



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, J.J.A)

CRIMINAL APPEAL NO. 195 OF 2014

BETWEEN

GEORGE WESONGA ABUTI.....1ST APPELLANT

MOSES KANGU WASWA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya

at Kakamega (Mbogholi Msagha and F. A. Ochieng, JJ.)

dated 7th October, 2008

in

HCCRA No. 68 of 2005)

JUDGMENT OF THE COURT

The appellants, **George Wesonga Abuti** and **Moses Kangu Waswa** were jointly charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code; two counts of assault causing actual bodily harm contrary to section 252 of the Penal Code and two alternative charges of handling stolen property contrary to section 322(2) of the Penal Code. We need not reproduce the particulars of each count. Suffice to say that the appellants pleaded not guilty to all the counts and after a full trial, they were found guilty on the two counts of robbery with violence and sentenced to death. The trial court rightly kept in abeyance sentence of death in respect of the 2nd count for one cannot die two times over.

The brief facts of the prosecution case were that on the night of 8th December, 2004 **James Wewecha Ongango**, the complainant in respect of count one, heard a knock on his door at about 10:30pm. He lit his lamp and opened the door. He saw the appellant, whom he knew prior to the incident as he was a neighbor. He had a bicycle with the torch on and was wearing a black woolen hat and black coat who then entered the house. The 1st appellant on realizing that the complainant had recognized hit him in the eye using a metal rod. During the entire ordeal the 2nd appellant remained at the door ostensibly keeping vigil while about 10 other robbers took the 1st complainant's watch, sheets, radio, clothes and 15 iron sheets. The 2nd appellant subsequently entered the house and put off the light. The appellants together with the other robbers then demanded the complainant to take them to his father's house. When he told them that his father was not around they asked him to take them to his brother's house, **Moses Murabo Ongango**, the complainant in count two. They then covered him with a blanket and a sack over his head and at knife point frog-marched him to 2nd complainant's house. He was made to pretend that he was borrowing something from him and when the 2nd complainant's wife **Fatuma Ongango, (PW2)** opened the door, they attacked her. In the process they robbed them of the KShs. 50,000.00, maize, radio and chicken and left after severely assaulting them. All the complainants as well as PW2 were admitted to hospital. The incident was subsequently reported to Mumias Police Station. While reporting, the said witnesses claimed to have recognized the appellants and led police officers headed by **P.C. Haggai Oduor (PW4)** to the house of the 1st appellant which was searched and 12 iron sheets, a bicycle and a radio were recovered therefrom. The 1st appellant then led the same police officers to the 2nd appellant's house and upon search the 2nd complainant's radio was recovered.

Henry Mboyoka (PW5) the village elder and **Jaffrey Amakabila (PW6)** a neighbor of the complainants both heard screams from the homes of the complainants on the material night and went there. PW5 recognized the 1st appellant and together with PW6 accompanied the police when they searched the appellants' homes. They corroborated PW4's evidence that the 1st appellant led the police to the home of the 2nd appellant and through the search some items stolen from the complainants were recovered.

Dr. Peter Asava, (PW7), Clinical Officer produced the P3 forms in respect of the complainants and his assessment of the degree of injuries was harm.

Put on their defence, the 1st appellant denied any knowledge of the charge save that he was arrested at 4:00am from his house. The 2nd appellant similarly denied any knowledge of the offence. Just like the 1st appellant, he dwelt on the circumstances of his arrest.

In its judgment delivered on 8th June, 2005, the trial court was satisfied that the appellants were armed and meted out violence on the complainants as evidenced by the P3 forms. It accepted the prosecution evidence as true with regard to the recoveries and further that the appellants did not rebut evidence that recovered items belonged to the complainants. Accordingly, the appellants were convicted on the two counts of robbery with violence. The court made no finding on the alternative counts. Subsequently, and as already stated the appellants were sentenced to death in accordance with the law.

The appellants were dissatisfied with the decision of the trial court and appealed to the High court. The learned Judges; (**Mboghli Msagha & Ochieng, JJ.**) in their considered judgment held that the evidence adduced by the prosecution was not only consistent but also corroborative. That the light from the lamp and 1st appellant's bicycle torch enabled the 1st complainant to properly identify and or recognize the 1st appellant as he entered his house. That the 1st appellant was the complainant's neighbor and therefore not a stranger. A radio belonging to the 2nd complainant was recovered in the 2nd appellant's house three hours after the robbery and no explanation was given as to how the 2nd appellant had come by the same. That the defences put forward by the appellants did not cast any doubt in the prosecution case. Consequently, the learned Judges upheld the appellants' conviction and sentences and dismissed the appeal in totality.

Aggrieved by the upholding of the conviction and sentences by the High Court, the appellants filed the present appeal in which they raised 12 and 13 grounds of appeal respectively. The grounds of appeal are similar in substance; to wit that the two Courts below erred by failing to observe that during the taking of the plea no language of the court was indicated, and no name of interpreter was indicated; convicting and sentencing the appellants to death on two capital offences without leaving one count in abeyance; failing to appreciate that the appellants were not given witness statements by the prosecution nor were their rights as enshrined in Article 50 (2) (j) of the Constitution upheld; failing to appreciate that there was variance in the name of the 1st complainant in the charge sheet and evidence; misapprehending the evidence of the purported identification/recognition that was flawed; failing to observe that the charge sheet had no signature of the commanding officer, magistrate or prosecutor or official rubber stamp; failing to observe that those who arrested the appellants' failed to inform them in a language they understood the reason for their arrest; convicting and sentencing the appellants on the basis of the doctrine of recent possession; failing to independently evaluate the evidence on record and come to an independent conclusion; failing to observe that the prosecution case was not proved beyond reasonable doubt; failing to resolve material contradictions in their favour; failing to summon vital witnesses to testify and finally, failing to consider the appellants' defences.

When the appeal came up for hearing, **Mr. Odhiambo**, learned counsel holding brief for **Ms. Mukoya**, learned counsel appeared for the appellants whereas **Mr. Kakoi**, principal prosecution counsel represented the respondent. Parties relied on their written submissions and opted not to highlight.

The appellants submitted that they were not told in a language which they understood the reason for their arrest nor was the language used when they took the plea indicated in the record. That the appellants should have been sentenced to death on one count of robbery with violence and the sentence on the other count left in abeyance. That in any event, the mandatory nature of the death penalty had been abolished in view of the Supreme Court decision in the case of **Francis Karioko Muruatetu & another V. Republic [2017] eKLR**. That the appellants' constitutional rights to be given witness statements that the prosecution intended to rely on before trial were violated by denial. That there was no appropriate identification and or recognition of the appellants. That there was a possibility of a mistake in the recognition of the appellants by the complainants. That the evidence tendered was not subjected to adequate evaluation by the trial court as well as first appellate court. That the houses in which the items alleged stolen from the complainants were recovered were not ascertained to belong to the appellants, hence the application of the doctrine of recent possession was a misadventure. That there was no inventory memo form or recovery form tendered in evidence confirming that the items were recovered from the appellants' houses. That the appellants' defences were disregarded.

Opposing the appeal, the respondent submitted on the question of defective charge sheet and language of the court on the date of plea that the appellants cross examined the witnesses, made applications and submissions during trial hence there was no prejudice or failure of justice occasioned to them. As regards identification, it was submitted that the appellants spent a lot of time with the 1st and 2nd complainants thereby making their identification and/or recognition easy. That the trial Court warned itself of the dangers inherent in identification under difficult circumstances and proceeded to acquit one of the persons charged with the appellants after weighing the evidence of identification. That the High Court analyzed the evidence on identification and came to the same conclusion as the trial Court, that this was a case of recognition as opposed to identification of a stranger. The respondent further submitted that the issue of contradictions was a matter of fact. That the essential ingredients of the offence of robbery with violence were proved. The appellants in their unsworn statements of defence did not refer to the events of the night of 8th December, 2004 when the complainants were attacked. They were properly placed at the scene of crime by the complainants. That the defences were rejected as they did not raise any doubts in the prosecution case.

We have carefully considered the record of appeal, submissions by counsel and the law. The main issues for our determination are whether the appellants were properly identified; the application of the doctrine of recent possession, whether the High Court re-evaluated the evidence on record and whether the case against the appellants was proved beyond reasonable doubt.

This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact tried by the trial court and re-evaluated by the appellate court on the first appeal. This is by dint of **section 361 (1) (a)** of the Criminal Procedure Code and as was held in **M’Riungu v. Republic (1983) KLR 455** where this Court stated;

“Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law.”

As regards identification, our perusal of the record leaves us in no doubt that visual recognition was the basis of the appellants’ conviction. The 1st complainant was able to recognize the 1st appellant as someone who lived near him and the 2nd appellant was the person who entered his house and put out the light. In the case of **R v Turnbull, (1976) 3 All ER 551**, Lord Widgery CJ observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. He went on to state;

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

Similarly, in **Lesarau v R, (1988) KLR 783**, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In this case, 1st complainant mentioned the 1st appellant by name. The recognition of the 1st complainant of the 2nd respondent was however discounted by the first appellate court on grounds that he never gave the name of the said appellant to the police as he had done with the 1st appellant.

The source of light was a tin lamp in the 1st complainant’s house and a bicycle torch which emitted light. There is also unchallenged evidence that the appellants spent a lot of time with the complainants during the commission of the offences. They were thus in close proximity and in particular, the 1st complainant thereby making the recognition of the 1st appellant by the 1st complainant a lot easier. In the case of **Cleophas Otieno Wamunga v Republic [1989]eKLR**, this Court while dealing with the complexities or dangers apparent in the identification of an assailant stated:

“It is trite law that where the only evidence against a defendant is evidence of identification of 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 possibility of error before it can safely make it the basis of a conviction”. Emphasis ours.

Both courts below warned themselves of the dangers of mistaken identity when it comes to recognition, but nonetheless came to concurrent findings that the 1st appellant was positively recognized by the 1st complainant. We have no reasons to depart from or interfere with that concurrent finding.

With regard to the doctrine of recent possession, **the 1st appellant was found in possession of some of the stolen items immediately after the incident while the 2nd appellant was caught three hours later with a radio stolen from the 2nd complainant. The items were positively identified by the complainants as belonging to them. The appellants did not explain how they came into possession of the said items.** Any reasonable person would certainly draw an inference of guilt based on the appellants’ physical and actual possession of some of the stolen items as recovered from their houses so immediately after the robbery. The doctrine of recent possession was expounded in the Canadian case of **Republic v Kowkyk (1988) 2 SCR 59** by the majority of the Supreme Court thus:

“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.” Emphasis ours.

The elements of the doctrine of recent possession were laid out in our local case of **Isaac Ng’ang’a alias Peter Ng’ang’a Kahiga v Republic Cr App. No. 272 of 2005 (UR)** where this court held that:

“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”.

We are of the view that all the aforesaid elements were satisfied in the present case. The stolen items were found in possession of the appellants, they were recovered immediately after the robbery in the appellants’ houses. The appellants did not deny being in possession of the stolen items. The items were positively identified by the complainants as belonging to them. Because of the short time between the robbery and their recovery, it cannot be said that the items had easily passed hands from one person to the appellant. Nor did the appellants claim ownership of the same. We are therefore satisfied that both the trial and 1st appellate Court were justified in reaching concurrent finding that the appellants were guilty of the offences charged based on the doctrine of recent possession as well. The appellants have complained that the houses in which the stolen items were recovered were not ascertained to belong to them. What ascertainment was required when all of them were arrested from those houses? Further, it is the 1st appellant who led the police officers to the house of the 2nd appellant. In any event both PW4 and 5 who were involved alongside the police officers in the search and recovery of the stolen items knew the appellants and their houses.

On the complaint regarding the first appellate court’s failure to re-evaluate the evidence and arrive at its own independent conclusion, in the celebrated case of **Okeno v Republic [1972] EA** this Court observed:

“It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld.”

We have examined the record of the first appellate court before us and are satisfied that the evidence in the trial court was properly re-evaluated by the first appellate court. The learned Judges went into great detail to re-examine the evidence on record and arrived at their own conclusion which happened to be the same as the conclusion reached by the trial Court. The learned Judges re-examined the evidence of each prosecution witness in the light of the defences and concluded that the prosecution indeed proved its case beyond reasonable doubt. They spent quite a bit of time on the question of recognition as well as whether the doctrine of recent possession was applicable in the circumstances of this case. On both counts they reached the same verdict as the trial court. We have not been given any reason why we should depart from those findings.

On whether the prosecution case was proved beyond reasonable doubt, section 296(2) of the penal Code and the case of **Oluoch v. Republic (1985) KLR** outlines the three ingredients which need to be proved in order to sustain a conviction for the offence of robbery with violence and the prosecution need only prove one of them. These are: **“The offender is armed with any dangerous or offensive weapon or instrument; the offender is in the company of one or more person or persons; or at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”**

We are satisfied that two of the above elements of robbery with violence were proved. The appellants were in the company of other people besides themselves and they beat up the complainants if the evidence of the clinical officer, his assessment of the degree of injury and production of the P3 forms in respect of the complainants is anything to go by.

From the foregoing, we are satisfied that the prosecution’s case against the appellants was overwhelming and that the High Court properly directed itself in dismissing the appeal. There are no reasons for interfering with the concurrent findings of the two courts below on the issue.

The appellants’ claim that on the day that they took plea the language of the court is not indicated. We have called for the original record and upon perusal we are satisfied the language of the court is indicated. In any event, the plea entered was one of not guilty. Thereafter the matter proceeded to full trial. What prejudice did the appellants suffer, we cannot think of any. On the whole therefore, the appeal on conviction fails and is dismissed.

With regard to the sentence, the Supreme Court in **Francis Karioko Muruatetu & another v Republic (supra)** held at para 69:

“Consequently, we find that section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty.” Emphasis ours.

Additionally, the Supreme Court stated at para 111 of the said judgment stated that:

“It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein ...” Emphasis ours.

Section 204 of the Penal Code provides that **“Any person convicted for murder shall be sentenced to death.”** Similarly section 296(2) of the Penal Code provides that the offender convicted for robbery with violence in circumstances stipulated therein; **“shall be sentenced to death.”**

In the case of **William Okungu Kittiny v Republic Criminal Appeal No. 56 of 2013**, this court recently held at para 9 that:

“From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the penal code. Thus, the sentence of death under section 296 (2) and 297(2) of the penal code is a discretionary maximum punishment.”

As was held in **William Okungu Kittiny's** case (supra) the decision of the Supreme Court in **Muruatetu's** case (supra) has an immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts. Accordingly, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial court could have lawfully passed.

Even though the Supreme Court did not outlaw the death sentence, we are of the view that in the circumstances of this case, the death sentence was not warranted and or justified at all. The appellants gave mitigating circumstances but the trial magistrate considered that irrespective of the mitigation the law only prescribed one sentence for the said offence. Since the appellant's mitigation is already on record, it is not necessary in our view, to order a sentence re-hearing by the trial court. The appellants have been in custody for 15 years. Having taken the appellants' mitigation into account, we are satisfied that a sentence of imprisonment of 20 years would serve the interest of justice.

For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of death is set aside and in substitution thereof the appellants are sentenced to 20 years imprisonment to take effect from 8th June, 2005 when they were sentenced.

Dated and delivered at Kisumu this 31st day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.