



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M'INOTI, MURGOR & KANTAI, J.J.A.)

CRIMINAL APPEAL NO. 142 OF 2019

BETWEEN

STEVEN OCHIENG OCHIRO ODHIAMBO.....1ST APPELLANT

MORRIS OTIENO ROY.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Machakos (Kemei, J.) dated 16th October 2018

in

H.C.C.R.A. No. 44 of 2017)

JUDGMENT OF THE COURT

The appellants, Steven Ochieng Ochiro Odhiambo and Morris Otieno Roy were convicted by the *Principal Magistrates Court at Mavoko* of 6 counts of robbery with violence “contrary to section 295 as read with 296(2) of the Penal Code” and sentenced to death. *The High Court at Machakos (Kemei, J.)* dismissed their first appeal on 16th October 2018 and now they are before us in their second appeal.

The charge sheet stated in count 1 that on the night of 5th and 6th February 2015 at *Syokimau Estate* in *Athi Rver Sub County, Machakos County*, jointly with others not before the court and while armed with dangerous weapons, namely, rifles and pistols, the appellants robbed *Simon Kiprotich Rugut* of a Samsung mobile phone No. 354330056326310, a Compaq lap-top, a digital camera, two rechargeable touches, a DSTV decoder, ignition keys, an LG radio, fridge guard and Kshs 44,350 in cash, all valued at Kshs 300,000 and immediately after the robbery threatened to use actual violence on the victim.

In the remaining 5 counts the appellants were charged, in similar circumstances, with robbery with violence alleged to have been committed on the same night and at the same place as in count 1, but involving different persons. Thus in *count 2* the vic-tim was *Janeffer Chemutai Rugut (Janeffer)* who was robbed of four bags, Toyota Premio registration No. KAS 963X, three Samsung Galaxy mobile phones, two ATM cards, national identity card, driving license, insurance cover certificate, three rings, a bottle of designer perfume, and a bottle of body splash, all val-ued at Kshs 600,000. In *count 3*, *Gift Kamau Mweha* was robbed of a duos mobile phone, Kshs 1,500 cash and a spec-trum watch all valued at Kshs 116,500. *Count 4* involved *Gilbert Osolo Onono* who was robbed of a Toyota Voxy registration No. KBR 735A, one iPhone mobile phone, and one Nokia E90 mobile phone, all valued at Kshs 856,000. In *count 5* the victim was *Gabriel Kinanga Obaga* who was robbed of US\$5,800, an iPh-one mobile phone, a Samsung Galaxy mobile phone, a wrist watch, a pair of shoes, and Kshs 4,000 cash, all valued at Kshs 650,00. Lastly in *count 6* the victim was *Kevin Nyasinga Kinanga* who was robbed of a HTC 606 Desire Dual Sim mobile phone No. 353835061967545, 35385061967552, identity card, an ATM card, voter’s registration card and Kshs 2,400 cash, all valued at Kshs 110,000.

In count 1, the 1st appellant also faced an alternative charge of handling stolen goods contrary to *section 322(1)* as read with *section 322(2)* of the *Penal Code*, the facts being that on 20th February 2015, at *Zimmerman Estate* in Nairobi, otherwise than in the course of stealing, he dishonestly received or handled a Samsung mobile phone No. 354330056326310 knowing or having reasons to believe it to be stolen or unlawfully obtained. On his part the 2nd appellant also faced, as an al-ternative to count 6, a charge of handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code, the facts being that on 8th February 2015, at *Monte Carlo Club* in Nairobi, jointly with others not before the court, otherwise than in the course of stealing, he dishonestly undertook the disposal of an HTC 606 Desire

Dual Sim mobile phone No.353835061967545, 35385061967552, knowing or having reason to believe it to be stolen or unlawfully obtained.

