



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 23 of 2011

ZABLON GITONGA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Criminal Appeal against both conviction and sentence by Hon. M. MAUNDU PM at ISIOLO PM  
Criminal Case No. 799 of 2010 delivered on 27.4.2011)*

### J U D G M E N T

The Appellant was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence are that on night of 24<sup>th</sup> and 25<sup>th</sup> day of August 2008 at Kiwanjani area in Isiolo District jointly with others not before the court while armed with dangerous weapons namely stones metal rod and a rungu robbed Joseph Kamaru of his cash Ksh.1500/- one pair of safari boots valued at Ksh.1800 all valued at Ksh.16800/- and at or immediately before or immediately after the time of such robbery the said used actual violence to Joseph Kamaru.

The appellant was tried and convicted of the offence and sentenced to death. He was aggrieved by the conviction and sentence and therefore file this appeal as follows:

1. **That the pundit trial magistrate erred in law and facts in basing my conviction on the evidence of the exhibited shoe (safari boot) but failed to note that:-**

(a) **That the said shoe was recovered after one year and the same was still in use by PW 5, Jackson Mwiti, thus the probability of the said special mark being erased, if at all it was originally there, remains high.**

(b) **That the said PW3 and 5 did not see special mark for that duration of one year .**

(c) **That PW3 said he bought the shoe from a man named Zakayo, nor my name or alias name thus the room for fabrication looms high.**

(d) **That PW1 Joseph Kamau had no habit of making all of his possessions with a letter “J” thus how come he labeled this only shoe.**

2. **That the pundit magistrate erred in law and facts in finding seeking corroboration from PW2’s evidence of visual identification of a stronger whereas the same had no descriptive initial**

**report, on ID parade, no lead to arrest and the nature of lighting is in question.**

**3. That the learned trial magistrate further erred in law and facts in failing to consider my claims of the alleged grudge between me and the key witness PW3 Lucy Kinder, which was corroborated by PW4 that Lucy is a Chang'aa seller which claim seriously dent the state's case.**

**4. That the learned trial magistrate erred in law and fact in failing to consider my defence and allegations thus contravening section 169 of the CPC and also contrary to the rule of natural justice.**

The facts of the case are that at 2 am on the night of 24<sup>th</sup> and 25<sup>th</sup> August 2008 the complainant and his wife PW.2 were sleeping at their home when they were attacked by four men who broke into the house through their window. The complainant was robbed of cash Ksh.15,000/- and a pair of safari boots. Both husband and wife testified that they could not identify the robbers. Four months later the complainant saw PW4 wearing his stolen boots at Isiolo and caused his arrest. PW4 called his sister who had given him the shoes. PW4's sister was PW3. She led police to the accused as the person who sold the boots to her. Her testimony that she bought the boots from the accused was supported by the evidence of PW5 who said he was present when the appellant sold the boots to PW3.

The appellant in his defence denied committing the offence and also denied selling the boots to PW3. The appellant stated that he had a business rivalry with Lucy Kendi. The appellant stated that Kendi had accused him of taking away her customers. The appellant said that upon arrest he found PW4, Kendi's brother in cells and that he was eventually released.

The appellant gave oral submissions. He emphasized that the evidence of identification by PW2 was not backed up by identification in the identification parade. He also said that PW4 who was arrested with the shoe and Zakayo who sold it were all released from cells without charges.

Mr. Motende, learned State Counsel represented the State in this appeal. The Learned State Counsel urged that the appellant was not convicted on the basis of identification. He urged that his conviction was on the basis of recent possession of stolen property. Counsel urged that the boots were properly identified by the complainant on the basis of a mark of letter "J" and a stain of super glue. Counsel urged further that the appellant sold them to PW3, 7 days after the robbery

We have considered the submissions by both the appellant and the learned state counsel. We have also subjected the evidence that was adduced before the trial court to a fresh evaluation and analysis while bearing in mind that we neither saw or heard any of the witnesses and have given due allowance. The principles which apply in a first appellate court are well established and we have observed them. They were ably set out in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005** 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 the fact that the trial court has had the advantage of hearing and seeing the witnesses."**

This case rests on evidence of identification. It is the evidence of the identification of the Appellant by

PW2 and the identification of shoes also by PW2 . Regarding identification this is what the learned trial magistrate stated.

**“It is also not in dispute that the Safari boots which were stolen from the complainant was later recovered from PW4 Jackson Mwiti. The complainant positively identified his shoes since he had put a mark on them. PW4 Jackson Mwiti said that the shoes were given to him by his sister one Lucy Kendi (PW3)...The accused did not even attempt to explain how he got those shoes. He sold those shoes to PW3 a few days after they were stolen from the complainant applying g the principle of recent possession it would be safe to deduce that the accused was among the persons who robbed the complainant on the material night. This finding is strengthened by the evidence of PW2 who claimed that she was able to identify the accused person on the night of the attack by aid of lights from the torches which the attackers had.”**

We shall first consider the evidence of identification of the Appellant by PW2. The evidence of identification was that of a single witness made at night. It is very important that while considering that evidence the court must address its mind to the unique circumstances surrounding that identification. The court must consider the nature of the light that enabled identification to be made. It must consider the distance at which the identification was made and whether there are any difficulties affecting such identification.

In the celebrated case of **PAUL ETOLE ANOTHER VRS REPUBLIC CA NO. 24 OF 2000 (UR)**, the court considering how the evidence of identification should be treated 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”.**

In the case of **Maitanyi vs RepublicREPUBLIC(1985) 2 KAR 75** it was held:-

**“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.**

**2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.**

**3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.**

**4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”**

We have quoted from the learned trial magistrate what he considered regarding the evidence of identification by PW2. All he stated was **“This finding is strengthened by the evidence of PW2 who claimed that she was able to identify the accused person on the night of the attack by aid of lights from**

***the torches which the attackers had.”***

The learned trial magistrate did not give a careful and cautious consideration of the evidence of identification. Just to illustrate this further, he did not consider the intensity of the light from the torches and how far PW2 was from his assailants at the time the identification was made. The light which aided this identification was torch light from torches in the hands of the assailants. It was important for the court to consider exactly how the identification came to be made especially considering that the torches were with the assailants and not PW2. There was lack of detail in PW2's evidence and it was difficult to test the evidence of identification with such scanty evidence. We are not satisfied that the circumstances of identification were clear and whether the conditions of light at the scene of the incident were conducive for a correct identification.

Regarding the identification of the shoes the learned trial magistrate found ***“The complainant positively identified his shoes since he had put a mark on them.”*** The mark in question was a letter “J” and a stain caused by super glue. There is nothing in the proceedings to show that the two marks which enabled PW2 to identify the recovered boots as his property were unique or special in any way. In order for identification of a recovered exhibit to be established the court must be satisfied that it was sufficiently demonstrated that the identification marks are so unique as to lead to a conclusion that there is no possibility of error they were made by the person identifying. What we mean is that the court should consider the identifying marks and be satisfied that they were so unique as to give assurance that they were exclusively made by the person identifying them. There was no cogent proof before the court that the mark 'J' and the stain caused by the super glue were exclusive to PW2 and safe enough to lead to a conclusion that there was no possibility they could have been made by another.

The learned trial magistrate applied the doctrine of recent possession and stated that it would be safe to deduce from the evidence before him that since the appellant sold the shoes to PW3 he was among the persons who robbed the complainant of the shoes.

Before applying the doctrine of recent possession there are certain facts which the court must consider. First of all the court must consider how proximate in time in relation to the date of the robbery was the shoe found in the possession of the Appellant. In this case the robbery took place on the 24<sup>th</sup> August 2008. PW4 was the person found in possession of the shoes and was even arrested and placed in custody for several days in that regard. It is his evidence that the shoes were sold to him by the Appellant. The Appellant has contested that evidence and has raised the issue of a grudge between him and PW3 as the reason he was framed with this offence. PW3 was a sister of PW4 and she was the one who lead the police to the arrest of the Appellant. Given those circumstances and the fact the evidence of possession is contested the learned trial magistrate ought to have inquired into and or given more weight to the Appellant's allegation of a grudge between him and PW3. This is because the only nexus between the Appellant and the recovered shoes was PW3 and 4. We do not know whether the learned trial magistrate would have come to the same conclusion had he given attention to the Appellants defence. No inquiry was carried out whether PW3 and 4 could have been framing the Appellant. In such circumstances what was required is other material evidence to implicate the Appellant or provide a nexus to the shoes. We have evaluated the evidence and find no such corroborating evidence.

We think we have said enough in this appeal. The evidence of identification of the Appellant by PW2 was not safe. The Appellant was not the one found in possession of the recovered shoes. The evidence connecting him to the shoes was contentious. We think that the doctrine of recent possession could not apply since the controversy with the evidence against the Appellant was not resolved. For this reasons we find that the conviction entered against the Appellant was unsafe and ought not to be allowed to stand.

**Accordingly we allow this appeal quash the conviction and set aside the sentence. The appellant should be set at liberty forthwith unless he is otherwise lawfully held.**

**DATED AT MERU THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2012.**

**LESIT, J**  
**JUDGE.**

**J.A. MAKAU**  
**JUDGE.**