REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.180 OF 2014 & 95 OF 2015

(An Appeal arising out of the conviction and

sentence of Hon. E.K. Nyutu – Ag.PM

delivered on 12th November, 2014

in Makadara CMC. CR. Case

No.4013 of 2013)

MICHAEL ABUKUSE.....1ST APPELLANT

MERCILINE MIDEVA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Michael Abukuse and Merciline Mideva were charged, with another, with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 22nd August 2013 at Kiambiu Slums in Nairobi County, the Appellants, jointly with others not before court, while armed with dangerous weapons, namely pangas and knives, robbed Peter Muthiani Kiio (the complainant) of four crates of milk and crates valued at Kshs.6,040/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the complainant. 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. They were sentenced to death. The Appellants were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal challenging the said conviction and sentence. The two separate appeals were consolidated for the purpose of the hearing of this case.

In their respective petitions of appeals, the Appellants challenged their conviction more or less on the same grounds. They were aggrieved that they had been convicted on the basis of the evidence of identification that was made in circumstances that was not conducive to positive identification. They faulted the trial magistrate for relying on inconsistent and contradictory evidence of the prosecution

witnesses which failed to muster the threshold set to establish the charge. The Appellants were aggrieved that the trial magistrate failed to take into consideration the fact that the complainant did not produce any medical evidence to establish that he had indeed been assaulted in the course of the robbery. They faulted the trial magistrate for failing to take into consideration the fact that crucial witnesses were not called to testify in the case thus prejudicing the Appellants' defence. They were finally aggrieved that they had been convicted against the weight of evidence. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside the sentence that was imposed upon them.

Prior to the hearing of the appeal, the Appellants sought to have the Occurrence Book report (OB) of Eastleigh Police Patrol Base where the first report was made. It transpired that the Occurrence Book report when it was alleged the complainant made the first report to the police was not available. Prior to the hearing of the appeal, the parties to this appeal filed written submission in support of their respective opposing positions. During the hearing of the appeal, this court heard oral rival submission made by Mr. Aketch for the Appellants and by Ms. Sigei for the State. In summary, Mr. Aketch submitted that the evidence of identification that was relied on by the prosecution to secure the conviction of the Appellants was doubtful and could not stand up to legal scrutiny. He faulted the trial magistrate for erroneously applying the doctrine of recent possession in the sense that the items that were allegedly found in the Appellant's possession were not produced into evidence. Learned counsel further submitted that the convicting magistrate did not comply with the provisions of **Section 200(3)** of the **Criminal Procedure Code** and thus prejudiced the Appellants because they were denied the opportunity to have the witnesses who had already testified recalled for cross-examination. He urged the court to allow the appeal.

Ms. Sigei for the State opposed the appeal. She submitted that the prosecution adduced sufficient culpatory evidence in form of the evidence of identification and the application of the doctrine of recent possession to secure the conviction of the Appellants. She stated that, the evidence adduced by the prosecution witnesses, taken into totality, established the Appellants' guilt to the required standard of proof beyond any reasonable doubt. As regard whether the convicting magistrate complied with provisions of **Section 200(3)** of the **Criminal Procedure Code**, learned State Counsel submitted that such requirement was not necessary because it was only one magistrate who conducted the entire trial to its conclusion. In the premises therefore, she submitted that the prosecution had established its case to the required standard of proof beyond any reasonable doubt and therefore the respective appeals lodged by the Appellants should be dismissed.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination is whether the prosecution established its case on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** as against the Appellants to the required standard of proof beyond any reasonable doubt.

It is clear from the submission made and the facts of this case that the prosecution relied on the evidence of identification and the application of the doctrine of recent possession to secure the conviction of the Appellants. There are a plethora of cases that give guidance to the court when evaluating the evidence of identification especially that made by a single identifying witness in circumstances that may be described as difficult. A leading case is that of **Maitanyi –Vs- Republic [1986] KLR 198**, where the Court of Appeal held at P.200:

"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

For a court to apply the doctrine of recent possession to secure the conviction of an accused, it must bear in mind the condition precedent that must be complied with as set out in **Malingi –Vs- Republic [1989] KLR 225** at Page 227 where Bosire J (as he then was) held thus:

"***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

In the present appeal, the complainant, a resident of Kiambiu informal settlement, testified that on 22nd August 2013 at about 6.00 a.m. as he was going about his business of distributing fresh milk using his bicycle, he was accosted by a gang of six robbers (four men and two women) who robbed him of four crates of milk worth Kshs.3,240 and the crates themselves. In the course of the robbery, one of the robbers attempted to stab him with a knife but he managed to escape injury. He was however assaulted during the robbery that resulted in the complainant sustaining injuries. Although the complainant testified that he was medically attended to after the robbery incident, he did not produce any documents in court to establish that he was so treated.

The complainant testified that during the course of the robbery, he positively identified the robbers. The robbers included the Appellants. He made a report on the following day i.e. 23rd August 2013 to PW4 Corporal Jared Mareri then attached to Kiambiu Administration Police Post. He told PW4 that he could identify the persons who robbed him if he saw them again. He did not give the facial or physical description of the persons who robbed him. The incident was later on the same day reported to PW5 PC John Kabere then based at Eastleigh Police Patrol Base. Again, the complainant told PW5 that he could identify the persons who attacked him if he saw them. Sadly, the facial and physical descriptions of the complainant's assailants appear not to have been recorded in the first report that was made to the police. Later on the same day, the Appellants were taken to Eastleigh Patrol Base on suspicion that they had robbed the complainant.

The complainant testified that he was called to the police station and exposed to the Appellants and asked if he recognized them as the persons who robbed him. He answered in the affirmative. No identification parade was mounted to enable the police ascertain if the identification made by the complainant was actually correct. The complainant told the court that he had seen the Appellants for the first time during the course of the robbery. There was no other person who witnessed the robbery witnessed other than the complainant.

In considering this evidence, the trial magistrate had this to say:

"From the foregoing, I find that the circumstances for identification for the 1st and 3rd accused were favourable. There was daylight. There was a struggle and reasonable lapse of time sufficient for PW1 to have good look at his assailants. The 1st and 3rd accused were arrested three hours after the robbery incident. PW1's memory was still very fresh when he went to identify them three hours after the robbery incident."

It was clear to this court that the trial court failed to properly evaluate the evidence of identification that was adduced by the complainant. As stated earlier in this judgment, whereas the complainant was robbed on 22nd August 2013, he made the first report to the police on the following day the 23rd August 2013. It was therefore misdirection for the court to hold that the Appellants were identified by the complainant three hours after their arrest. In actual fact, the complainant made the report to the police a day after the robbery incident. In that report, other than saying that he could identify his assailants if he saw them again, he did not give their physical or facial descriptions in that first report that he made to the police. If he indeed he did give such description, as stated earlier in this judgment, the Occurrence Book reports were not availed to this court.

As the first appellate court, this court is entitled to reconsider and re-evaluate the evidence of identification that was adduced before the trial court. It was clear to this court that the circumstances under which the robbery took place, it was not possible that the complainant was positive that he had identified the Appellants as the persons who robbed him. The robbery occurred at dawn and not during day time as observed by the trial court. It was not clear from the evidence whether there was sufficient light to enable the complainant be positive that he had identified the Appellants as members of the gang that robbed him. This court is not convinced that in the hectic circumstances of the robbery, and the fact that the complainant was robbed by more than six individuals, he was in a position to be positive that he had positively identified any of the robbers. This court holds that the evidence of identification more so being that of a single identifying witness was tenuous and could not sustain a conviction on such a serious charge as the one that the Appellants faced.

As regard the application of the doctrine of recent possession, it was the prosecution's case that the Appellants were, and specifically the 1st Appellant, was found in possession of five packets of milk that were robbed from the complainant. These packets of milk were not produced into evidence. As was held in the Malingi case (supra) "***the doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."*** In the present appeal, it was evident that the 1st Appellant gave reasonable explanation as to how he was found in possession of the five packets of milk. He explained that he had purchased the five packets of milk the evening before his arrest. Since the five packets of milk were not positively identified to be the specific packets of milk that were robbed from the complainant, the chain of evidence that would have successfully led to the application of the doctrine of recent possession was broken.

It is clear from the foregoing that the respective appeals lodged by the Appellants shall be allowed. The prosecution failed to adduce sufficient evidence to establish the guilt of the Appellants on the charges brought against them to the required standard of proof beyond any reasonable doubt. The Appellants' conviction is hereby quashed. It is substituted by a verdict of this court acquitting the Appellants of the charge. The death sentence that was imposed upon them is set aside. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2018

L. KIMARU

JUDGE