



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 11 of 2008

BEDAN MUGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was charged with three others with two counts of robbery with violence contrary to section 296(2) of the penal code. The rest were acquitted but he was found guilty in both counts for the reduced charge of simple robbery contrary to section 296(1) of the Penal Code. The Appellant was sentenced to 15 years imprisonment on the first count and 20 years imprisonment on the 2nd count. With the sentences ordered to run concurrently. Being aggrieved by the conviction and sentence he filed this appeal. There are six grounds of appeal in his filed petition of appeal which Mrs Ntaragwi relied upon in her submissions in support of this appeal. These grounds are as follows:

1. That the learned trial magistrate erred in both law and facts by convicting the appellant without considering that the charge sheet was defective.
2. That the learned trial magistrate erred in law and facts in founding a conviction failing to find that the incumbent matter was not proved beyond reasonable doubts, investigations were shoddy and mode of arrest was questionable.
3. That the trial Magistrate erred in both law and facts by convicting the appellant without considering that the conditions for positive identification were not conducive and the duration was too short.
4. That the learned trial magistrate erred in both law and facts by founding a conviction without considering that the possession of exhibits was not proved, and also some essential witnesses were not summoned to testify and clear the prevailing doubts.
5. That the learned trial magistrate erred in both law and facts by not putting into consideration my defence, rejected it and failed to give cogent reason for its rejection.
6. That I pray to be served with a true copy of lower court proceedings to assist me write my submissions to present during the hearing of my appeal
7. That I pray to be present during the hearing of my appeal.

The brief facts of the prosecution case was that the PW1 who is the father of PW2 were at home on the night of 25th October, 2006 at Kaaga area in Meru central district when they were attacked by four men and robbed off various items. The evidence adduced in court was able to establish that one Nokia phone was stolen from the wife of PW1 who was not called as a witness. They also stole two mobile phones and a pair of shoes from PW2. The Appellant and the 2nd accused in the case were arrested the same night of the incident. In his defence the Appellant denied any involvement in the incident and said that he was arrested as he walked home by security personnel from a private firm.

Mrs. Ntaragwi for the Appellant raised issue with the identification of the appellant PW1 and 2. She also challenged the circumstances under which the id was carried out especially because no descriptions had been given by the witnesses of the persons they could identify. Counsel relied on one case **Moris Sammy vs Republic**. On the application of doctrine of recent possession which states:

“On the doctrine of recent possession of goods, this court held in Isaac Nanga Kahiga alias Peter Nganga Kahiga vs Republic Criminal Appeal No. 272 of 2005 (unreported)

‘It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses’”

I am the first appellate court. This court’s duty bound to re-evaluate and re-analyze the evidence adduced in the lower court and to draw its own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. In this regard the case of **Okeno Vs. Republic** 1972 EA 32 is relevant. It was stated in that case as follows:-

“An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

The issues that arise in this appeal are first and foremost whether the evidence of identification was sufficient to found a conviction. The Appellant was identified by PW1 and 2 in identification parades conducted a few days after the incident. In evidence however, PW1 stated that the person he identified in the ID parade is the one who ransacked his car bands and wore a maroonish cap with a nike slogan. PW1 said that the person who was armed with a spade is the one who hit him but did not do anything else. PW2 testified that he identified the appellant as the person who was armed with a spade and whose role was to walk up and down in the bedroom and did not talk much. PW2 identified one other person who was the 1st accused in the case. It was Mrs. Ntaragwi argument if the identification of the 1st accused in the case was found shaky then the identification of the Appellant ought to have been found shaky.

I do not agree with Mrs. Ntaragwi that merely because the identification of the first accused in the case was regarded shaky the same should have applied to the identification of the Appellant. This is because the circumstances of the arrest were totally different and therefore, the acquittal of one on the basis of identification ought not to have dictated the manner in which the court was to treat the identification of the other. That notwithstanding I do find that the identification of the Appellant by PW1 and 2 was

unreliable for totally different reasons.

The first reason is the fact that the person PW1 described in his evidence is not the person that PW2 described in his evidence. While PW1 was identifying a man as the person who ransacked cupboards as the Appellant, PW2 was identifying the one who was armed with a spade and who paced up and down the bedroom without saying much. It is very clear from the evidence that even though they identified the Appellant as one who attacked them on the night in question, the descriptions of the role of the person they identified was inconsistency.

There is further evidence from the arresting officer that is PW4 which shows that the Appellant was taken to the police station by Securicor who had arrested him along the road on suspicion near Makutano. PW4 testified that soon after the Appellant was brought PW1 and 2 arrived at the station. PW1 identified a Nokia phone Exhibit 1 which the Appellant was found with. PW2 on the other hand identified one shoe the appellant was wearing as one of the items stolen from his house. It was irregular that PW1 and 2 who had seen the Appellant were later on called to an identification parade to identify him.

Regarding the Nokia Phone it was said to belong to the wife of PW1 who was not called as a witness. PW1 who purported to identify that phone said he could only identify it as belonging to his wife if it was switched on and if somebody rang it. There is no evidence that any one switched on that phone or that it was ever rang that identification was poor. PW2 identified one shoe as his. There was nothing in evidence to show the basis upon which that shoe was identified or any cogent proof that the shoe belonged to PW2. The identification of the shoe was therefore shaky and unreliable.

After carefully considering this appeal I do find that the prosecution did not prove the charge to the required standard and therefore the learned trial magistrate finding that the offence had been proved was wrong., consequently I do allow the Appellant appeal quash the conviction and set aside the sentence. The appellant should be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 2nd DAY OF MAY 2013

J. LESIIT
JUDGE