



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.12 &13 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. J. KARANJA (MR.) – PM delivered on 17th December 2013 in Nairobi CM. CR. Case No.1779 of 2012)

ANTHONY KIMATHI MUSYOKA.....1ST
APPELLANT

HENRY KIMATHI MUTUA.....
.....2ND **APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The 1st Appellant, Anthony Kimathi Musyoka and the 2nd Appellant, Henry Kimathi Mutua were charged with two offences under the **Penal Code**. They were charged with **robbery with violence** contrary to **Section 296(2)**. The particulars of the offence were that on 13th October 2012 along University Way in Nairobi, jointly, while armed with an offensive weapon namely a knife, robbed Erick Mwenda Miriti (the complainant) of a mobile phone Nokia 5330 valued at Kshs.13,999/- and a Cooperative Bank ATM card valued at Kshs.500/- and at the time of such robbery, threatened to use violence on the complainant. The Appellants were charged with **stealing** contrary to **Section 275**. The particulars of the offence were that on 13th October 2012 along University Way in Nairobi, the Appellants, jointly, stole Kshs.20,000/- from the account held by the complainant at Cooperative Bank using his ATM card. 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 of both counts. They were sentenced to death in respect of the 1st Count. They were ordered to each serve fifteen months imprisonment in respect of the 2nd Count. The Appellants were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal to this court challenging his conviction and sentence.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They faulted the trial magistrate for convicting them on the basis of the sole evidence of identification which was made by a single witness. They were of the view that the complainant had not positively identified them because the alleged identification was made under hectic circumstances; the description of the robbers was not recorded in the first report that was made to the police and finally, the trial court relied on dock identification to secure their conviction in the absence of the evidence of an identification made in a

properly constituted identification parade. The appellants were aggrieved that the trial court relied on weak and insufficient prosecution evidence to convict them. In particular, they were of the view that the evidence adduced by the prosecution witnesses was full of contradictions and inconsistencies that rendered the entire evidence incredible. They took issue with the fact that the trial court failed to take into consideration their respective defences before arriving at the decision to convict them. In the premises therefore, the Appellants urged the court to allow their respective appeals in their entirety.

During the hearing of the appeal, the two separate appeals lodged by the Appellants were consolidated and heard together as one. The Appellants presented to court written submission in support of their respective appeals. They further made oral submission urging the court to allow their appeals. Ms. Nyauncho for the State, made oral submission in opposition to the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence to establish the guilt of the Appellants on the charges brought against them to the required standard of proof. This court shall revert to the arguments made on this appeal after briefly setting out the facts of this case.

The complainant was at the material time a student at the University of Nairobi. He testified that on the material day of 13th October 2012 he left his place of residence at Langata with a view to attending his lessons at the University. At about noon, he alighted from a matatu at the bus stage next to Serena Hotel. He then walked towards the direction of the University. He told the court that he met with the two Appellants who asked him for directions to KCS House. He did not talk to them. He continued walking. The two men followed him. He decided to return back towards Serena Hotel. He then walked towards GPO. He proceeded towards University Way. Before he could enter the University, he was accosted by the two Appellants. This time they ordered him to surrender to them the bag that he was carrying. He told them that the bag did not contain anything of value other than his books. They asked him to give them his mobile phone. He resisted.

One of the Appellants whom he identified as the 2nd Appellant removed a pen-knife and threatened to stab him. He surrendered the mobile phone. They manhandled him and took away his ATM card. They forced him to disclose his password. After that, the two ran away. The complainant then went to Central Police Station where he made a report of the crime. He went to his bank to report the loss of the ATM card. It was then that he learnt that the card had been used to withdraw the sum of Kshs.20,000/- from his account. The complainant told the police that he could recognize the persons who robbed him if they were arrested. However, in the first report that he made to the police, he did not give the description of the persons who robbed him. No physical description of the robbers was recorded in the occurrence book at Central Police Station when the complainant made the first report.

The police used the particulars of the mobile phone robbed from the complainant to trace the robbers. PW2 PC Regina Kanali and PW3 Corporal Mercy Muthendu testified that on 16th November 2012, they traced the mobile phone that had been robbed from the complainant to one Omar Jelle who was then at Shell Petrol Station in Pangani. Upon interrogation, the said Omar Jelle told them that he had purchased the mobile phone from one Joseph Bundi. Omar Jelle escorted them to the shop of the said Joseph Bundi. Joseph Bundi told the police that he had purchased the particular mobile phone from the Appellants. The Appellants, Joseph Bundi and Omar Jelle were all arrested and taken to Central Police Station. The complainant was summoned to the police station where he identified the Appellants as the persons who had robbed him.

It was apparent that the police did not bother to convene an identification parade in order for the complainant to confirm his identification of the Appellants. The mobile phone which was recovered was produced into evidence by the prosecution. The complainant positively identified the mobile phone as the one that was robbed from him on the material day of the robbery. Joseph Bundi was not charged. Omar Jelle was charged with the Appellants but the charges were withdrawn before the trial commenced. Joseph Bundi and Omar Jelle were made to be prosecution witnesses. However, for some reason, they were not called to testify during trial.

When they put on their defence, the Appellants denied committing the offence. It was their case that they were innocent persons who were mistakenly connected to a crime that they did not commit.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court so as to arrive at an independent determination whether or not to uphold the conviction of the trial court. In doing so, this court should be mindful of the fact that it neither saw nor heard the witnesses as they testified during trial and cannot therefore give an opinion as to the demeanour of the said witnesses (see Okeno –vs-Republic [1972] EA 320). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellants on the charges of **robbery with violence** and **theft** to the required standard of proof beyond any reasonable doubt.

In the present appeal, it was evident that the prosecution relied on the evidence of identification and that of the recovery of the mobile phone to secure the conviction of the Appellants. As regard the evidence of identification, it was clear to the court that that evidence was that of a sole identifying witness. According to the complainant, he was accosted by the Appellants and robbed of his mobile phone and his ATM card. The complainant testified that the Appellants followed him for a while before they robbed him. Unfortunately, the complainant did not record the physical description of the persons who robbed him in the first report that was made to the police. This court cannot rely on the evidence of complainant that he was able to identify the Appellants as the persons who robbed him in the absence of such first report. The police bungled the evidence of identification when they exposed the Appellants to the complainant upon their arrest. The police should have mounted an identification parade for the complainant to confirm his alleged identification of the Appellants as the persons who robbed him. In any event, this court is of the view that the time between the robbery and the arrest of the Appellants (a period of more than a month) is such that it may not be possible for the complainant to have recalled from memory their physical attributes to enable him to be positive that he identified them as the persons who robbed him. It is trite that the court is required to treat the evidence of a single identifying witness with caution before convicting an accused person on such evidence. The court is required to warn itself of the danger of convicting an accused person on the basis of such evidence of identification by a single witness. In the present appeal, this court is not convinced that the evidence of identification was watertight as to exclude the possibility of mistaken identity.

As regard the evidence of the recovery of the mobile phone, the prosecution adduced evidence which was to the effect that the mobile phone was recovered from one Omar Jelle. The said Omar Jelle told the police that he had purchased the particular mobile phone from Joseph Bundi. When questioned, Joseph Bundi told the police that he had purchased the particular mobile phone from the Appellants. This information was presented to the court by PW2 and PW3, the police officers who investigated the case. Unfortunately, Omar Jelle and Joseph Bundi were not called to testify in the case. The testimony of PW2 and PW3 in regard to how the mobile phone was recovered was therefore hearsay evidence. It was not backed by direct evidence which should have been adduced by Omar Jelle and Joseph Bundi. In the absence of the evidence of the said Omar Jelle and Joseph Bundi, there was no evidence to connect the Appellants with the recovered mobile phone. There was a break in the chain of evidence linking the Appellants to the recovery of the mobile phone. The doctrine of recent possession cannot be applied to the Appellants because no evidence was placed before the court that connected them to the stolen mobile phone.

The upshot of the above reasons is that the prosecution did not adduce evidence which established the guilt of the Appellants on the charges brought against them to the required standard of proof beyond any reasonable doubt. The evidence of identification and the recovery of the mobile phone were not sufficiently corroborated to connect the Appellants to the crimes that they were charged with. Their respective appeals have merit and are hereby allowed. Their respective convictions are quashed. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF APRIL 2016

L. KIMARU

JUDGE