The prosecution called 15 witness in support of its case while each of the appellants gave sworn statements in their de-fence. The substance of the prosecution cases was as follows. On the material day and time, **Gift Kamau Mweha (PW1)**, **Gilbert Osolo (PW2)**, **Kevin Nyasinga Kinanga (PW6)** and **Gabriel Kinanga Obaga (PW7)** travelled to Syokimau to show PW6's father a motor vehicle, Toyota Voxy registration No.KBR 735A that PW6 wished to buy through PW2 as a broker. The motor vehicle belonged to **Miriam Lydia Omali (PW3)** who had entrusted it to PW2 to sell. The father, **William Kinanga Obaga (PW9)** sanctioned the transaction and PW1, PW2, PW6 and PW7 left Syokimau at about 10 pm, with PW6 driving the motor vehicle.

After a distance of about 500 meters from the home, they were carjacked by 4 or 5 young men armed with a gun. The car-jackers took control of the vehicle and robbed the occupants of the properties specified in the charge sheet. Specifically they robbed PW6 of an HTC 606 Desire Dual Sim mobile phone No. 353835061967545, 35385061967552. The carjackers then tied up PW1, PW2, PW6, and PW7 and abandoned them near Taj Mall. The victims were subsequently rescued and reported the robbery at Molongo Police Station. The motor vehicle was never recovered.

The evidence of **Josephat Saidi Muyumba (PW4)** was that he was employed as security staff at **Monte Carlo Club** in Nai-robi. On 8th February 2015 about 9.00 pm 6 customers visited the club and started drinking until about 2.00 am. They were unable to clear their entire bill and a balance of Kshs 4,000 was left unpaid. Among the 6 were the two appellants whom he knew as customers of the club. The 2nd appellant left behind an HTC phone as security, promising to bring the money later but he never came back. PW4 then gave the phone to his neighbour, **Kishoyan David Lemayian (PW8)**, to whom the po-lice traced the phone, which turned out to be the one stolen from PW6. PW4 was arrested and led the police to the 2nd appellant. That was the prosecution evidence as regards counts 3, 4, 5 and 6, as well as the alternative charge to count 6.

As for counts 1 and 2, the evidence was that **Simeon Kipro-tich Rugut (PW5)** was asleep with his family at their home in Syokimau on 7th February 2015 when he was woken up at 2.30 am by a loud bang on the door. About 6 or 7 people cut the win-dow grille and entered into the house, with one of them pointing a gun at PW5. The robbers proceeded to steal from him the items listed in the charge sheet (count1), among them a Samsung mo-bile phone No. 354330056326310. The gang then drove him away in his vehicle Toyota Premio registration No. KAS 963S, took his ATM card and PIN number and withdrew money at Bu-ruburu. Later they abandoned him at Ngara road and he found his way to Kilimani Police Station where he reported the robbery. Subsequently he attended an identification parade at Athi River Police Station where he iden-tified the 2nd appellant as the person who entered his house. He did not identify the 1st appellant.

The evidence of **Cpl. Samson Nyandondi (PW11)** and **Cpl. Isaac Sang (PW12)** was that they arrested the 1st appellant on 20th February 2015 at Kilimani because he was using his sim card on a stolen phone. The 1st appellant led the police to one **Sidney Lenny Odhiambo** from whom they recovered, among other phones the Samsung phone stolen from PW5. It was the prosecution evidence that Sidney Lenny Odhiambo informed them that he had received the phones from the 1st appellant. The 1st appellant also led the police to the 2nd appellant, whom they arrested.

Janeffer, who is alleged to have been robbed in count 2, was never called as a witness.

In their sworn defence the appellants denied that they com-mitted the offence. The 1st appellant's defence was that he is a painter and lives in Kawangware. On 20th February 2015 he was on his way to Yaya Centre in Nairobi to link up with a potential client when a vehicle stopped in front of him and he was arrested by 3 men and a woman who asked him where he was on the night of the robberies. Upon replying that he was at home sleeping, he was taken to Nairobi area where he was asked about a Samsung phone that he knew nothing about. He was driven to Kariobangi and back to Nairobi area where he spent the night and the next day in the company of suspects. He was then taken to Mlolongo Police Station on 23rd February 2015 and ultimately charged as we have already stated. He maintained that he had never seen the witnesses who testified against him before they came to court. He denied that he was found in possession of the Samsung phone or that he had led the police to it. He stated that he had never been to Monte Carlo club and that he had never drunk alcohol in his life. It was also his evidence that he had never met the 2nd accused before they were charged in court.

As for the 2nd appellant, his defence was that he is a plumber living in Kibera. On 21st February 2015 at about 5.20 am, he was arrested by the police because he had been smoking bhang. He was detained at Airport and Mlolongo Police Stations and interrogated about a case of robbery with violence. Ultimately he was taken to Athi River Police Station where PW5 purported to identify him. He denied that he knew the 1st appellant before they were charged in court. He also denied ever visiting Monte Carlo Club or that he knew PW4, whom he said he first saw in court.

In support of the appellant's appeal, their learned counsel, **Ms Odembo** submitted that the appellants' identification was un-safe because the offences were committed at night and some of the prosecution witnesses admitted that it was dark and that they could not identify the robbers. She added that PW5, who purported to identify PW2 never reported the alleged offence to the police and his wife, who allegedly reported on his behalf, was never called as a witness. Counsel also contended that none of the prosecution witnesses had described the appellants to the police when they had the earliest opportunity, which cast doubt on the reliability of their evidence of identification.

Next, counsel submitted that the prosecution case was riddled with material contradictions, even on such basic issues as the date of the alleged robbery or the number of the robbers involved. She added that the evidence of PW4 on the circum-stances under which he came to be in possession of the HTC phone which he offered for sale to PW 8, raised many questions which the two courts below ignored, and in particular the ques-tion whether PW4 indeed received the phone from the 2nd appel-lant.

It was counsel's further submission that the prosecution case had gaping holes because important witnesses such as Janeffer who was alleged to have been robbed in count 2 and Sidney Lenny Odhiambo who is alleged to have been found in pos-session of the Samsung phone, were not called as witnesses. Counsel also contended that the prosecution had failed to call witnesses from the telephone service providers to link the appel-lants with any of the phones alleged to have been found in their possession.

Ms Matiru, learned counsel for the respondent opposed the appeal, submitting that the appellants' identification was safe and that the prosecution proved all the counts beyond reasonable doubt. She added that the appellants were identified with the aid of car lights and moonlight and that the 1st appellant was found in possession of the Samsung phone stolen from PW5. As for the 2nd appellant, counsel submitted, he was the one who gave PW4 the HTC phone that was stolen from PW6 and could not explain how he had come by the phone. She added that PW5 also identified the 1st appellant in an identification parade at Athi River Police Station. On the basis of the foregoing, counsel urged us to dismiss the appeal.

This is a second appeal and by law it is restricted to matters of law only. In such an appeal, this Court will not interfere with the concurrent findings of fact by the two courts below unless it is satisfied that on the evidence on record, no reasonable tribunal would have reached those findings. In **Boniface Kamande & 2 Others v. Republic [2010] eKLR**, the Court explained as follows:

“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it.”

The first issue in this appeal is whether the identification of the appellants was safe. It has been stated time and again that whether the accused person was positively identified is a question of law. It is trite that in cases of identification under difficult circumstances, the court must analyze and evaluate the evidence carefully to assure itself that there was no possibility of mistaken identity because even honest people have difficulties identifying even those that they know very well. Thus, for example in **Joseph Ngumbao Nzoro v. Republic [1991] 2 KLR 212**, the Court cautioned as follows:

“Before accepting visual identification as a basis for a conviction, the court had the duty to warn itself of the inherent danger of such evidence. A careful direction regarding condition prevailing at the time of identification and the length of time the witness had the accused under observation together with the need to exclude the possibility of error was essential.”

Earlier in **Maitanyi v. Republic [1986] KLR 198**, the Court had given the rationale for the circumspection with which evidence of visual identification is received, as follows:

“The strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are not known because they were not inquired into.”

The offences with which the appellants were charged were committed at night in darkness. PW1 described the conditions as “very dark”. In his evidence, he could not identify any of the robbers, including how they were dressed because it was very dark.

On cross-examination this witness was categorical that there were no lights, other than the car lights. PW2 also admitted that it was dark, but claimed that he could see some faces inside the car from street lights. Other than the 1st appellant, PW2 could not identify any other of the 4 or 5 robbers, including the 2nd appellant. He could not even tell how the 1st appellant was dressed. Regrettably there was no inquiry as to how far the alleged street lights were from the car.

PW6, who was driving the car just before the robbery also admitted that it was dark and it was his evidence that there were no street lights. Subsequently he claimed there was moonlight and although he claims to have identified the 1st appellant, on cross-examination, he could neither tell where the 1st appellant was seated in the car, nor identify the 2nd appellant. When asked how long he had spent with the robbers, the witness could not even estimate the time, merely stating “I cannot tell how long we were with these thugs.” Again, there was no inquiry on the intensity of the alleged moonlight, granted that other prosecution witnesses had testified that it was very dark and the only form of lighting was the car lights.

On his part PW7 admitted that the night in question was dark, but he too claimed to have identified the 1st appellant from the motor vehicle lights, although he could not describe how the 1st appellant was dressed and admitted that he did not describe the attackers to the police when he first reported the robbery. Like the other evidence, there was no inquiry about the intensity of the vehicle lights that the witnesses relied upon to positively identify the 1st appellant. When asked how long the ordeal took, the witness responded that he did not know how long they stayed with the thugs.

This leads to the question of the Samsung phone that was stolen from PW5 and allegedly recovered from the 1st appellant, which possession, under the doctrine of recent possession, could have offered the best evidence of identification. The evidence of PW11 and PW12 was they traced the 1st appellant, with experts from *Safaricom*, through the sim card that he was using and arrested him near Yaya Centre. The 1st appellant then led them to the 2nd appellant and Sidney Lenny Odhiambo, who had the stolen Samsung phone. It was the prosecution evidence that Sidney Lenny Odhiambo informed them that he obtained the phone from the 1st appellant.

With respect, the alleged information from Sidney Lenny Odhiambo was all inadmissible hearsay evidence because Sidney was never called as a witness and no reason was offered for failure to call him. If that hearsay evidence is discounted, the prosecution evidence in this respect is merely that the Samsung phone was found in possession of Sidney Lenny Odhiambo and not in the possession of the 1st appellant. Such eventuality totally undermines the applicability of the doctrine of recent possession in this case which could have given assurance that the 1st appellant's identification was safe. We are also concerned that the 1st appellant having disputed the prosecution version of how he was arrested, the prosecution did not deem it fit to call the experts from *Safaricom* who allegedly assisted in tracking the 1st appellant.

As regards identification of the 2nd appellant, it was PW5 who allegedly identified him first at PW5's house and later in an identification parade at Athi River Police Station. PW5's evidence was that he was attacked by about 6 people at about 2.30 am in the morning of 7th February 2015. As regards the lighting conditions at the time, his evidence was:

"I have KPLC lights. We had switched off the lights before the thugs got into my house. We did not have lights."

That evidence notwithstanding, PW5 claimed to have identified the 2nd appellant because "the thugs had small torches". Again there was no serious inquiry about the intensity of the alleged light from the small torches, particularly after the witness stated that the torches were not powerful and that he could only see "a shape of a person". Similarly there was no inquiry on how far the 2nd appellant was from PW5 or the period of time they were together.

Although PW5 claimed to have identified the 2nd appellant in these obviously difficult circumstances, he never described him to the police. In fact the evidence on record is that he never reported the robbery to the police at all. The report was allegedly made on his behalf by his wife, Janeffer, who, as we have already noted, was never called as a witness. We may add here that we find it surprising that the appellants were convicted of robbing the said Janeffer in count 2 when she never testified and when no reason whatsoever was given for her failure to testify. It is quite anomalous, in our view, that whilst the charge sheet stated that the appellants robbed Janeffer of her motor vehicle Reg No KAS 963 X, Toyota Premio, the evidence that the prosecution adduced, without amending the charge, was that the appellants robbed PW5 of that same vehicle, which in fact PW5 testified belonged to him. So on the basis of evidence that the appellants robbed PW5 of the motor vehicle, they were convicted of a charge of robbing Janeffer of the same motor vehicle.

The next issue is the 2nd appellant's alleged possession of the HTC phone. That phone was in possession of PW4 when he was arrested on 14th March 2015 and his explanation was that PW2 had given the phone at Monte Carlo Club on 8th February 2015 to guarantee that he would come back and pay a bill of Kshs 4,000. The witnesses stated that the 2nd appellant was a customer at the club and that he had known him for about four years. Subsequently PW4 had given his neighbour PW8, the phone to use.

The evidence of PW4 is not consistent with that of PW8, who testified that on 9th February 2015 (that is the very next day after the 2nd appellant had allegedly given PW4 the phone) PW4 called PW8 and inquired whether PW8 was interested in buying an HTC phone. PW8 collected the phone from PW4, which he was selling for Kshs 6,000. After using the phone for 3 days, PW4 asked PW8 to return it because he did not appear to be serious about buying it. It was PW4's evidence that PW8 informed him that the HTC phone was his and that previously PW4 had tried to sell him another phone.

PW4's evidence clearly left a lot to be desired. There is no explanation why he was offering for sale a phone that, a few hours earlier, had allegedly been left by a customer to secure payment of a bill by that customer. Although he claims to have known the appellants as customers for a whole 4 years, he did not know their names. The witness was also clearly an incredible witness on other matters, such as his insistence that the club did not have CCTV cameras or that it sold its refreshments on cash basis only, rather than by bills. These issues would obviously have been known by a person who had worked at the club for 14 years as PW4 claimed to have done. PW10 subsequently testified that the refreshments were sold by bills, while PW15 testified that indeed the club had CCTV cameras. If the two courts below considered these issues, which they were duty bound to do, they could not conclude that PW4 was a witness of credit.

This Court has stated often times that it is not every inconsistency in the prosecution evidence which undermines the prosecution case. In **John Nyaga Njuki & 4 Others v. Republic, Cr App No. 160 of 2000** this Court stated as follows:

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

(See also Philip Nazaka Watu v Republic [2016] eKLR)

In this appeal however, we are concerned by a number of discrepancies and contradictions in the prosecution witness which cast doubt on the prosecution case. The evidence of PW11 and PW12 was that it was the 1st appellant who led them to the 2nd appellant after they arrested him near Yaya Centre. On the other hand, the evidence of PW4, the Monte Carlo Club security man was that it was indeed him who led the police to the 2nd appellant after they arrested him in connection with the HTC phone. What could explain such a significant variation in the evidence? PW6, who was driving the Toyota Voxy, stated that his father, PW9, was in the car when they were carjacked. None of the other witnesses mentioned PW9 being in the car and PW9 himself testified that he was left at home in Syokimau from where he was informed on the phone about the car-jacking. If a witness like PW6 cannot get such basic facts correctly, can he be relied upon to properly identify the appellants under difficult circumstances? We do not think so.

Having carefully considered the appellants' appeal, we are not satisfied that they were positively identified as the perpetrators of the robbery. We find their convictions unsafe and accordingly allow their appeal, quash their convictions and set aside their sentences. The appellants shall be set to liberty forthwith unless they are otherwise lawfully held. It is so ordered.

Dated and delivered at NAIROBI this 9th day of October, 2020

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR