 2012 in Kiambu CM. CR. Case No.89 of 2011)

RICHARD CHEGE WAITHERA.....1ST APPELLANT

STEPHEN WAIHENYA RUHOHI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The 1st Appellant, Richard Chege Waithera and 2nd Appellant, Stephen Waihenya Ruhohi were charged with two counts of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 3rd December 2010 at about 2.00 a.m. at Kiratina Village in Kiambu County, the Appellants, jointly with others not before court, while armed with dangerous or offensive weapons namely pangas and axes robbed David Karanja Wanjiku and Alice Wambui Karanja (hereinafter referred to as the complainants) of cash totaling Kshs.30,000/-, mobile phones, specifically Samsung Make C3212 and Kabambe, electronic goods listed in the charge sheet and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said David Karanja Wanjiku and Alice Wambui Karanja. When the Appellants were arraigned before the trial magistrate, they pleaded not guilty to the charge. After full trial, the Appellants were convicted as charged. They were sentenced to death. They were aggrieved by their conviction and sentence. They have each filed a separate appeal to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved that they had been convicted on the sole evidence of identification by the complainants that in their view was incredible, inconsistent and contradictory. In particular, they stated that the circumstances favouring positive identification were absent when it was alleged that the complainants had identified them. They took issue in the manner in which the police identification parade was carried out. They were of the view that the same was not conducted in accordance with the set rules. They were aggrieved that the trial magistrate had relied on insufficient, unbelievable and unproven facts to convict them. They faulted the trial magistrate for failing to consider their respective defences before arriving at the decision to convict them. For the above reasons, the Appellants urged the court to re-evaluate the evidence and reach an appropriate decision finding that the prosecution had failed to establish its case against them to the required standard of proof beyond any

reasonable doubt. The Appellants urged the court to allow their respective appeals, quash their conviction and set aside the sentence that was imposed on them.

During the hearing of the appeals, the two separate appeals filed by the Appellants were consolidated and heard together as one. The Appellants presented to court written submission in support of their respective positions. They also made oral submission urging the court to allow their respective appeals. Ms. Atina for the State opposed the appeals. She submitted that the prosecution had adduced sufficient culpatory evidence which established the Appellants' guilt, on the charges brought against them, to the required standard of proof. She urged the court to dismiss the appeals. This court shall revert to the argument made on appeal after briefly setting out the facts of the case.

The complainants, David Karanja Wanjiku (PW1) and Alice Wambui Karanja (PW2) are husband and wife. At the material time, they were residents of Kibichoi in Kiambu County. They testified that on the night of 3rd December 2010 at about 2.00 a.m., while they were asleep in their house with their three children, they heard the dogs bark. They woke up. They heard footsteps of people coming towards their house. The people called out to the complainants asking them to open the door. Before the complainants could respond, their door was broken into. Two men entered into their house. At that time, PW1 had switched on the electric lights in the bedroom. One of the men demanded to be given Kshs.200,000/-. PW1 answered that he did not have such kind of money. They then ordered PW1 to go under the bed. They ordered PW2 to accompany them as they ransacked the house. They stole Kshs.30,000/- which they found in a cupboard. The complainants were also robbed of a cassette player, two DVD players, a mobile phone Make Samsung and two pairs of shoes. The complainants testified that the two men were armed with a panga and an axe. They used these weapons to threaten them. After the robbery, the two men left their house. The complainants testified that the robbery incident took more than 30 minutes. In the course of the robbery, they testified that they were able to identify the Appellants as the persons who robbed them. In their respective testimonies, they explained the roles that each Appellant played during the robbery.

After the robbery, PW1 went to Kibichoi Police Post and made a report of the incident. They were later referred to Kiambu Police Station which was handling the case. PW6 PC Ken Mwenge, then based at CID Kiambu, was assigned to investigate the case. He testified that on interviewing the complainants, he established that three of their mobile phones had been stolen during the robbery. The particular mobile phones that were stolen were Make Samsung C3212, Nokia and Kabambe. PW1 produced a receipt of the Samsung mobile phone which contained the particulars of the phone. PW6 contacted Safaricom Limited to assist him trace the whereabouts of the phone. He was able to trace the phone to PW4 Josephine Njeri Maina a resident of Kanunga. This was on 5th January 2011. He arrested PW4. PW4 told him that she got the phone from PW3 John Muiruri Murigi. She had borrowed the phone from PW3 because at the time her phone had mechanical issues. She directed PW6 to PW3. PW3 was also arrested. Upon interrogation, he disclosed that the phone was given to him by the 1st Appellant, Richard Chege Waithera on 16th December 2010. He recalled that the 1st Appellant had approached him in company of one Mutimu with a view to selling him the said Samsung mobile phone. PW3 told the 1st Appellant that he was not interested in purchasing the same. The 1st Appellant however pleaded with him to advance him a sum of Kshs.2,000/- because he was at the time raising funds to pay his wife's maternity bill. He requested PW3 to keep the phone as security until the time he (1st Appellant) would repay the money. PW6 was satisfied with the explanation that PW3 and PW4 gave. They were released.

PW6 traced the 1st Appellant and had him arrested. His further investigation revealed that the 2nd Appellant was in company of the 1st Appellant during the robbery. On 15th January 2011, PW6 requested PW5 Inspector Erastus Ogutu to conduct a police identification parade. The identifying witnesses were the complainants. According to PW5, he conducted the identification parades in accordance with the Police Standing Orders. He testified that the complainants were able to identify the Appellants in the said identification parades. After conclusion of his investigations, PW6 formed the opinion that there was sufficient evidence to charge the Appellants with the offences for which they were convicted. The mobile phone that was recovered from PW4 together the SIM and the SIM card holder that was recovered from the house of the 1st Appellant were produced into evidence. The receipt indicating the ownership of the

mobile phone by PW1 was also produced into evidence.

When they were put on their defence, the Appellants denied participating in the robbery. The 1st Appellant denied that he gave the mobile phone to PW3 and PW4. He testified that the two witnesses should have been put to task to explain how they came in possession of the particular mobile phone. He stated that the two were released from being suspects in the case after they had bribed the police with the sum of Kshs.25,000/-. He questioned the manner in which the identification parade was conducted. He testified that two people pointed at him after they have emerged from the DCIO's office. No proper identification parade was conducted. He pleaded his innocence of the charges. On his part, the 2nd Appellant also denied being involved in robbery. Other than narrating the circumstances of his arrest, he did not give any evidence touching on the allegations made against him. He also questioned the manner in which the police identification parade was conducted. He stated that he had been seen by the complainants prior to being identified in the identification parade.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court so as to arrive at an independent determination whether or not to uphold the conviction of the trial court. In doing so, this court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified during trial and cannot therefore give an opinion as to the demeanor of the said witnesses (see Okeno –vs-Republic [1972] EA 320). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellants on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

In the present appeal, the main issue that emerged for determination was whether the Appellants were properly identified by the complainants. In their submission before court, the Appellants argued that the circumstances favouring positive identification were not present when the complainants are said to have identified them. They further pointed out the fact that in the first report that was made to the police by the complainants they did not give the description of their assailants. They only told the police that they would be able to identify the robbers if they saw them. This court has re-evaluated the evidence adduced by the complainants in regard to the circumstances of the robbery. It was clear to this court that although the robbery is said to have taken place for a period of 30 minutes, during the entire period, PW1 had been subdued and ordered to stay under the bed. PW2 was the one who was taking the robbers around the house as they were ransacking it looking for money.

Although the complainants testified that during the entire time the electric lights had been switched on, there was contradiction in their testimony when they also stated that the robbers were using torches to illuminate the house. This court cannot discount that in the hectic circumstances of the robbery, the complainants may not have been in a position to be positive that they identified the robbers. The robbery took place at night. The complainants had just been woken up from their sleep. They had been terrorized before they were robbed. They were threatened with harm. The robbers were armed with a panga and an axe. They had not met with the robbers prior to the robbery incident. If indeed the complainants had identified the Appellants as the persons who robbed them, nothing would have been easier than for them to give their description in the first report that they made to the police. The description that the complainants purported to give in court was a description given in the dock which in the circumstances of this case the court considers doubtful.

It is important that the description of the perpetrator of the crime be recorded in the first report made to the police. This is because, in the event that the perpetrator is arrested, and an identification parade is held, then it would be easier for a comparison to be made between the identification made in the police identification parade and the description given in the first report that was made to the police. This court is aware that in such hectic circumstances of the robbery, the complainants may have honestly but mistakenly believed that they had identified the Appellants as the persons who robbed them. In the absence of a first report indicating the description of the person who robbed them, the identification parade which was conducted by PW5 cannot in the circumstances be said to be free of doubt. The said identification parade was conducted 45 days after the robbery. It was impossible for the complainants to

have retained in memory the description of the persons who robbed them. This court cannot in the circumstances rely solely on the evidence of identification to uphold the conviction of the Appellants. The Appellants are justified in complaining that the said evidence of identification did not stand up to the legal standard.

In **Maitanyi –Vs- Republic [1986] KLR 198 at P.200** the Court of Appeal held thus:

“Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

In the present appeal, it is clear that the evidence of identification, especially,

that was made in circumstances that did not favour positive identification cannot not alone sustain the conviction of the Appellants. Other evidence is required to corroborate the said evidence. In the case of the 1st Appellant, the prosecution adduced further evidence which connected him to the robbery in question. PW1 testified that in the course of the robbery, he was robbed of his Samsung mobile phone. He provided a receipt which confirmed the particulars of the mobile phone. The receipt was produced into evidence. On 16th December 2010, PW3 testified that the 1st Appellant left him with the phone as security for the sum of Kshs.2,000/- that he had advanced to the 1st Appellant to settle his wife’s medical bill. PW3 loaned the phone to PW4. PW6, with the assistance of Safaricom Limited, a mobile phone operator, was able to trace the particular phone to PW4. PW6’s investigation revealed the movement of the phone from the 1st Appellant to PW4.

This court is of the considered opinion that the doctrine of recent possession applied in the case of the 1st Appellant. The 1st Appellant was found in possession of the mobile phone which was robbed from the complainants 13 days after the robbery. He did not give a satisfactory explanation of how he came to be in possession of the said mobile phone. As was held in **Malingi –Vs- Republic [1989] KLR 225**, the doctrine of recent possession is applied to establish a case if an item stolen during the robbery is found in possession of the accused and the accused fails to satisfactorily give an explanation of his possession of the same. In the present appeal, it was clear to this court that the evidence of the recovery of the mobile phone in the 1st Appellant’s possession points irresistibly to the fact that he was one of the persons who robbed the complainants. This evidence, taken with that of identification establishes the guilt of the 1st Appellant to the required standard of proof beyond any reasonable doubt that he participated in the two robberies that he was convicted of. His appeal against conviction and sentence therefore lacks merit and is hereby dismissed.

In respect of the 2nd Appellant, other than the evidence of identification which this court formed the view cannot alone sustain the conviction on the charges brought against him, no other evidence connects the 2nd Appellants with the crime. The circumstances of his arrest raises doubt that he had any connection with the 1st Appellant. Reasonable doubt has been raised in the mind of this court that the 2nd Appellant participated in the robbery. That doubt will of necessity be resolved in favour of the 2nd Appellant. In the premises therefore, his appeal against conviction and sentence has merit and shall be allowed.

The upshot of the above reasons is that the appeal lodged by the 1st Appellant lacks merit and is hereby

dismissed. The conviction and sentence of the trial court is hereby upheld. In respect the 2nd Appellant, his appeal is allowed. His conviction on both counts is quashed. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF MAY 2016

L. KIMARU

JUDGE