REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 5 of 2012

(From original conviction and sentence of the Senior Resident Magistrate's Court at Mwingi (H.M Nyaberi) in Criminal Case No. 15 of 2010)

THOMAS MUSYOKA KAKULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

1. Thomas Musyoka Kakuli (the appellant) was tried for the offence of robbery with violence contrary to section 296 (2) of the Penal Code, convicted and sentenced to death by the Senior Resident Magistrate at Mwingi on 20th December 2011. The particulars of this charge read that on the night of 23rd and 24th December 2009 at Tulimani village, Mbondoni sub-location, Kiomo Location in Mwingi District within Eastern Province, jointly with others not before the court while armed with a dangerous weapon namely a knife robbed Mrs. Ndanu Nzomo of a bag containing clothes and handbag containing identity card and Kshs 4,500 and immediately before the time of such robbery used personal violence against the said Ndanu Nzomo. The appellant has come before us challenging the conviction and sentence. The prosecution case was supported by evidence of seven witnesses while the defence case relied on the sole evidence of the appellant given under oath.

Grounds of appeal

2. The appellant had personally prepared six grounds of appeal. The memorandum of appeal was amended by his counsel and supplementary grounds prepared. These were filed with leave of this court. Both sets of grounds of appeal were argued together and mostly challenge the evidence. We have reproduced the grounds here below without repeating similar grounds found in each set as follows:

i. The learned trial magistrate erred in law and fact by failing to record all the evidence adduced by the prosecution witnesses during cross examination by the defence which resulted into him reaching a wrongful and biased decision (sic).

ii. That the trial magistrate erred in law and fact by failing to thoroughly evaluate and interpret the evidence on record and the law prevailing which omission made him reach a decision unsupported by any law or evidence.

iii. The learned trial magistrate erred in law and fact by convicting and sentencing the accused relying on

prosecution evidence which was full of conflicts, contradictions and inconsistencies (sic).

iv. The learned trial magistrate erred in law and fact by passing a judgement against the accused that was unsafe, unsatisfactory and against the weight of evidence.

v. The trial magistrate erred in law and fact by shifting the burden of proof to the accused.

vi. The trial magistrate erred in law and fact by depending on the evidence of identification whereas the agents of identification were insufficient at the scene of crime (sic).

vii. The trial magistrate erred in fact by dwelling on the evidence pointing to the accused as the possessor of the exhibited items without considering that the same was not foolproof (sic).

viii. The trial magistrate erred in law by not considering the accused's sworn defence.

Duty of this court

3. The requirement of the law as contained in decided cases, see **Criminal Appeal No. 7 of 2006 Alloys Omondi Nanga v. Republic** and **Okeno v. Republic [1972) E.A 32** among a myriad of others on this point, is that a court sitting on first appeal has a duty to re-examine the evidence on record and re-evaluate it in order to arrive at its independent conclusion that the one reached by the trial court in regard to whether the appellant is guilty or not. This duty is exercised bearing in mind the fact that the court sitting on appeal did not have the luxury of observing witnesses as they testified in order to form its own opinion as regards their demeanour.

Facts

4. On 23rd of December 2009 **Ndanu Nzomo (PW1**) left Garissa in a Nairobi bound bus for Tulimani trading Centre in Mwingi District. She had carried a black bag containing two kilogrammes of sugar, clothes and shoes and a handbag with Kshs 4,500 and her identity card. She alighted from the bus and started walking towards her aunt's place within the Tulimani trading centre. After walking for about 200 metres she met two men who emerged from both sides of the road. They greeted her and walked side by side with her for about ten metres. The man on her left grabbed her on the left hand while the man on her right held her shoulder firmly. She screamed telling them not to kill her. The two men pulled her to the side of the road with the man on her left pointing a knife at her stomach. The man on her right demanded that she surrenders her phone and took her big bag. The man holding the knife took her handbag. She was knocked to the ground and one man stepped on her neck. She was stabbed on the right hand near the wrist and on the cheek. After this the two men left. She managed to stand up and with two women who came by they went to a shop nearby. She was assisted to call her aunt **Rhoda Mutemi (PW2)** and inform her of what had happened. She was taken for treatment at Mwingi District Hospital until the following day when she was discharged. The matter was reported at Mwingi Police Station and investigations commenced. The appellant was arrested on 24th December 2009 at a home selling busaa about one kilometre away from Tulimani trading centre and charged with this offence.

5. These facts are contained in the evidence of **(PW1)** the victim of the robbery, her aunt **(PW2)** and **Musee Kisyo (PW3).** PW3 had been in his shop on the night of the robbery when he received information that a woman had been robbed nearby. He had gone to the scene and found PW1 with a wound on the hand and cheek. PW3 joined other members of public to the home where the appellant was arrested from. His further evidence is that there was information of someone selling the stolen items at a nearby homestead and members of public went to the place and found several people drinking busaa. One of the people had a black bag and when members of the public attempted to arrest him the people drinking busaa attacked them with fists and sticks injuring some of the members of public. PW3 testified further that the police arrived and managed to arrest the person whom he identified as the appellant.

6. **APC Cosmus Mwasya (PW4)** in company of **APC Valentine Matunda (PW5)** from the District Commissioner's Office, Mwingi confirmed finding the appellant having been arrested by members of

public and re-arresting him. They also confirmed recovering a black bag with assorted clothes. **Corporal Stephen Owino (PW6)** testified to receiving the report of the said robbery while manning a roadblock on the Thika-Garissa road near Tyaa river in Mwingi Town. **Anthony Kilonzo (PW7)** confirmed the injuries sustained by PW1 and filling the P3 form.

7. The appellant testified in his defence that on 23rd of December 2009 he had gone to buy a donkey which he drove home where he arrived at 3.30pm. He stayed at home the rest of the day and went to bed. On 24th December 2009 he went to plaster the toilet belonging to one Mwendwa at a place called Kiomo but did not do the work for lack of sand. He left at about 9.30am and passed by the homestead of one Mali who makes traditional liquor where he stayed until 2.00pm. He left that homestead and went to another homestead of one Manzi. He testified that after 30 minutes police went to the homestead causing people to run off leaving him behind. He was arrested because he was drunk. Under a tree was a bag left behind by fleeing people. In company of the police was one Henry Musyoka whom he had differed with on 22nd December 2009. The said Musyoka told the police that the bag probably belonged to the woman who had been robbed the previous night. The said Musyoka carried the bag and went towards the road where two women were. One of the women claimed the bag belonged to her. He denied that he had been selling clothes.

Submissions

8. The appellant through Mr. Ngala Mulonzya his counsel submitted that the trial magistrate did not record all the evidence adduced by PW1 and PW3 during cross examination leaving out vital evidence and that had this evidence been recorded the trial court would have arrived at a different conclusion; that the evidence was insufficient to base a conviction on because of contradictions and inconsistencies especially on the evidence surrounding his arrest; that the identification was inadequate; that the trial magistrate did not thoroughly evaluate the evidence on identification especially the evidence that it was at night with moonlight that was not bright and that the complainant testified that the attackers who were strangers to her stayed with her for five minutes; that after arrest and beating the appellant was first taken to the complainant bleeding and she identified him as one of the attackers and that the trial magistrate did not consider the appellant's defence but instead he brushed it aside. The appellant asked the court to allow the appeal and set the appellant free. He also asked the court to order a retrial.

9. On the opposing side was the learned state counsel who submitted that the rules of recording evidence are clearly laid down under section 194 of the Criminal Procedure Code and that the recording of evidence is done in open court in the presence of all the parties. He submitted that as far as the prosecution is concerned the record of the lower court is clear and complete; that the prosecution evidence is clear that the appellant was arrested at the busaa den and the complainant narrated how the appellant emerged holding a knife and she was able to see six meters away and the attack took five minutes which was enough time to identify the appellant; that in the R. v Turnbull case the court considers the length of time the attack took, the lapse of time and available light; that the appellant was positively identified; that the appellant's defence that there was a grudge with Musyoka was an afterthought and that the trial court ought to have evoked the doctrine of recent possession to convict the appellant as this case meets the test in Arum case. The learned state counsel asked the court to dismiss the appeal.

Issues for determination

10. We have noted that grounds numbers two, three, four, and seven challenge the evidence relied on by the trial court to convict. We will consider these grounds together to determine whether it was sufficient to support the conviction and whether it was contradictory and inconsistent. We will consider whether the trial court failed to record the evidence of PW1 and PW3 on cross examination; whether the trial court shifted the burden of proof to the appellant even though counsel for the appellant did not submit on this ground and finally whether the trial court disregarded the appellant's defence.

11. The evidence surrounding the arrest of the appellant was adduced by PW1, PW2, PW3, PW4 and PW5. According to PW2, she received a telephone call that the suspect in this case had been arrested and

he would be taken to Tulimani trading centre. PW2 and PW1 were told to proceed to Tulimani. Both witnesses testified that on arrival at Tulimani they found many people gathered waiting for the suspect. According to PW1 the suspect whom she identified as the appellant was brought by members of public and the police around 6.00pm and she was able to identify him as the person who had stabbed and robbed her. According to PW2 two suspects were brought, the appellant and one Kavita who was later released. PW3 was one of the members of public who was present when the appellant was arrested and he was also among those who went to Tulimani with the appellant.

12. The evidence of PW4 is that on arrival at Tulimani they found a suspect whom he identified as the appellant bleeding from beatings by members of public. PW4 testified on cross examination that they found the appellant at his home about one and a half kilometres from the road. PW4 further stated that he did not where the appellant had been arrested from and that the bag was beside him. We understand this to mean the recovered bag. PW4 said members of public had informed him that where they found the appellant was his home. PW5 testified that the appellant had been arrested elsewhere and brought to the road. We have considered this evidence we believe the evidence of PW1, PW2 and PW3 that the appellant was arrested at the home where busaa was being consumed and taken to Tulimani. PW4 seems to contradict himself that the appellant was arrested at his home which we find not true. It is true that the trial court did not evaluate this evidence fully because there is no mention in his judgement of these contradictions.

13. On the issue of identification of the appellant, the evidence of PW1 is clear that she did not know who had robbed her; that it was dark and the moonlight was no so bright. She said one could see a distance of 6 metres away; that the attackers were strangers to her and they took five minutes with her; that they greeted her and walked beside her for ten metres before they turned on her and attacked; that one man had small beards and was tall and that this is the man who stabbed her. The other man was short and was wearing a red cap. She identified the appellant as the one with the small beard and the court noted that the appellant had developing beard. It is our view that when the appellant, having been beaten and bleeding from the beating, was taken to Tulimani where PW1 was it was obvious who the suspect was. For a witness who had seen a suspect clearly under favourable conditions it would have been expected that PW1 would recognise the appellant as one of the men who attacked her by referring to any of the descriptions she has stated in her evidence but that is not what happened. She stated as follows in her evidence in chief: **“At 6.00pm, a suspect was brought by members of public and police. He is the accused in the dock. He was brought with my black bag.”** On being cross examined by the appellant she stated: **“When you were brought, I said it is you who took my bag and stabbed me. I had not known you before.”** To our minds, it is very easy for a complainant to state as PW1 did. Mind you this evidence did not come at the time of giving evidence in chief but during cross examination. Had she not been cross examined, this last bit of her evidence would not have been stated. We are alive to the fact that the complainant did not know the circumstances under which the appellant was arrested and the bag recovered.

14. In the case of **Ibrahim Kigame Agevi & another v Republic [2011] eKLR** the Court of Appeal stated as follows:

“The law is settled, that in general, identification of a 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 who would organize 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 is worthless” (see ***Njoroge v. Republic* (1987) KLR 19).**

15. The fate that befell the appellant is different than dock identification. He was taken to the road where the complainant was. Going by the evidence, the appellant was the only one bleeding from beatings. It was obvious who the suspect was and the probability is that the complainant would have easily picked him as one of the suspects who had attacked and robbed her the previous night. Going by the cited case above, the proper thing for the police to have done under the circumstances was to take the suspect to the police station, get all the details of the description of the suspect from the complainant and organise for an identification parade. This was not done and it was wrong for the police to act as they did.

16. *We have considered the evidence surrounding the identification of the appellant. We have also perused the judgement of the trial court and we find that the trial court did not subject the evidence on identification to careful scrutiny. We agree with the Court of Appeal that evidence of identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and considering the surrounding circumstances of identification as stated in* **R v Turnbull [1976] 63 Cr. App. R. 132**(See **Bernard Mutuku Munyao & another v Republic [2008] eKLR.** Our view is that five minutes with total strangers, on a dark night with not so bright moonlight under circumstances that the complainant found herself in is not sufficient to identify the attackers. We take note that the attackers emerged from both sides of the complainant and walked side by side with her for ten metres. It is human to be terrified and the complainant must have been. She did not have time to look at the attackers as they walked beside her and after ten metres they grabbed her, stabbed her on her hand and face and took her bags. Those are difficult circumstances to identify the attackers and obviously the trial court did not carefully scrutinize this evidence.

17. On further scrutiny we note that PW3's is the only witness who testified on what happened during the arrest. We have no doubt that the recovered bag belonged to the complainant. What is in issue here is who was in possession of the bag. Our reading of the judgement of the trial court, it appears that the court invoked the doctrine of recent possession although this does not come out clearly. This is what the court had to say on the issue:

"There is no dispute that the complainant did not know the names of her attackers. However, she stated that there was moonlight in which (sic) one could have seen 6m. The attackers walked side by side with her for about 10m. She strongly believed that if she saw them, she could identify them. Be that as it may, the accused was arrested with the bag that was subsequently identified by the complainant as hers as well as the exhibits therein…….. In Cr. Appeal No. 108 of 2003, Matu – vs- Republic (2004) 1 KLR, it was observed that the appellant had been in possession of goods stolen from the complainant kiosk and he would not offer any acceptable explanation on how he had come by that property. The inevitable conclusion, therefore was that the appellant had participated on the robbery (sic)……. I find the evidence of PW3 as credible and absolutely worthy of believing."

18. PW3 was one of the people who went to the home where it was alleged that the suspect of the previous night's robbery was selling the stolen items. He stated that on arrival at the home they found one person with a black bag and they tried to arrest him but this was not possible because the people drinking busaa in company of the person became violent. PW3 identified the appellant as the person with the bag. On cross examination, PW3 said the appellant had been carrying the bag swinging from his shoulder. He went on to state that he had seen the appellant with the bag at first but he was not present when the appellant was arrested. We do not have the advantage of any other evidence to confirm PW3's evidence. This evidence is contradicted by that of PW4 who stated that the appellant was arrested from his home and the bag was beside him. This where the police went wrong by not calling other witnesses to testify, especially the owner of the home, any other person who was present at the busaa place including the civilian who carried police in his/her vehicle to go to arrest the appellant.

19. When we consider this evidence is totality, especially evidence surrounding the arrest of the appellant, we find that it is not water tight. It is the kind of evidence that leaves more questions than answers. We agree with the appellant that the evidence is weak and the trial court ought to have noticed this. After careful evaluation of the evidence on the arrest and recovery of the bag, and bearing in mind that the case was not investigated, or that there is no evidence to point to any investigations having been carried out, and the fact that the appellant was taken to the complainant in circumstances that would have led to her identifying him against the laid down procedures of identification, we find that there has been miscarriage of justice.

20. Before we make our conclusions, we wish to address the other issues raised by the appellant. He has claimed that the trial court did not record all the evidence of the witnesses on cross examination. The appellant did not point out what evidence was left out by the trial court. The appellant did not point out what was left out and we find that this is a mere allegation without any basis and we dismiss this ground

of appeal.

21. On shifting the burden of proof, we find the ground without basis. In our view the trial court was explaining the requirement that an accused person has to explain how he/she came by the recovered stolen items. We have also noted that the trial court considered the appellant's defence but only half of it. He did not consider the evidence that the appellant claimed not to have been at the scene of crime on 23rd December 2009 as he had gone to buy a donkey and went home where he remained until the following day.

22. Our conclusion is that the evidence on identification and the manner in which the stolen bag was recovered does not meet the threshold of proof beyond reasonable doubt. It is unsafe to have convicted the appellant based on this evidence. We have explained our reasons in this judgement and we hereby allow the appeal, quash the conviction, set aside the sentence and order immediate release of the appellant unless he is otherwise lawfully held in custody. Those are our orders.

Florence N. Muchemi **Stella N. Mutuku**
Judge **Judge**

Signed, dated and delivered this 31st January 2013