



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NUMBER 396 OF 2008

(From original conviction and sentence in Nairobi Chief Magistrate's Court Criminal Case No. 1902 of 2005, S Muketi (Mrs) SPM on 19th November, 2008)

RONALD ONYANDO OSORO.....APPELLANT

VERS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant in this appeal, **Ronald Onyando Osoro**, together with **George Njoroge Ngendo** were charged in Nairobi Chief Magistrate's Court Criminal Case No. 1902 of 2005 with Robbery with Violence contrary to section 296(2) of the Penal Code. The particulars were that the appellant, on the 22nd day of August, 2005, at Ngara in Nairobi within Nairobi Area, jointly with others not before court, while armed with dangerous weapons namely pistols, robbed GIBSON KARIUKI KIBARA of his motor vehicle Registration NO. KAD 595Q Nissan Sunny, one mobile phone Nokia 3310 serial No35084920489904 and cash Kshs.1,100/= valued at Kshs.187,100/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said GIBSON KARIUKI KABARA. In the alternative the appellant was charged with the offence of Handling Stolen Goods Contrary to Section 322(2) of the Penal Code in that on the 23rd day of August, 2005 along Tom Mboya Street Nairobi within Nairobi Area, otherwise than in the course of stealing, dishonestly retained one mobile phone make NOKIA 3310 Serial No. 35084920489904 valued at Kshs.6,000/= knowing or having reasons to believe it to be a stolen property.

After the hearing the 1st accused, **George Njoroge Ngendo**, was acquitted while the appellant who was the second accused was convicted of the offence of Robbery with Violence aforesaid and sentenced to suffer death as prescribed by the law.

It is that decision that triggered this appeal. The appellant appeals against the said decision on the following grounds:

1. **That the learned trial magistrate erred in law and fact in holding that the offence charged was proved against the appellant to the inquired standard.**
2. **That the learned trial magistrate erred in law and fact in failing to consider that there were enough doubts created to secure the appellants acquittal.**
3. **That the trial magistrate erred in law and fact in relying on identification evidence by Pw1 the complainant she failed to consider the evidence was not supported, putting reliance on a single witness and whereas no identification document tendered in court to confirm the complainant Pw1 evidence.**

4. **That the learned trial magistrate erred in law and fact in accepting the Pw1 Pw3 evidence as safe and whereas no description was given initial report to police she failed to consider that the evidence was insufficient and incredible.**
5. **That the learned trial magistrate erred in law and fact in failing to give inter alia points for determination, the decision thereon and reason for the decision made contrary to the clear provision of section 169 of CPC.**
6. **That the learned trial magistrate erred in law and fact in failing to take into account and or she failed to consider and failed to give reason why she disregarded the appellants defence in violation of section 169(1) of CPC.**
7. **That I beg to be supplied with court trial proceedings and be availed in court during the hearing of this appeal.**
8. **The subordinate Court erred in law by failing to resolve that Section 77(1) (2) (a) (b) (c) (d) (e) (f) of the Former Constitution was infringed to the prejudice of the Appellant.**
9. **The subordinate Court erred in law by failing to comply with Section 77(2) (f) of the former Constitution as read with Section 198 of the Criminal Procedure Code (Cap 75) Laws of Kenya to the prejudice of the Appellant.**
10. **The subordinate Court erred in law and fact by relying on evidence of identification that did not meet the required legal standards.**
11. **The subordinate Court erred in law and fact by relying on the doctrine of recent possession that did not meet the required legal standards.**
12. **The subordinate erred in law by relying on circumstantial evidence that did not meet the required legal standards.**
13. **The trial court misapprehended the facts applied wrong legal principles to the prejudice of the appellant.**
14. **The trial court erred in law and fact by failing to resolve the material contradictions and inconsistencies in favour of the Appellant.**
15. **The trial court delivered a judgment that did not comply with Section 169 of the Criminal Procedure Code (Cap 75) Laws of Kenya.**
16. **The trial Court erred in law and fact by failing to consider the exhibit produced by the Appellant and misdirected itself on the practice of keeping exhibits in the store.**
17. **The trial court erred in law and fact by failing to comply with Section 77(2) (c) (d) (e) of the Former Constitution.**
18. **The charges were never proved as critical witnesses were never called to the prejudice of the Appellant.**

According to PW1, **Gibson Kariuki**, on 24th August 2005 he was operating as a Taxi driver of motor vehicle registration no. KAD 593 Nissan Sunny from Maendeleo Street when the appellant approached him and asked him to take him to Blue Hut Hotel Ngara. After agreeing on the fare, the appellant entered the vehicle and sat on the co-driver's seat and they left. Along the way the appellant was talking in Kiswahili on phone that he was on the way coming. On approaching the gate to the Blue Hut Hotel the appellant told him to stop and he saw two boys approaching his side and heard them knock the window. When he looked at the appellant he saw that he had removed a pistol which he pointed at him and PW1 was ordered to jump behind which he did. In the meantime the appellant opened the door for the said two people outside one of whom sat in front while the other sat behind. PW1 was then ordered to lie between the front and the rear seats which he did. He was then stepped on by the man at the rear and ordered to surrender the money and mobile phone and the man took from him the mobile phone Nokia 3310 and Kshs 1,100/= which he gave to the others, which money they divided amongst themselves while driving the vehicle. According to him it was the man who entered in front who was driving the vehicle. The man behind asked for the pistol from the appellant and threatened to kill PW1. When the vehicle stopped the appellant and the man behind removed PW1 from the vehicle and took him to a dark place about 50 metres away. He then heard a gun being cocked and someone shouting "hands up". The men then ran away and when he looked behind he saw that there were three men one of whom was in police uniform and they introduced themselves as police officers after he had informed them that he had been robbed. When they reached the road the vehicle was not there. However after sometime they saw a vehicle approaching and on realising it was the vehicle he was driving the police officers stopped it at gunpoint and the man who was driving the vehicle was arrested. PW1 was then ordered to drive with the two police

officers and the thief in front while another police officer was behind. He drove up to Ziwani DO's office where the thief was put in the DO's office. On interrogation the thief said his name was **George Njoroge**. According to PW2 he had not known the thief before but he was one of the boys who entered the vehicle at Blue Hut Hotel and was the one who took the driver's seat. According to PW1 Blue Hut Hotel is well lit by the light from the Hotel and Muslim Girls School and he saw them as they came towards the car and when they were knocking the door as they were not masked. At the time of his arrest nothing was found on him. When he went back to Maendeleo Street the appellant came and started negotiating the fare for being taken to Blue Hut Hotel and he recognized him and saw that one of the mobile phones he was holding belonged to PW1 and he was still in the same attire. The appellant wanted to go to Ziwani to collect money to bail out his friend who had been arrested and was at Ziwani DO's office. In the meantime PW1 sought police assistance and the man on being suspicious left but was traced near Ambassador where he was arrested with the two phones. However by the time they reached Central Police Station he had hidden the phones but removed them from his inner wear one of which PW1 identified as his phone since it had a mark on the screen and the name Nokia was removed. Although his sim card was not traced the he recognized the welcome note as "Jambo Mama Tosha" which had been written by a grandchild aged 12 years. According to him the person who was found with the phone was the appellant with whom he had stayed for between 10-12 minutes while discussing the fare and who had not concealed his face and had a Kisii accent. The next day PW1 recorded his statement and identified the other suspect. However nothing else apart from the phone was recovered. In cross examination by the appellant PW1 said that he was robbed on 22nd August 2005 and that the appellant went to him around midnight and that there was sufficient light where he was hired though he did not know the appellant before the robbery. According to him the vehicle was later sold after its photographs were taken.

PW2, **Reuben Wanjau Githinji**, was the owner of motor vehicle registration no. KAD 593Q which was being driven by his driver, PW1 on 22nd August, 2005 when it was robbed from PW1. The said vehicle was after recovery photographed after which he sold it. According to him the vehicle was brought to court five times and he used to bring it and take it in the evening.

PW3, **PC John Mugo** was on duty on 23rd August 2005 along Koinange Street with **PC Kariuki** when PW1 informed them at 2.30 am that he had been robbed of his vehicle the previous night at 11pm and he had seen one of the robbers who had hired the vehicle. They then arrested the appellant at Tom Mboya Stage 44 and they recovered from him Nokia 3310 which the complainant claimed was his. According to him the complainant had given the appellant's description. When arrested the appellant claimed the phone was his but PW1 demonstrated that the phone was his. PW5, **PC Musya Mutemi** was the investigating officer and he produced the exhibits in court. In cross examination by the appellant he said that PW1 made a verbal report which was not recorded by the APs at the DO's office but that his statement was later recorded after the appellant was arrested.

In his defence, the appellant testified that on 22nd he expected bananas from Kisii and at 3.30 pm he got a call that his said bananas were on the way. However the vehicle got a puncture on the way and arrived at 11pm. He made arrangements with the loaders to offload the same which process went on until 1.00am after which he decided to go home. Since there were people who were smoking he stood outside with a view to boarding when the vehicle was moving. Two police officers then came from the front of the vehicle and informed him he was under arrest and they took his phone Nokia 3310 and was taken to Central Police Station where he stayed for 6 days. According to him, he knew nothing about the charges. In cross examination he said that the receipt for transportation was a joint receipt and he did not know who was issued with the same.

In her judgement the learned trial magistrate found that the appellant haggled with PW1 over the price before hiring him hence there was sufficient time to identify the appellant. While appreciating the danger of convicting on the evidence of a single identifying witness the Court found that PW1's evidence was detailed and credible and was corroborated by the police who assisted in his arrest and recovered PW1's mobile phone. In light of the strong evidence adduced the Court the court found the appellant guilty of the offence of robbery with violence, convicted him accordingly and sentenced him to suffer death.

In his submissions in support of the appeal, **Mr Ondieki**, learned counsel for the appellant submitted that

the identification was not free from error and he relied on **Morris Muthiani Sammy vs. Republic Criminal Appeal No. 14 of 2006**. A look at PW1's evidence at page 23 line, learned counsel submitted, it was very dark and although it was stated that the full lights were on illumination is not indicated. PW1 had not seen the appellant before the date of the incident and as the distance was not indicated he could have been mistaken in learned counsel's view. In support of this submission he relied on **Wanjohi vs. Republic [1989] KLR 416** holding number 1, 2 and 3. According to him identification can be mistaken. He further submitted that the case did not meet the requirement for proof beyond reasonable doubt. It was submitted that the issue of accent can mislead and that that is a very queer way of identification hence it was erroneous and misleading to accept this. He submitted that the appellant was arrested on a charge of touting hence the subject charges were an afterthought and this aspect was never critically analysed and given due weight. According to him the case was, on the case of **John Kamundia Gitau and Another vs. Republic Criminal Appeal No. 28 of 1997**, based on mere suspicion which however strong cannot supply a basis for a conviction. It was submitted on the issue of circumstantial evidence that the totality of the evidence exposes missing links which do not tie up and as an example he stated that nothing was found at the time of the arrest in the body of the appellant. In his view there was no cogent evidence linking the appellant to the robbery in question. To him it was not enough to simply state that one knew the robbers as one ought to describe them. Taking the totality of the case, he submitted this is a case of mistaken identity and referred to **James Mwangi vs. Republic [1983] KLR 327** at holding numbers 1, 2 and 3. While referring to page 28 lines 3 to 7 it was submitted that the chain of events in the testimony of PW1 was broken hence creating a sufficient doubt. According to him the Administration Police arrested too many people with the second accused being arrested at Kariokor while the first accused was arrested at Tom Mboya yet the police officers who arrested the appellant were never called. In his view the said officers could have given adverse evidence had they been called. As the APs were never called to tie up the missing link the gaps ought to favour the appellant with respect to material inconsistencies. He submitted with respect to the doctrine of recent possession that taking into account the distance between Tom Mboya and Central Police Station and the timelines involved anything could have happened in between hence the doctrine is inapplicable. In his view there was a possibility that the charges could have been planted. In order to prove recent possession it was submitted that it must be proved that the item belonged to the complainant and with respect to mobile phones proof can only be by serial numbers and not marks since the latter does not meet the legal threshold. Since there was only one phone in court yet the appellant was arrested with two phones, learned counsel posed the question where the other phone was. As the serial number given in the charge sheet was never amended and in the absence of a receipt, it was submitted that the charge was never proved beyond reasonable doubt as there was no nexus between the Safaricom and the Charge. Where a trial starts de novo, it was submitted that it cannot be said that there was a trial because the phone was never marked. Finally it was submitted that the learned trial magistrate did not analyse the evidence of recent possession, search and recovery and the broken chain of events hence based on **Samuel Mwangangi vs. Republic** the appeal ought to succeed.

In opposing the appeal **Miss Onunga** for the State submitted that the identification was proper. According to her during the period when PW1 was negotiating the fare with the appellant he was able to clearly see the appellant for 10-12 minutes in a place which was well lit with electricity light hence he could identify the appellant whom he was able to describe by his attire. She submitted that PW1 came into contact with the appellant on two occasions wearing the same clothing. Since the appellant could not explain how he got hold of the phones that placed him at the scene of the crime, the fact that PW1 was able to show that the phone when inserted a sim card showed "Mama Tosha" was direct evidence connecting the appellant to the offence. Relying on section 282 of the CPC learned State Counsel submitted that the appellant had ample opportunity of addressing the issue of inconsistencies in the prosecution evidence at the trial which he did not. To learned counsel the decisions relied upon were merely persuasive and the Court ought to uphold the conviction and sentence and dismiss the appeal.

In reply **Mr Ondieki** submitted the authorities in question were Court of Appeal decisions hence binding. To him this was not evidence of recognition since it was a case of a stranger who attacked another stranger and as no identification parade ever took place there was no identification.

It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having

given allowance to the fact that this court did not see the demeanor of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704.**

It is contended that the identification was free from error since PW1 did not know the appellant before and there was no evidence on the intensity of the illumination. PW1 in his evidence testified that the appellant approached him on the day of incident at midnight and they spent about 10-12 minutes discussing the charges. PW1 was able to gauge the appellant's accent as that of a Kisii and that the appellant had not concealed his face. In **Libambula vs. Republic Criminal Appeal No 140 of 2003 [2003] KLR 683,** the issue of voice identification was dwelt on by the Court of Appeal in which it stated as follows:

“Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See *Choge v Republic* [1985] KLR 1.”

There was no doubt that in this case the appellant was not known to the complainants before the date of the incident. In our view no sufficient basis was laid upon which conviction could be based on voice identification. We have appreciated that the accent of the appellant was not one of the considerations that were taken into account by the learned trial magistrate in reaching her decision.

The place where PW1 was hired was near Florida Night Club. The appellant then entered the vehicle and sat on the co-driver's seat. When they reached the Hotel he again looked at the appellant expecting to be paid. According to him there was bright light coming from the Hotel and the School nearby. Later on he was able to recognise the appellant when he saw him again at the place where he had been hired when the appellant was still wearing the same clothing. What is surprising however is that PW1 according to him was not asked to record the appearance of the appellant when he recorded his first statement. In **Kariuki Njiru and 7 Others vs. Republic Criminal Appeal No. 6 of 2001,** the Court of Appeal stated:-

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered...Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all”

Similarly in **Mohamed Elibite Hibuy & Another vs. Republic Criminal Appeal No. 22 of 1996,** the same Court held:-

“If (sic) is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone particularly to the police at the first opportunity. Both the investigation officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omissions of evidence of this nature at investigation stage or at the time of prosecution in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency of his evidence.”

PW1's evidence was that he met the appellant the second time in the wee hours of the morning at the

place where the appellant had hired his services. That the appellant who had participated in the robbery would visit the same place and attempt to hire another vehicle where he had hired a vehicle which he eventually carjacked should have raised eyebrows on the part of the trial magistrate. To make matters worse none of the PW1's colleagues was called to corroborate PW1's evidence on this point.

As pointed out by **Mr Ondieki** learned counsel for the appellant there were several inconsistencies in the prosecution evidence with respect to the recovery of the phone belonging to PW1. For instance whereas PW1 in his evidence stated that the appellant was arrested with two phones, PW3 stated that the appellant was arrested with his own phone. It was not clear to the Court whether PW1's welcome message was his name or "Mama Tosha".

Why the prosecution did not deem it fit to conduct identification parade was also a mystery. This was not strictly speaking a matter purely based on recognition.

It is also true that the learned trial magistrate failed to state points for determination, the decision thereon and reason for the decision contrary to the clear provision of section 169 of CPC. The Court of Appeal in **Njoroge vs. R [2002] 2 KLR 200** expressed itself as follows:

"Before we conclude this judgment, we wish to call to the learned Judge's attention, the contents of a judgment. Section 169(1) of the Criminal Procedure Code (Cap.75 Laws of Kenya) provides:-

"169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it". (Underlining provided) The learned Judge's judgment clearly does not comply with the aforesaid provision. We wish to reiterate that trial courts should observe this provision scrupulously, otherwise, in an appropriate case an otherwise sound decision might be set aside."

We have considered the case in its totality and we are unable to find that the appellant's conviction was free from error. There were several gaps and omissions which were not explained by the prosecution. Accordingly we find that the appellant's conviction was unsafe and for that reason we allow the appeal set aside the conviction and quash the sentence and order that the appellant be released forthwith unless otherwise lawfully held.

Judgement accordingly

Judgement read, signed and delivered in open court this 16th day of December 2013.

F N MUCHEMI

JUDGE

G.V. ODUNGA

JUDGE

In the presence of:

The appellant

Mr Okeyo for Ms Onunga for State