



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, OUKO & M'INOTI, J.J.A.)

CRIMINAL APPEAL NO. 74 OF 2015

BETWEEN

PATRICK KIMANTHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Achode & Mbogholi JJ.) dated the 25th July, 2013)

in

H.C.C.R.A. NO. 449 OF 2007)

JUDGMENT OF THE COURT

1. Before us is a second appeal preferred by Patrick Kimanthi (the appellant) and as such **Section 361 of the Criminal Procedure Code** enjoins this Court to consider matters of law only. In ***Dzombo Mataza vs. R [2014] eKLR*** this Court set out the confines of its jurisdiction in such an appeal as follows:-

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see *Okeno v Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong”.*

2. Bearing the foregoing in mind, the salient facts of this appeal are that on the 21st September, 2005 at around 1:00 p.m. after withdrawing Kshs.29,700/= from the K-rep Bank branch at Kawangware, Geoffrey Kinyanjui Ngichu (PW1) boarded a matatu to Uthiru. Upon reaching his destination he alighted from the matatu and begun walking when a motor vehicle registration number KAT 494V make Toyota Corolla stopped beside him. The driver identified himself and the other occupants of the car as policemen. He told Geoffrey that they had been looking for someone matching his description. He went on to accuse

Geoffrey of being one of people who were killing policemen in the area. Two of the occupants who were seated at the back came out and forced Geoffrey into the car. He sat between the two men in the back seat. He was then informed that he was being taken to Kikuyu police station.

3. Instead of heading to the police station as indicated, they drove around and the alleged policemen continued interrogating Geoffrey. They asked him why he had not told them that he was from the bank. He was ordered to empty his pockets which he did and one of the men seated on his left who he later identified as the appellant took the money he had. Thereafter, the other man on his right searched him to confirm that nothing had been left in his pockets. It is at this point that Geoffrey begun having doubts that the men were probably not who they claimed to be. They continued driving for a considerable distance until the car stopped and he was ordered out by the appellant who led him into a farm. According to Geoffrey, the appellant pointed something which he suspected was a pistol at the back of his neck. He threatened Geoffrey to keep quiet or he would kill him. The appellant then ran back to the vehicle and Geoffrey heard it speed off.

4. Subsequently, on the 14th October, 2005 at around noon, Hesbon Weyanga Nabusisa (PW2) was stopped in a similar fashion after he had withdrawn Kshs.20,000/= from the bank. However, this time around the vehicle in question was registration number KAR 318C make Toyota Corolla. There were four occupants in the vehicle who identified themselves as policemen. He was also forced into the car and robbed of Kshs.20,300/= which he had. He was driven around for a considerable period and they stopped at Kangemi. He was sent by one of the men who he identified as the appellant to purchase airtime scratch cards in a nearby shop. As soon as he stepped out of the car the assailants drove away.

5. These incidents were reported to the police who managed to track the owners of the vehicles in question. Apparently, Elijah Musyoka Mitau (PW5) had leased his aunt's vehicle registration number KAT 494V to Stephen Mathu Mbuthia (PW7) for use in his car hire service business. Similarly, the registered owner of KAR 318C, Joseph Mbatia Gachina (PW6) leased out his vehicle to Stephen. Stephen confirmed that at all material time the vehicles had been hired by the appellant. This led to the arrest of the appellant who was later identified from an identification parade by both Geoffrey and Hesbon as one of the assailants.

6. As a result, the appellant was charged with several offences. Of relevance to this appeal is that he was charged with two counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the first count were that on the 21st day of September, 2005 at Uthiru shopping centre in Nairobi within the Nairobi area, jointly with others not before court, while armed with a dangerous weapon namely a pistol robbed Geoffrey Kinyanjui Ngechu of cash Kshs.29,700/= and at or immediately after the time of such robbery used personal violence to the said Geoffrey Kinyanjui Ngechu. On the second count, the particulars were that on the 14th day of October, 2005 at Adams Arcade in Nairobi within the Nairobi Area, jointly with others not before court, while armed with a dangerous weapon namely a pistol, robbed Hesbon Weyanga Nabusisa of cash Kshs.20,300/= and at or immediately after the time of such robbery used personal violence to the said Hesbon Weyanga Nabusisa.

7. He was further charged with the offence of being in possession of public stores contrary to **Section 324 (3)** of the **Penal Code**, particulars of which were that on the 24th day of October, 2005 near Ambassador Hotel in Nairobi he was found being in possession of a pair of hand cuffs being the property of the disciplined forces which was reasonably suspected to have been stolen or unlawfully obtained.

8. Last but not least, he was faced with one count of being in possession of suspected stolen property contrary to **Section 323** of the **Penal Code**. The particulars were that on the 24th day of October, 2005 near Ambassador Hotel Nairobi, having been detained by No. 58101 CPL Peter Indeché and No. 50754 PC John Wanyonyi as a result of the exercise of the powers conferred by **Section 26** of the **CPC**, the **appellant** had in his possession a pocket phone make Motorola whose serial number was obliterated and which was reasonably suspected of having been stolen or unlawfully obtained.

9. In his defence the appellant gave unsworn statement. He testified that he worked as a travel agent.

Apart from admitting that he knew Stephen, he denied hiring the vehicles in question. He equally denied committing the offences he was charged with. His evidence was that on the day he was arrested, that is, the 24th October, 2005 he had gone to Ambassador Hotel to collect money which James Kimani owed him. Whilst he was talking to James a vehicle with three occupants, one of whom he recognized as Stephen stopped near them. The occupants of the said vehicle called James and he went to the vehicle. He saw James being pushed into the vehicle. He was also ordered into the vehicle. They drove around for some time before the occupants asked if he and James had Kshs.10,000/= but they didn't have any money. Both he and James were taken to Kabete Police Station. In his testimony he stated he was detained for nine days without being informed of the charges against him. He later participated in an identification parade where he was identified by Geoffrey and Hesbon who had earlier on seen him when he was arrested. He maintained that the handcuffs were not recovered from his jacket but from James' jacket.

10. The trial court having considered the evidence found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant on all the aforementioned counts. He was sentenced to suffer death in respect of one count of robbery with violence while the sentence on the other counts were held in abeyance.

11. Aggrieved by the decision of the trial court, the appellant lodged an appeal in the High Court. The learned Judges of the High Court, (Achode & Mbogholi, JJ.), having re-considered the evidence that was tendered before the trial court, concluded that the evidence of the prosecution was cogent and proved the guilt of the appellant beyond any reasonable doubt. The learned Judges therefore dismissed the appeal and upheld the appellant's conviction and the sentence imposed on him by the trial court. This precipitated the second appeal to this Court which is anchored on the grounds that-

a. That the 1st appellate court erred in law and in fact in affirming the decision of the trial Court notwithstanding that the evidence adduced by the prosecution witnesses was not sufficient prove that the appellant hired and/or was in possession of motor vehicles in question at the times the alleged crimes were committed.

b. That the 1st appellate Court erred in law and fact in affirming the decision of the trial Court notwithstanding that the witnesses did not give description of the appellant before the identification parade was conducted.

c. That the 1st appellate Court erred in law and in fact in affirming the decision of the trial court notwithstanding that the identification parade was not conducted in accordance with the Rules set out in Chapter 46, Force Standing Orders.

d. That the two courts below erred in fact and in law in relying on dock identification which is worthless.

e. That the two courts below misapprehended the evidence on record

f. That the 1st appellate court erred in law and in fact in affirming the decision of the trial court notwithstanding that it was not proved that the appellant signed the identification parade forms.

g. That the 1st appellate court erred in law and in fact in affirming the decision of the trial court notwithstanding that there was no evidence to prove that a pair of handcuffs which was allegedly found in the possession of the appellant was the property of the disciplined forces.

h. That the 1st appellate court erred in affirming the decision of the trial court notwithstanding that the evidence on record does not support particulars of the offence of being in possession of stolen property."

12. Learned counsel for the appellant, Mr. A.O. Oyalo submitted that there was no evidence that the

appellant had the alleged weapon namely, pistol which was used to commit the offence in question. Besides, the motor vehicles were not found in his possession. He maintained that there was no lease agreement between the appellant and owners of the vehicle to suggest he had hired them as purported by the prosecution.

13. Faulting the identification evidence, Mr. Oyalo argued that firstly, no description of the appellant was given to the police before the identification parade was conducted. Placing reliance on the case of ***Gabriel Kamau Njoroge vs. Republic [1982-1988] 1 KAR 1134*** he contended that the description given of the appellant was not adequate to describe a person let alone test the veracity of the identification of the appellant as one of the assailants. Secondly, that the identification parade was of no probative value because the appellant was seen by the witnesses at the CID office before the identification parade was conducted. Thirdly, that the appellant did not sign the identification parade forms. In his view, the trial court should have invoked **Section 150** of the **Criminal Procedure Code**, and called a handwriting expert to assist the court determine if appellant had signed the same. Counsel, while placing reliance on **Section 48** of the **Evidence Act**, posited that in the absence of the evidence of the handwriting expert the court ought to have given the appellant the benefit of doubt that he did not sign the forms.

14. Counsel argued that the handcuffs were not identified in court as those that were used during the incidents. Further, that there was misjoinder of charges which was prejudicial to the appellant as the offences took place on different dates and in different places.

15. Senior Assistant Director of Public Prosecutions, Mr. Peter Mailanyi, appeared for the respondent and opposed the appeal. According to him, the evidence connected the appellant to the vehicles used in the robberies. He went on to state that it was the uncontroverted evidence of the owners of the vehicles that they had leased the vehicles to Stephen who had in turn hired the same to the appellant on the material dates. In any event, both Geoffrey and Hesbon identified the appellant as one of the occupants of motor vehicles registration number KAT 499V and KAR 318 C respectively during the incidents.

16. As far as Mr. Mailanyi was concerned the appellant participated in the identification parade and signed the forms. He never disowned his signature on the forms. He added that the failure to give description of the assailants did not render the identification parade useless. He argued that not only did the offence take place in broad daylight but that Geoffrey and Hesbon spent quite some time with the appellant rendering the prevailing circumstances favourable for a positive identification. On the issue of misjoinder of charges counsel's view was that **Section 135** of the **Criminal Procedure Code** allows different offences to be charged together in the same charge sheet if they arise from the same facts. He argued that the same vehicles were used and the offences were committed in Nairobi by same person. Therefore, there was no prejudice occasioned to the appellant.

17. We have duly perused the record of appeal. We have also considered the respective submissions of counsel as well as the authorities cited.

18. We are of the view that the following are the issues that call for our consideration in this appeal. Whether the appellant hired and/or was found in possession of the vehicles; whether the identification parade was conducted properly as envisaged under the law; whether the appellant's conviction on the other charges was sound; whether there was a misjoinder of charges.

19. This Court has in a myriad of cases stated that evidence of visual identification is of great importance in criminal cases but if not properly evaluated and tested can cause a miscarriage of justice to an accused person. In the case of ***R vs. Turnbull and others (1976) 3 All ER 549***, Lord Widgery C.J. had this to say on the issue identification of an accused person:-

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility

that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"

20. In this case the appellant was identified through an identification parade by Geoffrey and Hesbon. Preferably witnesses ought to give a description of the assailant before an identification parade takes place. In this regard, Geoffrey while being cross examined by the appellant's advocate stated as follows:-

"I recorded my statement on 22/9/05. I explained how the people who robbed were like. One in front was thick/black. He appeared a Nandi or Maasai. One on my left was brown and big and he appeared a Kamba and on my right he appeared a Kikuyu."

He further testified that the man who he described as being brown, big and with a Kamba accent was the appellant. Hesbon on his part did not give the description of the appellant prior to the identification parade. What was the consequence of his failure to do so?

21. In *Nathan Kamau Mugwe vs. Republic- Criminal Appeal No. 63 of 2008* this Court faced with a similar situation expressed itself thus:-

"As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness „SHOULD? be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

22. We agree with the findings in *Nathan Kamau Mugwe's* case. Our view is that the failure by Hesbon to give a description of the appellant before the identification parade did not vitiate the identification parade. Both Geoffrey and Hesbon gave a detailed account of the role played by the appellant in the robberies. Geoffrey identified the appellant as the man who took Kshs.29,700/= he had and led him to the farm. On the other hand, Hesbon testified that the other assailants referred to the appellant as sergeant. He was the one who sent him to buy the airtime scratch card and led him out of the car. We are convinced like the two courts below that the said witnesses got a clear impression of the appellant during the incidents and were able to positively identify him from the identification parade.

23. This Court in *David Mwita Wanja & 2 others vs. Republic [2007] eKLR* while emphasizing on the

importance of a properly conducted identification parade expressed itself thus-

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwangi s/o Manaa (1936) 3 EACA There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia vs. R [1986] KLR 422 where the court stated at page 424: -

“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed.”

24. Of relevance is Standing Order 6 (iv) (c) which provides that the witnesses should not see the accused before the parade. IP Ronald Simiyu (PW7) who conducted the identification parade gave a blow by blow account of what transpired during the parade. On cross examination he stated that the witnesses were in CID offices which were in a different building from the police station. Thus the witnesses could not see members of the parade until they participated. Geoffrey also confirmed that he did not see the accused before the parade. The two courts below made concurrent findings of fact that the witnesses did not see the appellant before the parade. We have no basis for interfering with that finding.

25. As to whether the appellant signed the identification parade forms, IP Ronald’s testimony to the effect that the appellant did so in his presence was unshaken. The trial court believed his evidence and we see no reason to interfere with the same. In the end, we find that the identification parade was properly conducted and the appellant was identified as one of the assailants.

26. Whereas we agree with the appellant that there was no documentary evidence, such as car hire/lease agreements with the car hire company, we find that Stephen’s evidence that he had hired the vehicles to the appellant on the material days was corroborated by Geoffrey and Hesbon who placed the appellant in the said vehicles during the incidents.

27. Moreover, we find that Stephen’s evidence is plausible because he was the one who orchestrated the ruse that led to the arrest of the appellant when he called him to pick up the car he liked and the appellant showed up. This clearly demonstrated that he used to hire cars to the appellant. We are therefore, of the view that taking into account all the evidence in totality, the prosecution sufficiently proved that the vehicles were in possession of the appellant at the time of the commission of the offences.

28. Having perused the record we see no reason to disturb the trial court’s finding that the appellant was found in possession of handcuffs when he was arrested. We say so because CP John Wanyonyi (PW9) testified that when he arrested the appellant he was holding a black jacket. It was upon searching the jacket that he recovered the handcuffs. Stephen who was also present during the arrest confirmed as

much.

29. However, there was no evidence tendered to prove that indeed the appellant was found in possession of a stolen mobile phone. The essence of the doctrine of recent possession is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation as to how he came to be in possession of that property, a presumption of fact arises that he is either a thief or receiver. See *Hassan vs. Republic* [2005]2 KLR 151. The circumstances under which the doctrine will apply were considered in Isaac *Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic* [2006] eKLR where this Court stated:

“It is trite that before a court of law can rely on the doctrine of recent possession as a 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 the 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 to the other.” [Emphasis added.]

No evidence was led as to whether the mobile phone found on the appellant was stolen or to whom it belonged. Accordingly, we find that the trial court erred in convicting the appellant on this count. The High Court similarly erred in failing to quash the conviction and setting aside the sentence in this Court.

30. Last but not least, the appellant argued that there was misjoinder of charges which prejudiced him as the offences took place on different dates and on different places. **Section 135** of the **CPC** provides that:-

“Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.”

This provision of the law allows for joinder of counts in a charge sheet where, *inter alia*, the offences form or part of a series of offences of the same or similar character. In the case before us we are of the view that from the evidence presented, the offences that the appellant was charged with form part of a series of offences of similar character. Hence we hold that there was no misjoinder of charges. We are, therefore, satisfied that save for the conviction for being in possession of a stolen mobile phone, the appellant was properly convicted of the other offences. Consequently, we quash the conviction for the offence of being in possession of a stolen mobile phone. Accordingly, we find that the trial court did not err in sentencing the appellant to death for the offence of robbery with violence while directing that the sentences for the other offences be held in abeyance. In the result, and save to the extent only stated hereinabove, we order that this appeal be and is hereby dismissed.

Dated and delivered at Nairobi this 26th day of January, 2018.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR