



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, W. KARANJA, KOOME, JJA)

CRIMINAL APPEAL NO. 59 OF 2014

BETWEEN

JAMAAL OMAR HUSSEIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High court of Kenya at Nairobi (Korir & Mutuku) dated 30th June, 2014

in

H.C.CRA. NO.57 OF 2012.)

JUDGMENT OF THE COURT

1. The appellant was charged, tried and convicted for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** before the Principal Magistrate court at Garissa. Particulars of the charge were that on 9th July, 2011 at Dagahaly market, Daadab District in Garissa County, the appellant together with two others while armed with a panga, violently robbed the complainant, **Abdifatah Amin Hassan** of a mobile phone, a wallet containing personal documents and cash Ksh.500.

2. The first appeal against conviction and sentence was dismissed on 22nd November, 2013 by the High Court (**Mutuku and Korir, JJ.**) provoking this appeal on grounds that the first appellate court erred by:

i. finding that the identification of the appellant was positive without the possibility of any error;

ii. finding that Section 151 of the Criminal Code was not violated by the failure of the trial court to swear PW1 afresh or remind him that he was under oath.

iii. failing to re-examine the evidence afresh in order to come up with its own independent inference;

iv. failing to find that the appellant's defense was plausible in the circumstances.

3. Urging the appeal before us, **Mr. Mugwe**, learned counsel for the appellant, submitted that although the complainant initially testified on oath before being stood down, the cross-examination after he was recalled was not done under oath as required by **Section 151 of Criminal Procedure Code**, as the witness was neither sworn afresh, nor reminded she was still on oath. He submitted that this gave the prosecution an unfair advantage as PW1 was a single identifying witness and his testimony could not be relied upon as it was not tendered on oath. Relying on the case **Chiro Sonje Mbaga v Republic CR App No 357 of 2008** learned counsel submitted that in its judgment, the appellate court had ruled that failure to swear a witness afresh or remind him he was under oath when recalled contradicted provisions of Section 151 Criminal Procedure Code and thus the evidence was expunged from the record.

4. On the issue of identification, counsel faulted the High Court for concluding that identification of the appellant was positive and without any possibility of error. According to him, there was no evidence to show the length of time the appellant had stayed with the complainant during the robbery. He also faulted both courts below for what he said was failure to consider the appellant's defence. Learned counsel urged us to allow the appeal.

5. Opposing the appeal, **Ms Maina** learned Senior Principal Prosecution Counsel submitted that failure to swear afresh or remind the complainant that he was on oath before cross-examination was not fatal. Though not citing any authorities, Ms Maina maintained that this Court had subsequently rendered decisions to the effect that failing to remind a witness that S/he was still on oath after recall was not fatal. She maintained that the trial court had relied on the doctrine of recent possession to convict the appellant as he was found in possession of the appellant's stolen items only a few minutes after the robbery. She discredited the Appellant's defense that the Complainant was framing him because it was raised in an unsworn statement at trial as opposed to earlier before the trial and she argued that it was as an afterthought. She urged us to dismiss the appeal saying that the evidence against the appellant was simply overwhelming.

6. We have considered the record of appeal, submissions by the Counsel and the law. This being a second appeal by dint of **Section 361** of the **Criminal Procedure Code**, this Court is restricted to a consideration of matters of law only. Whether or not a person was properly identified as the perpetrator of an offense is a question of mixed fact and law and proper for our consideration. The Court, will however not interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence, or are based on a misapprehension of the evidence or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **Kavingo v R (1982) KLR 214**

7. We identify in this appeal four issues for our determination.

- a) whether not swearing the witness afresh, or reminding him that he was on oath rendered his evidence worthless;
- b) whether the appellant was properly identified;
- c) whether the High Court re-evaluated and re-examined the evidence before it afresh and arrived at its independent findings.
- d) lastly, the doctrine of recent possession.

If this Court finds that failure to swear PW1 afresh or remind him that he was still on oath fatal, then paying homage to this Court's decision in **Chiro Sonje Vs Republic [2010] eKLR**, cited to us by counsel for the appellant, the complainant's cross-examination will have to be disregarded. The Court will nonetheless proceed to consider the rest of the evidence on record to determine whether the same can sustain the conviction. This will be our first point of determination.

8. The usual practice of courts in Kenya is to swear and clearly indicate on the record that a witness has taken oath before testifying as provided for under **Section 151 of the Criminal Procedure Code** and **Sections 17 and 18 Oaths and Statutory Declarations Act**. There is a presumption that a person who swears to tell the truth will do so and since evidence tendered on oath is subjected to cross-examination to test its credibility and veracity, then the same carries more probative weight. This is nonetheless not to say that unsworn evidence is totally worthless. It only means that the court considering such evidence has to consider it with circumspection and look for corroboration from other evidence adduced in the matter. This Court addressed the evidentiary value of unsworn statements, in **May v Republic (1981) KLR** (Law Miller & Potter, JJA.) as follows;

“An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case.”

In other words, unsworn evidence can still be relied on but it would require corroboration before it can form a basis for conviction. In more recent decision, this Court in **Mwangi v Republic (2006) 2 KLR 94** held that it is prejudicial for an accused person to be convicted on the basis of unsworn evidence.

9. What we need to consider now is whether in this case, where cross examination of the witness proceeded without the witness being sworn afresh or being reminded he was on oath, the appellant can be said to have been prejudiced. The High court addressed this issue and observed that it would have been prudent for the trial court to either swear the witness afresh or remind him that he was still on oath before cross-examination having been stood down after testifying in chief. The court nonetheless found the oath administered on the witness was still binding at the time of cross examination and consequently, the appellant had not been prejudiced. However, in view of this Court's decision in the **Chiro Sonje** case (*supra*), that conclusion by the High court cannot hold. In our view however, unsworn evidence is still valid evidence, only that it is of lesser probative value than evidence that is given on oath. If indeed it were no evidence at all, then how would courts treat evidence of minors?

10. As stated earlier, it is trite that the court will not base a conviction on unsworn uncorroborated evidence, but where such evidence is corroborated by other evidence, then such a conviction would be safe.

Furthermore, PW1's evidence in chief was tendered on oath and he was subjected to cross-examination by the appellant and his co-accused. It was not therefore worthless as submitted by counsel for the appellant. Our conclusion on that issue is that there was no prejudice occasioned to the appellant by the failure to swear PW1 afresh. Ground 1of appeal must therefore fail.

11. On the issue of identification, the two courts below made concurrent findings of fact to the effect that there was sufficient light at the scene from a nearby video shop, and that the circumstances prevailing at the scene were conducive to a proper identification. We have no basis for interfering with those findings. Further, on the issue of the treatment of the evidence of a single witness, the first appellate court found that the trial court had acted on the correct legal principle as set out in **Karani v. Republic KLR 1985**. The two courts below warned themselves of the danger of relying on the evidence of a single identifying witness. Both courts however found PW1's evidence credible and truthful and that his identification of the appellant was free from the possibility of error. In the present matter, the conviction of the appellant was not based exclusively on the evidence of a single identifying witness but also on the fact that the statement of PW1 was corroborated by that of PW4 and the recovery of the complainant's wallet and other items from the appellant.

12. This brings us to the issue of recent possession. The two courts below made a concurrent finding to the effect that the complainant's wallet was recovered from the appellant only a few minutes after the robbery. In the wallet were some personal documents belonging to the complainant which included his staff and National identification cards. The doctrine of recent possession as discussed in the Canadian case of **Republic v Kowkyk (1988) 2 SCR 59** where the majority of that Supreme Court accepted the following summary of the doctrine:-

“Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must– draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”

The initial trier of fact here was the trial court and it was correct in finding the elements of proof of guilt of the appellant were satisfied. Closer home, addressing the doctrine of recent possession, this Court in the case of **Isaac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic Cr App. No. 272 of 2005 (UR)** expressed itself as follows:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof;

- i. that the property was found with the suspect;***
- ii. that the property is positively the property of the complainant;***
- iii. that the property was stolen from the complainant;***
- iv. 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.”

All these elements were satisfied in the present case. The stolen items were recovered immediately after the robbery on the appellant's person; the appellant failed to put forward a satisfactory explanation as to how he came to be in possession of the stolen items and his defense of conspiracy was unsubstantiated.

13. On the issue of re-evaluation of the evidence by the 1st appellate court, it is without doubt the duty of the first appellate court to re-evaluate the evidence and make its own findings, with the usual caveat that unlike the trial court, it did not have the advantage of hearing and seeing the witnesses testify and therefore give an allowance for that. (**See Okeno v R [1972] EA 32**). From the record before us, it is evident that the first appellate court acknowledged its responsibility to reconsider and re-evaluate the evidence and reach its own conclusion. The learned Judges after re-analysing the evidence adduced before the trial court addressed all the points of law raised in the appeal and pronounced succinctly their findings on all the issues arising from the appeal before them. Ground 3 of the appellant's grounds of appeal therefore fails.

14. In all, we are not persuaded that the appeal against conviction has merit. The same is accordingly dismissed. On the issue of sentence, although learned counsel did not appeal against sentence, and he did not make any serious submissions on the issue, we take judicial notice of the fact that there has been a shift of paradigm in our jurisprudence in this area following the Supreme Court's decision in **Francis Karioko Muruatetu and others vs Republic**. Supreme Court Criminal Appeal No.15 of 2015 in which the mandatory aspect of the death sentence was declared unconstitutional. In view of this, and given that the appellant had mitigated before the trial court, this Court is in order to reconsider the death sentence imposed on the appellant by the trial court and upheld by the High court. In his mitigation, the appellant pleaded for leniency saying he had an old mother who depended on him. He was also a first offender. We also note that most of the complainant's stolen items were recovered and the injuries suffered by the complainant were not aggravated, we set aside the death sentence and substitute therefor a sentence of twelve years imprisonment.

Dated and delivered at Nairobi this 8th day of February, 2019. ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR