



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 77 OF 2012

(From Original Conviction and Sentence in Criminal Case No. 143 of 2011 of the Principal Magistrate's Court at Kwaie – E. K. Usui Macharia, SRM)

EDWARD OTSUDI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant on the first count was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. On the second count the Appellant was charged with the offence of being unlawfully present in Kenya contrary to Section 13(2) of the Immigration Act Cap 172. He was acquitted of the second count but was convicted on the offence in the first count. He was then sentenced to death. He has appealed against conviction and sentence.
2. The Appellant faults his conviction on the ground that his identification did not satisfy the required standard of proof and that the prosecution failed to satisfy the burden of proof required in criminal cases.
3. This is the first appellant Court. As such we are duty bound to reconsider the trial Court's evidence analyze it and re-evaluate it bearing in mind that we did not see the witnesses demeanour. See the case of **OKENO -VS- REPUBLIC [1972]EA.**
4. Victoria Waithira (Victoria) was a student at Jomo Kenyatta Campus Taita Taveta. On 10th January 2011 while in Ukunda on her way to Diani at 6.00pm she saw two men. It was still day light. One of them was leaning on a wall while the other who was dressed in a T-shirt and jeans had a paper bag, was standing on the path where she was walking. She was not suspicious because it was still day light. The one standing on the path removed from the paper bag a panga which was wrapped but she was able to identify it as a panga because she saw its tip. He snatched her bag and ran away. The other man also ran away. Because she was on her way to College she did not report it. She had in her bag a Nokia phone, Kshs. 4,000/-, jewellery and clothes. While at

College she was called by police officer who was then using her phone number. Later at Diani Police Station she saw her black tights, a string that she used to use as a key holder and her Nokia phone which items she identified as belonging to her. She was able to produce a receipt indicating the Serial number of the phone that was before the trial Court. She was even able to access the photographs in the phone which were her photographs. She did not participate in an identification parade because the Appellants declined. She was able to confirm on re-examination that the Appellant was the person who wearing the T-shirt and jeans and who had the wrapped panga when she was attacked.

5. PC Sigei Nicholas stated that on 12th January 2011 he was with another officer and whilst they were on patrol they noted three men running away on seeing them. They were able to apprehend one of them who was the Appellant. On carrying out a search they found on him a panga that was wrapped in a cloth, 5 rolls of bhang and two phones. In a rack-sack bag they found a rain coat two hats and ladies tights amongst other things.
6. The Appellant in his defence gave sworn evidence. He gave evidence about the evening of 12th January 2011 when he said he was his way home from a video shop. It was 9.30pm. Two officers stopped him and when they found in his possession 5 rolls of bhang they demanded a bribe. Since he had no money, he was taken to the police station then he was charged with the present offence. He denied the offence of robbery with violence.
7. On being cross examined he denied that he was at the scene of the robbery and that on his arrest the police found on him a panga.
8. The Appellant submitted that the trial Court was wrong to have relied on his identification because an identification parade was not undertaken. The evidence of Victoria which was not challenged in cross examination was that the identification parade did not take place because the Appellant declined. The Appellant did not even contradict Victoria's evidence in that regard in his defence. What the Court then relied upon was dock identification. In this regard we wish to refer to the Court of Appeal's response to submissions made that a dock identification was worthless. This was in the case Court of Appeal at Nyeri **CRIMINAL APPEAL NO. 333 & 335 OF 2009 MOSES KINOTI NKOROI -VS- REPUBLIC** where the Court stated-

14. The second ground of appeal relates to dock

identification and the allegation that no identification parade was held to identify the 2nd appellant as the perpetrator of the crime. There is no evidence on record to show that an identification parade was held for the 2nd appellant. The available record shows that the 2nd appellant was identified in the dock by PW1 (Stella Wagatu), PW5 (Robert Kinyua Mwangi) and PW 6 (Danson Mundia). This court has on many occasions reiterated that dock identification without an earlier identification parade is almost worthless. (See Njoroge – v- R, 1987 KLR 19; John Wachira Wandia & another – v- R {2006} eKLR); see also Ajode – v- R, {2004} 2KLR 81).

15. However, this Court in MUIRURI & 2 OTHERS – V-

R {2002} KLR 274,277 at paragraphs 25-35 stated that not all dock identification is worthless. In the present case, upon our re-evaluation of evidence, we are satisfied that the absence of an identification parade did not prejudice the 2nd appellant. There is credible, cogent and reliable evidence from PW 6 as corroborated by PW 1 and PW 5 that identified the 2nd appellant. As was stated in JOHN NJAGI KADOGO & 2 OTHERS – V- R, {2006} eKLR, “a court might base conviction on the evidence of dock identification if it is satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto, the court warns itself of possible dangers of mistaken identity”. We have perused

the record of appeal and are satisfied that the two courts below considered the totality of the evidence and found that all the appellants had positively been identified. We are satisfied that there was no error in the dock identification of the 2nd appellant.”

9. It should however be noted that the Appellant's conviction was also on the ground that the Appellant was found in possession of recently stolen goods of Victoria. The Appellant did not account for his possession of those goods. It is important to note that some of those items were items that ordinarily can only be possessed by a lady. Here we are thinking about black tights. The assumption therefore is that he was either the thief or receiver. In the case of **ERICK OHERIO ARUM -VS- REPUBLIC CRIMINAL APPEAL NO. 85 OF 2005** the Court in respect of the doctrine of recent possession had this to say-

“... In our view, before a Court of law can rely on the doctrine of recent possession as basis of conviction in a criminal case the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses ...”

10. In this case Victoria was able to positively identify as her property the telephone, the tights and the string used as a key ring. These items were found on the person of the Appellant. PC Sigei gave clear evidence of how he made recovery of those items together with others. The recovery by PC Sigei was two days after Victoria was attacked and robbed. We therefore find that the doctrine can be evoked as was done by the learned trial Magistrate in the lower Court. Having so found we find that the prosecution well met the standard of proof and did prove the case against the Appellant beyond reasonable doubt. It is for that reason that we dismiss the Appellant's appeal against conviction and sentence.

Dated and delivered at Mombasa this 26th day of November, 2013.

MARY KASANGO

M. MUYA

JUDGE

JUDGE