REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 282 of 2005

(From the Original Conviction and Sentence in Criminal Case No. 2979 of 2004 of the

Chief Magistrate's Court at Kibera – Ms Kasera SRM)

DALMAS OCHIENG OKOTH……....……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

DALMAS OCHIENG OKOTH, the appellant, was charged before the subordinate court with a main count of robbery contrary to section 296(2) of the Penal Code. He was also charged with an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. After a full trial, he was convicted of the main count of robbery. The particulars of that charge on 1st April 2004 at Bomas of Kenya Bridge Langata that charge Nairobi Area Province, jointly with others not before court, while armed with a dangerous weapon namely knife, robbed CHARLES KENNEDY ONSONGO of a bicycle make Ranger frame No. 130867, a dress, a trouser and a jacket all valued at Kshs.3,620/= and at or immediately before or immediately after such robbery threatened to use actual violence to the said CHARLES KENNEDY ONSONGO. He was, on conviction, 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 can be summarized as follows:-

1. The learned trial magistrate erred in convicting him on the evidence of identification in conditions which were not favourable to positive identification.

2. The learned trial magistrate erred in relying on circumstantial evidence while none of the alleged robbed items was found in his possession.

3. The learned trial magistrate erred in convicting him on evidence that was riddled with contradictions.

4. The learned trial magistrate erred in rejecting his alibi defence without giving any cogent reasons as stipulated under section 169(1) of the Criminal Procedure Code (Cap. 75).

The appellant also tendered written submission.

Learned State Counsel, Ms Gateru, opposed the appeal and supported both the conviction and sentence. Counsel contended that the complainant (PW1) was attacked by three people before night fall. It was still bright at around 6.30 p.m. PW 1 clearly saw the appellant as the person who had a knife and pulled his jacket. Counsel also submitted that the appellant was later found in possession of the jacket belonging to

the complainant. The jacket was positively identified by the complainant (PW1) as it had holes. The evidence of PW1 on the jacket was corroborated by the evidence of PW2 and PW3. Counsel also submitted that there were no contradictions in the prosecution case. Counsel further submitted that the charge was neither defective, nor was the appellant prejudiced in any way by the particulars of charge. Counsel lastly submitted that the alibi defence of the appellant was considered by the learned trial magistrate and rejected.

In reply to the submissions of the State Counsel the appellant submitted that the complainant should have given a description of the robbers in the first report, which he did not. He denied having been at the scene of the incident.

We have considered the grounds of appeal, the submissions on both sides as well as the evidence on record. This being a first appeal, we are duty bound to reconsider and re-evaluate the evidence on record afresh and come to our own inferences and conclusions (**OKENO – vs – REPUBLIC [1972] EA 32**).

From the evidence on record, it is clear to us that the conviction of the appellant was predicated on identification and possession of one of the robbed items, the jacket of the complainant (PW1). The identifying witness was a single witness (PW1).

The complainant (PW1) stated in evidence that he identified the appellant as one of the three people who robbed him. He stated that the appellant was the one who was armed with a knife and took away his jacket. We observe that the offence occurred on 1.4.2004. The complainant reported the incident to the police the same day. There is however no evidence from him that he told the police that he could identify any of the robbers, no whether he gave a description of any of the robbers. No police officer testified that the complainant either told the police that he could identify the robbers or gave a description of any of the robbers. The appellant was arrested 20 days later on 20.4.2004, when he was spotted by the complainant wearing his jacket, not because of his appearance or identify. In the words of the complainant –

"**I met 5 men seated behind St. Michael Catholic Church, one of them wore the jacket which was taken from me. I looked and one of them asked me why I was looking at him with a loud voice. I ran to Bomas Chief's camp and the chief arrested the person who wore my jacket".**

It was after the above story that PW1 (complainant) is recorded as having stated that he saw the appellant, or identified him when he attacked him. In our view, had the complainant actually identified the appellant as one of the robbers during the incident, he would have specifically said so when he reported the robbery. There is no evidence that he told the police or even the chief and those who arrested the appellant that he had identified the appellant as one of the robbers.

In convicting the appellant, the learned magistrate stated thus in the judgment –

"**Accused pleaded an alibi. He said he was at his village when the offence was alleged to have been committed. He has not called anybody to support the alibi although he said he was with his wife and mother at home. I am convinced that the accused was involved in the robbery. Complainant said he was at the time of robbery (sic) as it was still clear that evening and he was found with a jacket which had burnt holes which had been described by complainant even before the accused was arrested. I find the accused guilty of the offence of robbery with violence and convict him ……"**

The judgment of the trial magistrate was a short one. From the above observations of the subordinate court, we are of the view that the learned magistrate erred and misdirected herself.

Firstly, we will deal with the alibi defence of the appellant. It is trite that where an accused person raises a reasonable alibi defence, the burden shifts to the prosecution to disprove that alibi defence – see KIARIE –vs- REPUBLIC 1984 KLR 739 AND NSEMBE & ANOTHER –vs- REPUBLIC [2003] KLR 521. In requiring the appellant to call his wife and mother as witnesses, the learned magistrate erred, as she shifted the burden of proof of alibi defence to the appellant. That was a fatal error to the conviction.

The second error is that, though the learned magistrate convicted the appellant on the evidence of identification and possession of suspected stolen property, she failed to evaluate the evidence on each of these two elements as required by law.

With regard to the identification, there should have been further inquiry by the learned magistrate on the quality of the identification before convicting. The subordinate court appears to have assumed that there was positive identification of the appellant. The law requires that where the evidence relied upon is evidence of visual identification, the court, before convicting should warn itself of the need for caution before convicting the accused. Secondly, the court ought to examine closely the circumstances in which the identification by each witness was made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence – see PAUL ETOLE & ANOTHER –vs- REPUBLIC Criminal Appeal No. 24 of 2000 (unreported).

The failure of the learned magistrate to examine the evidence of identification and caution herself before convicting was a fatal error, and the conviction cannot stand on that account.

With regard to the possession of the jacket, we are of the view that the complainant's jacket was indeed found in possession of the appellant. However, the inference that someone is either a principal offender or a handler when found in possession of stolen goods depends on the nature of the items and the susceptibility of those items to change hands. When the appellant was initially arrested , there is evidence from prosecution witnesses, that he said that he bought the jacket from Gikomba market. In our view, an item such as the jacket in question can change hands quite easily. The period of 20 days from the date of the robbery was quite long and could have meant that the appellant indeed bought the jacket from Gikomba market. Though we entertain suspicion that he might have been one of the robbers, suspicion on its own cannot be a basis for founding a conviction in a criminal case. In our view, because of the lapse of time, there should have been additional evidence to connect the appellate with the robbery, to justify the application of the doctrine of recent possession. Unfortunately, there is no such additional independent evidence.

The appellant claims that his defence was dismissed without consideration and without the magistrate giving reasons for the dismissal. That ground cannot succeed. Our perusal of the judgment shows that the learned trial magistrate considered the defence and dismissed it because, in her view, the conditions of identification were favourable and the robbed jacket was found on the appellant. We dismiss that ground of appeal.

After having re-evaluated the evidence on record, we are of the view that the conviction of the learned trial magistrate is not safe and cannot be sustained. Consequently, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released, unless otherwise lawfully held.

Dated and delivered at Nairobi this 27th September, 2007.

J. B. OJWANG

JUDGE

G.A DULU

JUDGE

In the presence of –

Appellant in person

Ms. Gateru for State

Tabitha/Eric – Court Clerk