REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MURANGA

CRIMINAL APPEAL NO. 37 OF 2014

EDWIN MAINA MOCHA……..... APPELLANT

VERSUS

REPUBLIC …….....….....…….....…….. RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate's Court, Kigumo (D.Orimba) delivered on 15th April, 2014 in Criminal Case No. 1473 of 2013)

JUDGMENT

FACTS

1. The appellant, **Edwin Maina Mocha,** was charged with three counts of Robbery contrary to **Section 296(1)** of the **Penal Code** and an alternative count of Handling Stolen Goods contrary to **Section 322(2)** of the **Penal Code.**

2. The particulars of the charge on **Count I** was that on the 24th day of October, 2013 at around 2000 hrs. at Ngabori Village of Muranga County, robbed John Mbau Mbugua of his mobile phone Nokia 1280 valued at 2,300/- and before such robbery used actual violence to the said John Mbau Mbugua.

3. On **Count II,** on the 29th day of October, 2013 at around 2030 hrs. at Ngaburi Village within Muranga County the appellant robbed Joseph Mwangi Wambogo of his torch valued at 250 and before the time of such robbery used actual violence to the said Joseph Mwangi Wambogo.

4. On **Count III** on the same date and at the same village and County at 2000 hrs robbed Nyoike Chomba of his pair of safari boots valued at 1200/- and before the time such robbery used actual violence to the said Nyoike Chomba.

5. In the alternative, the appellant was charged with handling stolen goods and the particulars of the offence were that on the 31st day of October, 2013 at around 1845 hrs at Muthithi Village of Muranga County otherwise than in the course of stealing dishonestly received or detained a pair of safari boots knowing or having reason to believe them to be stolen goods.

6. The appellant was tried and convicted at the Senior Principal Magistrate's Court at Kigumo on all three Counts but was sentenced only on Count I, to the mandatory death sentence. The sentences on the other two counts were held in abeyance.

7. Being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal on 30th April, 2014 and also filed Amended Supplementary Grounds of Appeal as hereunder summarized:-

i. **<u>THAT</u> the sentence meted out was unlawful, bad in law and not commensurate to the offences charged;**
ii. **<u>THAT</u> the learned trial magistrate made a crucial error in both law and facts and grossly misdirected himself by holding that all the three robbery incidents occurred at night but the complainants mentioned my name to police upon report yet failed to consider in depth the circumstances which enabled them to know the alleged name;**
iii. **<u>THAT</u> the alleged recovery of Nokia phone was unsatisfactory.**
iv. **<u>THAT</u> entire case for the prosecution was not proved beyond reasonable doubt;**

8. The appellant appeared in person whereas Prosecuting Counsel Mr Njeru represented the State.

9. A brief summary of the submissions of the above is as follows. The appellant submitted that the sentence imposed was a death sentence and that there was no justification for the mandatory death sentence imposed on Count I which count was the offence of simple robbery contrary to Section 296(1) and that the conviction and sentence ought to have been as provided by the forgoing section.

10 On identification the appellant submitted that the three incidents are said to have occurred at night but the trial magistrate failed to carefully scrutinize whether the circumstances were conducive for identification and that there could have been a possibility of mistaken identity.

11. That the trial magistrate erred in both fact and law in failing to consider that report of the stolen phone was made to the police after six (6) days and that the police did not follow the correct procedure during the recovery exercise.

12. The appellant prayed that his appeal be allowed and the conviction be quashed as it was unsafe.

13 In response Prosecuting Counsel for the State conceded that the death sentence imposed was improper as the appellant had been charged with the offence of simple robbery contrary to Section 296(1) which carries a maximum sentence of fourteen (14) years.

14. That even though there was no evidence as to how **John Mbau Mbugua (PW1)** identified the appellant there was sufficient evidence on recent possession of the phone recovered from **PW2: as** the phone had been positively identified and proved as belonging to **PW1.**

15. Counsel submitted that there was no identification of any weapon used nor was there evidence adduced of violence or threatened force, therefore a conviction and sentence for Stealing from the Person under the provisions of Section 279 Penal Code would have been proper in this instance; and that the facts on record were supportive of this offence.

16. On Counts II and III Counsel submitted that he did not oppose the appeal on these two (2) counts as there was insufficient evidence on the circumstances of identification of the appellant; that the incidents occurred at night and it was not stated in evidence whether there was any source of light; that there was no possibility of identification as the conditions were not conducive.

17. Further there was no description or special marking given to the police on the shoes that were allegedly stolen from **PW3.** As for **Joseph Mwangi Wambugu (PW4)** no corresponding sandal was tendered in evidence. Counsel conceded the appeals on Counts II and III for the reasons that the prosecutions' evidence did not meet the desired threshold.

<u>ISSUES FOR DETERMINATION</u>

18. After taking into consideration the forgoing submissions made by the appellant and those of the Counsel for the State, we have framed the issues as set out hereunder for determination;

i. Whether the evidence proffered by the prosecution was sufficient to support a conviction of robbery and whether the sentence imposed was legal;

ii. Whether the appellant was positively identified;
iii. Whether the charge should be substituted;

ANALYSIS

19. This being the first appellate court it is incumbent upon us to reconsider and re-evaluate the evidence and arrive at our own independent conclusion always keeping in mind that we did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA**

20. On the first issue of whether the was evidence to support a conviction on robbery; Section 295 of the Penal Code sets out the key ingredients that constitute a robbery; One such ingredient being that the offender uses or threatens to use actual violence to any person immediately before or immediately after the time of stealing.

21. Prosecuting Counsel for the State correctly conceded that there was no evidence of any weapon nor violence or threatened force.

22. We are also satisfied that on Count I the prosecution did not tender any evidence to prove that the appellant used or threatened to use actual violence upon PW1; therefore there is no evidence to support a conviction on the charge of simple robbery contrary to Section 296(1).

23. Even if there had been sufficient evidence to support a conviction for simple robbery, we concur with both submissions of the appellant and Counsel that the sentence imposed was not in line with the provisions of Section 296(1) which provides as follows;

"296 (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years"

24. This ground of appeal on conviction and sentence has merit and is hereby allowed.

25. The next issue is whether there was positive identification of the appellant; The submissions of the appellant are that the three robbery incidents occurred at night and that there was no concrete evidence as to the availability of light at the respective points of attack and that none of the complainants was able to specifically elaborate on their observation and their visual ability that night.

26. In his submissions the appellant has cited the case of **Charles O. Maitany vs Republic (1968) KLR 198** where the appellant, therein, was acquitted as the record did not show any inquiries made as to the nature of the intensity of light and its source and relation to the point of attack and the positioning of the attacker.

27. PW1 testified that on the night of the robbery there was sufficient light and he was able to see the appellant and that his face was familiar and that he was a person well known to him.

28. The evidence of **PW4** was that the incident occurred at night and that he had a flash light which was grabbed from him; but he knew the attacker/ appellant by name; he further narrated how he held onto the appellants' leg during the incident and managed to remove one of his sandals; and was thus able to identify the appellant and also as being the owner of the owner of the sandal.

29. Counsel for the State did not oppose this ground of appeal and submitted that all the three incidents occurred at night and that none of the complainants testified on the sufficiency of light and that therefore there was no possibility of positive identification of the appellant as the conditions were not conducive.

30. Upon perusal of the Judgment on this issue, we note that the trial magistrate considered the identification evidence and found it be that of recognition. The trial magistrate made a finding of positive identification and states at page 30 as follows;

'It must be remembered that all the incidents occurred at night, but when the complainants reported the matter they clearly mentioned the name of the accused person as the one who attacked them'

31. In the light of the above we have re-analysed the evidence of **Mohamed Mohamed CIP Force No. 230722 (PW5)** who was the OCS Muthithi where PW1, PW3 and PW4 made their reports; we note from the record that **PW5** makes no mention of any description given of the appellant by these prosecution witnesses; nor did this witness state in his testimony that **"they clearly mentioned the name of the accused person as the one who attacked them"** when they made their reports**;** nor did he state that these witnesses assisted the police in arresting the appellant; nor were they present when the appellant was arrested.

33. In this instance we find no evidence on record of any report made by PW1, PW3 and PW4 to the police on the description of the appellant either by name, special mark or something existing or previously known to them that helped them recognize the appellant on the material night.

34 We also make reference to the **Charles O. Maitany vs Republic (supra)** where the appellant, therein, was acquitted as no inquiries were made as to the nature of the intensity of light and its source and relation to the point of attack and the positioning of the attacker.

35. The incidents occurred at night and no evidence was adduced on the source or nature of the light; nor of its intensity. It is our considered view that evidence on the quality of light would have greatly enhanced the quality of recognition.

36. From the evidence adduced we are satisfied that the evidence of recognition cannot be relied upon to form the basis of a conviction nor was there a possibility of positive identification of the appellant as the conditions and circumstances were neither favourable nor conducive. From the above evidence we are guided by the case of **Wamunga vs R (1989) KLR** where it was held that ;

"…. A trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from any possibility of error before it can safely make it a basis of a conviction"

37. This ground of appeal is hereby allowed.

38. Prosecuting Counsel has urged this court to apply the doctrine of recent possession as opposed to identification, and to substitute a conviction for a minor but cognate offence under section 179 of the Criminal Procedure Code.

39. We have considered the evidence of **PW1;** that his phone was stolen on the night of 24/10/2013 as he was heading home from Ngaburi Centre. The evidence of **PW5** was that on the 31/10/2013 after interrogating the appellant, he took them to **Edwin Mwaura** (**PW2)** where they recovered the stolen Nokia phone. The evidence of **PW2** also corroborates that of **PW5**.

40. The court record shows that the phone was recovered after approximately seven (7) days after the date of the incident and was found in the possession of **PW2** who offered an explanation as to how the stolen item came into his possession. That the appellant gave it to him as a pledge in exchange of Kshs 500/=.This explanation is corroborated by the evidence of **PW5**; that it was the appellant who took the police to **PW2.**

41. The stolen phone was positively identified by **PW1** as the one that and been stolen from him and he also tendered documentary evidence to prove that it also belonged to him.

42. NIt is trite law that the appellant must give a reasonable explanation as to how he came to be in possession of the recently stolen goods. In his unsworn defence the appellant merely alleged that he was framed whilst in custody.

43. In the light of the above we are satisfied that the recovery of the phone from the appellant within a period of seven (7) days constituted possession of recently stolen goods without a credible explanation of how he came by the phone. In the case of **Samuel M. Matu vs R Criminal Appeal No. 108 of** 2003 a period of twenty days (20) was held to be recent.

44. We find the explanation given by the appellant to be unsatisfactory and we are satisfied that from the evidence of **PW2** and **PW5** an inference can be drawn on the recent possession that the appellant was the one who robbed **PW1.**

45. However, there was no evidence of use of actual violence or threat to use actual violence as alleged in the particulars of the offence. A conviction for robbery therefor cannot lie. But the offence of stealing from the person contrary to section 279 of the Penal Code was fully established by the evidence placed before the trial court. Unfortunately, stealing from the person, though cognate, is not minor to simple robbery as they both carry the same maximum sentence of 14 years imprisonment. But simple theft under section 275 of the Penal Code is also cognate, **and** minor to simple robbery.

46. We are satisfied that from the aforesaid inference drawn from the very recent possession of the stolen property that this is a suitable and proper case for substitution of a conviction for simple theft contrary to Section 275 of the Penal Code.

FINDINGS

47. For the forgoing reasons we make the following findings -

i. *We find that* there is insufficient evidence to support a conviction for the offence of robbery contrary to Section 296(1) of the Penal Code. Needless to say we find that the trial magistrate erred in law and in fact in imposing the death sentence for the aforesaid offence.
ii. We find that the appellant was not positively identified at the scene of the robberies.

DETERMINATION

48. We partially allow the appeal. The convictions for robbery contrary to section 296(1) of the Penal Code are hereby quashed and the sentence of death imposed set aside. We substitute one conviction for simple theft contrary to section 275 of the Penal Code. We sentence the Appellant to three (3) years imprisonment effective from the date of the sentencing by the trial court. To that limited extent only does the appeal succeed. Orders accordingly.

Dated, Signed and Delivered at Murang'a this 27th day of November, 2015

HON JUDGE WAWERU

HON JUDGE MSHILA