REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 38 OF 2007

Peter Wanjohi Mbogo……..……Appellant

Versus

Republic……..…….……Respondent

(Appeal against conviction and sentence in Criminal case number 2202 of 2004, R vs Peter Wanjohi Mbogo at Nyeri delivered by E. J. Osoro, SRM on 15.11.2006).

JUDGEMENT

This appeal was previously heard and determined by two Judges (one of whom was a judge of the Environment and Land Court) and the two judge bench upheld the lower court's decision but the appellant moved to the court of appeal challenging the jurisdiction of the ELC judge to hear the appeal. The court of appeal up held the said appeal and remitted this appeal back to the High court for fresh hearing by a properly constituted bench.[1] This decision is pursuant to the fresh hearing as ordered by the court of appeal.

The appellant was charged in the magistrates court jointly with two others with five counts of the offence of Robbery with Violence contrary to Section **296(2)** of the Penal Code.[2] The first accused in the lower court is deceased while the third accused was acquitted. Hence, this appeal relates to the second accused in the lower court, that is, the appellant herein.

With regard to the first count it was alleged that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely Axes, Rungus, Pangas and claw Bars robbed **C W W** of a radio cassette make National, mobile phone make Motorolla T 192, cash Kshs.3,000/=, one video camera, 14 tapes all to the value of Kshs.22,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **C W W.**

The particulars of the second count were that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely Axes, Rungus, Pangas and claw Bars robbed **Charles Karumba Mutura** of a radio cassette make National, one telephone cordless receiver, mobile phone make Nokia 3310, cash Kshs.3000/= all to the value of Kshs.18,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Charles Karumba Mutura.**

The particulars of count three were that that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely Axes, Rungus, Pangas and claw Bars robbed **Mary Njeri Karumba** of three

wrist watches make Seiko, Monalisa and a pair of spectacles, driving licence, National identity card, mobile phone make Motorolla T 192, Co-operative bank card, cash Kshs.1,800/= all valued at Kshs. 36,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Mary Njeri Karumba.**

The allegations in count four were that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely Axes, Rungus, Pangas and claw Bars robbed **C W G** of a radio cassette make National star model rx-ct 840 serial number 26158, mobile phone make Siemens A 35, eight table clothes two torches, cash Kshs.200/= and a wrist watch all valued at Kshs.14,600/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **C W G.**

As for count five, it was alleged that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, jointly with others not before court while armed with offensive or dangerous weapons namely Axes, Rungus, Pangas and claw Bars robbed **R W W** of one hand bag, one compact, one wrist watch, one mobile phone make Motorola T 190 and cash Kshs.300/= all valued at kshs.7,950/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **R W W.**

The appellant was also charged with the alternative offence of handling stolen goods contrary to Section **322 (2)** of the Penal Code[3]the particulars of the charge were that on the 23rd day of May 2004 at Kiamwangi estate in Nyeri District of the Central Province, otherwise than in the course of stealing dishonestly received or retained one wrist watch make Seiko 5 knowing or having reasons to believe it to be stolen goods.

He was also charged with one count of Rape contrary to Section **140** of the Penal Code.[4]It was alleged that on the 10th day of March 2004 at Mathaithi estate in Nyeri District of the Central Province, had carnal knowledge of **C W G** without her consent. He also faced an alternative charge of indecent assault to a female contrary to section **144 (1)** of the Penal Code.[5]

PW1 testified that on 10th March 2004 at 10pm, she heard the dog barking continuously, that she lit all the lights outside and peeped out but could not see anything. But at 4.00am she heard the sound of the chain of the gate and when she peeped out she saw three people enter the compound. They smashed the windows and one entered through the window and opened the door for others.

They beat them demanding for money. She gave them Kshs.200, her mobile phone valued at Kshs.6,000/=, her daughter's mobile phone, a National star radio with a compact, a bag, 2 torches and table clothes. One of the thugs spoke Kirinyaga dialect when he asked PW1 to go to the table room and open the wall unit. The lights were on hence she saw him well as he took her to her bedroom and raped her for 6 minutes . Her daughter was also raped by two people. The lights were on hence she was able to see the 1st accused. This was the first time she was seeing the appellant. The police arrived and took PW1 and her daughter to hospital She never saw them again until the day they went to court. She identified the radio cassette National star and produced the receipt and license for the same. She also identified the compact that belonged to her daughter.

On cross-examination, she insisted that she identified the appellant as one of the robbers who was very brutal and was wielding a torch and a club. She was hit by the appellant on the shoulders and the back of her head. She stated that she was able to identify the appellant because of his beards and was the one who demanded money from the complainants.

PW2, stated that while sleeping in the company of his wife, he was attacked by the thugs at 2.45am who were many in number wielding axes, pangas, hack saw and clubs. They knocked out the security lights. They managed to steal his mobile phone, his wife's watch, his wife's mobile phone, Kshs.3000/= from PW2 and Kshs.1,800/= from his wife. They were not injured. He was not able to identify the robbers but was called to identity his panasonic cordless receiver phone which he had had for 10 years with his

initials inscribed on the same and did identify the same and his wife's three wrist watches.

PW3 recalled that on 9th March 2004 she retired to bed at 10.00 am and while asleep at 3 am she heard noises from outside and barking dogs. She heard windows being shattered and within 10 minutes many thugs entered the house armed with axes, pangas and clubs and torches. They robbed her of a Motorolla phone T 190. She heard them beating her mother and asking for her phone Siemens A 35. She was hit on the tooth by the 1st accused and raped by both 1st accused and the appellant. This happened when the lights were on.

They robbed them Kshs.300, a bag, radio national star and a compact of Congolese music. They were treated at the hospital and discharged. During cross-examination she insisted that she was raped by the appellant and saw him clearly on the night of the robbery however, no identification parade was conducted.

PW4 stated that on the 10th March 2004 at around 2.45am she was in her house and heard people banging her windows telling her to open. They asked for money and managed to get in. They demanded for Kshs.100,000 and threatened to kill her husband with weapons. They managed to steal her Kshs.1,800/=, her husband's Kshs.3,000/= and 3 wrist watches, one Swiss make Monalisa and 2 phones left by her children and a cordless receiver. She identified the Seiko 5 watch and the cordless receiver. She also identified the Orientex watch and two mobile phones, Motorolla valued at Kshs.4000/= and her husband's mobile phone Nokia valued at Kshs.6000/=. The men who entered their house were between 6 – 8 but outside they were many. They were armed with axes, pangas and rungus and stayed in the house for about 20 minutes. She was not able to identify the thugs as they had big hats and big coats and none looked at her.

Two weeks later officers from Karatina police station told them that their items had been recovered. She went to the police station where she identified some items stolen from them because they had inscribed their names on the said specific items.

PW5 a Doctor at Karatina District Hospital recalled that on the 10th March 2004 he saw C W W who had a history of being raped by people unknown to her who broke into her house at about 3.30 am. They had been assaulted and her daughter was injured at the mouth.

He also examined **R W**, then aged 19 years who alleged to have been raped and hit with a blunt object that caused the ejection of one of her incisor. She had been bleeding on the face from the mouth and had a blood stain on her inner wear and a white discharge noted. The degree of injury was grievous harm.

PW6 was attached to the flying squad Karatina and was partly the investigating officer of the robbery case. On 23/5/2004 at about 6 am while in his office at Karatina he received information that there were two individuals living in Kiamwangi area who were suspected to be robbers in Karatina town. In the company of others, he proceeded to Kiamwangi where they entered into a house and conducted a search and recovered a watch from the appellant in this case.

PW7 was the investigating officer in this case. He stated that on the 17th March 2004, together with his colleagues he received information that there was a person living in Mathira who was involved in criminal activities. They went to Kiamwangi estate with two officers and arrested the 1st accused. They went to the house of the appellant and 3rd accused searched the same and recovered a wrist watch produced in court as exhibit 9. The appellant refused to participate in the identification parade because he had big wound on the neck that could have had him identified easily. Investigations revealed that he had been burnt by sulfuric acid in a previous robbery.

The police recovered a Seiko 5 watch from the appellant and the same was positively identified by the owner and his wife because of a mark. It was one of the properties stolen from the complainants.

The appellant opted to make a sworn statement. He stated that on the 21st May 2004 he was asleep at his

house at Kiamwathi village when he heard a knock at his door. His brother opened the door and was told to lie down while the appellant was still in bed. P.C. Kariuki entered and told him not to get up from bed and to lie on his stomach and later to dress up. They searched the house and took his Seiko 5 watch and radio Panasonic. He testified that he had given P.C. Kariuki the permit for the radio and receipt. He claimed that the said police officer previously arrested him for allegedly possessing chang'aa and had demanded Kshs.3,000/= which he did not have hence was arraigned in court and fined Kshs.4,000/= in default to serve 3 months. He was taken to Karatina police station and arraigned in court. He claimed that PW1 did not give any description of the robbers. Moreover PW3 testified that she was raped in darkness and did not give the description of the robbers. He complained that he was not able to participate in the hearing when some witnesses testified among them PW4, PW5, PW6, PW7, PW8 and PW9. He claims that CPL Kamande demanded for Kshs.80,000/= to help him but he could not afford.

No identification parade was done. He claimed that the Seiko 5 watch Pex 9 was his and had possessed it for 3 years. He claimed that it was given to him by his deceased cousin and did not have any mark. Upon cross-examination, he admitted that he did not have any evidence that the watch was his. He claims that P.C. Kariuki had a grudge against him.

The learned magistrate found that both PW1 and PW3 identified the appellant at the scene. The lights were on at PW1's house. The court was convinced that the appellant was positively identified at the scene.

On the issue of rape the court was convinced that PW1 and PW3 had sufficient opportunity to identify the attackers because there was enough light in the house. Also the police recovered Pex 9 and Seiko 5 watch from the appellants house which was positively identified by PW2 and PW4.

The appellant was found guilty as charged in counts **III, IV, V, VIII** and was accordingly convicted and sentenced to death for robbery with violence, however the appellant was not sentenced in count **VIII** as the same was left in abeyance.

On 31st August 2016, the appellant filed an amended grounds of appeal citing lack of identification, that the charges were not adequately proved, that the trial court was influenced by the mode of arrest and that the trial court rejected his defence.

First, I address the question whether or not the appellant as sufficiently identified. *Identification evidence* is defined as evidence that an accused person was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence was committed. It is an established principle that there is a special need for caution before accepting identification evidence.

In the case of *Charles O. Maitanyi vs Republic,*[6] it was held *inter alia* that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care. The court in the said case added as follows:-

> *"……..There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his assailants, to those who come to the complainant's aid, or to the police…if the witness received a very strong impression of the features of an assailant; the witness will be able to give some description.."*

In *Kariuki Njiru & 7 others vs Republic,*[7] the court held *inter alia* that the *"law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."*

In the case of *Wamunga vs Republic,*[8] the court of appeal held as follows:-

> *"……..Evidence of visual identification in criminal cases can bring about miscarriage of justice*

and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification."

As correctly held in the above cited cases, I strongly hold the view that evidence based on identification in criminal cases can bring about miscarriage of justice and that it is of vital importance that such evidence must be examined carefully to minimize this danger. The court must warn itself of the special need for caution before convicting the defendant.

Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed

the charged crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the charged crime have been proven and that the identification of the accused is both truthful and accurate.

With respect to whether the identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony that are listed below.

With respect to whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person. I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution.

Thus, in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

i. What were the lighting conditions under which the witness made his/her observation?

ii. What was the distance between the witness and the perpetrator?

iii. Did the witness have an unobstructed view of the perpetrator?

iv. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

v. For what period of time did the witness actually observe the perpetrator?

vi. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

vii. Did the witness have a particular reason to look at and remember the perpetrator?

viii. Did the perpetrator have distinctive features that a witness would be likely to notice

and remember?

ix. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

x. What was the mental, physical, and emotional state of the witness before, during, and after the observation?

xi. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution. I have taken the above considerations into account, the fact that the robbery and rape were committed when the lights were on, the time the appellant spent with the complainants and the evidence by PW1 that "the second accused was left with my daughter and I later went to my daughter's bed room and we were ordered to cover ourselves and they left" Cross examined by the appellant, PW1 responded " I was able to see you and I also saw the weapon you were armed with." She also stated that the lights were on. She also told him she could identify him because of his beards.

PW3 also said the lights were on and was able to identify the assailants. She was clear it was the appellant who raped her first followed by the first accused who has since died. Upon cross-examination by the appellant she stated she was able to describe him to the police as short medium built.

It is also important to note that the above evidence does not stand alone as it is corroborated by the evidence that the appellant was found with a wrist watch belonging to the PW2 that was positively identified by the owner because of a mark on the same. To me, the mark sufficiently identified the watch. I find that the doctrine of recent possession was properly applied by the trial court in finding that the appellant did not properly explain how he got in possession of the wrist watch Seiko 5.

The key question that this court seeks to answer is whether or not the appellant offered any other explanation that could exonerate him from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered. This calls for close examination of the doctrine of recent possession.

The principles to be followed in recent possession were laid down in the case of *Arum vs. Republic*[9] where it was held that the doctrine of recent possession is applicable where the court is satisfied that the prosecution have proved the following:-

a) that the property was found with the suspect;

b) that the property was positively identified by the complainant;

c) that the property was stolen from the complainant;

d) that the property was recently stolen from the complainant.

The chain of events as disclosed by the evidence irresistibly pointed to the appellant as the source of the stolen watch. The defence tendered did not in my view rebut the said evidence. The appellant did not deny that he had the watch, instead he said it was given to him by a relative. To me, such an explanation was not sufficiently proved. The chain of events is clear and consistent and leads squarely to the

appellant.

In the circumstances, I find that the doctrine of recent possession was established. In the absence of any plausible or reasonable explanation as to how the appellant came into possession or a clear rebuttal of the said evidence, I find that the magistrate was correct in applying the doctrine of recent possession.

The upshot of the above is that the appeal is dismissed, conviction upheld and sentence confirmed. Orders accordingly.

*Dated, signed and delivered at Nyeri this **7th** day of **November** 2016*

John M. Mativo

Judge

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[1] See decision in Criminal Appeal No. 91 of 2014- Court of Appeal, Nyeri.

[2] Cap 63, Laws of Kenya

[3] Ibid

[4] Ibid

[5] Ibid

[6] {1988-92} 2 KAR 75

[7] Criminal Appeal no. 6 of 2001 (Unreported)

[8] {1989} KLR 424

[9] Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005