



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 131 OF 2016

BETWEEN

PETER KIARIE NJOROGE.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Achode & Mbogholi, JJ) dated 30th June, 2014

in

HC. CR. A. No. 376 of 2010)

JUDGMENT OF THE COURT

The appellant brings this second appeal to challenge the dismissal by the High Court of his first appeal thereby confirming the conviction and death sentence imposed by the learned trial magistrate for three counts of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code.

Since we are only concerned in this appeal with issues of law, we shall only briefly outline the facts leading to the appellant's trial so as to be able to relate them to the grounds proffered in the appeal on matters of law.

It was the prosecution's case that on the night of 9th October 2008 at Mutati Village in Gatundu, a four-member gang armed with knives and *panga* went on the rampage attacking and robbing residents. Three of their victims who they robbed separately were, Peter Kabue Muthama who was robbed of Kshs.2,500/= in cash, ID card, a driving licence, a pair of brown shoes and one jacket all valued at Kshs.4,500/=; Robbins Kabue Mbugua was robbed of cash Kshs.4,000/=, two mobile phones, ID card, voters card, ATM Cards and a driving licence, all valued at Kshs 12,800/=; and David Ndungu Muchiri who lost to the robbers Kshs.550/=in cash, an ID card, ATM card, a mobile phone, a pair of safari boots shoes and jeans long trousers.

The latter, two victims by sheer coincidence met at the nearby police post where they had gone to make a report of the robbery but unfortunately, there was no police officer on duty. But Peter Kabue Muthama

managed to contact the local chief, who in turn alerted the administration police officers in his office of the spate of attacks on a public road that had been reported to him that evening. Immediately PW3, AP Sgt. Stephen Hura and a colleague moved to the public road and shortly spotted a group of four men. Upon seeing the police officers the men took to their heels with the officers in pursuit. Sgt. Hura was able to arrest one of them who was identified as the appellant after a brief chase of about 200metres from the police post along a deserted public road. Three of the appellant's colleagues however managed to escape. Sgt. Hura recovered from the appellant a knife, *panga* and brown shoes.

In his unsworn defence, the appellant explained that as he walked home from a local trading centre, he met two Administration Police Officers who arrested him on allegation of a robbery incident, which he maintained he did not participate in.

The learned trial magistrate considered the evidence presented in support of the three counts, was convinced that they were all proved beyond doubt, convicted the appellant on all the three counts and sentenced him to death.

The appellant's first appeal to the High Court, as we have said was dismissed by Mbogholi and Achode, JJ. who expressed the opinion that, although Peter Kabue Muthama did not identify any of the robbers during the attack, he identified his shoes which the appellant was arrested with shortly after they were stolen from him. The learned Judges agreed with the trial magistrate that, though the robbers were strangers to Robbins Kabue Mbugua, he identified the appellant at the scene of the robbery as the person who muttered the words "*leo tumekupata*"; that he described what the appellant was wearing during the attack, namely a pair of jeans trousers, black leather jacket and a red marvin cap; and that he had a goatee. The next day when he went to the police post to record a statement, he once more identified him from the goatee and the same clothing he wore the previous night. For his part David Ndungu Muchiri, apart from confirming that he too saw the appellant's face during the robbery, corroborated the evidence on how the appellant was dressed. In addition he picked the appellant out in an identification parade. But over and above this evidence on identification, the learned Judges, accepted the invocation by the trial court of the doctrine of recent possession and held that the appellant was, shortly after the robbery, found in possession of Peter Kabue Muthama's brown shoes. With that determination on the question of identification, the learned Judges rejected the appellant's unsworn *alibi* defence, and ultimately dismissed the appeal. They however corrected the anomaly in the trial magistrate's judgment by directing that the sentence in respect of counts II and III be held in abeyance.

This appeal has been brought on six grounds which, before us were condensed and argued by Mr. Ondieki, learned counsel for the appellant as three. He submitted that it was irregular and a violation of the Constitution for the police to have taken the appellant to Peter Kabue Muthama's home upon his arrest; that the identification parade was conducted in contravention of the Force Standing Orders as the appellant was exposed to the witness ahead of the parade; and that the circumstantial evidence relied on by the prosecution did not meet the accepted threshold. Learned counsel referred us to this Court's decisions in **Chiro Sonje Mbaga V R** Crim. Appeal No. 357 of 2008 and **Misili Tulo V R** Crim. Appeal No. 30 of 2013, whose relevance to the appeal before us is not apparent.

Mr. Mailanyi, learned counsel for the respondent opposed the appeal for, in his view, there was no evidence that the appellant's right to a fair hearing was violated; that there was nothing irregular with the appellant being escorted to the victim's home immediately he was arrested for the latter to confirm ownership of the pair of brown shoes the appellant was found with ; and that the appellant was positively identified in the identification parade which was conducted in accordance with the Standing Orders.

There was uncontroverted evidence that the three victims were robbed by a group of four young men who were armed with a *panga* and knives; that in the course of the attack the victims did not only lose money and other personal items but were also beaten up and wounded. In other words there was proof that the suspects were armed with a *panga* and knives, which in the circumstances are dangerous and offensive weapons; that the robbers were four and that during the robbery they used personal violence on the victims. The offence under **section 296 (2)** of the Penal Code was disclosed. The main issue, however remains whether the High Court properly found that the appellant was part of the four-man gang that

robbed the complainants in the three counts of the charge sheet.

The robbery was at night. The suspects were four in number. They were not known to the complainants. They were armed with a *panga* and knives with which they attacked the complainants. They also had a powerful torch. But Robbins Kabue Mbugua and David Ndungu Muchiri insisted that, in that state, out of the four robbers they were able to see the appellant only. It must be remembered that the two were robbed separately and as such their evidence must be treated as that of a single witness. Such evidence, it is settled, must be treated with greatest care and circumspection. In this regard, we reiterate that the strictures enunciated in the *locus classicus* **R V Turnbull** (1967) 3 All EL 549, that the court must examine closely the circumstances in which identification by each witness came to be made. The court must, for instance, ask, how long did the witness have the appellant under his observation, at what distance, in what light, did the witness describe the appellant to the police? **Turnbull** (supra) has been approved in many decisions in this country. Its ratio *decidendi* was applied in **Wamunga V R** (1989) KLR 424 as follows;

“.....Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification.”

See also **Charles Maitanyi vs R** (1988-92) 2 KAR 75.

In the entire judgment of the High Court, like that of the trial court, not a single decision was cited for guidance. We believe that had the learned Judges made reference to any of the many decisions on this subject, their conclusion on identification would not have been the same.

That notwithstanding, before believing the evidence of the two complainants regarding identification of the appellant, the learned Judges playing their role of the first appellate court were expected to have inquired how it was possible for the two complainants in a state of darkness to have identified their assailants who were strangers to them.

Looking at the testimony of Robbins Kabue Mbugua, we do not see how he could claim to have been able to see the appellant. It was his evidence that it was dark, the attackers had a powerful torch but when they got close by they turned it off and immediately pounced on him. He was slapped with a *panga* on the face and was cut across the nose bridge. All this happened while he was lying on the ground. In his own words, he **“was confused”** as a result of this attack. The only feature he remembered was that the attacker had a goatee, black leather jacket and jeans. But he never told anyone about these things. In event, how possible was it for this witness to have noticed all these in darkness?

David Ndungu Muchiri, for his part confirmed that the robbers had a powerful torch which momentarily blinded him. Before he could recover he was attacked with a *rungu*. At the same time he was being frisked while lying down. He was explicit that he could only identify the one with a black leather jacket and a cap. He also had a goatee.

We do not think, with respect, it was safe to rely on the evidence of identification of the two complainants. We believe that an identification parade was organized because the evidence of identification was weak. The learned Judges, even then, failed to see that the parade was not conducted in accordance with the Standing Orders. It was apparent from the appellant and the parade officer, PW8, confirmed that the witness saw the appellant before the parade.

Having said the foregoing, the only evidence left is whether the brown shoes that the appellant was found with belonged to Peter Kabue Muthama. The trial court, finding that because the shoes were recovered from the appellant shortly after the robbery, the doctrine of recent possession was applicable. Apart from making a cursory remark of doctrine, the High Court did not consider its application. In order to secure a conviction on evidence based on the doctrine of recent possession, it was incumbent upon the prosecution

to establish, first that a pair of brown shoes was indeed found with the appellant; that it was positively identified by Peter Kabue Muthama as his; and that it was recently stolen from him. See **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga V R** NYR CA Criminal Appeal No. 272 of 2005.

Although the shoes had no special mark, we are persuaded that, in view of the short time span between the robbery and the recovery of the shoes that the shoes indeed belonged to Peter Kabue Muthama after he positively identified them. The fact that the appellant offered no explanation as to how he came by them after Peter Kabue Muthama laid a claim to them strengthened the application of the doctrine. The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, rebuttable a presumption of fact arises that he is either the thief or receiver. On that evidence, alone we are satisfied that the appellant was part of the gang that robbed Peter Kabue Muthama. There was no evidence in proof of the second and third counts involving Robbins Kabue Mbugua and David Ndungu Muchiri. In the result, the appeal on the first count fails and is dismissed.

We, however, allow the appeal on the second and third counts and quash the conviction and set aside the sentences imposed on those two counts only.

Dated and delivered at Nairobi this 28th day of July, 2017.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR