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

Criminal Appeal 711 of 2003

(From Original Conviction and Sentence in Criminal Case No.9277 of 2002 of the Chief Magistrate's Court at Kibera - Ms Mwangi).

STANSLAUS OPIYO WANDERA…….....
……..APPELLANT

VERSUS

REPUBLIC …….....…..…...RESPONDENT

JUDGMENT

STANSLAUS OPIYO WANDERA, the Appellant herein, was convicted of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to death as mandatorily provided by the law. He was aggrieved by the conviction and sentence. He therefore lodged this Appeal. In his three grounds of Appeal, the Appellant faults the Learned Magistrate for convicting him on uncorroborated identification evidence, wrong application of the doctrine of recent possession and finally the Learned Magistrate's failure to attach due weight on the defence advanced by the Appellant.

The evidence before the Learned Principal Magistrate (Ms Mwangi) was to the effect that the Complainant, ***ALLAN BOBBE*** was asleep in house along Riverside Drive when at about 4 a.m. on 14th December 2002 he was woken up by robbers who had gained entry in to his residence. The lights were off but the robbers managed to tie his hands and stole various items set out in the charge sheet. He was also assaulted in the process. When the four robbers left, the Complainant managed to untie himself and proceeded to Nairobi Hospital for treatment. He never managed to identify any of the robbers.

On the same day at about 6.30 a.m., PW3, a Police officer was coming from guard duties at Pakistan Embassy along Ring Road Westlands when he bumped into a person who informed him that there were some people behind him who looked suspicious and were carrying some items. He approached the said people and was able to recognise three of them including the Appellant. The one carrying the television set jumped over the fence after trying unsuccessfully to snatch PW3's gun. The Appellant too ran away. However, as PW3 knew him, he was later to lay an ambush and on 21st December 2002 had the Appellant arrested. He was then charged with the instant offence.

Put on his defence, the Appellant elected to give an unsworn statement. He stated that on 14th December 2002 as a mechanic, he went about his duties in Westlands until 1 p.m. and left. He continued the routine until Friday at around 7 p.m. when he was arrested by police officers as he was taking tea near his place of work. He was taken to his house and a search conducted which yielded nothing. He was then taken back to Westlands where he was accused of holding a motor vehicle. Later he was taken to Police Station and was later charged with an offence he knew nothing about.

In support of the Appeal, the Appellant tendered written submissions that we have carefully read and considered. On identification the Appellant submits that he was convicted on the evidence of a single identifying witness (PW3) that was not sufficiently corroborated. On the doctrine of recent possession, the Appellant submits that there was no evidence that the Television Set allegedly recovered by PW3 was found in his possession.

Finally, on his defence, the Appellant submits that the Learned Magistrate failed to appreciate his well set up alibi defence which needed adequate consideration before being rejected.

In supporting the conviction of and sentence imposed on the Appellant, the Learned State Counsel, Mrs. Kagiri, submitted that this was a case of recognition as the Appellant was known to PW3 who caused his arrest. The Learned State Counsel further submitted that a Television set stolen during the robbery was recovered from the Appellant barely 2 hours after the incident. Consequently the trial Court was right in invoking the doctrine of recent possession in convicting the Appellant. As for the Appellant's defence, it was the view of the Learned State Counsel that the Appellant's defence did not shake the prosecution case.

As we consider the submissions by the Appellant as well as the State Counsel, it must be remembered that as this is a first Appeal we are duty bound to examine and reevaluate the evidence on record to reach our own conclusions in the matter, always remembering that we had no advantage, as the trial Court did, of seeing and hearing the witnesses – See ***OKENO VS. REPUBLIC (1972) EA 32.***

It is also an established principle that an Appeal Court will not normally interfere with a finding of fact by the trial Court, whether in a Civil or Criminal case, unless it is based on no evidence, or on misapprehension of the evidence, or the Magistrate is shown demonstrably to have acted on wrong principles in reaching the findings. See ***CHEMAGONG VS. REPUBLIC (1984) KLR 611.***

There is no doubt that the trial Court heavily relied on the evidence of PW3 to sustain the conviction of the Appellant. He is the one who purported to identify the Appellant. This was evidence of a single witness. In ***RORIA VS. REPUBLIC (1967) EA*** **583** ***AT PAGE 584,*** Sir Clement De lestang V-P stated:

"……*A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardner, L.C said recently in the House of lords in the course of a debate on Section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts.*

"*There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – If there are as many as ten, it is in a question of identity……..That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification".*

In the instant case, PW3 was coming from duty at around 6.30 a.m. The light conditions prevailing were not disclosed and whether PW3 had a clear view of the appellant as to be able to recognise him was also not disclosed. It should be noted that, PW3 in his testimony stated that:-

"……***I went with the one with the T.V. and I saw the accused where he was hiding. He was carrying a Somali sword…..***"

If the Appellant was hiding, isn't it possible that the witness' view was impeded. Further it is not clear for how long this witness kept the Appellant under observation. It would appear that it was not long though. These inquiries were necessary to eliminate possibility of mistaken identity. See ***REPUBLIC VS. TURNBULL (1976) 3 ALL ER.***

It was the case of the Prosecution that the Appellant was known to PW3, hence this was a case of

recognition rather than identification. In ***ANJONONI & OTHERS VS. REPUBLIC (1980) KLR 50,*** the Court of Appeal observed-

"…….*The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was however, a case of recognition, not identification of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other……"*

It is not clear from the record how PW3 knew the appellant. All that the witness said was:

"….*I know you by your physical appearance ……"*

Assuming that indeed PW3 knew the appellant, one would have expected that PW3 would immediately record the incident in the OB giving the particulars of the Appellant. This was not however the case. Although the robbery is alleged to have been committed on 14th December 2002, the incident was only reported and entered in the OB on 20th December 2002. What makes the evidence of PW3 even more suspicious is the fact that he testified of recognizing three people in the following manner

"….I know all the 3 by their physical appearance ……"

Before then he had stated

"… *The one carrying T.V. was somebody I used to see in Westlands before…… The one who stood abit away was called John and the other one Mwana……"*

It is clear from the foregoing that PW3 did not at all recognise the appellant. Had he done so, he would have specifically stated so as in the case of the other three. It should be remembered that according to PW1, the robbery was committed by 4 and not 3 people.

In convicting the appellant, the learned magistrate observed

"……. The accused was the one carrying the T.V. when he met with PW3 on the morning of 14th December 2002……."

This extract is a gross misinterpretation of the evidence. Nowhere in evidence is it alluded to the fact that the Appellant was the one in possession of the T.V. on the material day. PW 3 in his testimony on the issue stated:

"……I went with the one with the T.V. and I saw accused where he was hiding. He was carrying a Somali sword…… the one carrying the T.V jumped over the garage door and laid on the ground and the members of public hit him with a stone. He fell down and dropped his jacket and he ran away……"

The Appellant has submitted and rightly so in our view that in so holding that the appellant was the one carrying the T.V. when that was not the case, the Learned trial Magistrate failed to consider properly the evidence presented by the prosecution witnesses.

On the doctrine of recent possession the learned trial Magistrate delivered herself thus:

"…….. The Court observes that although PW1 was not able to identify his assailants, the fact that the accused was found in so recent possession of the items stolen from PW1'S house is clearly a sign that he was part of the people who robbed PW1 and used violence injuring him……"

As already stated there is no evidence that the Appellant was found in possession of any of the items

stolen from the Complainant. If at all the Appellant was found in possession of anything, it was a Somali sword.

A Somali sword was not among the items stolen from PW1. The Appellant was apparently found hiding. The person who had the T.V. disappeared leaving behind the T.V. There is no suggestion that the Appellant was in the same company with the person who had the T.V. After all the Appellant was alleged to have been found hiding. He could have been hiding for some other reason and not necessarily because he was among those who raided and robbed the Complainant.

The doctrine of recent possession could only have been invoked had it been established by the evidence that when arrested the Appellant was found in possession of the T.V. It is instructive to note that the Appellant was arrested on 21st December 2002, six days after the robbery. His house was even searched and nothing incriminative was found in his possession. The person who had the T.V as already stated escaped. It is essential that before the doctrine of recent possession is invoked to establish:

"…… *whether the appellant was the man actually arrested with the stolen goods…….."*

See *JAGAT SINGH VS. REPUBLIC (1953) EACA 283.*

Could the appellant have been in constructive possession of the T.V.

The evidence on record seem to suggest otherwise. The person with the T.V. was walking along the road, whereas the Appellant was in hiding. In those circumstances it is difficult to say for certain whether the person with the T.V. was in the same company as the Appellant so that an inference can be drawn that the appellant was in actual constructive possession of the T.V.

It has always been said that it is not the duty of the trial Court to endeavor to make a case against an accused person where there is none.

"…… In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in counsel's speeches……."

See *OKETHI OKALE VS. REPUBLIC (1965) EA 555.* In our view the Learned Magistrate failed to approach the evidence on the doctrine of recent possession with the necessary circumspection.

The evidence of ownership of the T.V. left a lot to be desired. PW1 did not prove by way of documentary evidence or otherwise his claim to the ownership of the T.V. All that he said was:-

"……..*This was one of my stolen T.V Panasonic ……."*.

He did not go out of his way to say what caused him to believe that the T.V. was his. Panasonic TV's are common. In this regard therefore the evidence regarding ownership of the T.V. and hence application of the doctrine of recent possession was quite unsatisfactory.

According to PW3, he sought the permission of the O.C.S. to arrest the Appellant. Why the permission of the OCS was required in order to effect the arrest of the Appellant does not come out in the evidence. Perhaps the OCS should have been called as a witness to disclose the basis upon which he authorized the arrest of the Appellant and whether he had been given any information regarding the Appellant. Similarly it would have been advisable to call as a witness the investigating officer to shade light on the kind of investigations he conducted before preferring the charges against the Appellant. He would have tied up the loose ends in the prosecution case.

Other witnesses whose evidence appears to be vital to the just decision of the case were members of the public who are alleged to have stoned the robber who had in his possession the T.V. and also helped PW3 to carry the T.V. to the Police Station. Finally it would have been essential to call as a witness that

person who alerted PW3 about suspicious people who were behind him. All these witnesses were not called. Had they been, then their evidence no doubt would have corroborated and buttressed the evidence of PW3 as regards his alleged recognition of the Appellant. We are aware that even in cases of recognition mistakes are often made. That possibility cannot be ruled out in the circumstances of this case. No reasons were advanced by the prosecution for their failure to call these vital witnesses. As stated in the case of *BUKENYA VS. UGANDA (1972) EA 549*, the prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

The Appellant laments that his defence was not adequately considered by the trial Magistrate. This submission has considerable merit. Nowhere in the judgment of the Learned Magistrate does she advert to the defence advanced by the Appellant. The Appellant raised an alibi which the Court was duty bound to both consider and make a decision on. Unfortunately this was not done. The evidence of PW3 that founded the conviction needed corroboration so as to dislodge the Appellant's defence. In the absence of any other evidence to support, back up and or buttress the evidence of PW3, the Appellant's alibi defence would appear went unchallenged.

It is our considered view that arising out of the foregoing, the Appellant's conviction cannot be sustained. Accordingly we allow the Appeal, quash the conviction and set aside the sentence imposed. The appellant shall forthwith be released unless otherwise lawfully held.

Dated and delivered at Nairobi this 31st day of July 2006.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of:-

Appellant

Mrs. Kagiri for the State

Huka/Erick – Court Clerks