No. 2732

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 80 OF 2010

JOHN MWITA KHINGA…….APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

JUDGMENT

(from original conviction and sentence in the Senior Resident Magistrate's court at Kehancha criminal case no. 761 of 2009 by J.R. NDURURI-RM

John Mwita Kihinga, the appellant was charged before the Senior Resident Magistrate's Court, Kehancha with three counts of robbery with violence contrary to section 296(2) of the **Penal Code**, and one count of handling stolen property contrary to section 322(2) of the **Penal** The particulars of 1st count were that on 20th May, 2009 at about 8.p.m at Keomakebe village of Kuria West District, the appellant jointly with others not before the court and while armed with dangerous weapons namely a gun and pangas robbed **John Mwita** of TV.make Samsung, Sonny Radio Cassette, Sony Radio, DVD Player, three suit cases, cash Kshs. 28,000/= all to the total of Kshs. 74,900/= at or immediately before or immediately after the time of such robbery wounded **John Mwita** on the head. In respect of the 2nd and 3rd counts, it was claimed that on the same, date, place, time and in similar fashion, he robbed **Tabitha Ghati** of cash Kshs. 500/= and **Regina Robi** of a mobile phone make Nokia 1100 and cash Kshs. 600/=. In the fourth count, the particulars of the charge stated that on 21st May, 2009 at Keomakebe village of Kuria West District, the appellant otherwise than in the course of stealing dishonestly received or retained one mobile phone make Nokia 1100, the property of **Regina Robi** knowing or having reason to believe it to be a stolen good . The appellant returned a plea of not guilty on each of those counts and he was tried.

The complainant in count 1 **John Mwita** (PW1) is the husband to **Tabitha Ghati** (PW2) and complainant in count II **Regina Robi** (PW3) is a sister inlaw to PW1 and complainant in count II and IV respectively. The three robberies were committed in the house of PW1 at Keomakebe.

PW1 is a registered clinical officer then based at Eldoret. On 20th May, 2009 at about 8.p.m he was leaving the bathroom which is outside his house at Keomokeba when he found three people outside his house, two of whom were in police uniform and another who was in civilian clothes. The one in civilian clothes was wearing a maroon sweater with grey stripes and blue muffin. One of the men with police uniform was holding a gun. They introduced themselves to him as police officers, and that they wanted to search his house for a fugitive whom they suspected to be in the house. He allowed them in to the house, and since there was electricity light in the house, he recognized the man who was in civilian clothes as the appellant. He had previously treated him at Kugitimo Dispensary and seen him many times at the Dispensary, in the market and even used to pass by his house. He also used to buy some medicines from his pharmacy.

Once they entered into the house, the three men ordered that the electricity lights be switched off and was ordered to sit on the floor. When he resisted the appellant cut him with a panga on the head and one of them stepped on his chest, one of them searched his pockets and removed Kshs. 12,000/=. The two then started removing household goods including a television set make Samsung, a suit case, mobile phone make Smart Bluetooth valued at Kshs. 5,000/=, Sony radio DVD player, sony radio cassette player and a sword. They also took PW3's mobile phone make Nokia 1100 and Kshs. 500/= belonging to his sister inlaw PW3. The three then started caressing PW2 and PW3, and fearing that they were bent on raping them, he dashed out of the house and raised an alarm. The three robbers then ran out with the items they had stolen through the back door and disappeared into a maize plantation. The PW1's neighbours who responded to the screams pursued the robbers, and in the process recovered some of the items robbers had taken, being some musical CDs, the muffin that the appellant had been wearing, the suit case and the Sony radio cassette player. In the meantime, PW1 had contacted the Administration police officers at Ikerege AP Camp.

The following morning a neighbour also recovered some of the other stolen items in his shamba, being the said television set, a brief case and an extension cable. On the same day in the morning, Administration Police Officers from Ikerege arrived and informed him that they had arrested a suspect. PW1 and others proceeded to Ikerege AP camp where he saw the appellant and confirmed that he was among those who had robbed him. The police officers informed him that they had recovered a mobile phone from the appellant, which turned out to be the one stolen from PW3. PW1 also identified the panga that the appellant had used to cut him, and which had been recovered from the appellant by the same police officers. Late he reported the matter to Kehancha police station where he was issued with a P3 form which was completed at Kuria District hospital by **Chris Kipchumba**. It was however tendered in evidence by **Edwin Nyatera** (PW6). He assessed the degree of injuries sustained by PW1 as harm and probable weapons used as blunt and sharp. PW2 and PW3 gave the same evidence as PW1. Suffice to add that PW2 immediately identified the appellant among the robbers from the electricity light, because he came from the same area where her parents reside and she knew him well before that day. She stated that she had Kshs. 500/= in her purse, which the robbers took along with the other items in the house. She stated that after the robbers had ferried the items out of the house, the appellant started pulling at her maternity dress and that is when PW1 dashed out and raised an alarm. As for PW3, she stated that her mobile phone make Nokia 1100 had several customized features which she could identify it with. She said that its serial no. was **1108360015,** had a welcome note reading "God is great, he gives" and had a profile bearing her name **"Regina".** The phone was tested in court and indeed showed the said features. She stated that she identified the same phone by these features at Ikerege Administration Police camp after the police recovered it from the appellant.

Thomas Merengo (PW4) and **Mwikwabe John Nyahiri** (PW5) are some of PW1's neighbours who responded to PW1's alarm and recovered some of the stated items which the robbers had taken. CPL **James Kirui** of Ikerege (PW7) Administration Police camp arrested the appellant. The circumstances leading to the arrest were that during the night of 20th May, 2009, he received a telephone call from the area chief alerting him that robbers had struck at the home of PW1. He and his collegues started patrolling the area. At about 2.00 a.m they bumped into the appellant. They stopped him immediately, another person emerged from behind the appellant and when he saw the police, he ran into the bush and disappeared. The appellant appeared shaken, and when PW7 and his colleagues searched him, they recovered a panga, a sword, a torch and a mobile phone make Nokia 1100. The trousers that the appellant was wearing were wet, and black jack seeks were struck all over him. When they asked him his name and his place of abode, he appellant appeared hesitant, and PW7 and his colleagues decided to detain him and took him to Ikerege AP camp. Thereafter they proceeded to PW1's home, where he was told that PW1 had been attacked by three robbers, two who were in police uniforms and one in civilian clothes and were armed with a gun and pangas. PW 1 and PW2 informed him that they had recognized one of the robbers. They then returned to Ikerege AP camp with PW1, PW2, PW3 and other neighbours. PW1, PW2 and PW3 identified the appellant as one of the robbers who was in civilian clothes. PW3 also described the said features on her phone, and when PW7 switched on the phone, he found the same features. PW1 also identified the panga that the appellant had used to cut him by its black rubber handle as well as the torch which was red in colour. PW7 then escorted the appellant to Kehancha police station where he was received by CPL.**Willy Kiema** (PW8). He commenced investigations by testing PW3's said phone and found the features that PW3 described to him. He thereafter issued a P3 form to PW1 which was completed at Kuria District hospital, and thereafter charged the appellant with the offences.

When put on his defence, the appellant in unsworn statement of defence denied having committed the offences. He stated that he does not even know the area where the robberies are said to have been committed.

The learned magistrate having evaluated the evidence on record found the case for the prosecution proved . Accordingly he convicted the appellant on counts I,II,III and sentenced him to death. However, the learned magistrate made no finding in respect of count IV. This was an error on his part. Since the fourth count was not preferred as an alternative to the other three counts the learned magistrate was …..duty or obligation to make a finding on that count.

Again the sentence as imposed appears irregular. The appellant faced three counts of robbery with violence. Although the particulars in respect of counts II and III as framed were wanting nonetheless. The learned magistrate having convicted the appellant on the three counts, he was duly bound to state how the sentence of death was to be carried. Was it going to be executed in respect of all the counts or one count only.

As it is the learned magistrate simply said ***"…..There is only one sentence for the offences against which accused person has been convicted. I sentence the accused to death….."*** This means literally that he appellant will have to be executed three times over. Of course this is impossible. What the trial magistrate should have done is to sentence the appellant to death in respect of both counts but order the stay of execution of the sentence in respect of counts II & III pending the execution of the sentence in count I.

