REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 351 of 2004

MARTIN ARTHUMAN WANJALA ……..…….…….. APPELLANT

VERSUS

REPUBLIC ……..……..……RESPONDENT

(From original conviction and sentence in Criminal Case Number 82 of 2003 of the Chief Magistrate's Court at Nairobi –W. A. Juma, S.P.M)

JUDGMENT

The Appellant, *MARTIN ARTHUMAN WANJALA alias MATO* was jointly charged with five others with three counts of robbery with violence contrary to Section 296 (2) of the Penal Code. Following a full trial the Appellant alone was convicted whereas his co-accused were all acquitted. Upon conviction the Appellant was sentenced to death on all the counts by the Learned Magistrate. In so doing the Learned Magistrate fell into error. Logically, a convict cannot die more than once. In sentencing the Appellant as aforesaid, the Magistrate was suggesting that the Appellant could be executed three times over. This is ofcourse not possible nor feasible. What the Learned Magistrate ought to have done in the circumstances is to sentence to death the Appellant on one count only and leave the other counts in abeyance. Or if as in the instant case she was minded to sentence on both counts, she ought to have stayed and or suspended the execution of the death sentence in the other counts pending the execution of the sentence in count one. We reiterate that the practice of sentencing an accused person to death in more than one capital robbery which is gaining currency of late in our trial Courts ought to stop. It is our hope that the trial Courts will heed this advice and act accordingly.

The Appellant was aggrieved by the conviction and sentence and accordingly lodged this Appeal contesting his conviction on the grounds that his identification was not free from possibility of error. That recovered exhibits were not within his exclusive control, that the Prosecution case was not proved beyond reasonable doubt, that the Learned Magistrate erred in believing the Prosecution case, that the Appellant led to the arrest of the co-accused and finally that the rejection of the Appellant's defence by the Court was not proper.

The Prosecution case was that PW1 who was the Complainant in Court 1 was on 27th September, 2002 at about 7.30 p. m. on her way to the house at Harambee Police Lines. As she made to branch to her residence, two people passed by and suddenly she was held by the neck and knocked down on the road. She momentarily closed her eyes due to the pain. In the process her handbag containing her Certificate of Appointment (she was an Inspector of Police), Police bus pass, Spectacles, office keys, Mobile phone – Motorolla V61 and charger were snatched from her. They also snatched from her a paper bag containing groceries that she had purchased. When she opened her eyes she saw a member of the gang holding her bag and one of them who was tall demanded money from her and boxed her in the mouth. They continued assaulting her as they demanded money. Eventually they took her aside and searched her as she maintained that she had no money. All of a sudden the robbers then ran into Jericho estate. It was the evidence of PW1 that in the process of robbery she was able to recognise two of the robbers. One was tall with a big head and had injuries on the right side of the head, and at the front. The other robber was short and wore a white shirt. PW1 was able to recognize these two because it was not dark. PW1 then reported the incident to Buruburu Police Station. She thereafter recorded a statement with Police and was issued with a P3 Form that was later completed a month later. Subsequently PW1 received a telephone call from CID Bururburu requesting her to attend an identification parade. In the parade, she was able to identify the tall man who had injuries on the right part of the head. That person is the Appellant.

PW2, Kennedy Masero Otwere was the Complainant in count two. According to him, on 15th October, 2002 at about 7.15 p. m. he left his house to go to his kiosk nearby. As he walked along, a boy came from behind and passed him. He then turned back. Suddenly five people emerged from the side and held him, chocking him in the process. They took him to a dark place and frisked him and took his 1800/=, Seiko wrist watch, 3 bank cards, shopping card for Metro Supermarket, business cards and loose key. One of the robbers then instructed the other called Mato to take PW2's wallet from his trouser pocket. When done they all ran towards Jericho Estate. A neighbour of PW2 came by and took him to hospital. On his way home from hospital, he met PW1 with other Policemen from Harambee at the scene where he had been robbed looking for documents. PW1 claimed to have been robbed at the scene. PW2 told PW1 of his own experience at the scene a few moments earlier. PW2 was categorical that he recognised the robbers and in particular one called "Mato" whom he knew very well. That the said "Mato" had a scar on the head. According to PW2, the incident happened at 7.15p.m when it was not dark and that there was enough light that enabled him to identify Mato. He reported the incident to Buruburu Police Station and was issued with a P3 Form which was duly filled. Sometimes later PW2 was called to an identification parade and managed to identify three of the robbers one of them being "Mato", the Appellant herein.

PW3 Kennedy Oduor Onyango was the Complainant in count 3. It was his testimony that on 15th October, 2002 at about 8.30 p. m. he was in his house in Buruburu with his wife PW4 when he heard noise at the gate. 6 – 7 minutes later he saw 3 people enter his house. One of them was armed with a machine gun. PW3 and his wife were ordered to lie down. As he lay down he saw other people walk into the house. In total there were now 5 (five) robbers. They went straight for the T. V. yet others went to the kitchen and removed water bottles from the fridge. Yet others went to the bedroom and picked suitcases. The one in the bedroom took a tie and tied up PW3 and also took a pair of socks and stuffed them in his mouth. They then picked clothes, T. V., VCR and radio cassette and put them in a suitcase. They packed everything and went out with three briefcases and locked the door from outside. PW4 managed to extricate herself and proceeded to untie PW3. They then called the Police. In the meantime PW3 took the inventory of what had taken place. One day, CID Personnel from Buruburu Police Station called PW4 and informed her that some stolen items had been recovered. Together with PW3, they went to the Station and managed to identify some of the items stolen from them viz, VCR, one suitcase, one travelling bag, LG T.V. set, Radio cassette, one extension cable and a pair of shoes. They produced purchase receipts from the dealers in verification of the facts that the items were theirs.

Subsequent thereto an identification parade was conducted and PW3 was able to identify the Appellant. PW4 was however unable to identify any of the robbers. According to PW3, electricity light was on in the house during the entire robbery. That the robbery took 20 – 30 minutes. PW3 identified the Appellant by his physical features most outstanding being the big eyes. He gave the description to the Police. That person is the Appellant.

On 15th October, 2002 at about 8 p. m., PW5, Jackson Rioba was in Jericho Lumumba on official duties with P. C. Nzioka, and P. C. Kalaila when they saw a group of five youths crossing from Bururburu side towards Jericho Estate. They ordered them to stop. Instead of stopping, the said youth started shooting at them. The said Police officers returned fire. Some of the youth dropped the luggage they had and ran off. The others ran whilst with the luggage. The Police pursued one with a big suitcase and managed to arrest him. Just before he could be arrested he dropped the suitcase. When questioned about the luggage, he said he had no idea. The suitcase was then opened and therein was found T. V., Video, 3 pairs of shoes and a small extension cable. In the small bag there was a Panasonic music system.

The suspect was then escorted to Jogoo Police Station together with the exhibits. The suspect arrested as aforesaid was the Appellant.

PW11 was the investigating officer. He received information that the Appellant had been arrested and detained at Jogoo Police Station. He transferred the Appellant to Buruburu Police Station together with the exhibits. On searching the small bag in the suitcase, he came across a small receipt book with the names Diagnostic Imaging Services. It also had an address as well as telephone numbers. Using the telephone number, he was able to get in touch with PW3 and PW4. Apparently PW4 was an employee of Diagnostic Imaging Services as a Medical Secretary. PW3 and PW4 were able to positively identify the T. V. and video recorder as theirs by production of receipts. Following further interrogation, the Appellant volunteered information that led to the arrest of the rest of the co-accused.

Put on his defence, the Appellant in his unsworn statement of defence stated that he was on his way home on 15th October, 2002 when he met two Police officers who stopped and questioned him regarding where he was coming from and where he was headed. He explained himself but they still arrested and took him to Buruburu Police station where he was held for a week before being charged in Court with people he did not know.

In support of his grounds of Appeal the Appellant tendered written submissions. We have carefully pondered over the same. The Appeal was opposed. Mrs. Gakobo Learned State Counsel, in opposing the Appeal submitted that the identification of the Appellant by PW1, PW2 and PW3 was watertight. That this identification was further fortified when the witnesses were able to pick out the Appellant in subsequent identification parades. Counsel further submitted on the circumstances surrounding the Appellant's arrest. That when arrested, he was found in possession of some property, which property was properly and sufficiently identified by PW3 and PW4 as theirs. To Counsel therefore, the evidence of identification and recovery of property on the Appellant sufficiently connected the Appellant to the crime.

We have put the evidence adduced during the trial to fresh scrutiny and evaluation so as to draw our own conclusions as to whether the conviction and sentence can be sustained. This is as expected of us as a first Appellate Court. See ***OKENO VS REPUBLIC (1972) EA 32 and NGUGI VS REPUBLIC (1984) KLR 729.***

The Appellant's conviction was predicated upon two grounds, visual identification and the recovery from him of some of the items stolen from both PW3 and PW4. moments after the robbery. What we have to decide is whether that evidence was reliable and free from possibility of error, so as to find a secure basis for the conviction of the Appellant. In ***WAMUNGA VS REPUBLIC, CRIMINAL APPEAL NO. 20 OF 1989 (KISUMU) (UNREPORTED)*** **the Court of Appeal observed:-**

"……Evidence of visual identification in Criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification….."

The Learned Magistrate in her analysis of the evidence adduced before her on the issue of identification concluded thus:-

"…..The main issue is that of identification of those who robbed the Complainants. The three incidents happened at night one was inside the house where there was light. The others were outside but the witnesses say certain features about the Appellant. That he was tall and had injuries on the side of the head and he also had big head. The person who witnessed the first two robberies and who it is claimed knew the robbers was not availed as a witness. It is therefore the combined word of the Complainants against the suspects.

The circumstances surrounding the arrest of the first accused are different from others. He was arrested after a robbery against the third Complainant…. The suspect was positively identified by PW1, PW2 and PW3 and I do not see how they all ganged (sic) up just to point a finger at him…."

With respect to count 1, PW1 testified that when she was attacked, it was not yet dark. It was about 7.30 p. m. According to this witness she was able to see the Appellant clearly as it was not too dark. This aspect of the matter was not challenged at all by the Appellant. Although the attack on this witness would appear to have been sudden and although at some point she closed her eyes, she nonetheless was able later on to open them and see the Appellant and his accomplices. The robbers even talked to her as they frisked her for money. In the process, PW1 was able to note certain features about the Appellant namely that he was tall and had an injury on the head.

The trial Court was able to observe and see the scar at the area that PW1 claimed the Appellant had been injured. We are satisfied that the conditions obtaining at the scene of crime were not such that PW1 could not have identified the Appellant. We note that one month later, the Appellant was subjected to an identification parade by PW9 whereat PW1 easily picked him out. The Appellant claims since that the identification parade was conducted a month later, PW1's memory could have faded and the possibility of mistaken identity cannot be ruled out. We do not think that one month is such a long period of time that one's memory could easily have faded. In any event the Appellant didn't raise the issue during the conduct of the parade nor make such comments in the parade forms. We have perused the said forms and noted that the Appellant was satisfied with the manner the parade was conducted. In our view the identification of the Appellant at the scene of crime and in the identification parade by PW1 cannot be faulted.

PW2 was attacked at the same place 15 minutes before the attack on PW1. PW2 also stated that it was not yet dark when he was attacked. He stated that:-

"…At 7.15 p. m. it was not dark there was enough light to recognise somebody…."

In the course of the robbery he recognised one of the robbers called "Mato". He is a person who was well known to the witness. He also confirmed that the said Mato had a scar on the head. As the robbery was in progress, one of the robbers indeed called out Mato and instructed him to take the wallet from this witness's pocket. The witness gave out the name Martin in his first report to the Police which is one of the Appellant's names. He informed the Police that he knew where the Appellant resided. The Appellant does not dispute nor deny that his name is Martin Alias Mato. PW2 was also able to identify the Appellant in an identification parade. However in our view this identification parade was unnecessary as PW2 already knew the Appellant. All said and done, we are satisfied that PW2's identification of the Appellant cannot also be faulted.

In count 3 it was the evidence of PW3 and PW4 that though they were robbed at about 8. 30. p. m. electricity light was on in their house throughout the attack. The robbers were not disguised at all. They spent a lot of time in the house picking items and packing them in the suitcase. Indeed according to PW3 the robbery took 20 – 30 minutes. PW3 was able to see the robbers as they walked into the house before he was ordered to lie down. The robbers didn't blindfold PW3 nor PW4. These witnesses were therefore able to see the robbers as they tied them up and also as they moved up and down in the house. We are aware that:-

"…..It is essential to ascertain the nature of light available, its size and position relative to the suspect are all important matters helping to test the identification with the greatest care. It is not a careful test if none of these matters are unknown……"

See ***MAITANYI VS REPUBLIC (1986) KLR 198.*** The Learned Magistrate in her evaluation of the evidence failed to make inquiries in terms aforesaid which was an error. However on our own analysis of the evidence we are satisfied that there was electricity light in the house throughout the robbery. As the Appellant and his cohorts were not hooded and PW3 was not blindfolded throughout the operation and since his view was not at all impeded as he lay down and the robbery having been committed over a long period of time, we are satisfied that PW3 had ample time and opportunity to observe and identify the Appellants. Infact he in the process noted some physical features of the Appellant and described them to the Police. In a subsequent identification parade conducted by PW7, PW3 was able to positively identify the Appellant. We have looked at the parade forms and noted that the only complaint that the Appellant raised was that the witness took a very short time to identify him. We do not think that that is a valid complaint. There is no requirement that a witness must take a lot of time on an identification parade before pointing out a suspect.

The identification of the Appellant was further fortified in the manner and circumstances of his arrest. According to PW5 whilst on patrol duties with other Police officers on the night the robbery was committed on PW3 and PW4, he saw a group of about 5 youths crossing over to Jericho Estate from Buruburu. They ordered them to stop but the youth shot at them as they ran away. PW5 and his colleagues chased one of the youth who is the Appellant and managed to arrest him. He had been carrying a suitcase as he ran and when he was about to be arrested, he dropped the suitcase. When the suitcase was opened it was found staffed with items. When the Appellant was asked about the suitcase he said he had no idea. Some of the items in the suitcase were subsequently positively identified by both PW3 and PW4 as those stolen from them. We note that the Appellant's arrest was so soon after the robbery on PW3 and PW4. Although the chase and subsequent arrest of the Appellant was at night, PW5 never lost sight of the Appellant. The Appellant disputes the Police version of his arrest. According to him the case was a frame up. The Appellant and PW5 did not know each other previously. There was no grudge among them that could have perhaps led PW5 to frame him with the case. We also note that from his statement he claims that he was arrested and taken straight to Buruburu Police Station. This is not correct as according to the evidence on record, when arrested, he was first taken to Jogoo Police Station. We do not think that the Appellant's story is credible.

In the suitcase, a T. V. set, a VCR video, three pairs of shoes and an extension cable were found. PW3 and PW4 positively identified the items as belonging to them. According to PW11, the investigating officer, he was able to contact the two witnesses using the telephone details for Diagnostic Imaging Services which were in a receipt book he found in a small bag in the suit case. This is where PW4 used to work. If indeed the Appellant was framed in the case by the Police, where would the Police have found the aforesaid items and in particular the receipt book containing the details of where PW4 worked. The Appellant was arrested on the same night of the robbery. The items were similarly recovered on the same night. The Appellant takes the position that the Prosecution did not prove that he was in exclusive possession of the suit case upon his arrest and that that the Prosecution did not establish that he was part of the gang that ran away on being ordered to stop by PW5.

We think that this submissions by the Appellant are without merit. PW5 categorically stated that he saw the Appellant with the suit case. He

together with the other Police offices pursued him. As the chase ensued, the Appellant was still with the briefcase. It was only after the Appellant realized that he was about to be caught that he suddenly dropped the suitcase. This evidence was not at all challenged. PW5 also testified that the youths that were involved were 5 in number and had firearm. PW3 and PW4 testified that they were robbed by a group of 5 youths one of whom was armed. This cannot be a mere coincidence. In pursuing the Appellant, it is clear from the record that PW5 never lost sight of him. Further it would be noted that when ordering the youth to stop, the Police officers were a mere 50 metres away. They were thus in close proximity with the youths.

The evidence of identification and recovery of items which were positively identified by PW3 and PW4 sufficiently connected the Appellant with the offence. Even if there had been no evidence of identification, we are satisfied that the Appellant could still have been convicted on the doctrine of recent possession. In the case of ***ERICK OTIENO ARUM VS REPUBLIC, CA NO. 85 OF 2005*** (unreported) the Court of Appeal dealing with the doctrine of recent possession stated:-

"…….In our view, before a Court of law can rely on the doctrine of recent possession as a basis of conviction in a Criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly that, that property is positively the property of the Complainant, thirdly that the property was stolen from the Complainant, and lastly, that the property was recently stolen from Complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses……"

We have no doubt at all that the possession was proved. There is evidence from PW5 that the Appellant was running with the suitcase. Just before he was arrested he dropped the suitcase. Although at the time of arrest the Appellant was not in physical possession of the same, we are nonetheless satisfied from the foregoing circumstances that indeed the Appellant had possession of the same just before his arrest. It follows therefore that the property found in the briefcase by PW5 was in possession of the Appellant. This was shortly after the robbery on PW3 and PW4. These two witnesses positively identified some of the items as theirs both physically and also through documentary evidence. The Appellant offered no explanation as to how he came by the said property. It can therefore be safely assumed and concluded that he was part of the gang that robbed PW3 and PW4.

Accordingly, we have no hesitation in coming to the inevitable conclusion that the Appellant's Appeal lacks merit. It is accordingly dismissed. As for the sentence, we wish to correct error by the Learned Magistrate pointed out at the beginning of this Judgment. The Appellant shall suffer death in count one only. The sentence in respect of counts II and III shall be stayed and or kept in abeyance pending the execution of the sentence in Count I.

Dated at Nairobi this 23rd day of January, 2006.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Miss Gateru for State

Erick/Tabitha Court clerks

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LESIIT

JUDGE

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MAKHANDIA

JUDGE