



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL DIVISION  
CRIMINAL APPEAL NUMBER 306 OF 2011.

BETWEEN

PAUL NJOROGI THUO.....APPELLANT.

AND

REPUBLIC .....RESPONDENT.

*(An appeal from the conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 1986 of 2009 delivered by Hon. K. A. Bidali, SPM on 15<sup>th</sup> November, 2011).*

JUDGMENT.

Background.

1. Paul Njoroge Thuo, hereafter the Appellant, was charged with two main counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the 1<sup>st</sup> count were that on the night of 24<sup>th</sup> October, 2009 at Whistling Thorns Club in Kiserian within Kajiado District in Rift Valley Province, jointly with others not before the court, while armed with dangerous weapons namely an AK47 rifle, knives and rungs robbed **Mrs. Marie Louise Boley and Dr. Titus Naikuni** of the various goods set out in the charges. It was alleged that at, or immediately before, or immediately after the time of such robbery used actual violence on the said **Mrs. Marie Louise Boley and Dr. Titus Naikuni**.
2. He was charged in the alternative with handling stolen property contrary to Section 322(2) of the Penal Code. It was alleged that on the night of 24<sup>th</sup> October, 2009 at Whistling Thorns Club in Kiserian within Kajiado District of the Rift Valley Province, otherwise than in the course of stealing dishonestly retained cash Kshs. 27,205/-, 5 mobile phones, 2 binoculars, 4 cameras, 1 beaded belt, 1 kitchen knife and 1 purse, knowingly or having reasons to believe them to be stolen property.
3. The Appellant was arraigned in court and at the conclusion of his trial found guilty on all the counts. However, he was sentenced to suffer death in the 1<sup>st</sup> count while the sentences in the other counts were held in abeyance. He was dissatisfied with that court's decision lodged the present appeal against the conviction and sentence. He filed the grounds of appeal contemporaneously with written submissions on 14<sup>th</sup> November, 2018. They were that; (i) the learned magistrate erred in failing to find that his right to a fair trial as enshrined under Article 50(2) (c) & (j) of the Constitution was infringed, (ii) the trial magistrate erred by failing to note that there was a variance between the particulars of the charge and the evidence in breach of Section 214 of the Criminal Procedure Code, (iii) the honorable magistrate erred in failing to evaluate the lighting at the scene as required by law, (iv) the trial magistrate erred by failing to find that the prosecution did not prove its case to the required standard, (v) the learned magistrate erred by failing to note that the evidence relating to the alleged recent possession of the stolen property was fatally defective (vi) the honorable magistrate erred in failing to find that the witnesses' evidence was unbelievable and illogical, (vii) the learned magistrate erred in failing to take into account the Appellant's defence and discarding it without assigning a cogent reason for the finding, and (viii) the trial magistrate erred in convicting without critically examining and evaluating the evidence adduced by the prosecution and drawing his own conclusions.

**Evidence**

4. Briefly the prosecution case was that **PW2** who was working in the kitchen at around 5:00 pm saw two men wave at him and that one of the men passed by the kitchen window several times before leaving at 5:30 pm. Again, at around 6:40 pm he saw **PW1** alongside four men headed to the restaurant. He testified that they were held in the kitchen and that the Appellant is man who waved at them at 5:00 pm and was guarding them in the kitchen. **PW1** who was a security guard on the other testified that while he did not identify all assailants, he identified the Appellant as the other robbers were calling him "Njoroge" as he collected personal goods from the patrons, which he confirmed when he saw the Appellant's identification card. **PW3** testified that she was a waiter and was on her way through the kitchen when she was ordered to lie down by a man she identified as the Appellant. **PW4** did not identify the Appellant simply pointing out that he was not the gunman. **PW5**,

Dr. Titus Naikuni testified that at 6:45 pm he was at the counter when a man accosted them with a gun whereupon the Appellant ushered him and his wife to a corner. **PW6**, Josephine Naikuni testified that she was alongside **PW5** when a man wielding a gun approached them and asked them to lie down on the floor. **PW7** recalled that she was at the restaurant when they were accosted by two gang men who were later joined by two others one of whom she identified as the Appellant. **PW8** testified that he was at the restaurant when the robbery occurred and he identified the Appellant as the man referred to as Njoroge. **PW11**, CPL Tobias Otieno testified that he and his colleagues arrived at the scene at around 8:30 pm and he gave chase to a man who was holding a handbag and arrested him. He identified the man he arrested as the Appellant. **PW12**, IP Charles Ouma testified that he was alongside **PW11** when he gave chase and arrested the Appellant.

5. The Appellant denied committing the offence arguing that he was a case of mistaken identity.

#### **Submissions.**

6. The Appellant relied on written submissions whilst Mr. Miiri, learned State Counsel for the Respondent made oral submissions. The Respondent opposed the appeal. I shall consider the respective submissions in the body of the determination.

7. The main issues for determination are whether the Appellant' right to a fair trial was violated, whether Section 214 of the Criminal Procedure Code was complied with, whether the Appellant was properly identified, whether the doctrine of recent possession was properly applied and whether the case was proved beyond a reasonable doubt.

#### ***Whether the right to a fair trial was violated***

8. The Appellant contended that his right to a fair trial as set out under Article 50(2) (c) & (j) of the Constitution was violated. He contended that he was not supplied with witness statements before the trial commenced. Mr. Miiri on his part submitted that statements were provided to the Appellant.

9. The record shows that the Appellant first applied for the statements on 8<sup>th</sup> December, 2009 and when the matter was next mentioned on 22<sup>nd</sup> December, 2009 he confirmed that he had been supplied. The matter proceeded and on 31<sup>st</sup> March, 2010, subsequent to an amendment of the charges. He again applied to be supplied with witness statements. The court noted that the Appellant had not been supplied with some statements and made an order for their supply. This was not done and the Appellant once again raised the issue on 13<sup>th</sup> October, 2010 and a subsequent order for their supply made. There were no subsequent applications made and the trial proceed on well.

10. While there is no indication on the record that the final order for supply was complied with, the lack of subsequent applications is a pointer to compliance with the order. This ground of appeal is therefore dismissed.

#### **Whether Section 214 of the Criminal Procedure Code was complied with.**

11. The Appellant contends that in the present case the evidence adduced was at odds with the charges facing him and therefore the court was under a duty under Section 214 of the Criminal Procedure Code to order for the amendment of the charge sheet to conform to the evidence. He submitted that the goods stolen as detailed in the charge sheet did not tally with the evidence adduced in court which rendered the charge sheet defective.

12. It is clear that the particulars of the alternative charge of handling stolen goods indicates some stolen goods that were also set out in the particulars of count I and a purse that was amongst the goods stolen from the second complainant. As I shall set out hereunder not all the goods recovered from the Appellant were stolen from the named complainants. Again, an accused may be charged with being in possession of suspected stolen goods even though no complainant has been identified. As such, a charge sheet is not rendered defective by the mere fact that goods named in an offence alternative to the main charge are not named in the main charge. The test is the nature of the alternative charge. As such, the submission by the Appellant in the present case is not founded on good law and so this ground of appeal fails.

#### **Whether the Appellant was properly identified**

13. Under this head, the Appellant submitted that his identification was not free from error. He pointed out that it was clear from the evidence that the witnesses were scared during the robbery and since the scene was not well lit, it was difficult for them to identify their attackers.

14. He submitted that it was clear that no description was given of the assailants and that they actually recorded their statements after his arrest. Further that there were material discrepancies in the evidence of the witnesses regarding the number of robbers involved which raised doubts about the witnesses' ability to observe the robbers. He pointed out that in the present case all identification evidence was dock identification and was worthless as set out in **Gabriel Njoroge v. Republic[1982-88] KAR 1134**.

15. On his part, Mr. Miiri submitted that the Appellant was properly identified with the help of the electricity lighting that was sufficient at the time.

16. There were identification parades carried out during investigations by **PW10**, CIP Maurice Okul who testified that he conducted a parade in which **PW1**(John Pendo Letinai), **PW8**(Peter Robin Lewanika), **PW2**(Joseph Moiayi) and **PW3**(Sarah Njeri) were the witnesses. These witnesses testified that they saw the Appellant at the scene soon after the robbery when he was brought by the police who identified him as one of the robbers. This meant that the subsequent parade was merely academic, lacked evidentiary value and could not found the basis of a proper identification.

17. It is also clear that all the witnesses at the scene testified that they could identify the Appellant except for **PW4**, Marie Louise Boley, who

was the complainant in the first count. There was also evidence by PW1 who testified that while he had not seen the Appellant during the trial he heard his name being mentioned. Therefore, the evidence of identification adduced by the witnesses amounted to dock identification. The position of dock identification in our jurisdiction was set out in **Samuel Mwaura Muiruri & 2 others v. Republic[2002] eKLR**, thus:

***“We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep [1953] 20 EACA 166, Roria v Republic [1967] EA 583 and Charles Maitanyi v R [1986] 2 KAR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The Court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”***

18. The court is therefore under a duty to treat the evidence adduced with the greatest care before deciding to rely on the same. The Appellant submitted that the conditions at the scene were not conducive for a proper identification. However, the offence occurred at dusk, at around 6:30 to 7:00 pm when the location was relatively lit. Further, the lights were on at the hotel and as buttressed by PW2 the lights came on automatically at dusk. It is then clear that the conditions precedent at the scene were conducive for a positive identification.

19. Be that as it may, the court is also cognizant that in as much as the conditions for a positive identification may be prevailing, the evidence of the witnesses should be carefully interrogated as to its truthfulness. This was ably stated by the Tanzanian Court of Appeal in **Jaribu Abdallah(Supra)** thus:

***“In a matter of identification it is not enough to look at factors favouring correct identification, equally important is the credibility of witnesses. The conditions for identification might appear ideal, but there is no guarantee against untruthful evidence...”***

20. It then behooves the court to thoroughly interrogate the evidence adduced that led to the conviction of the Appellant. An evaluation of their evidence raised several issues. The first was the Appellant’s location during the robbery as it was clear that there were two distinct locations where the witnesses were held; in the kitchen and in the dining area. The evidence of **PW2** was that he was accosted in the kitchen and made to lie down and that the Appellant was left to guard them although he later joined the rest of the gang. The evidence of the rest of the witnesses was that they were held in the dining area and that the Appellant was part of the robbers raising the question whether the Appellant could logically be at two locations at the same time. The court must therefore evaluate the two sets of evidence.

21. **PW1** testified that he was led from the gate to the restaurant where he was laid alongside the others. He was laid in the restaurant area as per the evidence of **PW8** who followed him in. This was corroborated by **PW3** who testified that she was commanded to lie down next to them. **PW3** further testified that her first contact with the robbers was through the Appellant who grabbed her at 6:45 pm. **PW5** testified that it was the Appellant who led them to the place where they were to lie down when they ambushed them while **PW6** recalled the Appellant standing at the door when the robbery began. On her part **PW7** testified that the Appellant was not part of the initial group that accosted them saying that they were actually accosted by two armed men who were later joined by the Appellant and this mirrored the evidence of **PW8**.

22. From the foregoing, it is clear that the evidence raised the possibility of the Appellant’s presence at both locations. While a question may be raised that the Appellant guarded **PW2** and his colleagues for a short while, which was possibly five minutes when one considers the evidence of **PW3**, **PW5** and **PW6** that they were attacked at around 6:45 pm, this does not tally with the circumstances against other evidence on record. It is buttressed by the testimony of **PW2** that after their escape they called one Mutinda who then called for help. However, it is clear that the police were informed of the robbery at about 7:30 pm, as per the evidence of **PW11** which lends credence to a conclusion that the Appellant guarded **PW2** and company for a longer period and was not therefore present when the rest of the witnesses were accosted at 6:45pm. This absurdity clearly calls into question the identification evidence.

23. The second issue relates to the gunshot that led the police to the scene. **PW11** who was the arresting officer testified that the police arrived at 8.30 p.m. and that he shot in the air five rounds of ammunition. **PW5**, **PW6**, **PW7** and **PW8** on the other hand testified that they heard gunshots prompting them to run from the office where they were being held and they only returned when the police had arrived. **PW8** testified that the police arrived around 30 minutes after they ran away. From their evidence it was clear that there was a gap between the robbery and the arrival of the police which meant that the gunshots were not discharged by **PW11**.

24. From the foregoing, it is my candid view that the Appellant was not properly identified as one of the robbers and even if he were, the evidence on record was not sufficient to link him to the robbery.

#### **Whether the doctrine of recent possession was properly applied**

25. The Appellant then questioned the reliance on the doctrine of recent possession to found a conviction submitting that in the present case the circumstantial evidence did not point to the irresistible inference that he was in possession of the recovered goods to the exclusion of all others. He submitted that it was clear that the police arrived approximately an hour or more after the robbers had left the scene. That therefore the arrival of the police at the scene would have occasioned any innocent victim of the robbery to run away given the ordeal they had just suffered.

26. He further submitted that while there were reports that three cameras were stolen, evidence was that four cameras were actually recovered which should be contrasted against the evidence that the Appellant was actually in possession of a camera. He submitted that the contradictions and inconsistencies in the number of the recovered goods recovered was buttressed by his failure to sign the inventory prepared at the scene. He pointed to the bag where the recovered to goods were put belonging to him to point that he was also a victim.

27. Mr. Miiri on the other hand submitted that the doctrine of recent possession was properly applied, arguing that the Appellant was arrested in possession of the stolen goods.

28. As regards the Appellant's possession of a camera the evidence of **PW1**, **PW3** and **PW12** was that when the Appellant was brought to the restaurant after his arrest he had a camera strapped along his chest. The court noted that the arresting officer, **PW11**, did not testify as to the presence of a camera on the Appellant's person instead testifying that the only cameras recovered were inside the recovered bag. Other witnesses did not also testify of the presence of the camera. It is also clear that during the robbery none of the witnesses identified a robber wielding a camera.

29. The court did not locate the inventory of the goods recovered at the scene but has examined the list of exhibits adduced. It appears that four cameras were produced, only three cameras were recovered, namely; a silver Olympus camera, a black Olympus camera and a black Konica camera. This is because MFI 2 and MFI 19 were not two separate cameras simply exhibit 2 marked twice. The contradictions in question clearly raise doubts about the propriety of relying on the evidence in question.

30. The recovery was undertaken by **PW11** who testified that after accessing the compound they (police) encountered four men who started running in different directions and he fired a few rounds of ammunition in a bid to force the men to surrender. That he then chased one of the men, whom he identified as the Appellant, and caught up with him as he was climbing the back gate. He testified that the Appellant threw the bag to the other side of the gate as he could not escape given that the witness had a hold of his trouser. That the Appellant then descended from the gate, got hold of sand which he then threw into **PW11**'s eyes before running away again. The witness did not however lose sight of him and was able to apprehend him before calling for help to subdue him. He then took the Appellant back to where he had dropped the bag and they picked it. He testified that **PW12** had witnessed the whole chase and arrest of the Appellant.

31. On his part **PW12** testified that he witnessed **PW11** chase and arrest the Appellant and that they then recovered a lady's bag about five meters from where the Appellant had been subdued in which they recovered the stolen goods. The evidence of both witnesses sharply differs with regards to where and how the bag was recovered. This raises doubts that the Appellant was found in possession of the bag and the goods in it. No doubt the account of events as narrated by **PW11** was either tainted by embellishment or simply false as it was not grounded on reality. The trial court could not, in the circumstances safely convict the Appellant on application of the doctrine of recent possession.

32. In light of the foregoing, this court finds that the Appellant was not identified as one of the robbers who robbed the witnesses. The appeal is hereby allowed, the conviction quashed and sentence set aside. The Appellant is hereby set free unless otherwise lawfully held.

**Dated and delivered at Nairobi This 14<sup>th</sup> Day of December, 2018.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Appellant in person.
2. Miss Nyauncho for the Respondent.