



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 48 of 2011

GEORGE

KIMATHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment/Conviction and sentence of M. Maundu, Principal Magistrate on 25/08/2011)

J U D G M E N T

The Appellant GEORGE KIMATHI was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the 6th day of May, 2011 at Maili Tatu village the Appellant jointly with another not before court robbed ANITA KAJUJU of cash of Kshs.1350/=, mobile phone make Safaricom Kabambe, four goats and one sheep all valued at Ksh.22,000/= while armed with a rungu and at or immediately before or immediately after the time of such robbery wounded the said ANITA KAJUJU. The Appellant was convicted of the offence and sentenced to death. Being aggrieved by the conviction and sentence the Appellant filed this appeal.

The Appellant relied on 7 grounds of appeal, being as follows:-

- 1. That the Honourable trial Magistrate erred in both law and facts by basing my conviction on contradiction and inconsistent evidence.**
- 2. That the Honourable trial Magistrate erred in both law and fact in misdirected his judicious mind to convict the appellant when the evidence of exhibits was not tied up and failure of the prosecution to summon vital witness all contributed to the Magistrate deliver injustice in his judgment.**
- 3. That the learned trial Magistrate erred in both law and fact by not considering the way PW1 and PW2 were mis-leading the court by telling a total lie about the exhibits before court.**
- 4. That the learned trial Magistrate erred both in law and facts when he convicted the appellant in fact how the arrest was done and how they came to connect him with the crime that was not there.**
- 5. That the learned trial Magistrate erred in law and facts when he convicted the appellant failing to consider that this was capital offence and the appellant was not represented by the state advocate (pro bono) despite Constitution was already in place.**
- 6. That the trial pundit Magistrate failed to consider section 50(2) C of the new Constitution as**

immediately his ruling which was in contravention of Section 306(2) of the C.P.C placed the appellant on his defence.

7. The trial Magistrate also failed to consider that could have allowed mitigation of the appellant, it would have exonerated him something which he never wanted.

During the hearing of the appeal the Appellant submitted amended grounds of appeal together with his written submissions. The Appellant's amended grounds of appeal are as follows:-

1. *That the learned trial Magistrate erred in law by failing to observe that Section 48(1) of the Evidence Act was not complied with.*
2. *That the learned trial Magistrate erred in law by failing to observe that Section 50(3) (b) of the Constitution was not adhered to.*
3. *That the learned trial Magistrate erred in law by failing to observe that Section 211 of CPC was not complied with.*
4. *That the learned trial Magistrate erred in law by failing to observe that Section 197 and 198 of the CPC was not complied with.*
5. *That the learned Magistrate erred in law and facts to convict me to suffer death under the possession of the goat in question, without the need to find that the reason as to why I was in possession of the same was plausible.*
6. *That the learned trial Magistrate still erred in law and fact by failing to give my sworn defence due consideration.*

The Appellant challenged the conviction on basis of recognition by a single witness namely that the circumstances that were prevailing at the scene of the incident were not conducive to positive identification of the assailants. The Appellant also raised other issues which in our view can be considered alongside that of recognition for instance the fact that vital witnesses were not called, that prosecution relied on evidence of a single witness and failure to inform Appellant of the charge, with sufficient detail to answer it.

This is the first appeal from conviction. We are therefore the first appellate court and are guided by the principles enunciated in the case of **OKENO-V-REPUBLIC(1972) EA 32**, where the Court of Appeal set out the duty of the first appellate court in the following terms:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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 the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

During the hearing of the appeal the Appellant told the court that he had prepared written submissions which he handed over to the court. On the other hand Mr. Mungai learned State Counsel conceded to the appeal since the only evidence which connected the Appellant to the offence was that of PW1 who claimed she recognized the Appellant through moonlight yet she was in a house. Mr. Mungai learned State Counsel submitted that the conditions were not favourable to positive identification and that the recovered goods were not proved to be of the complainant as there were no receipts. In conclusion Mr. Mungai learned State Counsel did not support conviction and sentence.

Being the first appellate court we have the duty and obligation to re-evaluate and analyze the evidence that was adduced in the lower court to enable us reach our own conclusion.

In this case it is apparent that the prosecution availed six witnesses before they closed their case. Subsequently the Appellant was placed on his defence. The Appellant defended himself on 9th August, 2011.

The evidence on recognition was difficult since the incident took place at 8.00p.m and it was at night. The complainant PW1 testified that she was in the house and the assailants were outside the house. PW1 stated that one George Kimathi called her outside and on asking who it was he replied he was son of “**Riungu**” and that she was able to recognize his voice. That the complainant and the Appellant had a conversation for a while. That George Kimathi left and complainant went to sleep. That at 10.00 pm complainant heard a male voice asking her to wake up and the person was already in the house.

That the person hit the complainant with a rungu and she was able to see the Rungu since there was moonlight. The complainant was ordered to lie down on her abdomen and she complied. Complainant testified that she had seen that person and identified him as George Kimathi, the Appellant by use of moonlight. Complainant testified that she also recognized the Appellant’s voice. Complainant testified that the attacker had left the door open and moonlight was filtering in. The complainant was robbed Kshs.1350/=, mobile phone, 4 goats and a sheep.

The complainant made a report to Isiolo Police Station the following day. The Appellant was then as complainant was reporting brought with 4 goats, a sheep and complainant’s mobile phone. The complainant identified the phone as hers as it still had her safaricom line and the goats and the sheep were identified through a photograph and she said her goats and sheep had her brand ANK.

During cross-examination the complainant testified that she was able to identify the Appellant by voice and she said the Appellant was speaking mix “**ki-imenti and ki-tigania**” Meru dialects.

PW2 testified that on 6th May,2011 at 1.00a.m the complainant informed him she was robbed. She did not give him the names of the robbers. That later on the same day PW2 testified at Isiolo slaughter house they found Appellant with 4 goats and a sheep. Appellant was holding the rope which was tying the goats. The Appellant was then arrested by members of public who informed police who came and re-arrested the appellant.

PW3 testified that PW2 called him informing him of robbery against his mother, PW1. That the following day PW2 rang PW3 and told him of recovery of the stolen goats and arrest of the Appellant. PW3 then rang OCPD Isiolo informing him of the robbery and arrest of the Appellant. OCPD promised to send Officers to the scene. PW4’s evidence is that on 6/5/2011 at 7.00 a.m. PW2 asked him to accompany him to Isiolo slaughter house after he had told him PW1’s goats had been stolen on 5.5.2011 during the night. At Isiolo slaughter house PW2 showed PW4, 4 goats and one sheep which were tied together, which were with George Kimathi. PW2 and PW4 confronted the Appellant and asked him about complainant’s mobile phone. Appellant removed the phone “Kabambe” and gave it to PW2. When the phone rang PW2 asked the Appellant who was calling and he said it was Steve. PW2 asked the Appellant to ask Steve to come since the price was good in the market. Steve did not come. That police came and arrested the Appellant and recovered the stolen items from the Appellant. PW5 the Investigating Officer, testified how he was informed of arrest of the Appellant and how he proceeded to scene and re-arrested the Appellant. He also recovered the stolen items. PW6 a Clinical Officer testified on PW1’s injuries and filling of her P3 form. He assessed PW1’s injury as grievous harm.

The Appellant gave sworn statement. The Appellant testified that on 4/5/2011 at about 8.00 a.m. he left for Isiolo to look for employment. That the Appellant met one Stephen who hired him to drive those goats to Isiolo market at a price of Kshs.200/=. Appellant knew the said Stephen. He gave Appellant his mobile telephone number as security for payment. Appellant drove the goats to the market. Appellant did not know the goats were stolen property. Appellant left Stephen behind with a motorcycle. Appellant was

arrested by members of public at Isiolo market. Appellant told them the goat belonged to Stephen but members of public started beating Appellant and took him to Isiolo Police Station. That the Appellant gave the name of Stephen to OCS. That Stephen was arrested at 8.00 p.m but the following morning his wife brought Kshs.5200/- and gave it to Stephen. That Stephen was taken from cells and Appellant never saw him again. Later he was charged with the instant offence which he stated he knows nothing about. Significantly the prosecution did not cross-examine the Appellant after he had given sworn testimony.

In the case of **PAUL ETOLE & ANOTHER –V-REPUBLIC C.A.NO.24 OF 2000(UR)** the court stated as follows:-

“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”

We have closely examined the evidence of recognition by the complainant. The complainant was inside the house at the time she claimed to have recognized the Appellant. There was no light in the house, however, PW1 claimed she used the moonlight which was filtering in the house as the door was open. The complainant did not explain where the Appellant was standing in relation to the allegedly opened door. She did not explain the direction the door was facing in relation to the moonlight and the position of the moon. The intensity of the moonlight was not given at all. The complainant did not give details of the basis of recognizing the Appellant. She did not give the appellant’s name to PW2 nor to police.

The complainant claimed to have recognized the Appellant’s voice, significantly she did not tell PW2 or police this. She did not explain what the appellant said that enabled her to know the appellant’s voice.

In cross-examination by the Appellant the complainant stated that the Appellant was speaking in mix “**Ki-imenti and Ki-tigania**”. She should have given the police the words spoken in the said language which the complainant did not. In identifying someone by voice it is important to give the word uttered and peculiar manner of talking of the said person and voice identification parade carried out. It is not enough for someone to claim to have recognized an attacker by voice and fail to state the words uttered and his manner of speech that made one recognize the voice

We have perused the evidence of PW1, and find that at the time of attack there was no light in the house and the moonlight said to be source of light could not provide any light in the house to enable the complainant recognize the attacker.

On the issue of the recovered 4 goats, a sheep and mobile phone, the complainant did not prove the goats and a sheep were hers. PW1 stated that the goats had a mark “ANK”. The goats and sheep were not produced before court for court to see the alleged mark “ANK”. The prosecution produced photographs which we have perused and found no mark “ANK”. There is no explanation why the goats were not physically produced as exhibits. We also find that the mark “ANK” is not exclusively reserved for the complainant and could be used by any other person.

On the mobile phone the complainant stated that her mobile phone was “**safaricom Kabambe**”. The complainant did not give receipt in respect of the mobile phone nor the serial number of the phone. It was claimed the phone had the complainant’s “**simcard**” yet her mobile telephone number was never disclosed by the complainant or any witness.

We find therefore the complainant did not prove the recovered goats, a sheep and phone were her own properties.

The trial Court while considering the Appellant's defence, stated that the Appellant was found with the stolen items soon after the said robbery and his claim that he was given those items by a third party does not hold water since he was identified by the complainant at the said robbery. Even if the complainant identified the goats and sheep as hers on the principle of application of doctrine of recent possession we are persuaded by the case of **MWACHANJE & OTHERS – V- REPUBLIC** where the High Court at Mombasa(2002) eKLR at page 342 stated:-

“Where an accused is found in recent possession of goods alleged to have been stolen, he is under an obligation to explain how he came into such possession and that such possession is innocent. Failure to do so lead to the inescapable conclusion that he is a thief or robber.”

In the instant case though the goats, and the sheep allegedly stolen were found with the Appellant, the appellant in his defence explained how he came into such possession and that such possession was innocent. We find the Appellant gave an explanation how he came into such possession and even gave the name of the person who had hired him to drive the goats. He stated that he did not know the goats were stolen and as such he explained of his innocence. We find that where a person found in possession of recently stolen goods gives a reasonable explanation of his innocence, he is not required to prove its truth and in such situation the conclusion is that he is not a thief or robber.

We agree with the learned State Counsel that the learned trial Magistrate did not carefully evaluate the complainant's evidence in regard to the conditions of the light and what it was that enabled the complainant to make the recognition of her attack.

The moonlight alluded to by the complainant who was inside the house was not sufficient. It was important for the complainant to describe the nature of light that entered her house and intensity of the moonlight and also to describe what exactly she saw of her assailant that enabled her recognize him. Significantly in this case the complainant never gave the name of the Appellant to her son or PW2 or the police. We find the evidence of the complainant was shaky, devoid of detail and did not bring out the circumstances of recognition that would enable court to find that the Appellant was correctly recognized.

We find that there was no correct recognition of the Appellant and that the circumstances were not conducive for positive recognition of the Appellant. We are convinced that the evidence of a single witness, the complainant in the case, was not safe to found a conviction. We are further convinced the Appellant having given explanation on how he came into possession of goods that such possession was innocent and the same having not been challenged by the prosecution that the doctrine of recent possession did not apply in this case.

We therefore allow the appeal, quash the conviction and set aside the sentence. We order that the Appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 29th DAY OF NOVEMBER, 2012.

J. LESIIT

J. MAKAU

JUDGE

JUDGE

Delivered in open court in presence of:

Mr. Mungai State Counsel

Appellant in person –present

J. LESIIT

JUDGE

J. MAKAU

JUDGE