The appellant was aggrieved by the conviction and sentence aforesaid. He therefore lodged this appeal. He faulted the judgment on the grounds of contradictions in the prosecution case, the stolen goods recovered were not in his possession nor was he arrested at the scene of crime, there was no corroboration, the sentence imposed was harsh and excessive, the evidence of identification was not foolproof and finally that his alibi defence was not considered.

When the appeal came before us for hearing interpartes on 20th January, 2011, the appellant elected to canvass the same by way of written submissions. We have duly read and considered them.

The appeal was opposed. **Mr. Mutuku**, learned Senior Principal State counsel Submitted that the sitting room was well lit with electricity light when the appellant and his accomplices entered the house in the company of PW1. At around 4 a.m on the same night Administration police officers arrested the appellant and on searching him, a mobile phone was recovered from him. During the robbery, the appellant was recognized by PW1 and PW2. At the police station, PW3 positively identified the mobile phone found in possession of the appellant as hers and which had been taken from her during the robbery. The recognition of the appellant at the scene of crime coupled with being found in possession of recently stolen items made the conviction of the appellant very safe.

Being the first appeal, it is our duty to look at the entire evidence again, evaluate it and come to our own independent conclusions over the same. In doing so we must bear allegiance to the fact we should not really interfere with the finding of fact by the trial court unless it was based on no evidence or on a misapprehension of evidence, or the trial court is shown to have acted on wrong principle in reacting the finding.

The first set of evidence linking the appellant to the offences charged was his identification and or recognition at the scene of crime by PW1 and PW2. The second set of evidence linking again the appellant to the crime was being found in possession of a mobile phone recently stolen from PW3 which was positively identified by the owner. Accordingly the doctrine of recent possession came into play.

Dealing with the aspect of identification and or recognition, we note that the offences was committed at about 8 p.m. It was night. The robbers confronted the PW1 as he was walking from his bathroom to the main house. They introduced themselves as police officers on the hunt of a fugitive whom they suspected to be in his house. They asked him to open the door and he willingly did so.

It is instructive that at this time, PW1 had not discovered their real motive. He did not know that they were things. He talked to them freely. He willingly caused his house to be opened. The electricity lights were on. This fact has not been disputed. Much as the intensity of the same, its location in relation to the appellant and the time taken for the witnesses to observe the appellant sufficiently so as to be able to recognize was not inquired into by the court in terms of **Maitanyi .v. Republic (1986) KLR 198,** we are nonetheless satisfied just like the trial court that the two witnesses PW1 and PWII could have been in a position to positively identify the appellant. Afterall he was a person they were familiar with. According to PW1, the appellant had been previously a patient of his. He had also seen him severally at Kugitomo, in the market and at his pharmacy at Kiamokobe where he used to buy medicine. Infact he used even to pass by his house. According to PW1, it is the appellant who was dressed in police uniform. His accomplices were. It was the appellant again who welded a simi, a panga and a torch. The witness even gave the finer details of the torch and the panga. This description cannot have been for a person who saw the appellant fleetingly. He could not have noted such details if the electricity light in the sitting room was deem. Infact by his testimony, before the appellants ordered him to switch off the light and T.V. he had talked to them for about 5 minutes. This is sufficient time for a person to recognize a person he knows, more so as in this case where such person is not disguised. It is also instructive that in his first report to the Administration police who came by (PW7) he fingered the appellant to them as having been among the robbers. There is nothing on record to suggest that there was any grudge between the appellant and PW1 as would have acted as an impeting for PW1 to falsely accuse the appellant. Finally it is also instructive that during the robbery the appellant was wearing a muffin hat. The hat apparently dropped in the maize plantation into which the appellant and his cohorts had run through in a bid to escape. At Ikerege AP camp the following day, the appellant was still in the same clothes as the ones this witness

had seen him in during the robbery. This evidence cannot be said to be farfetched considering the appellant had been arrested in the wee hours of the same day of robbery and in the neighbourhood of where the robbery had been committed. In the circumstances of this case we are satisfied that the recognition of the appellant by PW1 cannot be faulted. The circumstances obtaining were favourable for positive recognition.

PW2 was the wife to PW1. At the time she was in the house watching T.V. with her sister in-law (PW3). They all confirmed that among those who gained entry in the house was the appellant. He was the only one among the three who was not wearing police uniform. Indeed he was wearing a grey sweater with maroon stripes and a blue muffin. They also confirmed that there was electricity light in the house. They were able to observe this before they were ordered to switch off the lights. PW2 knew the appellant very well. He was a neighbour in the village where she came from, i.e. Kugitimo infact his brother was her father's brother in law. Clearly in the light of this testimony the appellant cannot claim to be a victim of mistaken identity. The appellant having been known by PW2 and PW3 for a long time and having entered the house when the electricity was on and undisguised, it could not have taken that long time to be able to recognize him.

Of course we are congnisant of the fact that evidence of identification or recognition in difficult circumstances must be tested with greatest care and circumspection and can only form a basis for conviction, if it is absolutely waterlight See **Abdalla Bin Wendo & Anor .v. Republic (1953) 20 EACA 166, Roria .v. Republic (1969) E.A 583, Karanja & Another .v. Republic (2000)2 KLR 140**. This injunction is necessary knowing mistakes in recognition are often made of relatives and even of close friends. However it has been said that ***"……recognition of assailant is more satisfactory more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other……".*** The foregoing notwithstanding there is still need for caution and circumspection.

Having carefully weighed the evidence of recognition on record, we are satisfied that the appellant's conviction on that basis cannot be faulted. Of course the appellant has complained that all the witnesses who testified as to his recognition were close family members. We are not aware of legal requirement that close relatives cannot testify in the matter. Further there is no evidence that there were independent witnesses to the crime who were deliberately left out on the prosecution list of witnesses. The three witnesses though relatives were the victims of the crime and witnessed the same as it unfolded. The prosecution cannot be expected to go out there to look for independent witnesses when there were none so as to satisfy the appellant's quest for independent witnesses.

A few hours after the robbery, 4 a.m to be precise, PW7 and other Administration police officers whilst on patrol in the area having received a report on PW1 they encountered the appellant in the company of another person who escaped. He looked suspicious and shaken as he could not answer basic questions put to him by these officers. He was armed with a panga, simi and a torch. He also had in his pocket a mobile phone Nokia 1100. His trouser was wet with black jack seeds stuck all over. He could not explain how he had come by the phone. That phone belonged to PW3. She positively identified her phone as hers as she had a specific welcome note "God is great. He gives" and had a profile bearing her name **"Regina"**. She also had a serial number which she gave.

There is no doubt at all with all these evidence that PW3's ownership of the mobile phone was proved beyond reasonable doubt. The trial court was therefore right in invoking the doctrine of recent possession in order to convict the appellant.

However, we remind ourselves that our mind, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the accused. Secondly, that,

that property was positively the property of the complainant, thirdly, that property was stolen from the complainant. Of course the proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. See the case of **Erick otieno Arum –vs- Republic Criminal Appeal no. 85 of 2005 (UR)** and **Andrea Obonyo –vs- Republic (1962) E.A. 542.**

In this case we have no doubt at all that the recovered mobile phone was positively the property of PW3. It is also common ground that the phone had been stolen from PW3 hardly eight hours or so. In fact it was on the same night of the robbery that the appellant was found in possession thereof. There was no time that the mobile phone could have come to him through a third party.

The appellant has complained that his defence was not considered. However, we do not think that such accusation is right. Clearly the trial court considered the defence and found it wanting. It was a mere denial according to the learned magistrate and we agree with him. It could not stand in the face of overwhelming evidence of recognition and the application of the doctrine of recent possession.

There may have been contradictions here and there in the prosecution. This is not wholly unexpected. However those contradictions did not go to the root of the prosecution case. They were minor and can be ignored.

The upshot of the foregoing is that we find no merit in this appeal. It is dismissed. However, we shall make a correction with regard to sentence. The sentence of death will be carried out against the appellant in respect of count I only. The sentence in respect of counts II and III shall in the meantime be held in abeyance.

Judgment dated, signed and **delivered** at Kisii this 15th March, 2011.

ASIKE-MAKHANDIA **RUTH NEKOYE SITATI**

JUDGE **JUDGE**