



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 14 OF 2014

BETWEEN

KENNEDY OMONDI ASIKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment and decision of the High Court of Kenya at Kisumu

(Chemitei & Muchelule, JJ.) dated 3rd December 2013 *in H.C.CR NO.89 of 2011.*)

JUDGMENT OF THE COURT

1. The appellant was charged and convicted of robbery with violence contrary to **section 296(2)** of the **Penal Code** by the Principal Magistrate, Winam. The particulars of the offence were that on 18th October 2010 at 8.00 p.m. at Mamboleo area within Kisumu County, the appellant together with others not before court robbed **Samuel Otieno Odaa, (PW1)**, of his bicycle make Raja frame No.RA26828 valued at Kshs.2950, a mobile phone Motorola L7 and cash Kshs.200, all valued at Kshs.6150, and at or immediately before or immediately after the said time of robbery wounded PW1. The appellant was sentenced to death.
2. His first appeal before the High Court (**Chemitei & Muchelule, JJ.**) was unsuccessful, hence this second appeal.
3. The brief facts of the case were that on the material night at about 8.00 p.m. PW1 was walking towards Kajulu area with his girlfriend, PW2. It began to rain, and the couple took shelter somewhere along the way. The complainant was pushing his bicycle. Suddenly three people appeared and two of them attacked them, while the third one held PW2. PW1 was cut on his head, face and ear and robbed of various items as stated above.
4. PW2 testified that she was able to identify the person who held her because there were bright electric lights about 10 metres away from the scene. She further stated that she managed to escape uninjured and reported the incident at Kondele police station.
5. PW2 was assisted by **Jared Opande, PW3**, and **Justine Omondi, PW5**, to arrest the appellant shortly after the robbery. The appellant was found in possession of the bicycle that PW1 had been robbed of. They escorted the appellant to Kondele Police Station.
6. In his defence, the appellant stated that he was arrested for drinking changaa; and he was a total stranger to the alleged robbery.
7. Dismissing the first appeal, the High Court held that the appellant was properly identified; that the appellant was found in possession of the stolen bicycle and therefore the doctrine of recent possession was properly invoked, and therefore affirmed the sentence that had been passed by the trial court.
8. Being aggrieved by that judgment, the appellant preferred an appeal to this Court, based on a self-drawn memorandum of appeal. When **Mr. Lore** Advocate came on record for the appellant, he abandoned the original memorandum of appeal and filed a supplementary one consisting of two grounds of appeal as follows: -

“1. The learned judges of the Superior Court erred in law by failing to scrutinize the evidence of identification with great circumspection thus grossly being misdirected to hold that the evidence on record was properly corroborated to be cogent and

credible enough to sustain a conviction based on the doctrine of recent possession.

2. The learned judges erred in law to uphold that indeed all the prosecution evidence as presented lacked material and significant contradictions and thus created a nexus and linkage between the appellant, the offence at the scene of crime by directly pointing at the appellant as the assailant.”

9. When the appeal came up for hearing, **Mr. Omondi**, learned counsel for the appellant, made brief oral submissions. He urged that there was no proper identification of the appellant; that PW1 said that it was dark when the robbery occurred and did not see his assailants well; but PW2 stated that there were lights from the show ground, about 10 metres away. However, there was no inquiry as to the nature of the light and its intensity. In the circumstances, counsel submitted, it was not safe to rely on the evidence of identification of the appellant by PW2 only to convict the appellant.

10. In support of that submission, Mr. Omondi cited ***R v Turnbull [1976] 3WLR 445*** and ***Stephen Matu Kariuki & 2 Others v Republic [1996] eKLR***.

11. On the issue of recent possession of the stolen bicycle, the appellant’s counsel submitted that the receipt that was produced to prove that the bicycle that was allegedly found in the appellant’s possession had been doctored, and was therefore unreliable. He cited the case of ***Erick Oherio Arum v Republic, Criminal Appeal No.85 of 2005*** (unreported), to buttress that line of submission.

12. **Mrs Nyamosi**, Senior Assistant Director of Public Prosecutions for the respondent, opposed the appeal. She submitted that PW2 properly identified the appellant with the aid of electric light from the nearby showground. Further, the appellant was found in possession of the stolen bicycle just a day after the robbery. PW1 identified the bicycle as the one he had been robbed of and produced its purchase receipt. Counsel urged this Court to dismiss the appeal.

13. This being a second appeal, by dint of the provisions of **section 361** of the **Criminal Procedure Code**, we are enjoined to consider only matters of law. We cannot interfere with the findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered, or that they failed to consider matters they should have considered, or that looking at the evidence as a whole they were plainly wrong in their decision; in which case such omission or commission would be treated as matters of law. See ***Karani v Republic [2010] 1 KLR 73***.

14. The two issues of law that were raised by the appellant’s learned counsel relate to the sufficiency of evidence of identification of the appellant and application of the doctrine of recent possession.

15. It is not in dispute that PW1 did not identify his assailants; it is only PW2 who testified that she was able to identify the appellant. In ***Wamunga v Republic [1989] KLR 424***, this Court stated: -

“It is trite law that where the only evidence against a defendant is evidence 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.”

16. We are well aware that the appellant’s conviction was not entirely based on the evidence of identification by PW2. That notwithstanding, we are duty bound to re-examine that evidence.

17. PW1 and PW2 said that the attack took place on 18th October 2010 at about 8.00 p.m. PW2 said that she was able to identify the appellant because there were lights from the showground, about 10 metres away. However, she did not state how long she was with her assailant before she ran away. She also did not give the description of her assailant. She said that upon her escape she went and reported the incident at Kondele Police Station. She further testified: -

“A man called JJ saw me. He heard my problems. He called others that night. They went for bike and arrested accused... Accused was arrested with the bike.

...The man arrested with Sam’s bicycle is now in the dock. I saw him being arrested with the bike. He was new to me.”

18. The evidence is not clear as to how JJ (PW3) and his colleague, PW5, were able to identify the appellant as the person who had held PW2 during the robbery. This is what PW3 said: -

“I recall on 19/10/10 at about 4.00 a.m. I was at Kondele Parking bay. I heard a girl crying. She said she was robbed with her brother. She showed me direction of attack. I dropped my customer and returned. She showed me her attacker who had a bicycle. I called friends. We arrested the suspect. The girl showed us suspect. The suspect had threatened her before then. We took the suspect and bicycle to the police.”

19. The testimony of PW2 and PW3 regarding arrest of the appellant is contradictory. According to PW1 and PW2, the robbery took place at 8.00 p.m. PW2 managed to escape from the scene, reported the robbery to the police and presumably went home thereafter. But PW3 said that he heard a girl (PW2) crying at 4.00 a.m. when he was at Kondele Parking Bay. PW2 never said that she ever went to Kondele Parking Bay at 4.00 a.m., neither did she say that she pointed out her attacker to PW3. She simply said that she saw the appellant “*being arrested with the bike.*” But PW3 said that it was PW2 who showed them the suspect!

20. PW5 corroborated the evidence of PW3 in every material aspect. He told the trial court that on 19th October 2010 at 4.00 a.m. they

were told by PW2 that a person who had attacked her and her friend was at the Parking Bay and had the bicycle that her friend had been robbed of; that they apprehended the person and took him to Kondele Police Station together with the bicycle; that PW2 had positively identified the bicycle but did not tell the court how she was able to identify it.

21. Neither the trial court nor the first appellate court considered the inconsistencies regarding identification of the appellant that we have pointed out. PW2 never told the court that she went to Kondele Parking Bay on 19th October 2014 at 4.00 a.m. or at all; she also did not say that she ever pointed out the appellant to PW3 and PW5; or that she was able to identify the bicycle.

22. **Corporal Roseline Nanjala, PW6**, testified that the robbery was reported on 19th October 2010 at 5.40 a.m. when the appellant was escorted there by members of the public who had arrested him. The police officer did not tell the court that PW2 had reported the robbery earlier as stated by PW2.

23. Evidence of visual identification in criminal cases can bring about miscarriage of justice, and it is of vital importance that such evidence is examined carefully to minimize this danger. See Wamunga v Republic (Supra). Bearing this in mind, we find that the evidence of identification of the appellant was unreliable and could not found a conviction. In our view, the appellant's identification by PW2 at the trial court amounted to dock identification. In Ajode v Republic [2004] eKLR. This Court stated: -

“It is trite law that dock identification is generally worthless, and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.”

24. Even if PW2 had seen the appellant clearly on the material night, for PW3 and PW5 to apprehend the appellant they required to be given a clear description of the suspect by PW2. Given that it is doubtful that she pointed out the appellant to PW3 and PW5 and in the absence of any description at all, it remains a mystery how PW3 and PW5 were able to apprehend the appellant.

In Maitanyi v Republic [1986] KLR 198, this Court expressed:

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police... If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description.”

25. We agree with the appellant's learned counsel that both the trial court and the first appellate court did not give any weight to the material inconsistencies and contradictions that existed regarding identification and arrest of the appellant. We therefore allow the first ground of appeal.

26. Apart from the evidence of identification of the appellant, the two courts below also held that the appellant, having been found in possession of the bicycle that had recently been stolen from PW1, under the doctrine of recent possession it could safely be concluded that the appellant was among the people who had committed the robbery, having failed to give any explanation as to the circumstances under which he came by that bicycle.

27. The principles under which a court can rely on the doctrine of recent possession to convict an accused person are well known. In Erick Oherio Arum v Republic (Supra), this Court held: -

“In our view, before a court of law can rely on the doctrine of recent possession as 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, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; 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 property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses...”

28. The only evidence that was given regarding ownership of the bicycle was a receipt that was produced by PW1. That receipt had alterations that were not explained. PW1 found the bicycle at the police station. In our view, there was no positive identification of the stolen bicycle, given that the maker of the receipt that had visible alterations was not called as a witness.

29. The standard of proof in criminal cases is always beyond any reasonable doubt. In a case where an accused person is liable to be sentenced to death upon conviction, the evidence must be watertight before a court of law can convict. We find that the prosecution's evidence had glaring gaps that rendered the appellant's conviction unsafe. In the circumstances, the appellant must be given the benefit of doubt.

30. For these reasons, we allow the appeal, set aside the appellant's conviction for robbery with violence and quash the death sentence that was passed by the trial court and affirmed by the High Court. The appellant is set at liberty forthwith unless otherwise lawfully held.

31. This judgment is signed by **Musinga** and **Murgor, JJ. A.** under **rule 32(2)** of the **Court of Appeal Rules, Maraga, JA.** (as he then was) having been appointed the Chief Justice prior to the date of its delivery. The delay in delivery of this judgment is regretted. The same was occasioned by inadvertent failure to deliver the judgment that was otherwise prepared and perfected for delivery on its scheduled date. The omission was brought to the attention of the Court by the appellant long after the date scheduled for delivery of the judgment.

Dated and delivered at Nairobi this 2nd of October, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR