REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

Criminal Appeal 69 of 2009

STEPHEN MUIMI MUTEMI …...…….....……...APPELLANT

VERSUS

REPUBLIC ……....…….....……..…RESPONDENT

(From original conviction and sentence in Cr. case No. 548 of 2006 at the Senior Principal Magistrate's Court at Siakago)

J U D G M E N T

The appellant Stephen Muimi Mutemi was charged of one count of **robbery with violence** contrary to section **296(2)** of the Penal Code. The particulars of the charge are;

STEPHEN MUIMI MUTEMI: On the 2nd day of February 2006 at Kavingori village Gitiburi location in Mbeere District within Eastern Province while armed with a dangerous or offensive weapon namely a panga robbed IBRAHIM KAMAU NGANGA of one bicycle make Phoenix Frame Number 6587, three sacks of beans, six trousers, two suits, two radios, one speaker, one jacket, one bag, a belt, one pair of leather shoes, three hens and cash ksh.7,600/= all valued at ks.30,750/= and at or immediately before or immediately after the time of such robbery wounded the said IBRAHIM KAMAU NGANGA.

The appellant faced an alternative count of **Handling** abicycle and a pair of shoes contrary to section **322(2)** of the Penal Code. He was convicted for the main count of robbery with violence and sentenced to death. He was aggrieved by the conviction and sentence and therefore filed this appeal.

The appellant relied on grounds of appeal contained in his Amended grounds and written submissions which I will summarize as follows;

In ground one the appellant contends that the sentence of death was inconsistent with Article 26(1)(3) of the constitution which guarantees each person a right to life.

In ground two he contends he was held in custody for 44 days without a charge in gross violation of his fundamental rights under Article 49(1) (8) (I) and (II) of the constitution.

In ground three that the evidence adduced by the prosecution was contradictory and inconsistent and that it ought to have been rejected by the court. He challenges inconsistency in the list of missing items as stated in the evidence of P.W.2 and 3; lack of the frame number of the bicycle stolen and contradiction in length of days the complainant remained admitted in hospital.

In ground four and five the appellant contends that the trial court relied on hearsay evidence that the bicycle belonged to P.W.3 when no documents of ownership were produced. The appellant produced an agreement as proof the bicycle was his. He also contended that the alleged neighbours who secured P.W.1\'s property according to P.W.6 could also have stolen the complainant\'s property.

The appeal was opposed. Ms Esther Macharia, learned State Counsel for the State urged that the evidence against the appellant was overwhelming. She urged that the appellant was arrested in possession of a bicycle which P.W.3 said was his. Ms Macharia urged that even though the appellant has produced an agreement for sale of the bicycle in 2003, the evidence on record was he lived with the complainant and at the time he did not have any bicycle. Counsel urged even if the agreement was genuine, it could not have been for the bicycle he was found with. Counsel also urged that the appellant had not explained possession of P.W.3\'s shoes which he was wearing at time of his arrest. The learned State Counsel urged that it was the complainant\'s evidence that the appellant knew he had money and also knew where it was kept. That it was the reason he attacked him. Counsel urged that there was no evidence of bad blood between complainant and appellant, and therefore the complainant had no reason to fabricate the charge against the appellant.

This is a first appellate court. Being a first appellate court we have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation, while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance for same. We have complied with the principles applicable to first appeals as set out in the case **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005**. It was stated as follows:

"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs . Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). 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 findings and conclusions; 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 that fact that the trial court has had the advantage of hearing and seeing the witnesses."

The chief facts of this case were that the complainant who had previously employed the appellant had given him a place to stay in his home. On the material day, 2/2/2006, in broad daylight, when there was no one else nearby the appellant turned against the complainant and attacked him. He inflicted serious injuries on him before entering his house where he took money and other properties.

The complainant's evidence that he was attacked on the material day was supported by PW4, his neighbor. PW4's evidence was that he heard the complainant screaming for help while in his place. He went to find out what the problem was and found the complainant on the ground with serious injuries. He looked for means and took him to hospital after reporting the matter to the police.

PW4 testified that the complainant told him who inflicted the injury on him while they were still at the scene. He said that it was his former employee and that PW4 knew who it was physically but not by name. PW4 said that the complainant had walked 270 meters from his home and that he, PW4 never went to see if the appellant was still around.

We have considered the evidence of PW2 and 3, the wife and son of the complainant in this case. It is clear that the complainant was living alone with the appellant whom he was housing at the time. These two witnesses also said that on going home the day after the attack, they found several properties as listed in the charge sheet were missing. The son, PW3 was able to trace the appellant and to cause his arrest on

20th June 2006, 18 days after the incident.

There is no doubt in our minds that the appellant was well known to the complainant and that he was properly identified as the one who committed the offence since the conditions of lighting at the scene at the time of this incident were good for positive identification. The incident took place in broad day light. The evidence of identification is that of recognition. We are guided by the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

"**Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."**

After we carefully scrutinized the evidence of PW1, we find the conditions under which he made the identification of the appellant were good and free from the possibility of error. The motive of the attack is also very clear from the facts of this case. The intention was to rob the complainant. Indeed the appellant was found with some of the stolen items, a bicycle and pair of shoes. The appellant produced an agreement of sale dated three years before. He made no mention of the shoes. We looked at the document and for a matter dealt with in 2003, we have our doubts that the writings on the paper were that old. Only the paper was old. We do not think that the agreement raises in our mind any doubt that the appellant may not have been the one who attacked the complainant. He had both the bicycle and a pair of shoe stolen on the same day. There was no allegation made by the appellant that there existed any grudge between him and the complainant. Besides, the complainant knew him well and the first opportunity he had he boldly stated who attacked him.

In the case of **Terekali & Another –vs- Republic [1952] E.A,** it was held:

"Evidence of first report by the complaint to a person in authority is important as it often provides a good test by which the truth and accuracy of sub-sequent statement may be ganged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others…"

PW6 was the one who received the report of this incident from OCS Embu at 11 am same day. It is not clear who told the police. However even though PW4 was not a man in authority, we are satisfied that his evidence confirms consistency in the evidence of the complainant in regard to the identity of the one who attacked him.

The stolen bicycle and shoes was found in the appellant's possession 18 days after the robbery. In regard to the application of doctrine of the recent possession there must be proper identification of the stolen item as belonging to the complainant. PW3 identified the bicycle as his. PW1 and 2 also corroborated his evidence of ownership. The appellant's argument is that he produced documentary proof of ownership but the prosecution witnesses did not. As we have stated we have our own doubts regarding the document. We are satisfied that the appellant's claim that the bicycle was his was an afterthought as it was not his line of defence during cross examination of the prosecution witnesses. For the bicycle we are of the opinion that 18 days is recent possession of same.

In any event we find that the evidence of the complainant that the appellant was the one who attacked him was water tight. The evidence of possession of recently stolen bicycle and shoes only went to further strengthen the complainant's evidence.

The prosecution proved that the complainant was so seriously injured that he was admitted in hospital for 4 months according to the complainant. The appellant raised issue with inconsistency in the prosecution evidence regarding the period of time the complainant was hospitalized. We noted the inconsistency in the evidence of PW1 and 2. We did not think the inconsistency was material. We are certain that it did not occasion any prejudice to the appellant.

We have come to the conclusion that the appellant's appeal has no merit. We accordingly dismiss it, uphold the conviction and confirm the sentence.

DATED AT EMBU THIS 27th DAY OF JULY 2012.

LESIIT, J.
J U D G E

H.I. ONG'UDI
J U D G E

In the presence of:-

……for State

……Appellant

……..Court Clerk