



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO (P), KARANJA & ASIKE-MAKHANDIA, JJA)

CRIMINAL APPEAL NO. 309 OF 2010

BETWEEN

DESDELIO FAUSTO MURIUKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Embu,

(Hon. Lady Justice Khaminwa & M. Kasango, JJ.) dated 7th December 2007

in

HC. CR.A. NO. 116 of 2006)

JUDGMENT OF THE COURT

Emilio Nthiga Njeru, (PW3) was a Taxi driver in Kerugoya town. On 6th April, 2001, he was left in charge of a Taxi registration number KAD 262U by a fellow Taxi driver by the name **Johnson Kinyua Karimi**, (PW2) as the latter proceeded to have lunch. PW3 was soon thereafter approached by a customer requiring his Taxi services. That customer, according to PW3 turned out to be the appellant. The appellant wanted to be ferried to Kerugoya District Hospital to pick a patient and thereafter take the two to a village known as Kiwaruguru. Once they agreed on the charges they proceeded to the hospital and PW3 parked the Taxi as the appellant went for the patient. He came back with the patient and they proceeded to the village. On the way however the appellant and the “patient” suddenly attacked PW3 by holding his neck and pulling it backwards. The patient forced PW3 into the back seat whilst hitting him with a hammer. As PW3 struggled to regain control of the Taxi, it suddenly stopped and PW3 was thrown out by the appellant and the patient. The duo then drove off with the Taxi with PW3’s driving licence and keys inside. PW3 proceeded to report the robbery to the nearby Baricho police station and also informed the owner of the motor vehicle, **John Wachira** (PW7) of the incident.

Corporal Lawrence Munene, (PW4) of Karuri police flying squad on the same day at about 5pm was on high way patrol duties along Nairobi-Naivasha road. He was with **PC Kithika Wangai** and **PC Driver Kariuki**. They received information via radio communication that a motor vehicle registration number KAD 262U had fueled at a petrol station at Zambezi along Nairobi Naivasha road, but the occupants had refused to pay the sum of Kshs.1400/= for the fuel. They started looking for the motor vehicle. They soon spotted it being driven towards Naivasha. They chased it and caught up with it, but when ordered to stop, the driver ignored the order and drove on. The officers were forced to draw their guns and threatened to shoot before the Taxi stopped. Inside the Taxi were two people who turned out to be the appellant and the patient, who were then arrested.

According to PW4, it was the appellant who was driving the Taxi at the time. He also noted that the driver’s seat had some fresh blood, and upon searching the Taxi, they recovered a hammer, a driving license and some keys. The Taxi was then towed to Tigoni police station. In the evening they received information that the said Taxi had in fact been stolen from PW3 in Kerugoya. They circulated information regarding the recovery and the arrest of the appellant and the patient. Upon receiving information PW2, PW3 and PW7 accompanied by Police Officers from Kerugoya, proceeded to Tigoni police station and both witnesses were able to positively identify the Taxi as belonging to PW7. The Taxi was photographed by **Inspector Kemboi (PW5)** and subsequently released to PW7. The appellant and the patient who had been locked up at the same police station were positively identified by PW3 as the persons who had robbed him of the Taxi.

The appellant and the patient were then transferred to Kerugoya police station where an identification parade was conducted. **Lazarus**

Munene (PW6) a fellow Taxi driver was able to identify the appellant from the parade. The witness was the first to be approached by the appellant for purpose of hiring his Taxi. However, when they could not agree on the charges, the appellant opted to hire the Taxi then being operated by PW3.

Armed with this evidence, the appellant and the patient were arraigned before the Senior Resident Magistrate's court at Kerugoya and charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code, as well as handling suspected stolen property contrary to section 322(2) of the Penal Code. The case was heard and being satisfied that the offence was proved, the magistrate convicted them and thereafter sentenced them to death. They proffered an appeal to the High Court which was allowed with the High Court ordering a retrial of the appellant and the patient. This appeal therefore arises the decision of the High Court on the re-trial by the magistrate's court.

Turning on the particulars of the charges that faced the appellant during retrial, it was alleged that the appellant and the patient on 6th April, 2001 in Kirinyaga district of Central Province, jointly whilst armed with a dangerous weapon namely a hammer robbed Emilio Nthiga Njeru his Taxi registration number KAD 262 U Toyota Corolla, one pair of shoes and a driving license all valued at Kshs.251,000/= and at or immediately before or immediately after the time of such robbery wounded the said Emilio Nthiga Njeru. We need not reproduce the particulars of the second count as it was an alternative count and in any event the appellant and the patient were discharged on that count under section 215 of the Criminal Procedure Code.

Put on their defence, the appellant in unsworn statement stated that he was arrested in Naivasha town for creating disturbance in a bar but was later charged for an offence he knew nothing about. This was after he had apparently refused to give a bribe to the police officers who arrested him.

Upon weighing the prosecution as well as the defence case, the learned magistrate had no difficulty in concluding that the appellant was guilty since the evidence led against him was overwhelming. He accordingly convicted him and sentenced him to death.

Aggrieved, the appellant lodged an appeal in the High Court of Kenya at Embu. The appeal was heard by Khaminwa & Kasango, JJ and in a judgment delivered on 7th December, 2007 they dismissed the same.

The appellant is now before us on second and perhaps last appeal. Through **Messrs. Wahome Gikonyo & Co. Advocates**, the appellant complains that the High Court erred in not finding that; there was no retrial before the trial court as ordered by the High Court, there was no re-evaluation and reappraisal of the evidence before the High Court as required by law, identification of the appellant could not have been free from possibility of mistake, no police identification parade forms were tendered in evidence, the doctrine of recent possession was not properly invoked in the circumstances of this case, the alibi defence put forward by the appellant was not properly evaluated, there were many doubts in the prosecution case which ought to have been resolved in favour of the appellant and finally, that the mandatory death sentence imposed on the appellant was manifestly harsh and unconstitutional in view of the Supreme court's decision in **Peter Karioko Muruatetu & Ano. V Republic (2017) eKLR**.

The appeal was heard by way of written submissions with limited oral highlights. The appellant submitted that the judges of the High Court erred in not considering whether the hearing of Criminal Case number 1595 of 2004 was a retrial as ordered by the High Court. This was because a fresh charge sheet was presented to the trial court yet there was a previous charge sheet which the appellant was tried and convicted, upon which a retrial as ordered by the High Court should have proceeded. To the appellant since there was no retrial the proceedings were a nullity and the High Court should have declared the same as such. On identification of the appellant, it was submitted that it was dock identification which is worthless and that in any event the appellant had been shown to PW3 and PW7 before the identification parade. It was further submitted that no police identification parade forms were tendered in evidence. Relying on the case of **Maitanyi vs Republic, (1986) KLR 198**, counsel urged us to find that the alleged identification of the appellant was not free from possibility of error.

On the doctrine of recent possession, counsel submitted that no inventory of the alleged recoveries of the hammer, driving licence and keys was prepared nor tendered in evidence. Further some witnesses testified that the Taxi involved was KAD 252G, whereas others testified that it was KAD 262L. Relying on the case of **John Muraya vs Republic, Criminal Appeal Number 384 of 2009 (UR)**, counsel submitted that in the absence of an inventory it was not possible to tell whether the Taxi was recovered from the appellant and its registration number .

On alibi defence, counsel submitted that the appellant denied being arrested on the alleged day. He further stated that he was arrested in a bar in Naivasha. His defence therefore was that of an alibi. The learned judges of the High Court according to counsel never evaluated that evidence. Had they, perhaps they would have come to a different finding. For this submission counsel relied on the case of **Kiarie vs Republic (1984) KLR 739**.

Turning to the sentence, counsel submitted that since the mandatory death sentence has been declared to be unconstitutional by the Supreme Court in the case of **Francis Karioko Muruatetu & Another (supra)**, counsel urged us to equally find that the mandatory death sentence imposed on the appellant was unconstitutional and interfere with the same. Otherwise he prayed that the appeal be allowed in its entirety.

