HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.107 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. J.N. Onyiego - CM

delivered on 28th April 2015 in Kiambu CM.C. CR. Case No.733 of 2014)

DAVID KANYITA NYORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, David Kanyita Nyoro was charged with another (who was however acquitted by the trial court) with three (3) offences under the **Penal Code**. The relevant one here is the one of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 14th February 2014 at 3.00 a.m. at Golden Palm Estate in Kiambu County, the Appellant, jointly with others not before court, while armed with crude weapons namely iron bar robbed David Kabea Ng'ethe of his mobile phone, a laptop, a vanier calipher and Kshs.6,000/- and immediately before such robbery used actual violence on David Kabea Ng'ethe (hereinafter referred to as the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. He was aggrieved by his conviction and sentence. He has appealed to this court challenging the said conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. In summary, the grounds are as follows: the Appellant was aggrieved that he had been convicted on the basis of the evidence of identification which did not stand up to legal scrutiny. He was particularly irked that the trial court had admitted such evidence of identification without taking into consideration the fact that neither the complainant nor his witnesses gave the description of the robbers in the first report that was made to the police. The Appellant was further aggrieved in the manner in which the trial court received the evidence of the alleged recovery of the stolen items in his possession. The Appellant stated that the prosecution failed to establish any nexus between himself and the recovery of the stolen items. In that regard, it was the Appellant's appeal that the trial court wrongly applied the doctrine of recent possession to find him guilty of the charge. He faulted the trial court for failing to properly evaluate the evidence, which, in his view, exonerated him from the offence. He was concerned that the trial court had failed to consider the totality of the evidence adduced by the prosecution witnesses which in his view failed to establish his guilt to the required standard of the law. He was finally aggrieved that the trial court had failed to consider his defence before arriving at the decision to convict him. For the above reasons, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of this appeal, the Appellant presented to court written submission in support of his appeal. He also made oral submission urging the court to allow his appeal. On her part, Ms. Kule for the State opposed the appeal. She submitted that the prosecution had established its case on the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt. She urged the court to dismiss the appeal. This court shall revert to the arguments made on this appeal after setting out the facts of the case.

The complainant was at the material time a resident of Golden Palm Estate in Kiambu. He testified as PW1. He lived in his house with his wife PW2 Mary Kabura Ng'ethe. He had employed PW5 Fredrick Mulinge Mutunga as his gardener. On the material night of 14th February 2014, at about 3.00 a.m., the complainant arrived home. He called his wife who instructed PW5 to open the gate. He entered the house and went straight to the bedroom. PW2 felt hungry at the time. She went to the kitchen, which was downstairs, to eat some food. While at the kitchen, a gang of robbers entered the house through the kitchen door. They assaulted PW2 by hitting her on her head with both blunt and sharp objects. She bled from the injuries that she sustained in the attack. The robbers then went upstairs into the bedroom and confronted the complainant. They robbed him of his mobile phone and Kshs.6,000/-. It was later discovered that a laptop and a laptop bag had been stolen from the complainant son's bedroom. The son, PW4 Lewis Elijah Ng'ethe testified that when he learnt of the robbery, he went home the following day and established that indeed his HP laptop and laptop bag had been stolen during the robbery.

According to the complainant and PW2, the robbers were more than three in number. They were wearing heavy jackets. Some wore marvins to disguise their faces. The complainant testified that he was able to identify the Appellant because he had a fresh wound. Unfortunately, it is not clear from his evidence where the wound was. PW2 in her testimony also testified that she was able to identify the Appellant as being a member of the gang that robbed him. Both the complainant and PW2 gave the physical description matching that of the Appellant as being tall and slim. However, in their first report to the police, neither the complainant nor his wife gave this description to the police. In fact, the complainant only identified the assailants as ***"three young men".*** PW7 IP Hannington Mwazanga then based at Kiambu Police Station was requested by the investigating officer to conduct an identification parade. In the parade conducted on 3rd March 2014, the complainant identified the Appellant from the line-up that was mounted. After the robbery, PW2 was rushed to Aga Khan Hospital where she was admitted for six days before she was discharged. According to PW8 Dr. Zephania Kamau, PW2 sustained eight (8) injuries on her head, left eyebrow and rear part of the back. By the time of her examination (a month later), the injuries had healed. The P3 form was duly filled by PW8 was produced into evidence.

After the report was made to the police, the investigating officer PW12 PC Tom Odhiambo requested PW10 Cpl. Daniel Hamisi attached to the Safaricom Law Enforcement Unit to trace the complainant's phone which was stolen. According to PW12, with the assistance of PW10 and an informer, he was able to trace the phone which had been robbed from the complainant being LG Serial No.354851057843938 in the possession of the Appellant's wife. This was on 26th February 2014. According to PW12, upon the arrest of the Appellant's wife, a search was conducted in his house where a laptop bag which had initials identified as that of PW4 was recovered. When PW4 testified before court, the Appellant did not challenge his claim that indeed the said laptop bag belonged to him (PW4). The mobile phone with the serial No. 354851057843938 was established by PW10 to have been registered in a sim card belonging to the complainant. The prosecution also established through the evidence of PW3 Peterson Mugendi Stanley, the Caretaker of the block of houses where the Appellant had rented a room, that indeed the Appellant was the owner of the house where the stolen laptop bag was recovered.

When he was put on his defence, the Appellant denied involvement in the robbery. Other than narrating the circumstance of his arrest, the Appellant chose not to shed any light in regard to the culpatory evidence that was adduced against him by the prosecution.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court in light of the grounds of appeal put forward by the Appellant before arriving at its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, the court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified

and therefore give due allowance in that regard (see **Okeno –Vs- Republic [1972] EA 32).** The issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the Appellant's guilt of the charge brought against him to the required standard of proof beyond any reasonable doubt.

In the present appeal, it was clear from the evidence adduced and the submission made on this appeal that the prosecution relied on the evidence of identification and the application of the doctrine of recent possession to secure the conviction of the Appellant. The Appellant challenged the evidence of identification by stating that the identifying witnesses did not in the first report that was made to the police give the description of the persons who robbed them. In particular, the Appellant argued that given the hectic circumstances in which the robbery took place, and the fact that some of the robbers wore disguises, it was not possible for the complainant and his wife to be certain that they had identified the Appellant as being a member of the gang that robbed them. On its part, it was the prosecution's case that indeed the complainant and his wife identified the Appellant as being a member of the gang that robbed them. They gave the physical description that matched the Appellant. A striking description that they gave was to the effect that the Appellant had a fresh wound. As stated earlier in this judgment, it was not clear what part of the body the Appellant had a fresh wound. The complainant confirmed this evidence of identification when he was able to point out the Appellant in an identification parade that was conducted by the police three weeks after the incident.

Having carefully evaluated this evidence of identification, this court is not satisfied, and indeed agrees with the Appellant that the evidence of identification was not watertight as to be free from possibility of error or mistaken identity. In the absence of a first report made to the police, giving a clear description of the assailants, it is not possible for this court to conclude with certainty that indeed the Appellant had been properly and positively identified. The complainant, in the first report, told the police that he was attacked by ***"three young men".*** This is a generic description. It is not specific. It does not give particulars that would enable identification to be made later in an identification parade. This court was not persuaded that the identification by the complainant was watertight. The evidence of identification by PW2 similarly too cannot support a finding that she had identified the Appellant as a member of the gang that robbed them on the material night. She did not give the description of any of the robbers in the first report that she made to the police. Neither was she called to attend an identification parade where she could point out her assailants. This court therefore holds that, the evidence of identification, by itself cannot sustain a conviction.

This was not the only evidence that was adduced by the prosecution. The prosecution also adduced the evidence of the recovery of the mobile phone and the laptop bag in the Appellant's constructive possession. According to the investigating officer (PW12), he was able to trace the mobile phone stolen from the complainant to the Appellant's girlfriend. Upon her arrest, she disclosed that she had been given the mobile phone by the Appellant. A laptop bag was also found in the Appellant's house. The Appellant did not claim this bag when PW4 testified that the bag was his property and that it had been stolen from his bedroom on the material night of the robbery. The prosecution was able to establish to the satisfaction of the court that indeed the particular house where the laptop bag was recovered belonged to the Appellant. Although the evidence of identification was not strong, the evidence of the recovery of the laptop bag and the mobile phone connected the Appellant to the robbery. As was held in **Maitanyi –Vs- Republic [1986] KLR 198 at P.200**:

> ***"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:-***
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> ***"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".

In the present appeal, on application of the doctrine of recent possession, the prosecution was able to establish, to the required standard of proof that indeed the circumstances under which the Appellant was found in constructive possession of the mobile phone and the laptop bag pointed to no one but the Appellant as the person who robbed the same from the complainants. The said items were recovered about a fortnight after the robbery. From the nature of the items, it cannot be said that the period between the robbery and the recovery was inordinate. The Appellant did not give a reasonable explanation as to why the said stolen items were found in his possession. This court cannot therefore fault the trial magistrate for reaching the determination that he did. It was clear to this court that the defence adduced by the Appellant was evidently self-serving.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE