REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 380 of 2004

(From original conviction and sentence in criminal case No. 15889 of 2003 of the Chief Magistrate's Court at Makadara – Miss Karani SRM)

JOSPHAT MBUVU NDUNG'U …..……….……..…..………APPELLANT

VERSUS

REPUBLIC………………………………………………… RESPONDENT

JUDGMENT

JOSEPH MBURU NDUNG'U, hereinafter referred to as the Appellant was initially charged with the offence of robbery with violence. The particulars of the charge were that on 5th July, 2003 along Kirinyaga Road in Nairobi within Nairobi area the Appellant jointly with others not before Court robbed Esther Wangare of cash 600/=, handbag and personal documents all valued at Kshs.2,100/= and at or immediately before or immediately after the time of such robbery used actual violence. Following a full a trial in which only two witnesses testified, the Learned Magistrate found that the ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code had not been proved and thus reduced the offence to simple robbery, convicted the Appellant and sentenced him to 10 years imprisonment and thereafter to be placed under Police supervision for a further period of 5 years.

The Appellant was aggrieved by the conviction and sentence and hence lodged the instant Appeal. In his seven point Petition of Appeal, the Appellant faults his conviction by the Learned Magistrate on the following grounds:-

(i). THAT the charge was defective.

(ii). THAT the doctrine of recent possession was inapplicable in the circumstances of the case.

(iii). THAT the conviction and sentence was manifestly harsh and excessive.

(iv). THAT vital and essential witnesses were not availed.

(v). THAT the appellant's defence was not given due consideration.

The Prosecution case simply put was that on 25th July, 2003 at around 7 a. m. Esther Wangari, PW1 was headed for her place of work along Kirinyaga Road when 3 boys confronted her and snatched her bag.

She screamed and Police officer, PW2 who happened to be nearby gave chase to the boys and shot one of them in the right ankle. The one shot fell down and was found in possession of the handbag belonging to the PW1, the Complainant. The other boys made good their escape. The boy shot, injured and found in possession of the Complainant's handbag was according to PW2, the Appellant herein. He was thereafter arrested and in due course charged with the instant offence.

Put on his defence, the Appellant elected to give unsworn evidence and called no witnesses. He stated that on the material day, he was on his way to Grogan Road where he runs a Kiosk when he suddenly felt like he had been knocked down. Someone in casual clothes identified himself as a Police officer and demanded money from him. When the Appellant rebuffed his demands, he was arrested taken to Kamukunji Police Station, after which the present charges were laid against him.

In support of his Appeal, the Appellant tendered written submissions that I have carefully read and conspired. The Appeal was opposed by the State. Mr. Makura, Learned State Counsel in opposing the Appeal submitted that sufficient evidence was adduced by the Prosecution that led to the conviction of the Appellant. That the offence was committed at 7. a. m. in the morning and the Complainant clearly saw and identified the Appellant. The evidence of PW1 according to Learned Counsel was sufficiently corroborated by the evidence of PW2, the Police officer who shot the Appellant and recovered from him the bag belonging to the Complainant. Counsel further submitted that the Appellant was arrested at the *Locus in quo*. As regards the Appellant's defence, it was the Learned Counsel's view that the Learned Magistrate carefully considered the Appellant's defence before rejecting it.

In convicting the Appellant, the Senior Resident Magistrate, in a somewhat perfunctory Judgment said:-

"…***..I am satisfied that the Prosecution has proved its case to the standard required. The Prosecution evidence was consistent and well corroborated. However, I do note that the ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code have not been satisfactorily proved by the Prosecution. PW1 never mentioned any actual threat or use of violence on her at the time of the robbery neither did she mention seeing any offence (sic) weapons in the hands of her attackers. On the other hand PW3 (sic) did mention that he attackers had knives but it was stated in passing and in a very casual manner. We are not told which type of knives or how were they concealed or just exposed….. given the absence of any offensive weapons and actual or threatened violence used upon the Complainant, I am inclined to invoke Section 179 of the Criminal Procedure Code Cap 75 of the laws of Kenya and find the accused guilty of the offence of robbery contrary to Section 296 (1) of the Penal Code…..."***

It is trite that a trial Court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no Court should run away from or down play. In the same way, a first Appellate Court also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanour and the Appellate Court should give due allowance for that ***(OKENO VS REPUBLIC (1972) EA 32.)***

It is plain from the records laid before me that the conviction of the Appellant proceeded on the premises that the Appellant was identified by PW1 as being among the robbers, the chase and his eventual arrest at the *locus in quo* by PW2 and being found in possession of recently stolen items.

Dealing with identification, I doubt whether in the circumstances obtaining the identification of the Appellant at the scene of crime could have been positive and free from possibility of mistake. It would appear that the attack was abrupt and swiftly staged. There were other pedestrians at the scene of crime. The attack on the Appellant was not executed by one boy but many. According to PW2 they were about 5 boys. Time which PW1 kept the boys or atleast the Appellant under observation so as to be able to note his visual appearance and be able to identify him subsequently is unknown. PW1 could not even tell whether the intruders were armed or not, neither did she state the role played by the Appellant in the robbery. In my view and taking into account the totality of the foregoing I am far from being convinced

that the conditions obtaining at the scene of robbery could have been favourable for positive identification. It is now trite law that when the evidence before a Court of Law is mainly that of a single witness on identification, the Court has to be extra careful before entering a conviction. In that case the Court has to test with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conclusion favouring a correct identification were difficult. See ***ABDALLA BIN WENDO (1953) 20 EACA 166*** and ***REPUBLIC VS TURNBULL (1976) 3 ALL ER 519***

According to PW1 the offence was committed at 7 a. m. This was early in the morning. What was the state of lighting? No inquiries were made by the Learned Magistrate nor did the Prosecution lead any evidence pertaining to the conditions of light prevailing. It is possible that it could still be dark though it was 7 a. m. It is also possible that there was sunlight at the time. However in the absence of such inquiries, it is not possible to tell whether or not there was sufficient light that would have enabled PW1 to identify the Appellant.

The Leaned Magistrate also relied on the fact that the Appellant was chased by PW2 and arrested at the *locus in quo* to convict the Appellant. It is instructive to note that PW1 did not point out to PW2, the Appellant before the chase ensued. In her testimony regarding the issue PW1 stated:-

"…….***.I screamed there was a Police man passing by who ran and stopped then he shot at them. The other 2 ran away. The one who was shot had the handbag he fell….."***

It is clear from the above testimony that PW1 did not participate in the chase and eventual arrest of the Appellant neither did she point out the Appellant to PW2 who chased and arrested him. According to PW2 he:-

"…….***heard a scream by a woman. I ran and found 5 men running towards where I was between 2 houses so they turned to run backwards where they had come from chased them until Kirinyaga road up. I stopped them they were still refusing….. I fired one round …. I fired his right ankle. He ran ahead and fell….."***

From the foregoing it is clear that PW2 did not see the Appellant rob the Complainant. He was between houses when he heard someone screaming and then saw a group of five people run towards him. He only pursued the five people on suspicion that they could have committed an offence. The suspicion was based on the fact that when the five people saw him they changed course. In those circumstances, isn't possible that the said five people could not have been involved in the robbery involving the Complainant? That possibility is not remote considering that there were other pedestriams on the road. There is also this intrigue regarding the chase and eventual arrest of the Appellant. According to PW2, he chased them towards Kirinyaga Road. However according to PW1, he was robbed on Kirinyaga Road. The chase would appear to have been long. Can it therefore be said that the Appellant was arrested at the *locus in quo*? I entertain some doubts. It has been said that:-

"…***..The identification of a person who took part in the alleged offence and was chased from the scene of crime to the place he was arrested is ofcourse strong evidence of identification and if all the links in the chain are sound it may safely be relied upon….."***

See ***ALI RAMADHAN VS REPUBLIC CA NO. 79 OF 1985 (unreported).*** Sadly this was not the situation here. Had PW1 chased the Appellant and without losing sight of him and eventually managed to arrest him, that evidence would have been sufficient to nail the Appellant for the offence. PW2 having not seen the Appellant and his accomplices commit the offence but merely suspected then to have done so by seeing them run towards him and suddenly changing course on seeing him, cannot be the sort of evidence the Learned Magistrate should have relied on to convict the Appellant. There were certainly brakes in the links in the chain.

The Appellant was also convicted on the basis that upon arrest he was found in possession of the Complainant's stolen handbag. In so doing the Learned Magistrate indirectly invoked the doctrine of

recent possession. In my 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 the property was recently stolen from the Complainant. In the case of ***ERICK OTIENO ARUM VS REPUBLIC CRIMINAL APPEAL NO 85 OF 2005 (UNREPORTED)*** the Court of Appeal stated:-

"………***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 evince on the same cannot suffice no matter from how many witnesses…..***"

PW1 in her testimony regarding the issue testified that:-

"…***..As he was shot he dropped the handbag moved 2 steps then fell down. I witnessed with my own eyes….***"

However according to PW2 he:-

"…***..Found the handbag inside his stomach….***"

Later on ad on cross-examination by the Appellant PW2 stated that:-

"……***You fell on the handbag….***"

If these two witnesses were talking about the same thing, why should there be such contradictions. Was the handbag in the circumstances indeed found on the Appellant. There was even contradictions regarding the distance from where the Appellant was shot and where he eventually fell. According to PW1, on being shot the Appellant took two steps and fell. However according to PW2 he stated:-

"……***I fired his right ankle. He ran ahead and fell…***" (Shows distance from dock to car park outside).

In the case of ***DANKENAI RAMKISHAN PANDYA VS RPEUBLIC (1957) EA 336*** it was held that:-

"…***.Where the evidence is contradicted or is inconsistent, it should not be relied upon….***"

The contradictions and inconsistencies in this case considering that the incident was staged in a street with human traffic, the possibility of mistaken identity cannot be wholly ruled out.

Of critical importance however is the fact that the Complainant did not at all identify the handbag so recovered as being hers. Nowhere in the record is indicated that upon recovery of the handbag, the Complainant was called upon to identify the handbag. The record is completely silent as to whether the owner of the handbag ever identified it. PW1 and PW2 are all silent in their evidence as to what became of the handbag once it was recovered. It is a requirement that before the doctrine of recent possession is invoked, the property recovered must be positively identified by the Complainant. This was not the case here. We cannot assume that merely PW1 stated that her handbag was snatched during the robbery the one that was allegedly recovered from the Appellant must have been the same handbag. This is a Court of record and it has not room or place for speculation. In the premises, I think the Learned Magistrate was wrong to invoke the doctrine of recent possession to convict the Appellant.

I think that as a result of all the forgoing, the Appellant is entitled to the benefit of doubt. This Appeal is therefore allowed, conviction quashed, sentence set aside.

He is at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 29th November, 2006.

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MAKHANDIA

JUDGE

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

Appellant

Mr. Makura for State

Court clerk

………………………………………

MAKHANDIA

JUDGE