



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 59 OF 2012

LESIIT,GIKONYO JJ

LTIMPIYAN LEKOLOTO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

***(APPEAL FROM A JUDGMENT OF PRINCIPAL MAGISTRATE'S COURT AT ISIOLO
CRIMINAL CASE NO. 290.2011 (M. MAUNDU SPM) DATED 12.4.2012)***

JUDGMENT

1. The Appellant **LTIMPIYAN LEKOLOTO** was charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code and in the alternative with handling stolen goods contrary to section 322(2) of the Penal Code. He was found guilty and convicted in counts 1 and 2 and sentenced to death. In regard to the alternative charge of handling stolen goods contrary to section 322(1) and (2) of the Penal Code the charge was dismissed.
2. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He relies on his amended grounds of appeal where he raises four grounds. He challenges the qualifications of PW7 to fill the P3 form in respect of the complainant on grounds he was not an expert for being a Clinical Officer.
3. The Appellant challenges the evidence of PW1 and 2 for being null and void for reason of contradiction of the Appellants mode of dressing during the robbery. PW1 said he wore an Islamic cap. The Appellant contends that at no time did he led to recovery of any exhibits the appellant also faults the learned trial magistrate for failing to give due consideration to his defence.
4. The state was represented by Mr. Moses Mungai, learned State Counsel. He conceded the appeal on grounds there was no clear evidence that the Appellant led to the recovery of any of the stolen items. Counsel submitted that the Appellants arrest was arbitral and further that Nokia phone found in his possession was not sufficiently identified as PW3's stolen phone.
5. We have considered this appeal together with submissions by the Appellant and the learned State counsel. We have subjected the evidence adduced before the lower court to a fresh evaluation and analysis and have drawn our own conclusions while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We are guided by the court of Appeal case of **Okeno versus Republic 1973 EA 32** where it was held:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate

Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"

6. The facts of the prosecution case was that PW1 and 2 were travelling towards Isiolo from Marsabit. PW1 was driving a Toyota Land Cruiser while PW2 was in a lorry driven by one Gichuru. When the entourage was travelling between Merile and Sereolipi they were attacked by 8 men who were armed with rifles. The complainants stopped their vehicles and went outside in surrender to the robbers. They were robbed of various items including money and mobile phones. Some of the stolen properties were recovered.
7. The Appellant gave a sworn defence in which he denied the charge. He said he had gone to Sereolipi Market to do some shopping after depositing his phone for charging. He was arrested and later charged. He said that he was taken to a parade where the rest of the members had police uniform. On his part, he had a kikoi, red dyed hair and the only person with pierced ears.
8. The most important issue here is that of identification. The complainants in this case, PW1 and 2 identified the Appellant in a parade conducted by PW8, five days after the incident. There was a contradiction in the evidence of the witnesses touching on the clothing and appearances of parade members.
9. In **Gabriel Kamau Njoroge v. Republic [1982-88]IKAR 1134** the court of Appeal held:

"Dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.

10. In the above case two important points are made which is the principle that has guided us in testing the evidence of identification in this case. The first principle is the requirement that a witness should be asked to describe the person he claims he was able to identify during the incident in issue before the identification parade is done. The second principle is the duty the police have to conduct a fair identification parade.
11. There is no evidence PW1 and 2 recognized the Appellant before the parades were conducted. However, PW1 in his evidence stated that he identified the accused as the person he saw wearing a military jacket and woolen hat and having a G3 rifle. PW1 said Appellant was the one who remained at the scene when others left. PW2 on his part testified that he identified the accused as the person who was brown, who was wearing jungle jacket and a Islamic cap and who had a lesso on the lower side and who carried a gun. He also stated that the Appellant was the first to leave the scene of attack and that after he left the other 7 were left vandalizing their vehicles.
12. Even though a military jungle may pass as a jungle jacket may pass as a jungle jacket, there is no way a woolen hat can be mistaken as an Islamic cap. The two are distinctively different. We find that by virtue of the variation in the description of the head gear the Appellant was wearing and the contradictions as to the stage at which he left the scene of the robbery as described by PW1 and 2 that the two witnesses were not describing one and the same person. Their ability to identify the Appellant as one of eight persons who robbed them creates doubt as to whether they were identifying the same man.
13. In regard to whether a fair identification parade was conducted. The Appellant in his defence stated that he was the only one who was differently dressed during the identification parade and further that his hair was only one dyed red among all members of the parade. In his defence the appellant claimed that while the other members of the parade wore full police uniform he was dressed in traditional shukas.
14. The Police Officer who conducted the identification parade was PW8. When asked how members of the parade appeared at the parade, he clearly stated that all had normal clothing and

- none had dyed hair, including the Appellant. PW1 and 2 contradicted his evidence. PW1 stated that at the identification parade the Appellants hair was dyed. He did not say about other parade members. PW2 on the other hand stated that all the parade members had dyed hair and all were bare chested without shirts or clothing on the upper part of their bodies.
15. It is clear to us that PW8 lied about the manner of clothing or absence of it the parade members wore at the parade. He also lied that their hair was normal. More importantly is the question whether PW8 knew of his responsibility to ensure a fair parade if the suspect can easily be identified by him. It would not be a fair parade if the suspect can easily be identified by elimination method on account of having a different hair style or dye, different form of clothing or any other thing which makes it possible for identifying witnesses to distinguish him for being different for one or other reason. The prosecution had the burden to show that the Appellant was not easily distinguishable from the rest for any reason. From the evidence presented before the trial court, we are not satisfied that steps were taken to ensure that the Appellant had a fair identification parade conducted in his respect. We find that for this reason we are unable to find that Appellant was given an opportunity to have a fair trial conducted against him.
16. The learned trial magistrate found that.

“the two complainants were both consistent on the role the accused person played during the robbery. Secondly the accused person was positively identified by the two (2) complainants on identification parade.

The learned trial magistrate misapprehended the evidence of the two complainants in this case and came to the wrong conclusion that their evidence was consistent and that their ability to identify the Appellant at the identification parade was conclusive proof he was those who robbed him.

17. The other issue of importance was whether the Appellant was found with any of the stolen properties. Mr. Mungai, learned State Counsel conceded the appeal on the grounds the recovered properties which the complainant's positively identified as their stolen properties was not found in the possession of the Appellants and neither did the Appellant lead to their recovery.
18. The learned trial magistrate in his judgment came to the conclusion that the Appellant led Police Officers to a bush where a bag containing the complainant's properties was recovered 2 days after the robbery.
19. The evidence of PW1 was that his personal identification and employment and other cards were recovered and he positively identified them as Exhibits 4,5 and 6. Those PW2 identified were Exhibits 11,12 and 14. These cards and documents were recovered by scouts led by PW4. The recoveries were made at the scene of the attack at 7 pm the same day it happened. There was no nexus made by the prosecution between the Appellants and the recovery of these items.
20. The only item allegedly recovered through the Appellants was a bag Exhibit 3. According to PW6, he arrested the Appellant one day after the robbery. PW6 stated that the Appellant led them to a bush where they recovered a bag Exh.3, containing 35 packets of tea leaves Exhibit 7, 8 and 9.
21. PW4 and 5 who were present during the recovery contradicted PW6. PW 4 said that the recovered bag exhibit 3 had only packets of tea leaves. PW5 on his part also said that the bag exhibit 3 contained only tea leaves. From the evidence of PW4 and 5 we find that there is doubt that the Appellant led to the recovery of anything else apart from the bag Exhibit 3 and packet of tea leaves exhibit 7, 8 and 9.
22. PW2 identified the bag exhibit 3 as what was stolen from him. He specifically stated that the bag had clothes which were not recovered. He also stated the tea leaves they were carrying on the lorry he was travelling in were never stolen.
23. The learned trial magistrate found that the Appellant led to the recovery of the stolen things. The learned trial magistrate was not clear which of the stolen property the Appellant led to its recovery. We are however not in doubt that even though he did not state so, the learned trial magistrate convicted the Appellant on the basis of the doctrine of recent possession.
24. In *Arum vs Republic* (2000) IKLR 233 the court of Appeal held:

The way to test whether the prosecution has positively proved that the Appellant had recent possession of stolen property is set out in the case we have cited herein above. We are concerned that

the learned trial magistrate did not subject the evidence of recovery of Exhibit 3 adduced by the prosecution to the above tests. More importantly the learned trial magistrate did not evaluate or analyze the evidence adduced to determine whether he was satisfied that the bag Exhibit 3 was positively identified as the property of PW3.

25. All PW3 stated was that the bag was his. He did not say on what basis he identified the bag as his. In fact in the entire prosecution case the bag was not described. We cannot tell on what basis PW2 claimed it as his was it the colour? The size? The style or make of it? Any markings on it? There is no mention of this. We are not told it is a unique bag and on what basis it is unique. To say the least PW2's evidence that the bag was his was vague, devoid of detail and wholly unreliable. Such evidence cannot found a conviction for whatever reason.
26. Before we end we must mention something else which had disturbed us in this case. The manner in which the learned trial magistrate admitted into evidence statements allegedly made by the Appellant to PW6, one of those who led investigations into this case. PW6 was a Police Corporal. PW6 gave details of self incriminating statements made by the Appellant to him and other police officers after which they went in search of exhibits. That is how exhibit 3 the bag was recovered.
27. Article 49(1) of the Constitution, gives the rights of an arrested person. Among those rights is the right to be informed of the right to remain silent, (article 49(1) (a) (ii) the right to be informed of the consequences of not remaining silent [49(i) (a) (iii)]. Under Article 49 (1)(d) an arrested person has a right not to be compelled to make a confession or admission that could be used in evidence against the person. It is the duty of the court to ensure that these rights were accorded to an accused person brought before them. To admit the admission in evidence without enquiring into the question whether the Appellant had been informed of his rights before he made the admissions is a travesty of justice.
28. Besides this the Evidence Act is very clear of how confessions or admissions should be made and in which circumstances they may be admitted in evidence. Sections 25A(1) and 26 stipulates:

25A. (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

26. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

29. As indicated earlier PW6, a police corporal gave details of admissions made by the Appellant to Police Officers. Those details form part of the evidence of PW6 with respect to the learned trial magistrate that evidence contained illegally obtained evidence and ought to have been excluded from evidence.

30. We have come to the conclusion that the evidence adduced before the learned trial magistrate was insufficient to prove the charge against the Appellant to the required standard. The evidence was unsafe and could not found a conviction. For that reason we find that the conviction cannot stand and should accordingly be quashed and the sentence set aside which we hereby do.

31. We allow the Appellants appeal and order that we should be set at liberty forthwith unless he is otherwise lawfully held.

DATED AT MERU THIS 28TH DAY OF NOVEMBER, 2013.

J. LESIIT

JUDGE.

F. GIKONYO

JUDGE.