



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 200 OF 2011

HILLARY KEMOILO BOROR..... APPELLANT

VS

REPUBLIC..... RESPONDENT

(Being an Appeal from the original conviction and sentence by Honourable G.A Mmasi Senior Resident Magistrate, dated 29th September 2011 in Eldoret Chief Magistrate's Court Criminal Case No. 994 of 2011)

JUDGMENT

1. The appellant was convicted in two counts with two different offences. In the first count, he was convicted on a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death.

The particulars of the charge read as follows;

“On the 18th day of June 2009 at Chesirimion area in East Pokot District within Rift Valley Province being armed with a dangerous weapon namely AK 47 Rifle S/NO (386) 56 3622331 robbed Gilbert Kibii Kangogo one mobile phone make Blue tooth N96(i) and cash Ksh 3,000 all valued at Ksh. 8,000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Gilbert Kibii Kangogo.”

2. In the second count, he was convicted with the offence of being in possession of a firearm without a firearm certificate contrary to **Section 4(1)** of the **Firearms Act**. He was sentenced to a two years suspended sentence.

In this count, the particulars thereof alleged that on the 19th day of June 2009 at Chesirimion area East Pokot District within Rift Valley Province, without reasonable cause or excuse, the appellant was found in possession of an AK 47 Rifle S/NO. (386) 56 3622331 without a Firearm Certificate.

3. Being aggrieved by the conviction and sentence, the appellant lodged his appeal to this court vide an undated petition of appeal filed on 13th October 2011. Subsequently, the appellant engaged the law firm of Marube & Company Advocates to represent him in this appeal. His advocates then filed a supplementary petition of appeal on 26th July 2012 which incorporated the main grounds the appellant had raised in his initial petition of appeal.

4. The supplementary petition of appeal raised three grounds which are as follows;

i) That the learned trial magistrate erred in law in finding that the circumstances of identification/recognition of the Appellant was not conducive and or did not meet the required legal standard;

ii) That the learned trial magistrate erred in law in not evaluating the whole evidence before the court, as it was incumbent upon him.

iii) That the learned trial magistrate erred in law and in fact in convicting the Appellant on the doctrine of recent possession.

5. The appeal was prosecuted by way of oral submissions. At the hearing of the appeal, Learned Counsel **Mr. Marube** appeared for the appellant while the State was represented by Learned prosecuting Counsel **Mr. Omwenga**.

In his submissions, **Mr. Marube** argued the three grounds of appeal separately.

On the ground challenging the identification of the appellant, Counsel submitted that the evidence of PW2, PW3 and PW4 showed that the circumstances under which the alleged identification was made were not conducive to a positive and reliable identification of the attacker. He invited the court to find that the appellant was not positively identified as the person who robbed PW1 of the property described in the charge sheet. Counsel also urged us to disregard the evidence on the identification parades conducted by PW5 pointing out that the same did not have any probative value as no description of the robber had been given to the police.

6. Regarding the doctrine of recent possession, **Mr. Marube** submitted that the doctrine was inapplicable in this case as the mobile phone recovered from the appellant was not positively identified as the mobile phone stolen from PW1 during the robbery. He further claimed that there was doubt regarding how the phone was recovered as the police officer who recovered it is not the one who produced it in court as evidence.

Finally, Counsel contended that the learned trial magistrate misdirected herself by not giving due consideration to the defence proffered by the appellant during the trial.

7. The state contests this appeal. The state maintained the position that the appellant was correctly convicted as he was positively identified by three prosecution witnesses as their attacker. **Mr. Omwenga** however conceded that no proper foundation had been laid by the prosecution for the conduct of the identification parades and that the same were inconsequential.

But in his view, this did not dilute the evidence on identification as the same was corroborated by the evidence of recovery of the firearm and PW1's mobile phone from the appellant. Counsel also disputed the appellant's claim that the trial court disregarded his defence. According to him, the trial court considered the appellants defence and rightfully dismissed it.

8. This is a first appeal. We are fully alive to the duty of the first appellate court which is to re-assesses and re-evaluate the evidence on record and draw our own conclusions. In doing so, we have to bear in mind that unlike the trial court, we do not have the advantage of having heard or seen the witnesses. See *Okeno V Republic 1972 EA 32*; *Mwangi V Republic [2004] 2 KLR 28*; *Soki V Republic, [2004]2KLR 21* and *Kariuki Karanja V Republic [1986]KLR 190* among others.

9. In this case, the prosecution called a total of 9 witnesses.

In brief, the prosecution case was that on 18th June 2009 between 4 am and 5 am, PW2 **William**

Kibet Kiptoo was driving motor vehicle registration No. KBF 157 N, a matatu minibus from Chemalingot to Nakuru. He had on board thirty five passengers who included PW1 **Gilbert Kibii** and PW4 **P.C Duncan Ochieng**. PW3, **Moses Chepchieng Chelanga** was his conductor. On arrival at Cheseremon, he found stones on the road and he was forced to stop the vehicle. The vehicle headlights were still on. Through them, he saw a man emerge from the right side of the road armed with a gun. The man shot at the vehicle and the bullet hit the front windscreen's frame on the right side. He alighted and dived under the vehicle. The man went and stood on the passenger door. He ordered all passengers to alight, surrender all their money, mobile phones and lie down. PW1 surrendered cash Kshs 3,000 and a mobile phone described as Bluetooth N96(1) valued at Kshs5,000. PW3 was also robbed of Kshs 3,000 while PW4 surrendered Kshs 2,400.

The intruder then ordered all of them to run to the direction they had come from which they did. They returned to the scene about thirty minutes later and though the vehicle was still there, the robber had disappeared. PW2 then drove to Marigat police station where they reported the robbery.

10. According to the evidence of PW2, PW3 and PW4, they were able to see and identify the appellant as their attacker during the robbery. PW1 was however not able to identify the robber as according to his evidence, the robber had tied a flowered sheet on his head covering his face so that only his eyes were exposed.

On 20th June 2009, they were all summoned to Kabarnet Police Station where they identified the appellant in identification parades conducted by PW5 Chief Inspector **Jacob Kioi**.

11. From the evidence of **PW6** Corporal **Hassan Nour**, it is clear that the appellant was arrested on 19th June 2009 at Loruk trading centre by one **P.C Wambua**. He was informed of the arrest and went to join **P.C Wambua** at the scene of the arrest. And upon conducting a search on the appellant, they recovered two Nokia mobile phones (Exhibit 6(a) and (b) and another one which was a motorolla (Exhibit 6(c)).

According to PW6, they interrogated the appellant who led them about 200 meters away from the scene of the robbery to an anti hill where they retrieved an AK 47 rifle wrapped in a nylon sack. He also led them to a point about 50 meters from the scene where they recovered another set of three mobile phones. Two of the phones were Nokia's while the third one was a motorolla (Exhibit 2, 9(a) and 9 (b) respectively.

The appellant and the recovered items were handed over to the DCIO Baringo Police Station for further investigations. Investigations were conducted by PW9 Corporal **Nathan Mbugua**. The recovered items which included assorted items of clothing and a flowered bedsheet were handed over to PW9. He produced them in evidence during the trial.

12. The appellant in his defence denied having committed the offences preferred against him. He claimed that he had been sent away from High School on 18th June 2009 in search of school fees. He spent the night at Loruk trading centre and when he went into a hotel the following morning for breakfast, he was arrested for no apparent reason. He was escorted to Marigat police station and finally to Kabarnet Police station.

13. We have carefully considered the submissions made by counsel for the appellant and the state; the grounds of appeal as well as all the authorities cited by the parties. We have also re-evaluated the evidence on record.

We wish to first deal with the appellant's claim that his defence was not given due consideration by the trial court.

A perusal of the trial court's judgment reveals that the learned trial magistrate reproduced and considered the appellant's testimony but dismissed it as untrue. We find that the appellant's

assertion that his defence was not considered by the trial court was baseless. Nothing therefore turns on that ground of appeal.

14. The first issue that we have to determine in this appeal is whether the offence of robbery with violence was committed in this case.

The offence of robbery with violence is created by **Section 296 (2)** of the **Penal Code** which must be read together with **Section 295** which defines the offence of robbery. A reading of **Section 295** of the **Penal Code** reveals that the essential ingredients of the offence are that there must be threat or use of violence to any person or property in order to facilitate the act of stealing.

15. The offence of robbery with violence is established if any of the three circumstances enumerated under **Section 296 (2)** are proved to have existed in the course of a robbery. *These are;*

a) That the offender was armed with any dangerous or offensive weapon: Or

b) That the robber was in the company of one or more people: Or

c) That immediately before, or after the robbery, actual violence was occasioned to the victim.

*It is trite that proof of any of the above essential elements to the required standard of proof is sufficient to establish the offence of robbery with violence. It is thus not necessary for the prosecution to prove all the elements of the offence together in order to secure a conviction. See **Johana Ndungu Vs. Republic [1995] KLR 387; Jairus Mukolwe Ochieng v Republic Court of Appeal Criminal Appeal No. 217 of 2007, [2013] eKLR.***

16. In this case, it is not disputed that the vehicle in which the prosecution witnesses were travelling in on the fateful morning was intercepted by a man who while armed with a dangerous weapon namely an AK 47 rifle robbed the witnesses of a mobile phone and cash amounting to a total of Kshs 8,400. We are therefore satisfied that the offence of robbery with violence was committed in this case. The learned trial magistrate's finding to that effect was thus correct.

17. Having arrived at the above conclusion, the next question that we must answer is whether the appellant was the person who committed the offence.

In our view, the just determination of this question and therefore

this appeal principally turns on whether the appellant was positively

identified as the robber and whether the trial court properly applied

the doctrine of recent possession.

18. Starting with the issue of identification, it is now settled law that evidence of recognition is more reliable than identification of a stranger but *mistakes* can sometimes be made even in cases of *recognition*.

*In **R v Turnbull & others [1976] 3 ALL ER 549**, the court held that mistakes can be made even in the recognition of friends and close relatives and that an honest witness may nonetheless be mistaken.*

In **Kiarie V Republic [1984]KLR 739**, the Court of Appeal stated as follows;

“It is possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

In Wamunga V Republic [1989] KLR 424, the Court of Appeal also

had the following to say on the issue of identification;

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

19. In this case, the key witnesses who claimed to have identified the appellant are PW2 and PW3. This is so because PW4 claimed to have seen and identified the robber just as he was alighting from the vehicle. We have decided to reproduce the evidence of PW2 and PW3 on identification so that its true import can be appreciated.

PW2 testified as follows;

“One man emerged from the right side of the road, he was armed with a gun. The vehicle headlights were on. The person was not far...the person came to the passenger door. He was holding the gun. At the scene I clearly saw he had a white pink flowered sheet on his neck. I was able to see his face. He was wearing Akala (tyre) shoes.”

On cross-examination he stated as follows;

“I saw you shot at the vehicle. I dived under the vehicle but I was seeing you and hearing you talk. I saw you vividly. You

had tied the sheet from the head and neck...you had not covered the face. I saw your appearance. People resemble...”

20. On his part, PW3 testified as follows;

“ I saw a person emerge from the right front side. He was

armed with a gun. He hit the passenger door. He ordered that we open the door, we resisted. He shot one shot. He hit at the right windscreen window at the frame. People screamed. He ordered us to alight. He was standing next to the door. He told us to place money and mobile phone down and lay down. We did so I lay down. I saw him. He was covering a white pink flowered sheet. I was sleeping next to where he was standing. He had a pair of akala (tyre) shoes. ... I was a person I had seen there before. I had twice carried him in vehicle from Nakuru to Chemalingot. He is the accused in the dock.”

In cross-examination he stated;

“I know passengers when writing receipts. I do not recall date when you boarded my vehicle...”

21. After analyzing the above evidence, we are unable to agree with the learned trial magistrate's finding that the appellant had been positively identified as the person who robbed PW1 of his mobile phone and Kshs 3,000. We note that the robbery is alleged to have occurred at around 5.30 am. It would appear from the recorded evidence that though it was in the morning, daylight had not properly set in and there was some degree of darkness. This can be discerned from the evidence of PW2 and PW3 who claimed to have seen and identified the robber through the vehicle's headlights.

22. From the record, there appears to have been a material contradiction between the evidence of PW1, PW2, PW3 and PW4 regarding the appearance of the robber which was hard to reconcile. PW1 testified that though he saw the robber through lights inside the vehicle, he was unable

to identify him as he had tied a flowered bedsheet on his head concealing his face except for his eyes.

PW2, PW3 and PW4 on the other hand claimed that the robber had only tied his head and neck with the bedsheet but his face was exposed. For witnesses who claimed to have seen their attacker at the same time and in the same set of circumstances, it is difficult to understand how they could have made completely different observations regarding whether or not the robber had concealed his face. This, coupled with the fact that the robbery appears to have taken a very short time introduces some element of doubt as to whether the witnesses had sufficient time to clearly see and correctly identify their attacker.

23. It is important to note that none of the witnesses who claimed to have identified the appellant as their attacker gave an approximate distance regarding how close or far the attacker was when they first saw him and how long they were able to see him.

They did not also give a description of the intensity of the light through which they saw the attacker. That is, whether the vehicle's headlights were dim or bright. PW2 stated that on seeing the robber approaching the vehicle after firing a shot at it, he immediately alighted and dived under the vehicle but he continued seeing and hearing the attacker as he stood on the passenger door. Unless he had supernatural abilities which were not disclosed on record, we fail to understand how he could have continued to see the robber when he was already hiding under the vehicle.

24. According to the evidence of PW3, when he saw the appellant, he realized that he was a person he knew prior to the material date as he had allegedly conveyed him as a passenger twice before in the same matatu. But when put to task by the appellant under cross-examination, he could not tell on what dates he had ferried the appellant as his passenger. He did not also disclose whether it had happened close to the time the robbery occurred or a long time ago. From this evidence, it is clear that PW3 did not have any close relationship with the appellant and he was not a person he knew well before the material date. In the circumstances, we find that his testimony cannot be treated as evidence of recognition of a suspect. It is more of evidence of identification.

25. Finally, we wish to observe that though the witnesses reported the robbery the same morning at Marigat Police Station, they did not give a description of the suspect they claim to have identified to the police. They did not also account for this failure. We are guided by the Court of Appeal in *Simiyu & Another V Republic [2005] 1 KLR 192* when it expressed itself on this point as follows;

“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused, and then by the person or persons to whom the description was given. The omission on part of complainant's to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity.”

We are persuaded to find that the witnesses in this case did not give a description of their attacker to the police because they were not sure of his identity.

26. It is however interesting to note that despite the fact that the police were not given a description of the robber, one ***P.C Wambua*** arrested the appellant on the following day at Loruk trading centre in the absence of all the witnesses. This means that the appellant was not identified by anybody as the suspect in the robbery before he was arrested. We cannot help asking ourselves the following questions: On what basis did ***P.C Wambua*** arrest the appellant? How did he link him to the robbery?

None of these questions were answered by the prosecution because regrettably, ***P.C Wambua***

did not testify in this case.

27. We are also of the view that as the police did not have a description of the robber, there was no basis upon which identification parades could have been organized and conducted. Learned Prosecuting counsel **Mr. Omwenga** was right in conceding that the evidence relating to the identification parades in which the appellant was purportedly identified was worthless and inconsequential.

We also wish to note that the AK 47 rifle allegedly recovered through the stewardship of the appellant was not produced in court and identified by PW1, PW2, PW3 and PW4 as the gun or firearm the culprit was armed with during the robbery before it was produced in evidence by the investigating officer. Regarding the flowered bedsheet, though it was produced in court, PW1, PW2, PW3 and PW4 failed to positively identify it as the one the appellant had tied on his head during the robbery. They did not point out any special characteristic or unique mark in the bedsheet that made them identify it as the one the robber had worn on his head during the robbery.

28. We believe we have said enough to demonstrate that the circumstances obtaining during the robbery were not conducive to a positive, reliable and correct identification of the appellant.

From our appraisal of the evidence on record, we are satisfied that the alleged identification of the appellant as the culprit in this case cannot be said to have been free from error. Had the learned trial Magistrate properly analysed the evidence on identification and taken into account all the factors we have enumerated above, she may have come to a different conclusion. Consequently, it is our finding that the appellant was not properly and positively identified as the person who perpetrated the robbery in this case.

29. Turning now to the doctrine of recent possession, the law is that for the doctrine to apply, the prosecution must establish the following conditions; First, that the property was found in possession of the suspect; Secondly, that the property was positively identified by the complainant and thirdly, that the property was recently stolen from the complainant. See **Martin Oduor Lango & 2 others v Republic Court of Appeal Criminal Appeal No. 282 of 2012 [2014] eKLR** ; **Arum v Rep. [2006] 1 KLR 233**; **Issac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Court of Appeal at Nyeri Criminal Appeal No. 272 of 2005, (2006)eKLR.**

30. In this case, the only property that was stolen during the robbery and was allegedly recovered on the following day was PW1's mobile phone. According to the charge sheet and PW1's testimony, the make of the stolen Mobile Phone was Blue tooth N96(1). This is the phone which PW1 positively identified in court in his evidence through the production of a receipt of purchase of the same.

But according to the evidence of PW6 who together with **P.C wambua** recovered several items from the appellant, they recovered six mobile phones. The make of all the recovered phones was either Nokia or motorolla. He did not testify that one of the recovered phones was a Blue tooth N96(1). It is only PW9 who in the course of his evidence testified that one of the items handed over to him by the DCIO Baringo in the course of his investigations was a mobile phone make Blue tooth N96(1).

31. It is unfortunate that for undisclosed reasons, **P.C Wambua** who had allegedly been in the company of PW6 when the said recoveries were made, was not called as a witness to confirm or deny that such a phone had been recovered from the appellant.

But if according to the evidence of PW6, no such phone had been recovered from the appellant, how then did the phone land in the hands of PW9?. This is not however our concern here. The fundamental point to note is that the prosecution did not adduce any evidence to prove that the said mobile phone had actually been recovered from the appellant a day after it had been stolen.

This in effect means that one of the conditions that must be present for the doctrine of recent possession to apply was missing in this case.

32. We therefore agree with Mr. Marube's submission that the doctrine of recent possession was not applicable in this case. We find that the learned trial magistrate's finding that the complainant's mobile phone had been recovered from the appellant a day after the robbery was not supported by the evidence on record.
33. For all the foregoing reasons, we have come to the conclusion that the charge of robbery with violence was not proved against the appellant beyond any reasonable doubt. We are thus satisfied that his conviction for that offence was not safe. In the result, we allow the appeal with regard to the conviction and sentence in count 1. That conviction is hereby quashed and the sentence of death set aside.
34. Regarding the conviction in count 2, the appellant did not appear to seriously challenge it on appeal. Mr. Marube's submissions largely focused on the invalidity of the appellant's conviction in count 1.

We have nevertheless re-examined the evidence with respect to the offence charged in count 2. PW6 maintained in his evidence that it is the appellant who led them to a place where they recovered the firearm described in count 2.

The appellant in his evidence did not dispute that he was arrested by the police on the 19th June 2009 at Loruk trading Centre. He did not also specifically deny that the said fireman had been recovered in his constructive possession as alleged by PW6. The evidence of PW6 on this point remained unshaken by the defence. He identified the said fireman in court before it was produced in evidence by PW9.

35. Given this evidence, we have no reason to fault the trial court's findings that the appellant was found in possession of an AK 47 rifle as alleged. The firearm was subjected to examination by a ballistic expert (PW7) who certified that it was in good condition and was capable of being fired. As no evidence was adduced before the trial court to prove that the appellant had a firearm certificate, we find that he was properly convicted in count 2. That conviction is therefore upheld.

36. On sentence, we note that the appellant was sentenced to a two year's

suspended sentence. However, under **Section 4 (3)** of the **Firearms Act**, the offence for which the appellant stands convicted in count 2 attracts a sentence of a minimum of five years and a maximum of ten years imprisonment. That being the case, we find that the sentence imposed on the appellant by the trial court had no basis in law and was clearly illegal.

37. Under Section **354** of the **Criminal Procedure Code**, this court is empowered to review and alter a sentence passed against an accused person by the lower court if the same is contrary to the law or for other sufficient cause. We find that it is our duty to correct the illegal sentence meted out against the appellant in count 2 in order to align it to the applicable law. We accordingly set aside the sentence imposed by the learned trial magistrate and substitute it with a sentence of five years imprisonment. The sentence will take effect from the date of the appellant's conviction.

It is so ordered.

DATED and SIGNED at ELDORET this 10th day of February 2015

G.K KIMONDO

C.W GITHUA

JUDGE

JUDGE

DATED and DELIVERED at ELDORET this 10th day of February 2015.

C.W GITHUA

JUDGE

In the presence of:

Appellant in person

Mr. Mulati for the state

Mr. Marube for the Appellant

Mr. Paul Ekitela Court Clerk