



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CR. APPEAL NO. 1 OF 2013

JOSEPH MUSYOKA MATIVO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the conviction and sentence in Criminal Case No. 198/2012 in the Principal Magistrate's Court at Makueni (Hon. J. Karanja, PM))

Judgment

1. The appellant, Joseph Musyoka Mativo (“Appellant”) and another person, Thomas Kyalo Kavungo, were arraigned before the Principal Magistrate’s Court, Makueni, on 6th June, 2012 and charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.
2. The Appellant and his co-accused also faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code.
3. After a fully-fledged trial in which the Prosecution marshaled the evidence of six witnesses and the Appellant gave an unsworn testimony and called one witness, the Learned Trial Magistrate convicted the Appellant of the main count. He acquitted his co-accused of both the main count and the alternative count on account of insufficient evidence linking him to either offences. At the same time, the Learned Magistrate sentenced the Appellant to death.
4. The Appellant has now appealed against both the conviction and sentence. The Appellant filed five grounds of appeal. The State opposed the appeal through Learned State Counsel, Mrs. Gakobo, and urged the Court to affirm the conviction and sentence. At the hearing of the appeal, the Appellant submitted written submissions which he sought to rely on while Mrs. Gakobo made oral submissions. We have carefully read the written submissions by the Appellant and taken them into account.
5. The Court must begin by reminding itself the standard for review in criminal appeals such as this one. As a first appellate court, this Court has an obligation to re-evaluate all the evidence given at trial in the lower court and come to its own independent conclusions. The Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, the Court must be acutely aware that we never saw nor heard the witnesses as they testified and, therefore, we must make an allowance for that. See *Okeno v R* [1972] EA 32 and *Kariuki Karanja v R* [1986] KLR 190.
6. As aforesaid, the Appellant listed five grounds of appeal in his Amended petition of appeal as follows:
 - a. That the Learned Trial Magistrate erred in both law and fact when he convicted on the basis of a fatally defective charge;
 - b. That the Learned Trial Magistrate erred in both law and fact by relying on identification evidence which was not free from error;
 - c. That the Learned Trial Magistrate erred in both law and fact by accepting evidence of an

- Identification Parade which was not properly conducted;
- d. That the Learned Trial Magistrate erred in both law and fact by convicting yet vital witnesses had declined to testify;
 - e. That the Learned Trial Magistrate erred in both law and fact by rejecting the Appellant's witness.
7. However, in the written submissions, the Appellant seems to have collapsed the grounds of appeal into two major complaints. On our part, we will analyze the appeal on three grounds which we shall enumerate shortly. First, we lay out the evidence adduced at trial.
 8. Peter Wambua Matutu ("Peter") owns a motor cycle. He uses it as a *boda boda* taxi. On 3rd June, 2012, at around 9:00 pm, Peter was in search of customers for his business. Outside Mkombozi Bar in Wote, he saw a person he thought could be a potential customer. Upon initial inquiry, the gentleman indicated that he was, in fact, in need of a *boda boda* taxi but that he needed to fetch his companion who was inside the Bar so that they can travel together. With the price agreed and the companion having arrived, Peter and his two customers departed for Bosnia on Kikumini Road about seven Kilometres from Mkombozi Road.
 9. They did not get there. A few Kilometres into the journey, one of the passengers – the one Peter had spoken to outside Mkombozi Bar and with whom he had negotiated the price, alerted Peter that he felt nauseous and needed to throw up. Peter stopped the motor cycle. Suddenly the man who had claimed to be nauseous, put a vicious arm hold on him in a style of armed robbery popularly known as *ngeta* in Kenya. His companion alighted from the motor cycle and rained blows and kicks on Peter. They overpowered him, robbed him of his money, wallet, a shoe, and a bunch of keys. They then tied him up on a tree and gagged him with his shirt to ensure that he could not get help quickly. They then made off with Peter's motor cycle.
 10. Peter was able to remove the gag from his mouth and literally gnawed his way to freedom by using his teeth to bite away the ropes which had been used to tie him up. He then walked back to Mkombozi Bar where a fellow *Boda Boda* taxi operator, Stephen Muendo Kineene, took him to the Police Station where he reported the robbery. Police Constable James Maina was at the desk at the time and he accompanied Peter to the scene of the robbery where he verified the incident.
 11. The narrative up to this point is undisputed. The agreement ends there. The State's case after that is as follows. Later very early the following morning, Corporal Robinson Ekutu received a call from a member of the public that two strangers had been arrested by members of the public at a place called Kyambalasi behaving suspiciously. The two had a motor cycle with them and the members of the public suspected that it had been stolen. When Corporal Ekutu arrived at the scene, he says he questioned the two persons and formed the view that, indeed, they were suspicious. When they did not have any documents to prove ownership of the motor cycle, he arrested them and booked them at the Police Station. It turned out later, that the motor cycle so found was the same one belonging to Peter which had been stolen during the violent robbery.
 12. The Police organized an Identification Parade thereafter. The two gentlemen who had been arrested by Corporal Ekutu were presented at two separate Identification Parades. Peter was able to identify the Appellant and his co-accused at the two Identification Parades. That lay the ground for the charging of the Appellant and his companion in the Magistrate's court.
 13. The Appellant's testimony, however, was that this is a case of mistaken identity. He denied that he was the person who had hired Peter's motor cycle on the fateful night. As for being found with the motor cycle, his testimony is that he was only at the wrong place at the wrong time: the villagers only accosted him for being a stranger in the area early in the morning and wrongly associated him with the stolen motor cycle. He denied that he was ever found with the stolen motor cycle.
 14. The Learned Trial Magistrate disbelieved the Appellant's story. He accepted the narrative of Corporal Ekutu that the Appellant was arrested by members of the public in possession of the stolen motor cycle. The Learned Trial Magistrate also had no doubts that Peter had positively identified the Appellant. He therefore had no hesitation in convicting the Appellant. It would appear that he convicted on the basis of both the identification evidence and the recent possession of the stolen motorcycle.
 15. As aforesaid, the Appellant raises three major complaints on appeal. First, he argues that the charge sheet was fatally defective and should never have formed the basis of a valid conviction. His precise argument is that a charge for the offence of robbery with violence must contain the magic words "immediately before or immediately after the time of such robbery – either used

actual bodily violence or threatened to use actual bodily violence against the victim...” The Appellant argues that in the absence of those “sensitive words”, the charge sheet was fatally defective and could not sustain a conviction.

16. Our jurisprudence is quite clear that a defective charge cannot sustain a conviction. The question we must ask here, however, is whether the charge sheet was, in fact, defective. In particular, are the words cited above “magic” words which must appear in every charge of robbery with violence.
17. The charge sheet read as follows:

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

1. **Joseph Musyoka Mativo and 2) Thomas Kyalo Kavongo.**

On the 3rd day of June 2012 at Kamunyolo Sub-location, Wote Location in Makueni District of the Makueni county, jointly robbed of Peter Wambua Matata cash Kshs. 650, Motor Cycle Reg. No. KMCT 898 Make SKYGO 125-3, a wallet, a bunch of keys and a shoe, all valued at Kshs. 72,150, the property of Peter Wambua Matata.

18. The Appellant complains that the charge sheet is defective because it does not speak of actual or threatened violence on the victim during the robbery. As the Appellant argues, those words are “sensitive”; meaning talismanic and they must be present to sustain a conviction for robbery with violence.
19. We disagree with the Appellant. Both our statute and our case law are quite clear that the offence of robbery with violence can be successfully proved in one of three alternative ingredients are charged and proved:
- a. The offender is armed with any offensive weapon or instrument; or
 - b. The offender is in the company of one or more other persons; or
 - c. At or immediately before and or immediately after the robbery, the offender beat, struck or used any other form of personal violence against the victims of the robbery. See, for example, *Ganzi & 2 others versus Republic (2005) 1KLR 52*
20. The Appellant’s argument about defective charges obviously makes the mistake of assuming that all these three elements of robbery with violence must be pleaded and proved. However, the charge sheet needed to plead and the State needed to prove only one of these elements in order to successfully get a conviction. Here, the charge sheet explicitly says that the Appellant was in the company of one other person during the commission of the offence. In our view, that sufficiently specifies one of the ways in which a person can commit robbery with violence.
21. The Appellant next complains that the identification relied on for his conviction cannot be said to be free from error. His first salvo in this regard is that the evidence of identification was that of a single witness; and in circumstances which were less than ideal for positive identification. He notes that the incident happened at 9:00 pm. Second, he notes that the identifying witness, Peter, displayed confusion because he was sure that the Appellant’s co-accused in the court below was the second assailant when the Identification Parade was carried out but only for him to recant that evidence during the trial. Yet, Peter had said that he had seen both assailants very clearly in the glare of the security light outside Mkombozi Bar and in the moonlight at the site of the robbery. Third, the Appellant impugns the utility of the Identification Parade: he says that they were exposed to the identifying witness just before the Identification Parade hence poisoning the well, so to speak. Lastly, the Appellant reminds us that the Learned Trial Magistrate did not administer to himself the caution before relying on the evidence of a single identifying witness.
22. Our law is quite clear that identification witness especially that of a single identifying witness must be approached with great caution and circumspection. As the Court stated in *Joseph Ngumbao Nzavo v. Republic (1991) 2 K.A.R. 212*:

Before accepting visual identification as a basis of conviction the Court had a duty to warn itself of the inherent dangers of such evidence. A careful direction regarding the

conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential.

23. The Appellant is correct that the evidence on record would not meet this high standard required by our law. In our view, he is also correct that the identification parade done in this case was worthless for purposes of sustaining a conviction. The evidence of Peter seems to indicate that he saw the Appellant and his co-accused at the Police Station just before the Identification Parade. Peter testified that

the suspect was called outside the office and I was called to identify the ones who robbed me. I went into the OB office and they were called in the line and I identified one of them...

24. This testimony, read in context, is worrying for us because it tallies up with the allegations by the Appellant that Peter saw him just before the Identification Parade. Peter does not add much comfort when he responds to a question in cross-examination by stating that he could not “recall” whether he had seen the Appellant at the Crime’s Office immediately before the Identification Parade.

25. It would be possible to overlook some of these red flags except a major one makes it impossible to ignore valid questions about the reliability of the Identification. Peter was quite sure that he had seen the two assailants in the glare of the security lights outside Mkombozi Bar, and again the moonlight when they accosted him. He was sure of this that when given the opportunity to identify the assailants in an Identification Parade, he quickly picked them up. Yet, by the time of the trial, Peter was a lot less sure about the identity of the 2nd assailant. In fact, he completely recanted the positive identification respecting the co-accused.

26. In our view, this raises some reasonable doubts about the reliability of Peter’s identification evidence. It seems to us that the identification parade was not carried out in accordance with the prescribed guidelines. In particular, it seems that the Complainant had seen the Appellant severally before the identification parade in circumstances which already suggested that the Appellant was the assailant. After reevaluating the evidence, we are, therefore, uncertain that there was positive identification in this case.

27. That leaves us with the evidence of recent possession as the only plausibly linking the Appellant with the crime. Although he did not explicitly label it as such, the judgment shows that the Learned Magistrate relied on the doctrine of recent possession as buttressing the evidence of identification to sustain the conviction. In doing so, he believed the Prosecution case that the Appellant was arrested shortly after the robbery while in possession of the stolen motor cycle. The Learned Magistrate, who saw and heard all the witnesses, also disbelieved the Appellant’s narrative that he was simply at the wrong place and the wrong time and was arrested simply for having been a stranger at Kyambalasi in the morning of 4th June, 2012.

28. To invoke the doctrine of recent possession, the Prosecution must prove beyond reasonable doubt each of the following four elements:

- a. First, that the property was stolen;
- b. Second, that the stolen property was found in the exclusive possession of the accused;
- c. Third, that the property was positively identified as the property of the complainant; and
- d. Fourth, that the possession was sufficiently recent after the robbery. As to what constitutes “recent” possession is a question of fact depending on the circumstances of each case including the kind of property, the amount or volume thereof, the ease or difficulty with which the stolen property may be assimilated into legitimate trade channels; the property’s character, and so forth.

29. In the case of ***Malingi v Republic*** [1989] KLR 225, 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.

30. Of the four elements the Prosecution must prove to rely on the doctrine of recent possession, the second one – showing exclusive possession at the time of arrest – is the most troubling aspect of the case. The Prosecution case is that members of the Public called the Police and Corporal Ekutu and another Police Officer went to Kyambalasi and found the Appellant and his co-accused having been arrested by members of the public with what turned out to be the stolen motor cycle. None of the arresting members of the public were called to testify that indeed, the Appellant was found in possession of the motor cycle. This was crucial evidence that had to be adduced before the doctrine of recent possession could be relied on. The testimony of Corporal Ekutu on the question of possession is mere hearsay which cannot be relied on to establish the veracity of the claim that the Appellant was found in possession of the motor cycle. Without this crucial link, the doctrine of recent possession is inapplicable.

31. With our finding that the identification evidence was not sufficiently reliable to link the Appellant with the offence and our conclusion that there was no evidence proving exclusive possession of the stolen motor cycle, it follows that this appeal must succeed. Consequently, this Court allows the appeal, sets aside the conviction and sentence imposed and order that the Appellant shall be set at liberty forthwith unless otherwise lawfully held. Those, then, are the orders of this Court.

DATED, SIGNED AND DELIVERED this 3rd day of December 2013.

JOEL M. NGUGI, Judge

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B. T. JADEN, Judge

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