



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL 43 & 62 OF 2003**

**(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 178 of 2002 K.Kirui { S.R.M.})**

**FREDRICK NDUNGU MWANGI.....1<sup>ST</sup> APPELLANT**

**JOHN MACHARIA KIMANI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

Fredrick Ndungu Mwangi (*hereinafter referred to as the 1<sup>st</sup> appellant*) and John Macharia Kimani (*hereinafter referred to as the 2<sup>nd</sup> appellant*) were jointly charged with others who were acquitted by the trial court with the offence of **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that on the 18<sup>th</sup> October 2001, the appellants jointly robbed No.34630 PC Thomas Kingoo of one Revolver.38 S/No.128022 loaded with six rounds of ammunition, Ksh.2000/= and one torch and at or immediately before or immediately after the time of such robbery, while armed with pangas and rungus, used personal violence to the said PC Thomas Kingoo. When the appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, the appellants were convicted as charged and sentenced to death as is mandatorily provided by the law. The appellants were aggrieved by their conviction and sentence and each filed a separate appeal to this court.

At the hearing of the appeal, the two separate appeals were consolidated and heard together as one. The appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted based on insufficient and contradictory evidence of identification. They were aggrieved that they had been convicted based on incredible evidence of the recovery of the pistol which was stolen from the complainant. They faulted the trial magistrate for not considering the totality of the evidence adduced and properly evaluating it and therefore reaching an erroneous conclusion that the appellants were guilty of the offence charged. They were aggrieved that they had been convicted based on evidence that fell short of establishing the ingredients of the offence of Robbery with violence. They faulted the trial magistrate for finding in favour of the prosecution against the weight of evidence. They were finally aggrieved that the trial magistrate had not considered their defence before he arrived at the said decision convicting them.

At the hearing of the appeal, the appellants presented oral submissions in support of the appeal. The 1<sup>st</sup>

appellant submitted that the complainant in the case, PW1, PC Thomas Kingoo testified that he had recognised his attackers although the robbery took place at night. He submitted that the complainant did not tell the court the source of light that enabled him to recognise the persons who attacked him. He maintained that the complainant did not give a credible explanation of what role each of his attackers played during the robbery. He reiterated that the complainant had testified that he was held from behind and cut five times on his head; the complainant could not therefore be in a position to identify his attackers. In view of the fact that the attack was abrupt and unexpected, the complainant could not have been in a position to positively identify his attackers, taking into consideration that the attack took place at night. The 1<sup>st</sup> appellant argued that if the complainant had indeed seen his attackers and identified them, he could have shot them with the pistol that was in his possession at the time of the attack.

The 1<sup>st</sup> appellant reiterated that the evidence adduced by PW2, the person who assisted the complainant to walk to the police station, was clear. PW2 testified that the complainant had not given the description of the persons who attacked him. Neither did the complainant give a description of his attackers to the police when he made the initial report to the police. The 1<sup>st</sup> appellant urged this court to ignore the evidence of the Government Analyst which allegedly established that there was blood in the panga which was retrieved from his house. He wondered how the Government Analyst could have identified the blood type in the said panga yet the police officers who recovered the said panga had testified that the same had been washed. He took issue with the evidence of the arresting officer who gave contradictory evidence of where the said panga was recovered from. He submitted that the prosecution adduced evidence that the said panga was recovered from two houses i.e. his house and that of his co-accused who was acquitted by the trial court. He urged this court to evaluate the totality of the evidence adduced and find that the prosecution had failed to establish the charge against him. He urged the court to allow the appeal.

The 2<sup>nd</sup> appellant submitted that PW4 Cpl. Jeremiah Musyoki had testified that he was found in possession of the pistol which was robbed from the complainant. The 2<sup>nd</sup> appellant maintained that PW4 was not present when the said pistol was allegedly recovered in his possession. He submitted that he was arrested by PW4 because of an existing grudge with the said police officer. He submitted that the police officers who arrested him were not called to testify during trial. He explained that in the circumstance of this case, it was important for the officers who arrested him to testify before the trial court. He submitted that there was no evidence which was adduced by any other witness to corroborate the testimony of PW4 that he had been found in possession of the said pistol. He took issue with the fact that the investigating officer did not testify during trial. He further submitted that when the pistol was recovered by the police, the same was not dusted to establish whose fingerprints it contained. He reiterated that other than the evidence of the recovery of the pistol, there was no other evidence that connected him with the robbery. He maintained that the trial at the subordinate court was irregularly commenced because he did not take plea. He submitted that the police officer who prosecuted the case at the time plea was taken was unqualified prosecutor. He urged the court to allow the appeal and quash his conviction.

Miss Opati for the State opposed the appeal. She submitted that the robbery took place on the 18<sup>th</sup> October 2001 between 10.00 p.m. and 11.00 p.m. as the complainant was walking back to Molo Police Station. She submitted that the complainant was attacked by a group of five armed robbers and robbed of his pistol together with six bullets, Ksh.2000/= and a torch. She submitted that the complainant recognised the 1<sup>st</sup> appellant as one of the attackers as he knew him prior to the robbery incident. On the following day, after the complainant had identified his attackers, the police went to the house of the 1<sup>st</sup> appellant and found a freshly washed panga hidden behind a cupboard. DNA profiling was done by the Government Analyst who linked the panga to the attack of the complainant. She therefore submitted that the evidence of identification of the 1<sup>st</sup> appellant by the complainant was corroborated by the evidence of the panga which was recovered in his possession.

In respect of the 2<sup>nd</sup> appellant, Miss Opati submitted that the 2<sup>nd</sup> appellant was arrested on the 28<sup>th</sup> November 2001 in another scene of robbery and the pistol which was robbed from the complainant together with two rounds of ammunitions was found in his possession. She explained that the 2<sup>nd</sup> appellant did not give an explanation of how he came to be in possession of the said pistol. She submitted

that the trial magistrate had correctly applied the doctrine of recent possession and therefore correctly drawn the inference that the 2<sup>nd</sup> appellant, having been found with the pistol which was robbed from the complainant, had participated in the robbery of the complainant. She submitted that any defects in the proceedings would be curable under the provisions of **Section 382** of the **Criminal Procedure Code**. She reiterated that the prosecution had established the charge of robbery with violence against the appellants to the required standard of proof beyond reasonable doubt. She urged the court to dismiss the appeal.

The duty of this court as the first appellate court was set out by the Court of Appeal in **Okeno vs Republic [1972] E.A 32** at page 36 where it was held that;

***“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination (Pandya vs Republic [1957] E.A 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala vs R.[1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] E.A 424.”***

In the present appeal, we have re-evaluated the evidence adduced before the trial magistrate and considered the rival submissions made by the appellants and by Miss Opati for the State. The issue for determination is whether the prosecution adduced evidence which established the guilt of the accused persons to the required standard of proof beyond reasonable doubt.

The 1<sup>st</sup> appellant was convicted based on the evidence of identification by the complainant and the forensic evidence which connected a panga that was allegedly found in possession of the 1<sup>st</sup> appellant to the attack of the complainant during the robbery. According to the complainant (PW1), he was accosted by robbers as he was walking to the Molo Police station on the night of the 18<sup>th</sup> October 2001. The complainant was attacked between 10.30 p.m. and 11.00 p.m. He testified that he was attacked by a gang of five robbers who suddenly held him from behind and cut him five times on the head with a panga. He recalled that he was robbed of his pistol during the said robbery. He testified that he identified the 1<sup>st</sup> appellant and his co-accused in the lower court (*who was acquitted*) as being among the persons who attacked and robbed him. He testified that he was able to identify the 1<sup>st</sup> appellant because he had seen him by the lights from a nearby building. It was this evidence that the trial court decided constituted sufficient evidence of identification of the 1<sup>st</sup> appellant.

This court notes that the identification of the appellant by the complainant was an identification which was made in difficult circumstances. This court is aware that it has to cautiously treat the evidence of identification by a single witness particularly when the same was made in difficult circumstances. To convict an accused person based on such evidence of identification, this court must be certain that such evidence was watertight and free from the possibility of error. In the event that there will be doubt, then the court must secure other evidence that would corroborate such evidence of identification. (See **Maitanyi vs Republic [1986] KLR 198 at page 200**).

The complainant testified that he was suddenly attacked and robbed of his pistol. In the process of the attack, he was injured and bled profusely from the cut wound injuries that he was unable to retrace his way back to Molo Police Station. It was evident that due to the nature of the attack during the robbery, the complainant could not have been in a position to positively identify his assailants. If indeed the complainant saw his assailants, he could have been in a position to use his pistol and fend off the attack. As it were, the attack surprised the complainant and that was the reason why he was incapacitated by the robbers. Upon evaluating the evidence of identification adduced by the complainant, and taking into consideration that the attack took place at night, we are unable to reach a determination that the complainant positively identified his attackers.

The evidence which the prosecution sought to rely on to corroborate the said evidence of identification *i.e.* that of the alleged recovery of a panga from the house of the 1<sup>st</sup> appellant which had human blood stains was inconclusive. The report which was sent to the Government Chemist for analysis did not have any findings that could connect the said panga to the attack on the complainant. In fact, the Government Chemist made no findings on the samples that were delivered to him. In the circumstances therefore, the prosecution did not establish, to the required standard of proof beyond reasonable doubt, that it was the 1<sup>st</sup> appellant that robbed the complainant. The evidence adduced was insufficient to secure the conviction of the 1<sup>st</sup> appellant. His appeal will therefore be allowed.

As regard the 2<sup>nd</sup> appellant, he was convicted based on the evidence of the recovery of the pistol which was robbed from the complainant. The robbery took place on the 18<sup>th</sup> October 2001 at Molo. The said pistol was recovered by PC Kurgat and Cpl. Sigei allegedly from the 2<sup>nd</sup> appellant on the 28<sup>th</sup> November 2001 at Nakuru. The said police officers did not offer their testimony before the trial court. This court cannot therefore be certain as to the circumstances under which the said pistol was recovered allegedly in possession of the 2<sup>nd</sup> appellant. PW4 Cpl. Jeremiah Musyoki testified that he found the 2<sup>nd</sup> appellant already arrested by the said PC. Kurgat and Cpl. Sigei. His testimony therefore did not illuminate to the court the circumstances of the arrest of the 2<sup>nd</sup> appellant. For the doctrine of recent possession to apply to the 2<sup>nd</sup> appellant, the prosecution was required to establish that the said pistol that was robbed from the complainant was found in possession of the 2<sup>nd</sup> appellant, so soon after the said robbery.

An essential ingredient to establish the doctrine is that the prosecution must establish where and when the stolen item was found in possession of the person so accused. In the present case, the prosecution failed to connect the said pistol to the 2<sup>nd</sup> appellant. No evidence was adduced by the prosecution to establish the circumstances under which the said pistol was allegedly recovered in possession of the 2<sup>nd</sup> appellant. There was no sufficient evidence to connect the 2<sup>nd</sup> appellant to the robbery of the complainant. The 2<sup>nd</sup> appellant cannot therefore be categorically said to have committed the offence. His appeal is similarly allowed.

The upshot of the above reasons is that the appeals filed by the appellants are allowed. Their convictions quashed. The death sentences imposed set aside. The appellants are ordered released from prison and set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

**DATED at NAKURU this 3<sup>rd</sup> day of December 2007**

**M. KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**