Opposing the appeal, Mr. Ondimu, learned Principal Prosecution counsel submitted that since the charge facing the appellant was one of robbery with violence, the prosecution had to prove that there was theft of some property, that the offender was not the owner of the property, that the offender was armed with dangerous or offensive weapon or was in the company of one or more persons, and in the process violence was visited upon the victim, and finally that the offender took part in the commission of the offence. Counsel relied on the case of **Oluoch vs Republic, (KLR) 549** for these propositions.

Counsel further submitted that the evidence of PW2, PW3 and PW7 attest to the Taxi being violently stolen from PW3. The motor vehicle belonged to PW7. PW2 saw the appellant enter the Taxi and left with PW3. . Later he received information that the motor vehicle had been stolen and was held at Tigoni police station. He accompanied PW7 to Tigoni police station and found the motor vehicle and also saw the appellant. He was also informed that it was the appellant who was found in possession of the motor vehicle and indeed he was the one driving at the time of arrest.

On the other hand, PW3 testified that on the material day, two passengers hired the Taxi he was driving. Among the two was the appellant. PW3 was to take him to Kerugoya Hospital to pick a patient and then take the two to some village. Along the way the passengers attacked him with a hammer. According to the witness the appellant and the patient repeatedly hit him with the hammer at the back of his head and violently threw him out of the Taxi and drove off. When the Taxi was recovered PW4 confirmed that it had blood stains and the hammer inside was blood stained too. On the basis of the foregoing evidence counsel believed that all the ingredients of the offence of robbery with violence were established contrary to the submissions of the appellant.

On identification of the appellant, counsel submitted that from the evidence adduced during the trial, PW3 had adequate time to identify the appellant, the offence having been committed in broad daylight. The record shows that the appellant hired the Taxi at about 1 p.m. They then drove to Kerugoya general hospital where they picked the patient. They then fueled and drove off before he was attacked and robbed of the Taxi. Therefore, the witness according to counsel had adequate time to see the appellant sufficiently to be able to identify him.

On reliance on a single identifying witness, counsel submitted that both courts below were alive to the issue and did warn themselves of the consequences as required. Besides, there was the evidence of PW1 who sold the hammer. According to this witness the appellant bought from him a hammer at around 11 a.m. on the same day and that he had interacted with him. This was the same hammer that was recovered from the Taxi. Counsel further submitted that PW2 had also testified that the person he saw board the Taxi was the appellant. Concluding his submissions on this aspect, counsel maintained that the evidence on identification adduced at the trial was overwhelming and placed the appellant at the scene of crime.

Regarding the complaint that the high court erred in failing to observe that the Occurrence Book (OB) did not disclose the place where the offence was committed and had some misdescriptions and was not tendered in evidence counsel submitted that there is no such statutory requirement. He relied on the case of **Japheth Gituma Joseph & 2 others vs Republic (2016)** for that proposition. Turning on the failure by the prosecution to produce in evidence Police Identification parade forms during the retrial counsel maintained that the failure was not in any way fatal to the prosecution case as PW2 and PW3 had positively identified the appellant.

Concluding his submissions counsel stated that taking into account all the evidence on record adduced by the prosecution and the circumstances of the case, the prosecution discharged its burden. Accordingly, the trial court rightly convicted the appellant and the High Court in its appellate jurisdiction rightly confirmed the conviction and sentence. He therefore urged us to dismiss the appeal for want of merit.

We are aware that this is a second appeal. The duty of this Court in such an appeal is set out in section 361 of the Criminal Procedure Code and countless authorities of this Court. The jurisdiction is limited to consideration of law only. In the case of **John Kariuki Gikonyo vs Republic, (2019) eKLR**, this Court observed that:

“Our role as the second appellate court was succinctly set out in Karani vs Republic, (2010)1 KLR 73 wherein this Court expressed itself as follows:-

“This is 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 decision of the superior court on facts 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.”

