



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 72 OF 2017

BETWEEN

MUTUA MBALUKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos, (B. Thurania & J. Ngugi (Prof), JJ) delivered 15th October, 2013

in

H.C.RA. 101 & 102 OF 2012)

JUDGMENT OF THE COURT

On 7th July 2011 at about 9 pm **Juliana Katoto Musau, (PW2)** and her husband, **Stephen Musau Mbai, (PW3)** closed their shop at Kathamboni market in the then Makueni District and headed home on their motorcycle. On the way they came across two people who blocked their way forcing them to stop abruptly. The said people were armed with sticks and stones. They set upon the couple and in the process PW1 was injured on the chest, nose and mouth. Her leg too was burnt by their motorcycle's exhaust pipe. When the couple called out for help, one of the attackers pulled PW1's handbag and ran away with it on realizing that members of the public who had responded to the couple's cry for help were closing in. The handbag contained cash Kshs 3,100/=, identity card, voter's card and a notebook.

Members of the public who came with torches noticed some footprints from the scene after the couple had told them what had transpired. They followed the footprints in pursuit of the assailants. The footprints led them to a place where they found some bicycle tracks. They followed the tracks up to a certain home which turned out to be the home of one, Mutua Mbaluka, the appellant herein. They surrounded the house and forced the appellant out of the house. Following brief interrogation, they frog matched him to Kathamboni market where PW2 immediately identified him as one of the attackers. "Mob justice" was immediately administered on him and in the process he named an accomplice who was however not traced. The appellant then led the mob to a collapsed latrine in his compound where PW 1's handbag was retrieved together with her identity card, notebook as well as her voter's card. However the money was missing.

The District Officer was alerted and came to the scene in the company of police officers and proceeded to the house of one, Amos Mambo Mule who had also been mentioned by the appellant as an accomplice. He was arrested after attempting to flee through a hole he had dug in his house. The duo were escorted to Wote police station by **APC Samuel Kinyanjui Kirui, (PW7)** with the recovered items, and were received by **Cpl Paul Kiprop Kipkore, (PW6)**. At the police station PW1 was issued with a P3 form and treated at Makueni District Hospital. The P3 form was subsequently filled by **Joseph Kiptoo Boot, (PW2)**, a clinical officer then based at Makueni District Hospital.

After further investigations the appellant and his co-accused were arraigned in the Principal Magistrate's Court at Makueni on one count of robbery with violence contrary to **section 292(2)** of the Penal Code. The particulars of the offence were that on 7th July, 2011 at 9pm at Kathamboni village, Thavu Sub-location Kathonzweni location in Kathonzweni District of Eastern Province jointly with others not before court and while armed with dangerous weapons namely *rungus*, they robbed **Juliana Katoto Musau** of her handbag, cash Kshs. 3,100/=,

National Identity card, Elector's card and a funeral note book all valued at Kshs. 4000/= and at the time of such robbery used personal violence to the said Juliana Katoto Musau. They both denied the charge and their trial ensued.

Put on their defences, they all denied participating in the crime and claimed that the purported crime was a set up due to business rivalry between them and the complainants.

In his judgment, the trial Magistrate found that the prosecution case had been proved beyond reasonable doubt, convicted appellant and his co-accused and sentenced each one of them to death. Aggrieved by the conviction and sentence, the appellant and his co-convict proffered an appeal to the High Court at Machakos. In due course the appeal was heard by Jaden & Ngugi JJ. Whereas the appeal by the co-convict was successful, the appellant was not so lucky. His appeal was dismissed.

The appellant is now before us on a second and perhaps last appeal. Through Messrs. Ratemo Oira & Company Advocates, the appellant has raised a total 7 grounds of appeal, to wit, that the High Court erred in law and fact; in not appreciating that no proper police identification parade was carried out; that there was no conclusive evidence linking the appellant to the crime; failing to evaluate the evidence afresh so as to reach its independent conclusions; and the evidence relied on by the prosecution was not free from error, was contradictory, inconclusive and created a lot of doubts that should have been resolved in favour of the appellant .

Presenting the appeal, Mr. Oira, learned counsel for the appellant submitted that the offence was not proved as required in law. That there were contradictions between the evidence of PW2 and PW3 with regard to the identification of the appellant. Whereas PW3 who was riding the motorcycle testified that he was not able to identify the appellant, PW2 who was a pillion passenger emphatically stated that she was able to see the appellant sufficiently through the moonlight and the headlights of the motorcycle as to be able to identify him. Subsequently, to the appellant's counsel this was an impossible feat given that she was seating at the back of the motorcycle. Counsel further submitted that there was no recovery of recently stolen goods from the appellant contrary to the submissions by counsel for the respondent. That in any event the alleged recoveries were not by the police and further that the toilet where the recoveries were made did not belong to the appellant. Counsel went on to submit that on the whole the evidence adduced by the prosecution did not irresistibly point to the appellant as the perpetrator of the crime. There were doubts in the prosecution case which should have been resolved in favour of the appellant. It was submitted further that since PW2 and PW3 conceded that they did not know the appellant, it was thus not a case of recognition but visual identification in difficult circumstances. Such evidence has to be carefully examined before a conviction can turn on it. According to counsel, this threshold was not met in the circumstances of this case, and the appellant ought not to have been convicted therefor. For all these submissions, Counsel relied on the following authorities, **Anjononi v Republic (1980) KLR 59 and Maitanyi vs republic (1986) KLR 198**. As a parting shot counsel urged us to allow the appeal in its entirety.

Opposing the appeal, **Ms. Wang'ele**, learned Senior Principal Prosecution Counsel, submitted that the appellant was raising issues that were never canvassed in the two courts below. That the conviction of the appellant turned on identification and the application of the doctrine of recent possession. Counsel submitted that PW2 was able to see the appellant courtesy of the moonlight as well as headlights from the motorcycle. When the appellant was arrested by members of the public he volunteered to show them where PW2's handbag was. Indeed he took them to a toilet within his compound and the handbag was retrieved with the contents belonging to PW2 save for the money. In those circumstances counsel maintained that the doctrine of recent possession was properly invoked. To counsel there was sufficient evidence to convict the appellant. With regard to the alleged contradictions, counsel maintained that there were none and even if there were, they were minor and did not affect the strong prosecution case against the appellant. She therefore urged us to dismiss the appeal.

As this is a second appeal, our consideration is limited to matters of law only. Otherwise we are generally bound by the concurrent findings of facts by the two courts below departing therefrom only in the rarest of cases where, for instance they are not based on any evidence or proceeded from a misapprehension of the evidence or are plainly untenable. See **Karingo V Republic (1982) KLR 219** and Section 361 of the Criminal Procedure Code

We have determined that the following are the issues of law that call for our interrogation; identification of the appellant, whether the High Court properly re-evaluated and re-appraised the evidence as required of it as a first appellate court, whether the prosecution proved its case against the appellant to the required standard and finally the application of the doctrine of recent possession.

With regard to identification of the appellant, it is only PW2 who claimed to have identified the appellant. It is noteworthy that the incident happened at 9pm. She claimed to have been assisted by the moonlight and the headlights of the motorcycle in identifying the appellant. From her own testimony she was a pillion passenger on the motorcycle and was seated directly behind PW3. Given those circumstances, it is doubtful whether PW2 would have been in a position to see the appellant sufficiently to be able to identify him. She did not indicate in her

testimony how she observed the appellant to be able to identify him. Nor was the strength of the light at the scene, be it the moonlight or the motorcycle's headlights interrogated in terms of **Maitanyi vs Republic (supra)**. To cap it all PW3 who was riding the motorcycle and who would have been in a better position to identify the appellant was unable to do so thereby creating a doubt as to whether PW2 actually saw the appellant and or whether her identification of the appellant was free from possibility of error. Moreover, when PW3 testified, she stated that the appellant and his co-accused were facing the opposite direction as they approached them. The High Court in its judgment correctly pointed out that PW2's evidence on identification lacked details regarding the stage at which she saw the faces of the attackers, whether it was fleetingly or long enough to be able to remember their faces and was thus unreliable. Had this been the only evidence that was led against the appellant with regard his identification, it would not have been sufficient to convict the appellant. However there is some other evidence that places the appellant at the scene of crime.

That was the evidence of PW2, PW4 and P5. Their evidence was that together with other members of the public who responded to PW2's and PW3's cries for help, came to the scene and upon seeing the shoe marks followed them until they got to where there were bicycle tyre marks. They followed those tyre marks which led them to the house of the appellant. They forced him out of the house and upon interrogation he led them to a toilet where PW2's handbag and all its contents save the money were recovered. Those contents were national identity card, Electors card and a funeral notebook. The recovered handbag and the contents therein as aforesaid were positively identified by PW2 as her property.

PW3's evidence on recovery was corroborated by that of PW4. His evidence was that he assisted in tracking down the robbers and was present when the appellant took them to the toilet where the handbag was recovered. Further corroboration is found in the evidence of PW5 who stated that he also proceeded to the scene when he heard screams. He was among those who tracked the appellant up to his house and had him arrested. However he was not present during the recovery of the handbag.

In our view, both the two courts below properly invoked the doctrine of recent possession in convicting the appellant. The circumstances under which the doctrine can be invoked to secure a conviction were set out in **Malingi VS Republic (1989) KLR 225** thus:

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he had in possession had been stolen, it had been stolen a short period prior to the possession, that the lapse of time from the time of its loss to the time the accused was found with it was, from the existing nature of circumstances of the case, recent; that there are no co- existing circumstances which point to any other person as having been in possession of the item”

In this case the appellant did not give any explanation as to how he had come in to possession of the recovered items belonging to PW2 which had been stolen from her hardly 3 hours before the recovery.

We have no doubt at all that in upholding the appellant's conviction by the trial court, the High Court undertook what in our view was a faithful discharge of its duty as a first appellate court to independently re-appraise and re- evaluate the whole evidence tendered in the trial court. It indeed adverted to the holdings in the famous case of **Okeno VS Republic (1972) EA 32**. Thereafter it undertook a careful judicious approach appreciating that the evidence of visual identification can bring about a miscarriage of justice. In the end it discounted the evidence of visual identification of the appellant by PW2 and rightly so in our view. In the end the High Court relied on the doctrine of recent possession to uphold the appellant's conviction. In doing so it went out of its way to appreciate when the doctrine can be invoked and we think it did a sterling job contrary to the appellant's submissions.

On the whole, we are satisfied just like the two courts below that the conviction of the appellant was based on sound evidence. Consequently, we see no merit in this appeal. It is dismissed in its entirety.

Dated and delivered at Nairobi this 5th day of June, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

*I certify that this is a true
copy of the original.*

Signed

DEPUTY REGISTRAR