REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 91 of 2005

STEPHEN MUTURI WAITHERA ……...…….APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(From original conviction and sentence in Criminal Case No. 1449 of 2003 of the Chief Magistrate's Court at Nairobi)

JUDGMENT

STEPHEN MUTURI WAITHERA the appellant was charged before the subordinate court with one count of robbery with violence contrary to Section 296(2) of the Penal Code. He was also charged with a second count of being in unlawful possession of a firearm contrary to section 4(2)(b) of the Firearms Act (Cap. 114). He was further charged with a third count of being in possession of ammunition contrary to section 4(2)(b) of the Firearms Act (Cap. 114).

After a full trial, he was convicted of the offence of robbery with violence and acquitted of the other two counts. He was sentenced to suffer death as provided for by law. Being dissatisfied with the decision of the learned trial magistrate, he has appealed to this court. His grounds of appeal are that –

1. The learned trial magistrate erred in convicting him on evidence of possession of a leso and table cloth while he was not found in possession of the said items.

2. The learned trial magistrate erred in convicting him on uncorroborated evidence.

3. The learned trial magistrate erred in being impressed by the mode of arrest.

4. The learned trial magistrate erred in rejecting his defence without giving proper reasons contrary to Section 169(1) of the Criminal Procedure Code.

5. The learned trial magistrate erred in convicting him when the prosecution case was not proved beyond all shadow of doubt.

The appellant also filed written submissions. At the hearing of the appeal, the appellant submitted that he

was absent during trial when PW1 testified, though he cross examined him.

Learned State Counsel, Ms Nyamosi, opposed the appeal. It was her contention that the ingredients of the offence were proved. Though PW1 was a single identifying witness, the appellant was arrested just outside the bureau which the complainant (PW1) owned. He was also found with a leso and table cloth. Therefore the doctrine of recent possession applied. It was counsel's contention that if the evidence of PW1 and PW2 is put together, the issue of mistaken identity will not arise. Counsel contended that there was therefore no need for an identification parade, as appellant was arrested at the scene. Learned State Counsel also contended that there was no contradiction between the evidence of PW1 and PW2 as alleged by the appellant. Counsel further submitted that the alibi defence had no merits, as the appellant was arrested on the spot.

In response, the appellant submitted that the evidence of PW1 and PW2 was that they went to make a telephone call when they saw him being chased by members of the public. PW1 and PW2 did not know why he was being chased.

We have to remind ourselves that, this being a first appeal, we are duty bound to re-evaluate the evidence on record a fresh and come to our own inferences and conclusions – **OKENO – vs – REPUBLIC [1972] EA 32.**

In brief the facts to the case are as follows. On 17.5.2003 at about 9.30 p.m., JENNIFER WAMBUA (PW1) was at her telephone bureau at Mathare North area III. A young man went there holding a pistol and told her to hand over to him a mobile phone. She did so. Another young man approached and started searching the customers who were at PW1's bureau. The two intruders were with a woman. They took the day's collection of Kshs.1,450/= and PW1's handbag which contained some items. After the intruders left, PW1 went to a nearby bureau with one of the customers, to make a telephone call. She then saw the police chasing the appellant and arresting him. The appellant was then brought to her telephone bureau with her leso and table cloth.

The appellant was arrested by PW2 PC JOSEPH WANJAU of Muthaiga Police Station, together with another police officer STEPHEN IRUNGU. The arrest was initiated by members of the public, who informed the police officers that there were some young men who were robbing members for the public. The police followed the track used by the young men and found some young men sharing what they had robbed from people. When they ordered the young men to identify themselves, one of them fired at them and started running away. They fired back, chased him and arrested him. He was the appellant. On searching him, they found a leso and table cloth hidden in his jacket pockets. The police also recovered a gun with ammunition. The stolen items were later positively identified by the complainant. The appellant was later charged with the offences.

