



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.36 OF 2012

(Appeal from the judgment of Hon. R. Ondieki in Kilifi Cr. Case No.533 of 2010)

BENARD NJERU KAMWARA PETITIONER

VRS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with two counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence for the 1st count were that the appellant on the 12/6/2010 at Kibaoni/Takaungu stage in Kilifi District within Coast Province jointly with others not before court, robbed Austin Adiwour of a mobile phone Nokia 3110, cash ksh.118,141.10 cts and 3856 packets of cigarettes all valued at ksh.365,404.22 cts and at or immediately after the time of such robbery wounded the said Austin Adiwour. The particulars of the offence for the 2nd count were that the appellant on the 12/6/2010 at Kibaoni/Takaungu stage in Kilifi District within Coast Province jointly with others not before court, being armed with dangerous weapon namely a pistol and a knife robbed Benson Baya Msanzu of his Nokia 3310 mobile phone and cash ksh.150/- all valued at ksh.2,800/-.

The appellant was convicted and sentenced to suffer death. His grounds of appeal are that:

- a) The identification parade was poorly conducted.
- b) The doctrine of recent possession was not proved.
- c) There was no link connecting his arrest with the case.
- d) The prosecution case was full of contradictions and discrepancies.
- e) The charge sheet was defective.
- f) The exhibits that were produced were not found in possession of the appellant.
- g) The victim of the robbery did not recognize the appellant.

The appellant filed written submissions and entirely relied on them. He maintains that the trial court failed to re-evaluate the evidence on identification. No descriptions of the robbers was given to the police. The officer who conducted the identification parade did not indicate if he had been given any description of the suspect. The identification parade witnesses had seen the appellant before the parade

was conducted. The appellant was the only parade participant who had a bandage on his head. The entire parade was therefore not conducted as per the parade rules.

The appellant contends that it was alleged that he was found with some of the stolen items. The evidence indicated that he was arrested with a bag containing Sweet Menthol (SM) cigarettes. According to the arresting officer, they found the appellant being beaten up by a mob on the roadside. They searched him and did not find any gun or knife. It is alleged that the bag recovered from the appellant had a pistol and a knife and SM cigarettes. The complainant did not testify that the cigarettes allegedly found in the bag were part of the stolen items. There is the evidence that a woman in the matatu vehicle the appellant was travelling in is the one who claimed that the bag belonged to the appellant. That witness was vital yet she was not called to testify. The appellant was travelling on the vehicle and there was no connection with the case of robbery. The trial magistrate in the judgment noted that it was not clear as to what happened to the knife and pistol that were allegedly recovered. It is therefore clear that there was no vital evidence to show that the appellant was in possession of the pistol and a knife or the alleged cigarettes. The appellant further contends that although it was alleged that there were stolen phones whose make was 3110, the evidence give the description of the phones as 2110 Nokia. It is his submissions that he had gone to buy land in the area. The evidence shows that the victims' entire stock of cigarettes was stolen but only a small tin of SM cigarettes was recovered.

The State opposed the appeal. Mr. Nyongesa, prosecuting counsel submitted that the robbery occurred at 2.00 p.m. PW1 described the appellant's physique. The appellant was with two others and was armed. He was arrested shortly after the robbery. Some of the stolen cigarettes were found with the appellant. The trial court applied the doctrine of recent possession and did not rely on the evidence of identification.

Being the first court to handle the appeal, it is our duty to re-evaluate the evidence afresh and make our own conclusion. The record of the trial court shows that six witnesses testified. **PW1 Austin Odiwor** was a driver employed by Ocean Distributors Limited, Kilifi. On the 12th of June, 2010 at about noon, they were distributing cigarettes and he was the driver of motor vehicle registration no.KBE 043E, Toyota Hilux. He was at Kibaoni with PW2 who had gone to a client's shop to take an order. While seated in the vehicle two men emerged from either side of the vehicle and he was sandwiched between. His colleague came and he was pushed down the floor. A 3rd man arrived and tried to start the vehicle but he could not. He was told to start the vehicle or he would be killed. He saw the robbers had pistols and knives. He switched on the start button and they drove off. It is his evidence that on the way his colleague PW2 was thrown out of the vehicle. One of the robbers placed a gun on his neck. He was robbed of Ksh.6,000/- and his phone. There was money in the rear cabin and they were carrying cigarettes of different make. The robbers stopped the vehicle and wanted to shoot him but one of them indicated that the gun shot would attract attention. He was cut on the back of the shoulder and was bleeding. He was left and the robbers went away. After about 5 minutes, two Administration Police passed by on a motorbike. His colleague PW2, caught up with him and they took him to Kilifi District Hospital. He told the police that he could identify one of the robbers. He had identified him as a hefty man with a beaded belt and was the one with the pistol. He estimated the value of the cigarettes in the vehicle to be ksh.242,000/-.

PW1 further testified that, he attended an identification parade and was able to identify the appellant who had a bandage on his head. He identified him by his belt and appearance. **PW2, Benson Baya Msanzu** was with PW1. On 12/6/2010 at about noon, they were at Kibaoni where they had packed their vehicle. He had gone to take an order from a shop located about 6 metres from where they had packed. Upon going back to the car, he was pushed inside the vehicle and made to lie down. There were three robbers. He saw a small sack on the lap of one of the robbers. He was robbed of his Nokia 3310 and ksh.150/-. He was then pushed out of the vehicle and the robbers proceeded with PW1. He ran to Mavueni stage and made a phone call to their Mombasa Office. He informed members of the public about what had happened and they called the police who arrived after 30 minutes. They looked for the vehicle and found it near Bahari Girls School. They started looking for PW1 and found him near a village bleeding. PW1 was taken to Kilifi Hospital. He went to Kilifi Police Station and an AP vehicle took a suspect to the station. The suspect had been badly beaten but he could not identify him.

PW3, Gibson Kirimi was a driver of a Nissan Matatu. On 12/6/2010 at about 3.30 p.m he was from Malindi heading to Mombasa. He picked two female passengers at Mavueni stage. About 100 metres from the Mavueni stage, the appellant stopped him and boarded the vehicle. While on their way another Nissan Matatu approached them with its headlights on. He stopped his vehicle and was asked to remove a passenger who had boarded the vehicle at Mavueni. He was told the passenger had a black bag. The appellant was removed from the vehicle and there was a black bag on the floor which he took with him. The appellant was badly beaten by the people who had stopped the vehicle. There were cigarettes, a toy pistol and a knife inside the bag. The appellant was bleeding on the forehead. He was taken to Kijipwa Police Station.

Dr. Rashid Azaveri was PW4. She was based at Kilifi District Hospital. She produced a P3 form which indicated the injuries sustained by PW1. The P3 form was filled on 2/7/2010 by her workmate Dr. Mango. **PW5, Inspector Ronald Kimanzi** was at the Kilifi Police Station. He got information of the robbery on 12/6/2010 at about 1.00 p.m and rushed to the scene. They found a vehicle with empty cartons of cigarettes. While there, he got a phone call from a member of public that one of the suspects had been arrested in a matatu by civilians. They proceeded to Takaungu and found the appellant being beaten by a mob beside the road. Next to the appellant were 10 packets of SM cigarettes. PW5, later on conducted an identification parade and the appellant was identified by some witnesses. The appellant was taken to hospital.

PW6, PC Christopher Mosop was based at the Kilifi Police Station. He investigated the case. They went to Mavueni stage with other officers on 12/6/2010 at about 1.00 p.m. They found members of the public who led them to where the distributor's vehicle had been left. They were told that the robbers had dumped the vehicle and ran away in the direction of Bahari Girls. The owners of the company went to the scene with a spare key and opened the vehicle. It was established that cigarettes worth ksh.118,148.10/- were stolen. While at Mavueni inspector Kimanzi called and informed him that the appellant had been arrested and SM cigarettes recovered from him. The appellant was later charged with the offence. Before then, PW6 organized an identification parade that was conducted by PW5 and the appellant was identified.

In his unsworn defence, the appellant testified that he resides at Bamburi where he operates a cafe. On the 12/6/2010, he went to meet Mzee Kahindi who was to sell him a plot. He found him waiting with his family. At about 3.30 p.m the family members could not agree on the purchase price of between ksh.200,000/- and 300,000/-. He left the place and went to Kilifi stage. A vehicle came from Malindi direction and he boarded it. On reaching Kibaoni area, another Nissan Matatu approached from behind and stopped them. They were 10 passengers in the vehicle. People asked the driver for a man who had boarded the vehicle at Mavueni to alight. He said he was the only one who had boarded the vehicle on the way. He was beaten up and lost consciousness. His phone and money were stolen. He found himself at the police station.

The main issue for determination are whether the appellant was positively identified, whether the appellant was found in possession of stolen property and whether the prosecution proved its case beyond reasonable doubt. With regard to the first issue, the trial magistrate found that the witnesses saw the appellant before the parade was conducted. He ignored the evidence on identification. The evidence indicate that when the appellant was arrested and taken to the Kilifi Police Station, PW1 and PW2 were at the station and they saw him. The parade conducted by PW5 also show that the appellant was the only one with a bandage on his head. We do find that the identification parade was not conducted in conformity to the Forces Standing

Order Rules. The appellant had some disfigurement on his head and it was easy to pick him out. Further, the witnesses were aware that the suspect had been beaten up and had even seen him. PW1 and PW3 had seen the appellant. PW3 saw the appellant when he was removed from his vehicle and beaten up by members of the public. We do agree with the findings of the trial court that the identification parade was not properly conducted.

The next issue relates to the application of the doctrine of recent possession. The evidence of the

prosecution clearly proves that PW1 and PW2 were robbed of their vehicle and cigarettes. PW2 was thrown out of the vehicle. PW1 was injured and taken to hospital. The evidence proved that the robbery was indeed violent. Moreso, there were three robbers who were armed.

The robbery took place at about mid-day. We do understand that whenever a robbery occurs, it would not be possible for the victims and witnesses to give the exact time the incident took place. PW1 stated that it was noon while PW2 stated that it was 12.30 p.m. there is no difference in time. PW5, a police officer was informed of the robbery at about 1.00 p.m. The appellant's evidence is that he had gone to see Mzee Kahindi and left at about 3.30 p.m. This is the same time given by PW3. According to PW2, the police went to the scene after about half an hour.

It is the evidence of PW3 that the appellant flagged down the vehicle about 100 metres from Mavueni stage. He had picked two women at Mavueni. The appellant in his defence indicated that he boarded the vehicle at Kilifi. It is not clear where Mzee Kahindi's home is from the appellant's defence. The evidence of PW3 shows that when the appellant was being taken out of the vehicle, he went out with the bag. Although the witness mentioned a knife and a toy pistol, PW5 and PW6 did not see these weapons when they reached at the scene. It is clear from the evidence that the appellant was arrested by members of the public. The incident occurred within the vicinity where the appellant boarded the vehicle. PW3 was categorical that he even stopped the vehicle at exactly where the appellant was standing. This was about 100 metres from Mavueni stage. At that time, the police had been called and were checking on the stolen vehicle near Bahari Girls which is within the area of Mavueni stage. The evidence proves that the appellant was found in possession of the ten (10) packets of SM cigarettes. These cigarettes had been robbed from PW1 and PW2 a few hours before his arrest. The defence evidence does not mention anything about the cigarettes. PW3 was just driving his vehicle and took the appellant as a passenger. The trial court noted that he was truthful. We do agree with the findings of the trial magistrate that the doctrine of recent possession applied. Although the magistrate went on to refer to the evidence on identification after he had faulted the identification, we do find that the appellant was found in possession of the cigarettes. These were 10 packets. The evidence indicates that cigarettes worth ksh.240,000/- were stolen. The daily return form produced in court shows that PW1 and PW2 were distributing cigarettes of different brands including SM cigarettes. The value of the SM (Sweet Menthol) cigarettes is given as ksh.3,771/-. There were 20 packets of SM cigarettes. The appellant was found with 10 packets. There were three robbers during the incident.

The defence evidence is that the appellant had gone to purchase a plot from Mzee Kahindi. The appellant was put on his defence. The defence evidence does not raise any doubt on the prosecution case.

In the end, we do find that the prosecution proved its case beyond reasonable doubt. The appellant was arrested by members of the public who had seen him boarding a matatu a few metres ahead of Mavueni stage. They pursued the matatu and arrested him. The police were called and cigarettes were found in possession of the appellant. We do agree with the findings of the trial magistrate that the doctrine of recent possession is applicable.

In the end, we find that the appeal lacks merit and is hereby disallowed.

Dated, delivered and signed at Malindi this 5th day of November, 2015.

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SAID J. CHITEMBWE

JUDGE

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M. MUYA

JUDGE