



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 20 OF 2013

JOHN BRUCE WAHINYA NGA'NG'A.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 08 of 2010 in the Senior Principal Magistrate's Court at Kikuyu – Mrs. D. Mulekyo (PM) on 29th January 2013)

JUDGMENT

Introduction

1. The appellant appealed against conviction and sentence for the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code** and for the offence of being in possession of an imitation of a fire arm contrary to **Section 34(1)(3)** of the **Firearms Act Cap 144 laws** of Kenya. He was sentenced to suffer death as prescribed by law in the first count and to serve 12 years imprisonment in the second count. The 2nd count was ordered to remain in abeyance.
2. It had been alleged that on 18th day of May 2010 at Muthure village in Kikuyu District within Central Province, jointly with others not before the court, they robbed Peter Njoroge Ndungu of cash Kshs.500/=, a copy of pay slip for March 2010, a photocopy of identification card, a duplicate of the certificate of insurance and a wallet and immediately before such robbery they threatened to use actual violence against the said Peter Njoroge Ndungu.

Grounds of Appeal

3. The appeal which was urged on his behalf by learned counsel Mr. Kamotho eight grounds of appeal, the gist of which was that the court relied on evidence of a single witness; there was no proper identification; his defence was not considered; pertinent issues were not considered; the court misapplied the doctrine of recent possession; he was not given a fair hearing, and that there existed a grudge between the complainant and the appellant.

Grounds of Opposition

4. The appeal was opposed by the learned state counsel Miss Maina on grounds that the prosecution proved its case beyond reasonable doubt. She submitted that in ground No I and II, even if **PW1** did not state that there was light during the attack, it was clear that in his first report he said he

- knew the appellant and even mentioned his name.
5. That in ground No. III, the defence was considered as can be seen in the judgment.
 6. Miss Maina also submitted that in ground No. IV the evidence of **PW1**, **PW2** and **PW4** corroborate each other while in ground No, V the offence occurred on 18th May 2010 and the stolen items were recovered from the appellant on 20th May 2010. Miss Maina contended that the appellant's rights were not infringed, as he was informed of what he was being charged with. She urged the court to dismiss the appeal and uphold the conviction.

Summary of The Case

7. In order to analyse the evidence effectively, we set out in a nut shell, the case that was before the trial court. The trial court was told that the complainant who was also the assistant of chief Kanyariri Sub Location was walking home from the trading centre at around 11 p.m. on 18th May 2010, when he came upon three people. He testified that of the three he managed to identify one of them as a man who had previously been arrested by members of the public and brought to him on allegations of having committed an offence. All three men were armed with AK-47 rifles.
8. The men ordered him to lie down and he complied; lying face down. They frisked him and relieved him of his wallet containing Kshs.500/=, a photocopy of his Identification Card orthopaedic card, insurance certificate and his March pay slip. He was then ordered to walk home without looking back. When he got home he called the OCS Kikuyu Police Station who advised him to make a formal report the following morning.
9. On 20th May 2010 **PW1** accompanied the police from Kikuyu Police Station, and an informer to the home of one Wahinya for purposes of arrest. The said Wahinya was arrested and a bag recovered in his house, in which were found a home-made gun together with documents which **PW1** identified to be his.
10. When placed on his defence the appellant gave a sworn statement in which he told the court that on the 20th (month and year not indicated), he was at a wake for his late father when three persons appeared. He identified two of them as police officers and the third as the complainant who was claiming a refund of monies he had paid the appellant to do a dirty job for him. When the appellant told him that he did not have any money, the complainant promised to see him inside jail. Thereafter he was escorted to Kikuyu Police Station. He denied that there were any recoveries made in his house and told the court that the police told him it was raining and hence they could not prepare an inventory.

Issues for Determination

11. We formed the following issues for determination.
 1. The weight of the evidence.
 2. The manner in which the evidence as a whole was assessed.
 3. The application of the doctrine of recent possession.
 4. The appellant's rights to fair trial.

The Weight of The Evidence

12. Mr. Kamotho submitted that the appellant was convicted on the evidence of a single witness and that it was not safe to do so. That the offence was said to have occurred at 11 p.m. and there was no evidence as to whether there was moon light or the complainant had a torch. In his view it was doubtful that **PW1** was able to identify his attackers in those circumstances.
13. Mr. Kamotho also contended that there was no evidence indicating when **PW1** interacted with the

appellant previously, nor that he had been charged and convicted or the offence of stealing as testified by **PW1**.

14. Mr. Kamotho further argued that at the time of arrest the police vehicle parked outside a fence, over which the police jumped and gained access into a compound leaving the informer in the vehicle. His question was therefore, how the police were able to identify the appellant's house and "storm in," without the informer to point it out.

15. In response Miss Maina urged that even if **PW1** did not state that there was light during the attack, it was clear that in his first report he said he knew the appellant and even mentioned his name.

16. The record shows that the learned trial magistrate followed the right steps in her assessment of the evidence. She was alive to the fact that the evidence against the appellant rested on the testimony of **PW1**; that as observed in **Abdalla Bin Wendo v Republic (1953) 20 EACA pg 166**,

"Subject to certain exceptions a fact is capable of proof by the testimony of a single witness."

She also warned herself in line with **Roria v Republic (1967) EALR at 584** that:

"There was indeed a danger in basing a conviction on the identification of a single witness and this Court had a duty in a case where this has been done to satisfy itself that in all the circumstances the conviction was safe."

17. Having laid a basis as above, the learned magistrate proceeded to analyse the evidence and we can do no better than to quote her judgment where she analysed the evidence thus:

"The complainant told the court that of the three people he met he recognized the appellant as someone who at one time had been brought before him by members of the public on some allegations and he had escorted him to kikuyu where he was subsequently charged, convicted and sentenced. The recognition being based on the witness' past association with the appellant and given the other evidence, I am persuaded that the identification was proper. Further any doubts in the Court's mind are erased by the evidence of **PW2 that in his formal report at the police station the complainant had mentioned the appellant, as well as the evidence of the recovery of the complainant's belongings in the appellant's house. All the witnesses testified that when the appellant was arrested he was found with items which the complainant identified as his."**

18. The appellant did get his chance to defend himself and he did so on oath. He stated that **PW1** had him arrested because he was unable to refund money that **PW1** had given him as payment "to do some dirty job for him," which was to eliminate a woman who had infected **PW1** with AIDs. **PW1** denied this in cross-examination. The learned trial magistrate considered this evidence in the context of the rest of the evidence on record which was to be found in the testimonies of **PW1**, **PW2** and **PW4** and was satisfied that the evidence of the prosecution was sufficient to discharge the prosecution's burden of proving their case against the appellant beyond reasonable doubt.

19. We too have reconsidered the evidence and find no reason to fault her assessment thereof, nor to arrive at a different conclusion.

Recent Possession

20. On this issue Mr. Kamotho argued that at the time of arrest, **PW4** was said to have been standing outside the appellant's house holding the bag which contained the exhibits, and that the appellant could not therefore have come out of the house holding the said bag.

21. Mr. Kamotho also urged that no inventory was taken by the police officer of things that were recovered; that **PW2** did not report that a wallet was stolen from him during the attack; that whereas the goods were said to have been in a wallet at the time of the robbery it was not clear that they were in a wallet at the time of recovery; that therefore, there was no connection between the recovered goods and those allegedly stolen from the complainant.
22. Miss Maina on her part, argued that the doctrine of recent possession was properly applied since the offence occurred on 18th May 2010 and the items recovered from the appellant on 20th May 2010. Further, that the appellant did not explain how he came to be in possession of the complainant's property.
23. We assessed the evidence on record to establish whether the doctrine of recent possession was applicable in the circumstances of this case. We had recourse to the case of **Malingi v Republic, [1989] KLR 225**, where the Court of Appeal had this to say about the doctrine of recent possession:
- “By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver.”**
24. The evidence adduced in court was that during the robbery on 18th May 2010 at 11 p.m., the complainant was relieved of a wallet containing Kshs.500/=, a photocopy of his identification card, orthopaedic card for Thogoto Hospital, insurance certificate for his car and his payslip for the month of March 2010. Two days later on 20th May 2010 at 7 p.m. CPL Rashid called him to accompany them as they went to arrest suspects, with PC Kamande, the OCS and a man whom he did not know.
25. It was his evidence that when they got to their destination the OCS and the two officers accessed the house by jumping over the fence and opening the door of one of the houses in the compound. That from where he was he could see a man by aid of a light bulb, lying on a sofa. The police officers emerged from the house escorting the said man and PC Kamande was holding a bag.
26. **PW1** identified the man as Wahinya, one of those who had robbed him. Wahinya is the appellant now in court. According to **PW1** the bag in PC Kamande's hands contained a firearm and upon being searched, also yielded the missing payslip, photocopy of identification card, medical card PCEA Hospital, duplicate insurance certificate, some receipts and the wallet. This evidence as to the mode of arrest and recovery was corroborated by Cpl Rashid who testified as **PW2** and PC Kamande who testified as **PW4**.
27. Except for the cash, which naturally was not recovered, and the wallet, the rest of the documents recovered were of no value to anyone else except the owner. The learned trial magistrate accepted the prosecution evidence that they were recovered from the appellant less than two days from the day on which they were stolen.
28. The appellant's defence was that no recovery was made in his home. He testified that since there were many other houses in the compound where he was arrested, an independent witness should have been called to corroborate the prosecution evidence. In our view, the police officers were

such independent witnesses, because there is no evidence that they had any reason to frame **PW1** and to frame the appellant. In any case the complainant denied that there existed any ill-will between him and the appellant. The trial court believed him and we find no evidence to persuade us to the contrary.

29. It was therefore upto the appellant to give a plausible explanation as to how or why he had them in his possession. He gave none. It is of no consequence whether the documents were inside the wallet or outside of it at the time of recovery. The important thing is that the recovered property was proved to belong to the complainant, and to have been recovered from the appellant in close proximity to the robbery, and he had no plausible explanation therefor.

Fair Trial

30. On whether or not the appellant received a fair trial Mr. Kamotho submitted that **Articles 49 and 50** of the **Constitution** required the appellant to be warned. He also urged that the Investigations Officer did not record the appellant's side of the story.

31. Miss Maina disagreed with this argument and stated that the appellant's constitutional rights were not violated. She pointed out that the appellant was informed of what he was being charged with. The court was not told which particular clause of the cited Articles of the Constitution was infringed. From the record however, we note that the charges were properly framed and read to the appellant. Every element thereof was explained to him in a language which he understood and he pleaded thereto. He was able to follow the proceedings and to cross-examine the witness.

32. The evidence proved that the appellant was with two others, and that all three men were armed with what he said were AK-47 rifles. At the time of arrest a fire-arm was recovered from him. Upon examination by **PW2** the Fire-arm Examiner the implement turned out to be a home-made gun made of wood and metal parts. It was fashioned to resemble a gun and was designed to chamber a range of ammunition.

33. The exhibit was successfully test fired using five rounds. **PW3** certified it to be a firearm for purposes of **Cap 114 Laws** of Kenya. At the close of the prosecution case although the court mentioned **Section 211** of **Criminal Procedure Code** the appellant elected to give sworn testimony and to call no witnesses. This shows that it was **Section 210** of the **Criminal Procedure Code** which was being complied with.

34. After a careful re-evaluation of the evidence as is our mandate as the court of first appeal, and bearing in mind that we did not have the advantage of seeing or hearing the witnesses as they testified, we are satisfied that the prosecution adduced enough evidence to sustain the conviction against the appellant. We find no fault with the manner in which the learned trial magistrate assessed and weighted it, nor with her application of the doctrine of recent possession. We also find that the appellant's right to a fair hearing was not contravened.

35. We therefore find that the appellant was properly convicted, for the offences of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and of possession of a firearm contrary to **Section 34(1)(3)** of the **Firearms Act Cap 144 (Laws of Kenya)**. He was also properly sentenced.

The upshot of the foregoing is that the appeal is lacking in merit and is dismissed in its entirety.

DATED, SIGNED and DELIVERED at Nairobi in open court this 10th day of December 2013.

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R. MWONGO

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L. A. ACHODE

JUDGE

JUDGE