



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 831 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 1048 of 2003 of the Senior Resident Magistrate's Court at Limuru (Ezra. 0. Awino))

JOHN MWARIRI MBUGUA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 832 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 1049 of 2003 of the Senior Resident Magistrate's Court at Limuru (Ezra. 0. Awino))

PETER NJUGUNA KIMURI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The Appellant **JOHN MWARIRI MBUGUA** with **PETER NJUGUNA KIMURI** the 1st and 2nd Appellants respectively had their Appeals consolidated to facilitate the hearing. They had been charged together with one **JOHN NJUGUNA JEREMIAH** with one count of **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code. In the Alternative the 2nd Appellant was charged with **HANDLING STOLEN GOODS** contrary to Section 322(2) of the Penal Code. The two Appellants were convicted in the main count and sentenced to serve five years imprisonment with two strokes of the cane each and to be under police supervision for five years. Their co-accused who was the third accused in the case was found to be a juvenile and was sentenced to a probation term of 3 years. The Appellants were aggrieved by the conviction and sentence and thus filed this Appeal.

The Complainant was driving along Kijabe Road when he was accosted by three men. It was 6.30 a.m. or after, on the material day. The three forced him to stop at gun point and were also having panga and rungus. That they forced the door opened and robbed him of his car radio cassette, jack, spanner, spare wheel, ID card, driving licence, torch, cash Kshs. 1,850/- and his hat. He reported to the police soon thereafter and even took the police back to the scene. The police officers, among them PW2 tracked down

the robbers on foot until they found the Appellant and his co-accused whom they arrested on the grounds they fitted the description given by the Complainant. They also recovered a torch, Exhibit 5, which the Complainant identified as his. According to PW2, the Complainant insisted that the 1st Appellant in the case was wearing brown trousers. That they went back, reached his house and recovered the trouser Exhibit 4. The Complainant said in court that it was the 2nd Appellant who wore a leather jacket and carried the toy pistol, Exhibit 2. The toy pistol was recovered from the house of the 1st Appellant. The complainant also said that it was the 3rd accused in the case who wore the brown trousers, Exhibit 4.

In their defences, both Appellants denied the offences and told the court that they never understood why they were arrested.

The Appellants raised several issues in their Petition of Appeal. However, the key issue raised was that of identification. It was their contention that the arresting officers did not handle the issue properly because they took the Appellants to where the Complainant was, at the scene of crime, instead of taking them to the Police station. Further that they were identified by the Complainant at that scene instead of having an identification parade conducted for proper identification. The 1st Appellant also raised issue with the brown trouser, Exhibit 4 in the case, which the police recovered from his house after the Complainant alleged that he was wearing such. The 1st Appellant also raised issue with the learned trial magistrate's finding that the Appellants were arrested on the basis of a description given to the police by the Complainant. He contended that in fact, the police depended on the description of clothes alone. That, that being the case, he ought not to have been arrested since according to the Complainant, he had changed his clothes after the incident. The 2nd Appellant on his part challenged the trial magistrate's decision on the basis it considered only the Prosecution case.

Learned counsel for the Respondent **MISS OTIENO**, opposed the Appeal. She started by submitting that the Prosecution evidence was sufficient to sustain the **CAPITAL ROBBERY** charge. **MISS OTIENO** also submitted that the Complainant was able to describe the Appellants to the police by the colour of the clothes they were wearing during the attack. She further submitted that a toy pistol and a panga, weapons identified by the Complainant as having been used during the attack, were recovered from the Appellants. They were actually recovered from the 1st Appellant's alleged house. On the sentence **MISS OTIENO** submitted that the same was reasonable on grounds the offence of **ROBBERY** contrary to Section 296(1) of Penal Code attracted a maximum sentence of 14 years imprisonment.

The conviction of the Appellants hinges on their identification by the Complainant. It is true that the incident took place during the day time and that the Appellants were arrested the same day. From the evidence on record, the Complainant's description of his attackers was as follows;

In regard to the 1st Appellant, he was said to have been wearing brown trousers. However, at the time of his arrest, the 1st Appellant was not wearing brown trousers. The alleged trousers were recovered later from a house described by PW2 as belonging to the 1st Appellant and the 3rd accused in the case. On what basis was the 1st Appellant arrested considering that the Complainant was not present during the arrest? If PW2 and his colleagues had any other description, the same was not disclosed to the court. It then follows that the 1st Appellant was arrested on suspicion. That suspicion in my view was never resolved. The only way to resolve it was by an identification parade properly conducted to verify whether the Complainant could identify the Appellants. Having failed to carry out such a parade, then the Complainant's identification of the 1st Appellant was dock identification which is worthless standing on its own. In **PETER MAINA vs. REPUBLIC C.A. No. 111 of 2003 (NYERI), OMOLO, TUNOI and GITHINJI, JJA** held;

"Before the court can base a conviction on the evidence of

identification at night, such evidence, should be absolutely watertight.

Further, visual identification must be treated with greatest care and

ordinarily a dock identification alone should not be accepted unless the

**witness had in advance given description of the assailant and identified
the suspect on a properly
conducted parade".**

It is good that the Complainant claimed that he could describe his attackers. It is not good that the only description he gave of the 1st Appellant was not confirmed by PW2 and others with him in the sense that he was not wearing what the Complainant had described to them.

The basis of identifying the 2nd Appellant was the Complainant's description that he was wearing a leather jacket. No leather jacket was mentioned by PW2. Whereas the Complainant identified Exhibit 4 as the trouser the 1st Appellant was wearing at the time of attack, he made no reference to the leather jacket he said the 2nd Appellant had been wearing. Given that evidence, it is also clear that the 2nd Appellant was arrested on suspicion. Just like in the case of the 1st Appellant, that suspicion remained unresolved since no identification parade was conducted in his respect.

The Complainant did go further to identify three other exhibits. He identified a toy pistol and a panga, exhibits 2 and 3 respectively as weapons used on him by the attackers. He did not however disclose the basis of his identification. Likewise, he also identified a torch, exhibit 5, as the one stolen from him during the attack. He told the trial court that the torch had special marks but those were never disclosed nor were they identified to the court. The identification of these three exhibits was wanting. They were not identified as required. A panga and torch are common items used by many a household in this country. There must be hundreds of thousands of such items in our households. To say of such items "**these are the ones used or robbed of**" without identifying any special or peculiar mark on them as proof of such identification, is a mockery of the art of identification. The evidence of the Complainant on the identification of these items did not corroborate in any way his evidence, that the Appellants had robbed him. As such that evidence fails to qualify as evidence of recent possession of stolen items and therefore, the doctrine of recent possession could not apply.

I find that the convictions entered against the Appellants in this case were unsafe and should not be allowed to stand. Accordingly I quash the convictions and set aside the sentences. I further direct that the Appellants should be set at liberty unless they are otherwise lawfully held.

Orders accordingly

Dated at Nairobi this 23rd day of September 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE