



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 48 OF 2012**

**LESIIT,GIKONYO JJ**

**NAFTALI MWENDA MUTWA.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

***(APPEAL FROM A JUDGMENT OF CHIEF MAGISTRATES COURT AT MERU CRIMINAL CASE NO. 48 OF 2012 (R. B. OCHIENG PRINCIPAL MAGISTRATE TIGANIA)***

**JUDGMENT**

1. The Appellant **NAFTALI MWENDA MUTWA** was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. He was found guilty of the offence convicted and sentenced to death. Being aggrieved by the conviction and sentence he filed this appeal.
2. The Appellant relied on amended memorandum of appeal in which he raised four grounds which we summarize as follows:

**That the learned trial magistrate erred in law and facts by relying on the evidence of identification made under conditions and circumstances which were difficult and not free from error that the evidence of recovery of stolen items was contradictory and that the Appellant's defence was not given due consideration.**

3. The appeal was opposed. Mr. Motende, learned State Counsel urged the court to dismiss the appeal as the Appellant was positively identified by moonlight and lights of a passing motor cycle and that the complainant knew the Appellant before as he was a neighbor of many years. Learned State Counsel urged that all the ingredients of the offence were met since the Appellant was in company with another, that both were armed with a rungu and knife and that the doctor confirmed complainants evidence that she had soft tissue injuries inflicted upon her during the robbery. Mr. Motende submitted that the complainant was robbed of properties listed in the charge sheet and that some of these were recovered on the person of the Appellant one day after the incident.
4. The brief facts of the case are that the complainant alighted at a canteen at about 7 pm. She saw the Appellant who was her neighbor walking behind her with another man and she felt safe as she knew him. The Appellant passed her after a distance then turned back and with his accomplice they attacked her, hit her with a rungu and she fell down. She was threatened with a knife causing to her to release her handbag in which was cash Ksh.5700/-, 2 mobile phones a wallet, necklace, 2 ATM cards in her names, her identity card, her interim driving licence, and other

documents.

5. The complainant reported the matter to her local Assistant Chief PW3 same night and gave Appellants name as one of her attackers. PW3 with a village elder proceeded to Appellants home same night and missed him. The two with others laid an ambush and at 2 am they apprehended the Appellant and from his person recovered a necklace, complainants pay slip, a receipt and prayer book exhibits 1 to 4. The four were identified by the complainant as her property after which PW4 charged the Appellant.
6. The Appellant denied the offence and put forward an alibi as his defence. He said that he spent the whole day working at his farm and that at 9 pm he slept. He said he was arrested at home at 2 am by PW2 who had a grudge against him and was the one who framed him with the offence. The Appellant called his mother who reiterated his defence.
7. We have carefully considered the Appellants appeal, his written submissions and those of the learned State Counsel. We are a first appellate court and as expected we have subjected the entire evidence adduced before the lower court to a fresh evaluation and analysis while bearing in mind we neither saw nor heard any of the witnesses and have drawn our own conclusions giving due allowance.
8. We are guided by the court of Appeal in the decision of **Okeno Vrs. Republic** 1972 EA 32 which held:-

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and 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 Vrs. R. (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 finding and conclusion; 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 Vrs Sunday Post [1958] E.A 424.”**

9. The evidence of the prosecution in this case hinges on the evidence of recognition by the complainant PW1 and the doctrine of recent possession. We shall consider each of them. PW2 and 3 swung into action immediately. They caught the
10. PW1 knew the Appellant before as he was her neighbor of many years. The Appellant did not challenge that evidence. The incident took place at night or early evening. The learned trial magistrate applied the principle in the case of **ABDULLAH BIN WENDO VS. REP (1953) 20 EACA 166**, and observed the importance of testing with greatest care and observing the possibility of error while considering the evidence of identification by a single witness. The learned trial magistrate then observed:

**“According to the evidence of the complainant she was attacked by the road side as she was heading home at about 7.30 pm in darkness by two thugs one of whom she positively identified as the accused person. He was well known to her being a neighbor and she knew him by name while his accomplice (still at large) was also a villager but only known to her by appearance. She first noticed them at a canteen. They then followed and passed her before making a u-turn and this time round attacked her while passing her. While they were trailing her she had managed to recognize the accused person with the assistance of light splayed by a passing motor cycle head lights.**

**Taking into consideration the fact that the accused person was well known to the complainant and that she had initially seen and recognized him while at a canteen, and shortly thereafter while they were trailing her-with the assistance of a passing motor cycle headlights. I am of the view that the identification of the accused by the complainant was not based on a fleeting glance as she had the opportunity of seeing and recognizing the accused person when she first met them and as they were trailing her before the attack.**

**Indeed it is the evidence of the complainant that she was emboldened into walking alone in darkness due to the fact that the accused and his accomplice whom she knew well were close behind her and she was therefore under the impression that her safety was guaranteed.”**

11. We agree with the learned trial magistrate evaluation and analysis of the complainant's evidence. In deed from her evidence the Appellant was well known to her. In addition she saw the Appellant clearly at a canteen at close quarters. She also saw him following her from behind and headlights of a passing motor bike confirmed to her that it was the Appellant and his companion walking behind her which emboldened her to walk home free of anxiety as she felt safe with him behind her.
12. It is true as the Appellant stated in his written submissions that the attack took place at a dark place. However that evidence of identification cannot be taken in isolation from the rest of the evidence. The complainant's first report to a person of authority was to PW3, the Assistant Chief. She boldly gave his name as one of her attackers. The report was made to PW3 at 8 pm same night. The complainant was therefore not suffering from any illusions as to the identity of the one who had robbed her.
13. PW2 and 3 swung into action immediately. They caught the Appellant in an ambush mounted after they were unable to find the Appellant at home at 2 am the same night. PW2 and 3 apprehended the Appellant and on his person were some properties. Among those items were three pay slips in the complainant's names. They were Exhibit 3. PW2 and 3 handed over the exhibits and the Appellant to PW4. The complainant identified them in court as hers and also as among items stolen from her on the night in question.
14. We note that the learned trial magistrate did not consider the evidence of recovery of the complainant's property on the person of the Appellant and therefore did not apply the doctrine of recent possession. That is an omission on the learned trial magistrate's part. However, as the first appellate court we have a duty to re-evaluate and re-analyse entire evidence and draw our own conclusions on the case.
15. In ARUM V REPUBLIC (2000) 1KLR 233 the court of Appeal held;

**“1. Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof;**

- (a) That the property was found with the suspect**
- (b) That the property was positively the property of the complainant.**
- (c) That the property was stolen from the complainant**
- (d) That the property was recently stolen from the complainant.**

**2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.**

16. We find that the doctrine of recent possession applies in this case. The prosecution established beyond any doubt that the complainant pay slips which were in her names Exhibit 3 together with the receipt Exhibit 4 prayer book and licence Exhibit 1 and 2 were stolen from the complainant at 7 pm and recovered from the Appellant at 2 am same night.
17. There is no doubt about the ownership of the pay slips as complainant's property. The Appellant had possession of them 7 hours after they were stolen. The Appellant had no explanation for his possession except to say PW2 fabricated the case against him.
18. PW 2 was a village elder. He was not the complainant in this case. There is no iota of evidence to suggest that PW2 conspired to fabricate the case against the complainant. In any event we have no doubt that the case was not a fabrication. The complainant evidence she was robbed was consistent with her report to PW3, a person in position of authority. It is PW3 who chose the persons to assist him get the offenders and in that regard he brought in PW2 and others. We rule out any possibility that PW2 fabricated this case against the Appellant as he alleged.

19. The evidence of recognition by the complainant taken together with the recovery of the complainant's property from the Appellant 7 hours after the robbery is overwhelming evidence against the Appellant. The Appellant's defence of alibi did not shake the prosecution's evidence against him or raise any doubt in veracity of the prosecution's case. The learned trial magistrate gave due consideration to the Appellants defence and correctly found it to be untrue.
20. We have carefully considered the appellant's appeal. We are satisfied that there was overwhelming evidence against the Appellant and that the conviction was safe. We find the Appeal without merit and dismiss it accordingly. We confirm the conviction and uphold the sentence. Those are our orders.

**DATED AT MERU THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2013.**

**J. LESIIT**

**JUDGE.**

**F. GIKONYO**

**JUDGE.**