We consider the following to be issues of law calling for our determination in this appeal: whether there was a retrial; identification; recovery; inventory and doctrine of recent possession; alibi defence; and sentence.

On the first issue we note that it was never raised in the trial court nor the first appellate court. It is being raised for the first time in this second appeal.

Though the appellant was represented by counsel in the first appellate court he never took up the issue nor has any explanation been proffered for the failure.

Given the foregoing can the first appellate court be faulted for having failed to consider an issue that was never placed before it? We think not. In the case of **Alfayo Gombe Okello vs Republic (2010) eKLR**, this Court observed:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have ...”.

The court declined to entertain the new issue.

Similarly in the case of **John Kariuki Gikonyo vs Republic, (2019) eKLR** this Court having made reference to the case of **Alfayo Gombe Okello (supra)** stated:

“... In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal...”

The same situation obtains here! We must also refrain from entertaining or considering an issue that is being raised in this second appeal for the first time when ideally it should have been raised in the two courts below so that we could have on record their input.

On identification the appellant has directed his arsenal towards the issue of a single identifying witness and that no proper evidence of identification was adduced against him. From the record however the appellant was not identified by a single witness. He was identified by PW1, who sold him the hammer on the material day, PW2 who saw the appellant enter PW3's Taxi, PW3 from whom the Taxi was violently stolen and PW4 who arrested the appellant with the Taxi along Nairobi-Naivasha road.

But even assuming that the identification of the appellant was by a single witness, that is PW3, we would agree with the concurrent findings of the two courts below that the circumstances obtaining were conducive for the proper identification of the appellant. PW3 testified that the appellant hired his Taxi at about 1 pm. They then drove to Kerugoya General Hospital where they picked the patient. They fueled the Taxi and drove towards Kiaruguru village before the appellant and the patient attacked him and violently took possession of the Taxi after throwing him out. Clearly therefore PW3 had adequate time to identify the appellant since the offence was committed in broad daylight and he was with the appellant for a long time. It is also not lost on us that the trial court warned itself of the dangers of relying on the evidence of a single witness on matters identification. It cited authorities where convictions on evidence of a single witness were upheld. At the end of the day the trial court was satisfied that the identification of the appellant could not be faulted. The first appellate court also addressed this issue at length and came to the conclusion, and rightly so in our view, that the trial court was right in relying on the evidence of PW3 to convict the appellant. We have no reason to interfere with these concurrent findings by the two courts below.

Turning on the issues of recovery, inventory and the application of the doctrine of recent possession, the appellant submitted that though PW4 claimed to have recovered the Taxi whilst in the hands of the appellant as well as the hammer, he did not testify as to having prepared an inventory of the alleged recoveries. Further PW2 testified that the Taxi which was stolen was registration number KAD 262U whereas PW5 testified that it was KAD 252 G. Yet another witness testified that it was KAD 262L. On the basis of the foregoing the appellant took the view that the alleged recoveries were doubtful, that the failure to take the inventory was fatal and therefore the doctrine of recent possession could not be invoked. The appellant relied on the case of **John Mutura vs Republic, Nyeri Criminal Appeal Number 384 of 2009 (ur)** for the latter submission.

In response the respondent submitted that the Taxi which was stolen from the PW3 by the appellant was KAD 262U and reference to other registration numbers 252G was a typing error. That failure to prepare an inventory was not fatal to the prosecution case. Given the circumstances of the case it was the respondent's submission that the doctrine of recent possession was properly invoked. From the record PW2 testified that on the material day he left the Taxi in the hands of PW3. The Taxi registration number was KAD 262 U, Toyota Corolla, maroon in color. He later saw the same motor Taxi at Tigoni police station. PW3 identified the Taxi based on photographs. The photographs were taken by PW5 who tendered them in evidence together with his report. On the other hand, PW4 testified in detail as to how he recovered the Taxi from the appellant and towed it to Tigoni police station. Finally, PW7 confirmed that he owned the said Taxi. He identified the Taxi at the Tigoni Police station and photographs of the same taken.

