



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 3 OF 2017

BETWEEN

KAZUNGU KAVIHA NYANGO.....1<sup>ST</sup> APPELLANT

SAMUEL GASHOMI MOHAMED.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at*

*Malindi (Meoli & Tuiyot, JJ.) dated 24<sup>th</sup> May, 2012*

in

H.C.CR.A No. 47 of 2011)

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JUDGMENT OF THE COURT

1. **Kazungu Kaviha Nyango** (1<sup>st</sup> appellant) and **Samuel Gashomi Mohamed** (2<sup>nd</sup> appellant) were jointly charged in the Senior Resident Magistrate's Court at Lamu with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the charge were that on 16<sup>th</sup> December, 2009 at Muhamarani area in Lamu District within the then Coast Province, the appellants jointly robbed David Kamau Alice of his motorcycle make TVS star sport, registration number KMCE 065X valued at Kshs. 84,000/= and cash Kshs. 200/=. The appellants pleaded not guilty to the charge and the matter proceeded to trial.

2. Upon weighing the evidence tendered, the trial court convicted the appellants and sentenced them to death. Aggrieved with their convictions, the appellants preferred appeals before the High Court which were dismissed vide a judgment dated 24<sup>th</sup> May, 2012. Unrelenting, the appellants have filed this second appeal before us. As such, we have no jurisdiction to entertain matters of fact by dint of **Section 361 (1) (a)** of the Criminal Procedure Code. In **Karani vs. R [2010] 1 KLR 73** this Court expressed;

***“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.”***

3. In brief, the facts culminating in this appeal were that Dullu Komora (PW4) owned motorcycle make TVS registration No. KMCE 065X. He employed David Kamau (PW2) to operate the said motorcycle as a ‘boda boda’ for transporting people and goods at a fee. On 16<sup>th</sup> December, 2009 at around 5:00 p.m. David was approached by two men who requested him to take them to Witemere to pick up timber at an agreed fee of Kshs.300. Upon arrival, they asked David to get off the motorcycle and follow them on foot to where the timber was allegedly stored. Suddenly, one of the men who David claimed was the 1<sup>st</sup> appellant held him by the neck while the other who he identified as the 2<sup>nd</sup> appellant held his legs. A struggle ensued and the 2<sup>nd</sup> appellant hit David on his head with a log causing him to fall down. They tied him up and took the keys of the motorcycle as well as Ksh.200/= which was in his pocket. David managed to untie himself and he reported the incident at Mpeketoni Police Station. PC Mutisya Nzioka (PW1) circulated the registration details of the motorcycle to other police stations.

4. The following day, Dullu noticed two men pushing a motorcycle which resembled the one that was stolen at Isoe Bridge. He called his sister who alerted the police and the appellants were arrested. Both David and Dullu identified the motorcycle as the one which had been stolen the previous day. They were able to do so on account of a picture of a red scorpion which had been affixed thereon. Later on, the 2<sup>nd</sup> appellant led the police to where they had dumped the motorcycle’s number plates. Consequently, the appellants were arraigned and charged in court.

5. In their sworn statements, they denied taking part in the robbery. They maintained that they were framed because they had failed to bribe the police who had arrested them for no apparent reason.

6. The trial court in its judgment stated-

***“Upon receipt of the report PW1 one P.C. Mutisya Nzioka circulated the number of the stolen motorcycle to other police stations. On the same day accused were arrested with the motorcycle at Isoe Road Block in Garsen District at 9 p.m. Their explanation on how they were arrested was not convincing. Their defences were afterthoughts. It could not be convenient (sic) that a motor cycle was stolen at 5p.m. and the same day at 9p.m. it is found with the accused persons more than 70 km away. They must be the ones who robbed the complainant the motorcycle and drove it towards Isoe where they were arrested. All the prosecution witnesses struck me to be very honest. The complainant did not know the accused persons before and there (sic) he had no reason to lie against them.***

***PW8 one P.C. Paul Kirunge attached to Isoe Police Patrol Base stated that he arrested the two accused persons pushing the stolen motor bike. He further said that the motor bike had no number plates. PW7 stated that he was led by 2<sup>nd</sup> accused to recover the number plates at Muhamarani in a bush.***

***I therefore find that after considering the evidence presented before (sic) the charge against both accused has been proved beyond doubt and I proceed to convict them...”***

7. On their part, the learned Judges of the High Court in their own words observed;

***“There is evidence of how PW4 saw two people pushing his motor bike. He immediately asked his sister to alert the police. These two were soon thereafter arrested by the police. Both PW2 and PW4 identified the bike as it had a red scorpion mark. So the appellants were arrested with the item that has been stolen hardly 24 hours earlier. What explanation did they have for possessing it? It would appear that the appellants never offered any satisfactory explanation. Instead they***

***led PW1 and PW2 to where they had hidden the registration plates. The logical conclusion to reach is that the appellants were the two people who had robbed the complainant.”***

8. The appellants filed separate grounds of appeal raising similar issues, *to wit*, the learned Judges erred in law by-

***i. Denying the appellants the right to legal representation.***

***ii. Failing to find that identification evidence was not sufficient to warrant their conviction.***

***iii. Finding that the doctrine of recent possession was applicable in the circumstances.***

***iv. Finding that the prosecution had proved the offence of robbery with violence as against the appellants.***

***v. Failing to re-evaluate and re-analyse the evidence on record.***

***vi. Summarily rejecting the appellants’ defences.***

9. Mr. Mutua, learned counsel for the 1<sup>st</sup> appellant, submitted that the two courts below failed to caution themselves of the fact that this was a case of a single identifying witness. In as much as the offence occurred in daylight, David did not give any description of his assailants to the police when he reported the incident. As a result, there was no positive identification of the 1<sup>st</sup> appellant. In his view, this was simply a case of mistaken identity. In support of this line of argument, he cited the case of ***Wamuga vs. R [1989] KLR 424.***

10. Mr. Mutua argued that the doctrine of recent possession ought not to have been applied. This is because the prosecution neither established that the 1<sup>st</sup> appellant was in possession of the alleged stolen motorcycle nor the ownership of the motorcycle. Hence, there was no obligation upon the appellants to explain their possession. He contended that there was contradictory evidence with regard to the recovery of the registration number plates which ought to be resolved in the appellant’ favour.

11. Miss Otieno, learned counsel for the 2<sup>nd</sup> appellant, reiterated that there were contradictions in the prosecution’s evidence. In particular, she stated that there were contradictions with respect to the date of the appellants’ arrest and how the registration plates were recovered. She urged that the identification of the 2<sup>nd</sup> appellant was dock identification because no identification parade was conducted.

12. Mr. Monda, Senior Assistant Director of Public Prosecution, maintained that the High Court had properly re-evaluated the evidence on record. According to him, failure to conduct an identification parade was not fatal. The crux of the matter was that the appellants were found in recent possession of the stolen motorcycle within 24 hours; they failed to give a satisfactory explanation of the possession. He argued that the contradictions on the date of arrest and recovery of the registration plates were immaterial. He urged us to dismiss the appeal.

13. We have considered the record, submissions by counsel as well as the law. The right to legal representation is universally acknowledged as a fundamental right. This right is enshrined under **Article 50 (2) (h)** of the current **Constitution** which provides as follows:

***“50(2) Every accused person has the right to a fair trial, which includes the right-***

.....

***h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”***

14. It is on that basis that the 1<sup>st</sup> appellant contends that he was denied legal representation. In implementing **Article 50(2) (h)**, Parliament enacted the **Legal Aid Act, 2016** which sets out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. It is important to note that the said Act commenced on 10<sup>th</sup> May, 2016 long after the trial, and indeed after first appeal herein had been concluded. It is therefore not applicable in this case. It is also instructive to note that a substantial part of the appellants' trial was conducted under the former **Constitution** which did not provide for legal representation at State's expense. See **Section 77 (14)** of the former **Constitution**.

15. Be that as it may, this Court prior to the enactment of the **Legal Aid Act** expressed that an accused person is entitled to legal representation as envisaged under **Article 50 (2)(h)** where substantial injustice would otherwise be occasioned in the absence of such legal representation. See **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs. R [2015] eKLR**. Furthermore, in **David Njoroge Macharia vs. R [2011] eKLR**, this Court, after noting the difference between **Article 50** of the **Constitution** and provisions of the former **Constitution** regarding the right to legal representation, stated that under **Article 50** an accused person is entitled to legal representation at State expense if the situation requires it, such as in cases involving complex issues of fact or law where the accused person is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. The Court concluded thus:

***“We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”***

We find that the appellants were not prejudiced in any way. It is clear from the record that they understood the nature of the charge against them and participated in the trial.

16. Time and again this Court has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In the case of **R –vs- Turnbull and Others [1976] 3 All ER 549**, an English case, **Lord Widgery C.J.** had this to say:-

***“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?”***

17. In this case, there was no evidence that David gave any description or physical attributes of his assailants who he claimed to have seen clearly when he reported the incident. It is also clear that no identification parade was conducted to test the correctness of the identification of the appellants. See this Court's decision in **John Kamau Wamatu vs. R [2010] eKLR**. David simply saw the appellants at the station and identified them. Perhaps, that is reason why the High Court unlike the trial court found and rightly so, that the identification evidence was not sufficient to warrant the appellants' conviction.

18. Having expressed ourselves as herein above, what is left is the circumstantial evidence upon which the two courts below convicted the appellants. For a conviction to be rightly based on circumstantial evidence such evidence must meet a certain criteria. This Court in Musili Tulo vs. R [2014] eKLR, while discussing the criteria observed:

***“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-***

***i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

19. The circumstantial evidence was that the appellants were found in recent possession of the stolen motorcycle. Did this evidence meet the above criteria? 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. R [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. R [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.]

20. Based on the foregoing, we are of the view that the prosecution failed to prove that the appellants were in possession of the stolen motorcycle. We say so because firstly, there were inconsistencies relating to the recovery of the registration plates and date of their arrest. PC Shadrack Noah (PW7) stated that it was the 2<sup>nd</sup> appellant who led the police to a bush in Muhamarani where they recovered the registration plates of the motorcycle. In contrast, PC Immanuel Mamai (PW5) testified that it was the 1<sup>st</sup> appellant who led the police to recover the registration plates at Witmere. Similarly, on one hand, PC Mutisya testified that the appellants were arrested and found in possession of the motorcycle on 16<sup>th</sup> December, 2009 while PC Shadrack testified that the appellants were arrested on 17<sup>th</sup> December, 2009. On the other hand, the charge sheet indicated that the appellants were arrested on 18<sup>th</sup> December, 2009. Both the trial court and the High Court failed to reconcile these inconsistencies which went to the root of whether the appellants were found in possession of the stolen motorcycle. We find that the inconsistencies are such that are incapable of being cured by **Section 382** of the Criminal Procedure Code.

21. Secondly, the prosecution failed to establish that the recovered motorcycle belonged to Dullu. A picture of a red scorpion on a motorcycle, in our opinion, is not a unique feature or sufficient to establish that Dullu owned the recovered motorcycle. Additionally, there was no evidence tendered to show that Dullu owned the motorcycle which was stolen on the material day. More evidence was required to establish that the recovered motorcycle was the one which was stolen, given that the recovered motorcycle had no registration plates. Without such proof, there was no basis for the learned Judges to

come to the conclusion that the motorcycle which was found in the appellants' possession was actually the one which was stolen. See this Court's decision in Titus Muindi Mukoma vs. R - Criminal Appeal No. 275 of 2011 (unreported).

22. An accused person can only be called upon to offer an explanation of his/her possession after the prosecution proves that he/she was in possession of a stolen item. In Malingi vs. R [1989] KLR 225 this Court succinctly expressed:

***“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver”***

Consequently, the appellants were under no obligation to offer any explanation of being in possession of the recovered motorcycle.

23. In our view, all there was against the appellants was mere suspicion. Dullu testified that on 17<sup>th</sup> December, 2010, a day after the incident, while he was on his way to Mombasa, he noticed two people pushing a motorcycle resembling the one which had been stolen. He called his sister who was at Isoe to inform the police of the same. PC Paul Kimuge (PW8) who was then stationed at Isoe Patrol Base, testified that he received the information and later arrested the appellants. His evidence was that,

***“I went out and two people were with a motor bike with no registration number. I suspected them and I told them they were under arrest.”***

In the end, the circumstantial evidence did not irresistibly point towards the guilt of the appellants. Accordingly, it could not be the basis of the appellant's conviction. See Sawe vs. R [2003] KLR.

24. Those being our findings, we allow the appeal, quash the conviction and set aside the death sentence, and order the appellants be released from prison forthwith unless otherwise lawfully held.

**Dated and delivered at Mombasa this 12<sup>th</sup> day of October, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**