REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 13 OF 2007

GEORGE OKELLO ……. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Being Appeal against Judgment from Eldoret Chief Magistrate's Court Criminal Case No. 1429 of 2005

delivered on 25th January, 2007 by M.K.N. Nyakundi – Senior Resident Magistrate).

J U D G M E N T

George Okello (herein, the appellant), appeared before the Chief Magistrate Eldoret charged with two counts viz;

(1) Robbery with violence contrary to section 296(2) of the penal code, in that on the 22nd February, 2005 at 21.00 p.m. at [name withheld] Estate, Uasin Gishu District Rift Valley Province, jointly with others not before the court robbed C. O.O of one Mobile Phone make Nokia 3310, a wrist watch make Noris, a belt and cash Kshs.1,640/- and immediately after the time of such robbery beat up the said C.O.O.

(2) Unnatural offence contrary to section 162(a) of the penal code, in that on the 22nd February, 2005 at 21.00 p.m. at [name withheld] Estate, Uasin Gishu District Rift Valley Province had carnal knowledge of C.O.O against the order of nature.

After pleading not guilty to both counts, the appellant was tried and convicted of both counts. He was sentenced to death by the learned trial magistrate who did not indicate on which count the sentence applied. We would opine that the sentence related to the first count which carries a mandatory death sentence. It would appear that the sentence on count two was not pronounced but left in abeyance as required in view of the death sentence **(see, Borus & Another v.s. Republic (2005) KLR 649)**

Be that as it may, the appellant was aggrieved by the conviction and sentence and preferred this appeal on the basis of the grounds contained in the petition of appeal filed herein on 1st February 2007.

In essence, the appellant complains that he was convicted on the basis of the prosecution evidence of

identification which was insufficient and made in difficult circumstances. That, the trial court failed to resolve the contradiction in the evidence by PW3, 4, and PW5 on the recovery of the exhibits and that the investigating officer was not called to testify.

The appellant represented himself at the hearing of the appeal and opted to rely on his written submissions which co-opted new grounds of appeal.

It is on record that, on the 30th September, 2010 the appellant applied to amend his petition of appeal but was told by the court to comply with section 350 (v) of the Civil Procedure Code. It would however appear that there was no such compliance. Therefore, the new grounds of appeal were filed without the leave of the court and must be disregarded by this court.

In his written submissions, the appellant reiterates the ground of appeal contained in his original petition of appeal and contends that the evidence on the recovery of the exhibits was contradictory which contradiction was not resolved by the learned trial magistrate before arriving at her decision.

On identification, the appellant contends that the learned trial magistrate considered the evidence of a single witness without adequately warning herself on the danger of convicting on the evidence of a single witness in difficult circumstances. In that regard, the appellant relied on the decision in the case of **Simiyu & Another V.s. Republic (2005) IKLR 192.** The appellant further contends that the prosecution evidence of identification was flimsy and distorted. On the second count, the appellant contends that he was not medically examined to established that he sodomized the complainant (PW1). Further, no forensic expert was called to testify.

In opposing the appeal, the learned counsel for the state/respondent **Mr. Oluoch**, briefly went through the evidence adduced by the prosecution witnesses and submitted that the appellant was previously known to the complainant as a neighbour, that there was bright moonlight which assisted in his identification and that, since the incident took a long period of time, there was adequate opportunity for the appellant to be seen.

The learned state counsel went on to submit that a long trouser and black belt stolen from the complainant were recovered in the appellant's possession and positively identified by the complainant. The recovery happened three days after the offence and since the appellant did not lay any claim to the recovered items, the doctrine of recent possession took effect as the appellant was found in recent possession of stolen property. The learned state counsel further submitted that the clinical officer (PW6) confirmed that the complainant was assaulted and sodomized and that, after duly warning herself, the learned trial magistrate concluded that the identification of the appellant was not mistaken. The learned state counsel contended that the appeal lacked merit and urged this court to dismiss it.

We have carefully considered the foregoing submissions by both the appellant and the respondent. Our obligation is to re-visit the evidence adduced in the trial court with a view to arriving at our own conclusion. We however, bear in mind, that the trial court had the advantage of seeing and hearing the witnesses (see, **Okeno V.s. Republic (1972)EA 32 and Achira Vs. Republic (2003)KLR 707).**

In summary, the prosecution case was founded on the facts that follow;-

On the material date, the complainant **C.O.O (PW1)** took a public service vehicle (matatu) heading to a place called Mwanzo. This was about 9.30 p.m. He alighted at a place called Kidiwa and decided to walk on foot to his Kamukunji Estate house. In the process, he passed an open field situated between Kidiwa and Kamukunji. While there, he met two men one of whom held his neck and hit his right leg with an iron-bar. He was ordered to walk along with the two men. His attempt to cry was in vain. His voice could not just come out. The time had reached 10.00 p.m. he heard the voice and saw the face of one of the two men. He recognized that person as being the accused (appellant) who was dressed in a woolen cap, red, yellow, black, white (multi coloured) stripped – T- shirt and a black trouser.

The complainant recognized the appellant with the aid of bright moonlight. He (complainant) noted that

the appellant's co-accused was a tall person. He (complainant) requested the two people to kill him even as they demanded money. He gave them Kshs.1,640/- but one of them took his wallet. His mobile phone, a wrist watch, black belt, black leather shoes and trousers were taken away.

Thereafter, the complainant was ordered to lie down facing downwards. It was then that the two people sodomized him in turns. They left him only after he feigned death. He went to his house and informed his neighbours. He reported the incident on the following day at the Eldoret Police Station. He was referred to hospital where he was examined, treated and a P3 form completed. He informed a police officer that he was able to recognize one of the two offenders. He took police officers to the house of the appellant on the 23rd February 2005 but did not find him. He took them again on the 25th February 2005 and found the appellant. He (appellant) was arrested. His house was searched and the complainant's belt was recovered. Later, the appellant led the complainant and police officers to a place where the complainant's trouser was recovered.

IL(PW2) worked with the complainant, at [Particulars withheld]. On 23rd February 2005 the complainant informed him what had happened to him. The (PW2) took the complaint to the Uasin Gishu District Hospital and the police station. The complainant informed him that he (complainant) knew one of the offenders. Later, he (PW2) learnt that the appellant had been arrested. He went to the police station where the appellant was under interrogation. Thereafter, he went with the appellant and others to a place where the complainant's stolen trouser and belt were found inside a fence.

P.C. Isaiya Kibii Tuwei (PW3), of Eldoret Police Station received the complainant's report on 23rd February 2005 at about 5.00 a.m. The complainant informed him that he was attacked by a person known to him and that the person lived at Kamukunji Estate.

P.C. Tuwei later accompanied the complainant to the house of the appellant where the complainant's black belt was recovered. **P.C. Simiyu (PW4)**, also of Eldoret Police Station accompanied his colleague (PW3) to Kamukunji Estate where they arrested the appellant and recovered the belt in his house. He (PW4) indicated that the complainant's stolen trouser was recovered in the course of investigations.

P.C. Kuloba (PW5), also went to the house of the appellant. He confirmed that the appellant led them to a fence within his compound where the complainant's stolen trouser was hidden and recovered. **Patrick Kiprono (PW6)** a clinical officer at the Uasin Gishu District Hospital examined the complainant, on 23rd February 2005 and confirmed that he had been assaulted and sodomized.

The appellant was placed on his defence on the basis of the foregoing evidence by the prosecution. He elected to make an unsworn evidence and stated that he lived in Kamukunji Estate, Eldoret and that on the 23rd February 2005 he went to work at around 7.00 a.m. He returned home at 6.30 p.m. and slept. On 24th February, 2005, he woke up, went to work and returned home. On 27th February, 2005 at 5.00 a.m. he heard a knock at his door. He opened the door after being told that it were police officers knocking. The police officers arrested him, searched his house and removed a belt from his trousers. He was thereafter taken to Eldoret Police Station and charged with the material offences. The defence was considered by the learned trial magistrate along with the evidence by the prosecution. The conclusion reached was that the prosecution case against the appellant was proved beyond reasonable doubt. Consequently, the appellant was convicted on both counts.

On our part, we are satisfied that the ingredients of both offences were duly established by the evidence availed by the prosecution through the complainant. (PW1) and the clinical officer (PW6). It was thus proved that the complainant was attacked and robbed of his property by two men who assaulted him with an iron-bar and eventually sodomized him. The basic issue that fell for determination was whether the appellant was positively identified as having been one of the two offenders. The offences occurred in the hours of darkness i.e. between 9.30 p.m. to 10.00 p.m. The only source of light as indicated by the complainant was moonlight said to have been bright at the time. The complainant was alone at the time. He was the sole identifying witness. His evidence of identification against the appellant was not boosted by any other. Thus, the alleged identification of the appellant at the scene of the crime was not

corroborated by any other direct evidence. However, the complainant indicated that he had previously known the appellant as a neighbour. In fact, the appellant was arrested after the complainant led police officers to his house where a belt and a pair of trousers said to belong to the complainant and which were part of the items stolen from him were recovered. Suffice therefore, to say that the alleged identification of the appellant by the complainant was by recognition.

In essence, the prosecution evidence of identification was by a single witness in difficult circumstances. Such evidence requires careful and cautionary treatment by a trial court which must warn itself of the dangers of convicting on the evidence of a single witness in difficult circumstances. (See **Abdalla Bin Wendo V.s. Republic (1953) EA.CA. 166)**

In **Roria Vs. Republic (1967)EA 583**, it was noted that a conviction resulting entirely on identification invariably causes a degree of uneasiness. In the same case, it was stated as follows;-

"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest case the evidence of a single witness respecting identification especially when it is known that 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."

Herein, it was the evidence of the complainant (PW4) that he recognized the appellant as there was bright moonlight at the time. The moonlight thus created favourable circumstances for the recognition of the appellant.

It was also indicated by the complainant that the ordeal took a considerable period of time and that the offenders were in close proximity with the complainant. This showed that there existed adequate opportunity for the identification of the appellant. Being aware of the dangers of convicting on the evidence of a single witness in unfavourable circumstances, we are nonetheless satisfied that the identification of the appellant by the complainant was proper and could be relied upon even in the absence of corroboration. The identification was by recognition. Recognition as opposed to mere identification is more satisfactory, more assuring and more reliable than identification of a stranger (see, **Anjononi & Others Vs. Republic (1980) KLR 59)**

Further to the evidence of direct identification of the appellant, the prosecution also provided circumstantial evidence against the appellant in the form of recent possession of some of the complainant's stolen items 1.e. a belt and a pair of long trousers. It was shown by the complainant (PW2), the complainant's workmate (PW2) and the police officers (PW3, PW4, and PW5) that the said items were recovered while in the possession of the appellant.

In his defence, the appellant did not dispute the recovery of the items in or within the compound of his house. Apart from suggesting that the items belonged to him, he offered no explanation for his possession of the items when it was clear and that they had been positively identified as property belonging to the complainant. This failure to give an explanation meant that there was no rebuttal of the presumption that the appellant was involved in robbing and even sodomizing the complainant. In the case of **Peter Kariuki Kibue Vs. Republic Nbi. Criminal Appeal No. 21 of 2001,** the court of Appeal stated that;

"The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. Since he did not offer any explanation the rebuttable presumption in law raised, based on the provisions of section 119 of the Evidence Act, is that he was one of the people who robbed Damaris of the items together with her car and also robbed Irungu of his car. It is a presumption of fact which courts often refer to as the doctrine of possession of recently stolen property."

So, on account of the complainant's evidence of recognition against the appellant and the doctrine of

recent possession, we must hold that the appellant was positively identified, directly and indirectly, as one of the two people who robbed and sodomized the complainant. His conviction on both counts by the learned trial magistrate was proper and lawful. It is hereby sustained with the result that this appeal stands dismissed in its entirety. In view of the death sentence applicable to the first count, the appellant is also sentenced to serve five (5) years imprisonment on the second count. However, the sentence on the second count will be held in abeyance.

F. AZANGALALA

JUDGE

J.R. KARANJA

JUDGE

(Delivered and signed this 10th day of March, 2011)

10/3/2011

Before F. Azangalala, J.R. Karanja JJ.

C.C. Andrew

State counsel – Mr. Kabaka holding brief for Oluoch

Appellant present in person.

F. AZANGALALA

JUDGE

J.R. KARANJA

JUDGE

Court; Judgment delivered to appellant.

F. AZANGALALA

JUDGE

J.R. KARANJA

JUDGE