In his defence, the appellant gave an unsworn statement. He stated that on 17.5.2003 at 9.00 p.m. he was in his house at Mathare II area. He decided to go to the shops at Mathare North. On the way, he met two people who demanded his identity card, but he had none. They were police officers. They decided to arrest him. As they were walking, they met a lady who claimed to have been robbed. He was led to Muthaiga police station and was later charged in court. He contended that with regard to count 2 and count 3 he had been charged and acquitted at the City Court in Criminal Case No. 1449/2003.

We have first of all to state that though the appellant was recorded as being absent on 23/11/2003 when PW1 and PW2 testified, that must have been a clerical error. We say so because the appellant in fact cross-examined the said two witnesses. The appellant therefore must have been in court when those two witnesses testified.

We have evaluated the evidence on record. The appellant's conviction mainly hinges on the evidence of visual identification by the complainant PW1, a single identifying witness. In **ODHIAMBO – vs – REPUBLIC [2002] 1 KLR 241** Chunga CJ, Lakha and Ole Keiwua JJA held –

"1. **Courts should receive evidence on identification with great circumspection particularly where**

circumstances are difficult and do not favour accurate identification.

2. Where evidence of identification rests on a single witness and circumstances of identification are known to be difficult, what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which, the court may reasonably conclude that identification is accurate and free from possibility of error".

The evidence of identification on record in this case causes us a degree of uneasiness. The incident occurred at night. The complainant (PW1) did not state whether there was light in her telephone bureau, how bright that light was and how its source was placed in relation to the appellant. There is no evidence that she described the appellant to anybody before she saw him in the custody of the police. The appellant was arrested because of a report to the police by other persons who did not testify in court. The other person, a customer, who was with PW1 during the robbery was not called to testify. He would probably have given evidence on whether the appellant was one of the robbers. We are of the view that, from the evidence on record, the identification of the appellant as one of the robbers was far from positive. It is not safe to sustain a conviction on the same.

The other evidence on which the appellant was convicted was evidence on recent possession of stolen property, that is a leso and table cloth. It is trite that for the doctrine of recent possession to apply the requirements of the definition of possession under Section 4 of the Penal Code have to be satisfied. The definition is as follows –

"Possession" –

(a) "be in possession of' or "have in possession" includes not only having in ones own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.

(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them".

In our present case, the circumstances of the recovery of the leso and table cloth are not wholly clear. There is no indication that there was light when the appellant was said to have been searched and found with the items. There were other young men who ran away. The other police officer (STEPHEN IRUNGU) who was said to be present during arrest and recovery of the items from the appellant by PC JOSEPH WANJAU (PW2) was not called to testify. In our view, it was possible that the items were not recovered from the appellant, as there was evidence that there were other young men who ran away. That is not all. The items were also common items, and the complainant did not give any special identification marks for those items. Curiously, though there is no evidence of recovery of a mobile phone from the appellant, the complainant is recorded as having identified a mobile phone in court, which is alleged to be the one or similar to that robbed from the complainant. The evidence of possession by the appellant of recently stolen goods is wanting. In our view, the prosecution failed to prove that the appellant was found in possession of the stolen items.

The appellant has complained that the learned trial magistrate did not consider his defence as required under Section 169(1) of the Criminal Procedure Code (Cap.75). The said section provides –

"169(1). Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be

dated and signed by the presiding officer in open court at the time of pronouncing it".

We observe that, other than the learned trial magistrate giving a summary of what the appellant stated in his defence, she did not consider the defence or make any findings as to whether she believed or disbelieved the defence and give reasons for the findings. The learned trial magistrate should have considered the defence of the appellant and made findings on the same, and given reasons for the findings. The law is couched in mandatory terms. The failure to do so prejudiced the appellant.

Consequently, and for the above reasons, we allow the appeal, quash the conviction and set aside the sentence imposed by the learned trial magistrate. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 7th day of June 2007.

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LESIIT

JUDGE

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DULU

JUDGE

Read, Delivered and Signed in the presence of –

Appellant

Ms Nyamosi for State

Tabitha/Eric – Court Clerks

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LESIIT

JUDGE

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DULU

JUDGE