Taking into account the totality of the above evidence we are satisfied just like the two courts below that the motor vehicle recovered from the appellant was KAD 262U Toyota Corolla contrary to the submissions by the appellant. This is the same vehicle that featured in the particulars of the charge sheet and the photographs tendered in evidence.

We further agree with the respondent's submissions that failure by PW4 to prepare an inventory of the recovery of the Taxi was not fatal. In the case of **Leonard Odhiambo Ouma v Republic, (2011) eKLR** this Court held that:

“...Failure to compile an inventory contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial. We find no substance in this ground as well...”

We would equally hold that failure by PW4 to prepare an inventory did not occasion failure of justice nor was the appellant prejudiced.

The doctrine of recent possession has been applied in numerous cases of this Court in which we have stated that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, possession must be positively proved. In other words, there must be positive proof:

- 1) That the property was found with the suspect.
- 2) That the property was positively the property of the complainant.
- 3) That the property was stolen from the complainant.
- 4) That the property was recently stolen from the complainant.
- 5) 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. See **Eric Otieno Arum v Republic (2000) eKLR**, and **David Mugo Kimunge v Republic (2015) eKLR**.

Applying the above perimeters to the circumstances of this case, we entertain no doubt at all just like the two courts below that the doctrine of recent possession was properly invoked. The Taxi which had been violently stolen from PW3 at about 1 p.m. was 4 hours later found in possession of the appellant by PW4. The Taxi was positively identified by PW2, PW3 as well PW7 as belonging to PW7. A motor vehicle is not the kind of property that can easily pass from one person to another. The appellant had no explanation as to how he had come by the Taxi. Given the foregoing the appellant's submissions to the contrary hold no water at all.

The appellant has also complained that his defence was not considered by the trial court. The complaint is however not borne out by the record. All that the appellant said in his alibi defence was that he was arrested in Naivasha in a bar for causing disturbance but was later charged with an offence he had nothing to do with because he had refused to part with a bribe. He further accused one of the police officers who arrested him of being vindictive as he had objected to the police officer marrying his family friend. The trial court duly considered his defence and observed thus:

“I do not believe the story of the accused that he was arrested out of a grudge as he him (sic) was to marry his family friend. The recovery and robbery of the motor vehicle is quite consistent from the chain of events. Accused two’s defence is a creation of his own imagination.”

Therefore the claim by the appellant that his defence was not considered is not correct. Again if we may ask if indeed the appellant was arrested in Naivasha as he claimed, why did he find himself booked in Tigoni police station if the Occurrence Book for the police station is anything to go by? It would have been logical that having been arrested in Naivasha as claimed, he would be booked at Naivasha police station.

In sentencing the appellant to death, the trial court expressed itself thus,

“... The law does not give me an option as the only sentence available is death. I do not sentence accused persons to hang until pronounced death (sic) as per the law established”.

On appeal, the High Court did not address the issue as it dismissed the appeal in its entirety. Before us the appellant urged us to review the sentence imposed downwards as mandatory death sentence has since been declared unconstitutional by the Supreme Court.

This Court notes that the Supreme Court in ***Francis Karioko Muruatetu & Another vs Republic (supra)*** held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional; that its mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. It is obvious that the trial court imposed the death sentence because it was the only sentence available for that kind of offence at the time. The trial court felt that its hands were tied. However, guided by the aforesaid decision of the Supreme Court, we are inclined to interfere with the sentence imposed. We note that the Taxi which was stolen was recovered on the same day, the violence used on PW3 was not aggravated and the appellant was a first offender. We would accordingly set aside the sentence of death imposed on the appellant and substitute it therefor with a sentence of 25 years’ imprisonment effective from the date of sentence by the trial court. Otherwise the appeal on conviction is dismissed.

Dated and delivered at Nairobi this 6th day of November, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR