REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 70 of 2008

JOHN MUTURA MURAYA……….......................... APPELLANT

Versus

REPUBLIC….. RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Kiguma in Criminal Case No.176 of 2007 by S.M. MOKUA –SRM)

J U D G M E N T

The appellant, **John Mutura Muraya**, was convicted after a trial by the Senior Resident Magistrate at Kigumo law courts of one count of robbery with violence contrary to *section 296(2)* of the penal code and sentenced to death. Aggrieved by the conviction and sentence aforesaid, he lodged the instant appeal in which he faulted the learned magistrate for convicting him on doubtful evidence of recognition, evidence that had glaring inconsistencies and contradictions that ought to have been resolved in his favour, wrongful application of the doctrine of recent possession and failure to attach any weight to the cogent defence advanced by him.

On 24th December, 2006 **Joseph Chege Kawui** ***(Kawui)*** was from Magute shopping centre when he was confronted by four young men who proceeded to attack him. In the process they robbed him of Ksh.1,000/=. Three of them later escaped. However, one of them who was armed with a knife remained behind. **Kawui** identified this attacker as a son of a person who had purchased land in the neighbourhood. It was his evidence that he was able to recognise him since it was not fully dark. He also stated that he was able to identify him from his voice. **Kawui** stated that he met someone presumably **Joseph Maina Ngugi** ***(Ngugi)*** PW3 and immediately informed him about the robbery herein and fingered the appellant as one of culprits.

The following day, **Kawui** reported the incident at Maragua Ridge AP Camp and informed APC **David Mukua** ***(Mukua)*** PW2 that he had recognised the appellant among those who robbed him**.** **Mukua** later accompanied **Kawui** to the home of the appellant. He searched the appellant's house and recovered the complainant's torch there form.

The complainant testified that he was able to identify the said torch as his since it had inscriptions of his name on it. The appellant was thereafter arrested and handed over to **P.C. Charles Mbondo** ***(Mbondo)*** PW4 of Maragua police station who re-arrested the appellant and took possession of the exhibits. The exhibits were the knife and torch respectively. He later charged the appellant with the offence.

Put on his defence, the appellant in his unsworn defence stated that he was a resident of Maragua Ridge. On 10th January, 2007 he was arrested whilst at the shopping centre by police officers. Thereafter they proceed to his home. A search was conducted thereat and no recovery was made. Later he was taken to Maragua police station. Three days later he was charged with the instant offence. The appellant essentially denied committing the offence.

The trial magistrate believed the evidence of the prosecution witnesses that a torch belonging to **Kawui** was recovered from the appellant's house so soon after the robbery and that the appellant did not offer any explanation as to how he came by the said torch which had the name of **Kawui** thereon. He concluded that the appellant was in recent possession of the torch and drew the inference from the fact of recent possession of the torch that the appellant participated in the robbery on **Kawui**. The trial magistrate too was satisfied that though the offence was committed at about 7.30 pm it was sufficiently bright as to enable **Kawui** to recognise the appellant. Finally, the learned magistrate was also convinced that **Kawui** recognised the appellant by his voice.

When the appeal came up for hearing before us on 6th October, 2009, the appellant with the permission of the court tendered written submissions which we have carefully read and considered.

Mr. Makura, learned senior state counsel on the other hand opposed the appeal. He submitted that the evidence of appellant's identification was one of recognition**.** **Kawui** was attacked by the appellant and his group when it was not so dark. **Kawui** was able to recognise the appellant visually as well as by voice. Thereafter **Kawui** made a report to **Mukua** and **Ngugi** soon after the robbery and mentioned the appellant. Whereupon the appellant was arrested and upon his house being searched, a torch with the name of **Kawui** inscribed thereon was found. That torch was stolen during the robbery. The doctrine of recent possession applied. The defence given by the appellant did not cast any doubts on the prosecution case.

As we consider the submissions by the appellant and the learned senior state counsel, it must be remembered that as this is a first appeal we are duty bound to examine and re-evaluate the evidence on record to reach our won conclusion in the matter, always however remembering that we had no advantage, as the trial court did of seeing and hearing the witnesses – **see Okeno V R. (1972) EA.32.**

The conviction of the appellant was dependent on the evidence of recognition visually as well as by voice. It was also dependent on the application of the doctrine of recent possession in the circumstances of this case. It is recognised that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In **Kiarie V Republic (1984) KLR 739**, the court of appeal observed that where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction. In the same case, the court sated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken. Lastly, although recognition is more reliable than identification of a stranger, such evidence of recognition should be tested carefully knowing that mistaken recognition of close relatives and friends are sometimes made. **See Anjononi and others V The Republic (1980) KLR 59** and **Wamuga V Republic (1989) KLR 424.**

The trial court was alive to the fact that the case against the appellant was based on visual as well as voice recognition and recent possession of stolen property. It is our view that relying on evidence of recognition as corroborated by evidence of recent possession of stolen property, the trial court was entitled to convict the appellant. According to **Kawui,** the robbery was committed when it was not so dark. That he could still see the appellant. That evidence was not seriously challenged by the appellant in cross-examination. There is no suggestion that at 7.30 p.m when the offence was allegedly committed was pitch dark so that PW1 could not see and recognise the appellant. As the learned magistrate correctly pointed out in his judgment, there are days when at 7.30 pm the day is still bright enough for one to see without the assistance of unnatural light. The appellant was a person well known to **Kawui** since he came from the same village. Indeed his father had bought land from **Kawui's** family. This fact too was not discounted by the appellant. There is no suggestion that **Kawui** had a grudge against the appellant as would have acted as a catalyst for him to frame the appellant with the case. Further, **Kawui** even observed that the appellant was armed with a knife. He was thus very observant. The encounter between

Kawui, the appellant and his cohorts was at arms length thereby making the recognition of the appellant very easy in the circumstances. As a person well known to **Kawui**, his recognition by voice would perhaps have been easy. However from the record it is not apparent that the appellant ever talked to **Kawui** during the encounter. Nor is it clear whether **Kawui** was at all conversant with the appellant's voice so that he could easily recognise it. As stated in the case of **Choge V Republic (1985) KLR 1.**

"**…..Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was and who had said it….."**

To the extent that the record does not show any exchanges between the appellant and **Kawui**, during the robbery, we think that the learned magistrate erred in relying on the evidence of purported voice identification.

However we are satisfied that the appellant was positively recognised visually by **Kawui**. Besides the appellant was in recent possession of a torch belonging to **Kawui** and which he was robbed of during the incident. That torch was positively identified by **Kawui**. He had inscribed thereon his name. That torch was recovered from the house of the appellant according to the evidence of **Mukua** on 10th January, 2007. This was about 17 days after the robbery. This is not along period of time. In any event a torch is not such an item that changes hands frequently. The appellant did not give an explanation to account for his possession. In his defence, the appellant seem to suggest that no torch was recovered from his house following the search. There fore the alleged torch must have been planted on him. However we have not come across any grounds in the record that would support the appellant's contention regarding the alleged framing of him with the case either by PW1 and or PW2. On our own evaluation of the evidence, we are satisfied that the torch was found in the house of the appellant upon search. There is no suggestion that the house in which the torch was recovered did not belong to the appellant and or any other person(s) a part from the appellant reside therein. The appellant himself admits that indeed the house belongs to him. In the circumstances, there is a presumption that the appellant was among those who robbed **Kawui** of Ksh.1,000/= and the torch. **See Andrew Obonyo V R (1962) EA 542.** This evidence was strong, corroborative and also independently proved the guilt of the appellant.

The appellant has raised the issue of contradictions and or in consistencies in the prosecution case that ought to have been resolved in his favour. However he pointed out no such contradictions and inconsistencies. The inference where contradictions in evidence exist but are not identified is necessarily that the evidence on record was not properly evaluated by the trial court. We entertain no such misgivings on the part of the learned magistrate in the circumstances of this case. Even if such contradictions and inconsistencies existed, they were in our view minor and did not go to the root of the prosecution case.

The last ground of appeal relates to the failure by the learned magistrate to examine critically the defence of the appellant. We are of the view that this complaint is without merit. We think that there was sufficient consideration of the defence advanced which in any event merely dwelt with the events of the day of his arrest. Accordingly the evidence did not throw away reasonable doubts in the other wise strong prosecution case.

To conclude this judgment we wish to reiterate that the conviction of the appellant was based on recognition of the appellant by **Kawei** at the scene of crime and the recent possession by the appellant of some property stolen from PW1 during the robbery. In our view the evidence of recognition taken together with evidence of recent possession by the appellant of the torch positively identified by **Kawui** as belonging to him makes the prosecution case watertight.

In view of the foregoing it is our considered opinion that the appellant's conviction was inevitable.

Consequently, his appeal must be and is hereby dismissed.

Dated and delivered at Nyeri this 19th day of November. 2009.

J.K. SERGON

JUDGE

M.S.A. MAKHANDIA

JUDGE