



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, KOOME & KIAGE, JJ.A.)**

**CRIMINAL APPEAL NO 92 OF 2014**

**BETWEEN**

**JAMES MWANGI KINYUA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

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

*(Wakiaga & Ngaah, JJ.) dated 4<sup>th</sup> July, 2014*

*in*

***H.C.C.R.A No. 136 OF 2009)***

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**JUDGMENT OF THE COURT**

[1] This is a second appeal by James Mwangi Kinyua (*the appellant*) from the judgment of the High Court Nyeri, (*Wakiaga & Ngaah JJ.*), dated 4<sup>th</sup> July, 2014. We think it is necessary to restate some brief background information surrounding this matter. On 30<sup>th</sup> October 2008, three tourists namely Anthony Randell, (PW1), Sharon Jennes, (PW2) and Mark Richard Jennes, (PW3) were on holiday in Kenya. They were booked at Bantu Lodge at the foot of Mount Kenya within Nyeri County. They arrived on that same date and after lunch, their Tour Company had organized for them to be taken on a nature walk to Lenana Caves (*Mau Mau caves*) on the foot of Mount Kenya within Gathiuru forest. The three tourists left the hotel at about 2pm under the guidance of a tour guide by the name Cyrus Maina Munyiri, (PW 6).

[2] They arrived at the caves without any incident and happily took photographs of the caves and across the river. However, as they were leaving the caves, they encountered a group of six men; one of whom was known to Cyrus the tour guide. Cyrus told the trial court the person he recognized was known to him by a nickname ‘**Nganisha**’. Cyrus exchanged greetings with Nganisha and even borrowed a matchbox to light a cigarette. Thereafter, he and the three tourists continued walking back to Bantu Lodge. After a short while, two of the men overtook the three tourists and grabbed Cyrus by the collar from behind. They then led him towards a thicket within the vicinity. As Cyrus was resisting, another group of assailants appeared at the scene and began to rough up the three tourists.

[3] Anthony was grabbed from behind, his attempt to resist resulted in a struggle after which he was pushed to the ground, and his assailant pinned him down while strangling his neck. Anthony pleaded with the assailant to let him off as he was now short of breath. At this juncture, Sharon and Mark tried to rescue Anthony with Sharon lunging at the attacker with a kick, while Mark attempted to push him off. Their efforts paid off momentarily as the attacker released Anthony from his grip, enabling him to stand on his feet. As soon as the three tourists had shaken off this initial attacker, more assailants pounced on them, hitting them viciously with sticks all over their bodies.

[4] Anthony testified that he sustained injuries to his head, mouth (*losing a tooth in the process*), and he sustained a fracture of the right arm. He momentarily lost consciousness thereafter, and when he came to, he realized that he had been robbed of cash, Kshs. 5,000/=, 40 US Dollars, ATM Cards, camera with lens attached, battery and memory card inside the camera all amounting to the sum of Kshs.223,000/=.

[5] Sharon testified that she sustained injuries to her mouth which was hit by an unknown object, causing her lips and tooth to split. She also sustained injuries to her head which bled profusely; and a fractured right forefinger. She was robbed of her wallet, 800 US Dollars, 600 Pound Sterling, one British Passport, one New Zealand Passport, camera battery, memory card for the camera and a Swiss Army Knife. It was Sharon's testimony that the assailants also threatened to rape her as they violently robbed her of her property.

[6] Mark testified that he sustained injuries to the right side of his face, tooth, head, shoulder, leg; in addition to a missing nail of the right small finger. Due to the viciousness of the attack, Mark lost consciousness and regained the same when the attackers had left. He was robbed of his wallet, 340 US Dollars, Kshs. 7,000/=, ATM cards, a Mobile Phone and its memory card amounting to the sum of Kshs. 30,000/=.

[7] After the assailants concluded their mission and fled from the scene, the three victims recollected themselves and started walking towards Bantu Lodge albeit with difficulty, as they were bleeding heavily from their wounds. Along the way, they came across their ATM cards, a jacket and cap belonging to Cyrus and other assorted items, which they collected. As they were walking, they met a group of people from the Lodge who were coming to rescue them. Cyrus had managed to escape from the attackers, run to the Lodge and reported the incident. The hotel sent its security team who led the victims to the Lodge. As the victims arrived at the Lodge, a person was brought to the Lodge having been arrested by members of public as he was suspected to have perpetrated this robbery. This person was the appellant. Nonetheless, all the tourists said they could not identify him but Cyrus said he could identify him although he had not known him prior to the attack. The person Cyrus seemed to know as '**Nganicha**' was never arrested.

[8] The victims received first aid at the lodge before being taken to Nanyuki Cottage Hospital for further treatment. The other evidence that the learned trial court relied on was by Mohamed Osman (PW5). This was the witness who arranged the tour and delivered the three tourists at Bantu Lodge, he organized Cyrus to take the guests on a nature walk along the foot of Mount Kenya. He left the guests with Cyrus and went to Nanyuki town but was later informed on telephone that his guests were attacked and robbed of their belongings. He drove back to the Lodge and found his visitors were injured and they were being given first aid and one suspect had been arrested by the members of public who brought him to the Lodge.

[9] PC Douglas Muthinja, (PW 4), re-arrested the appellant and took him to Naromoru police station. He conducted a search on the appellant; recovered USD 230, Ksh 1650/=, and a BBK ATM advice slip dated 27<sup>th</sup> October 2008 for withdrawal of money that had been done in Narok. The withdrawal slip tallied with the credit card no 492182792 belonging to one of the tourists. This is the evidence which linked the appellant to the offence of robbery with violence. However, when PW4 was giving his evidence during cross examination, the prosecutor applied for an adjournment. The court granted the adjournment and ordered that PW4 be recalled at a later date. He was never recalled to complete his evidence. The three tourists were not able to identify the appellant as one of the attackers. However, Cyrus who was attacked first said he saw the appellant during the attack. Cyrus told the police that he had also identified another attacker by the name Nganicha but he was never arrested.

[11] This is the basis upon which the appellant was charged before the Senior Principal Magistrate's Court at Nanyuki with three counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and one alternative count of handling stolen property contrary to **Section 322 (2)** of the **Penal Code**. The particulars of the of the first count were that; on the 30<sup>th</sup> day of October, 2008 at Gathiuru forest in Nyeri District within the then Central Province, the appellant, jointly with others not before court robbed Anthony Randell of a camera make Canon, Lens, Sun glasses, a wallet, U.K driving licence, cash US Dollar 200 and Kshs.5,000/= all valued at Kshs. 223,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Anthony Randell.

[12] The particulars of the second count were that; on the 30<sup>th</sup> day of October, 2008, at Gathiuru forest in Nyeri district within the then Central Province, the appellant, jointly with others not before court robbed Shason Jennes of, one camera battery, Swiss army knife, Cash Kshs. 1,000/=, US Dollar 800, Great Britain Pound 755 all valued approximately Kshs. 200,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Shason Jennes.

[13] The particulars of the third count were that; on the 30<sup>th</sup> day of October, 2008 at Gathiuru forest in Nyeri district within the then Central Province, the appellant, jointly with others not before court robbed Mark Jennes of, one wallet, two bank cards, one mobile phone make Nokia 5310 with a memory card, Cash US Dollars 340, and Kshs.7,000/= all valued approximately at Kshs.30,000/=, and at or immediately before or immediately after the time of such robbery used actual violence to the said Mark Jennes.

[14] The particulars of the alternative count were that; on the 30<sup>th</sup> day of October, 2008, at Gathiuru forest in Nyeri district within the then Central Province, otherwise than in the cause of robbery, the appellant dishonestly received or retained 230 US Dollars, Kshs.1,650/=, and ATM Advice slip of Barclays Bank knowing or having reason to believe them to be stolen goods.

[15] Based on the foregoing summary of the evidence, the trial court found that the appellant had a case to answer, and placed him on his defence, whereupon he chose to give an unsworn statement. The appellant advanced the defence of *alibi* contending that on the material day he left his home at Kirinyaga for Burget to see a cousin. Upon arrival, he met eight men who asked him where he was from. In response, he said that he had just alighted from a vehicle and that he was from Kirinyaga. He was also asked whether he had seen anyone else from the time he arrived, to which he replied in the negative. The appellant was informed by the men that they were looking for suspects following an attack which had taken place nearby. He was then led to a nearby bush where some injured people were. The injured were asked if they could identify the appellant, to which they replied in the negative. The appellant underwent a search which yielded nothing.

[16] Moments later, police arrived and the appellant was arrested and placed in custody. According to the appellant, at 7 p.m. he was called from his cell and was informed by the police that they had found out where he had hidden dollars and Kenya shillings. He was also shown dollar bills and Kenya shillings. It was his testimony that he had a bus ticket showing that he had travelled from Kirinyaga on the material date. The appellant vehemently denied committing the offences he was charged with.

[18] At the end of the trial, the appellant was found guilty as charged with the three principal counts of robbery with violence. Although convicted in respect of the three counts, he was sentenced to suffer death in respect of one count and the sentences for the other two counts of robbery with violence were held in abeyance. Being aggrieved with the said conviction and sentence, the appellant unsuccessfully appealed before the High Court and hence this second appeal.

[19] The appellant relied on the following grounds as per the supplementary memorandum of appeal:-

- ***The identification by PW 6 was suspect and uncorroborated by any other witness.***
- ***The evidence of PW 4, of producing dollars and receipt of ATM cards cannot be held to be recent possession of the theft from the three victims who did not identify the appellant.***

- ***Those who arrested the appellant by the police were never called to testify and this was a glaring gap in the prosecution's case.***
- ***The subordinate Court shifted the burden of proof of possession of U.S. dollars or of ATM to the appellant which must beg the question that they were planted on the appellant.***
- ***The alternative charge of handling stolen property count IV was added to divert the attention of the court to a robbery, since there was no mention of offensive weapon and all the 3 counts were defective.***
- ***No medical evidence was tendered by the prosecution as to injuries sustained by victims in 3 counts and the court erred in law by taking judicial notice which was a mis-direction.***
- ***The defence of the accused as to his alibi was never considered neither his defence on which no finding was made, just brushed aside which was a grave error leading to his conviction and sentence.***
- ***The superior court agreed that the appellant's rights had been violated, but added that: "It is a breach that should not nullify the proceedings"; a grave and lopsided view of the right of fair trial, especially the uncorroborated evidence of PW 4.***

[20] The appellant was represented by Mr Mahan, learned counsel, who submitted that none of the three complainants identified the appellant as one of the attackers; although the attack was executed by six people, it is instructive that only Cyrus said he identified the appellant as one of the attackers; his evidence was not supported by any other witness; save for the fact that the appellant was arrested by a group of unknown people who took him to Bantu Lodge and Cyrus found him there when they arrived with the other victims, none of the people that arrested the appellant gave evidence which could have discounted his defense. Counsel also pointed out according to the chronological account of how the attack happened, Cyrus was the first victim to be attacked by six people whom he did not know. He was knocked down and he momentarily lost consciousness, and when he came back to his senses, he ran to the Lodge to seek for help. This was therefore a very brief encounter with six strangers in the forest followed by a vicious attack, thus the prevailing circumstances cannot be said to have been conducive for positive identification.

[21] Mr. Mahan cited the well-established principles of identification of an assailant in criminal cases as stated in the case of;- ***Wamalwa and Another v Republic, (1999) 2 E.A. 358*** in support of this submission. He further faulted the conviction of the appellant on account of possession of stolen property immediately after the robbery in form of some dollar bills and withdrawal slip which were purportedly found in his possession. An application to have the arresting/investigating officer recalled to shed light on the recovery of the dollar bills did not materialize; failure to recall a critical witness after the court had made an order for recall denied the appellant a fair trial; moreover, none of the complainants could tell whether the dollar bills which were found in possession of the appellant belonged to them; that the appellant was not supplied with a statement, neither was he searched while in custody as contended by PW 4.

[22] Mr. Mahan also pointed out another gap in the prosecution case, that was, the absence of a medical report to confirm the injuries inflicted upon the complainants and the failure of the prosecution to include the details of the offensive weapon which was used to commit the heinous offences. This according to counsel was a major lapse on the part of the prosecution as the appellant was facing a serious offence which resulted with a conviction and death sentence. Finally, counsel took issue with the appellant's defence of *alibi*, which was disregarded as simplistic. In his submission, that defence was not discounted by any of the prosecution witnesses; none of the members of public that arrested the appellant testified; and he had a bus ticket showing that he had travelled from Kirinyaga, to Buguret. The appellant's *alibi* raised a reasonable defence deserving due consideration. The case of ***Okale v Republic (1965) E.A. 555*** was relied upon in support of the said submission.

[23] On the part of the State, this appeal was initially opposed but in the course of his submissions, Mr Kaigai, the learned Assistant Director of Public Prosecutions; conceded the appeal on the one ground that the appellant was not given a fair trial. Mr. Kaigai started by supporting the conviction and sentence of the appellant; he submitted that the doctrine of recent possession was properly invoked following the recovery of dollar bills and an ATM receipt in possession of the appellant; that the High Court found that there was indeed a breach of the appellant's right to a fair trial because PW4 was not re-called despite an order having been made for his recall; that notwithstanding, the appellant had substantially cross-examined PW4. However, Mr. Kaigai ended up conceding that failure to complete cross examination of PW4, who was a key witness prejudiced the appellant and the an anomaly was not curable under **Section 382** of the **Criminal Procedure Code** .

[24] We have stated at the outset that this is a second appeal, and that being so, the jurisdiction of this Court is limited to matters of law only. In **David Njoroge Macharia v R, [2011] eKLR** it was stated that under **Section 361** of the **Criminal Procedure Code**:

***“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no 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 also Chemagong v Republic (1984) KLR 213)”***.

[25] From the foregoing summary of the evidence before the trial court, the judgment by the learned Judges of the High Court, the grounds of appeal and submissions made before us on this appeal, we think the issue of identification goes to the core of this appeal and needs to be re visited. In **Wamunga v Republic, [1989] KLR 424- Criminal Appeal No 20 of 1989**, this court held that:-

***“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 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 the identification”***.

[26] On identification, this is how the trial court assessed the evidence and concluded in a pertinent portion of the judgment:-

***“The most important question however for decision by the court is the identity of the robbers. The evidence before me is that the robbers were six (6) in number. Only the accused was arrested. PWS 1-3 said they could not confirm him to have been one of the robbers because the attack was too fast. There is however the evidence of PW 6 guide Silas Maina”***. [Emphasis added]

It also went on to state:-

***“I repeat the incident took place in broad daylight and I believed that it is possible for PW 6 to have recognized the accused as the same man he had seen within only a few hours of the attack. That identification is in my considered view safe”***.

The High Court Judges re-evaluated the evidence and concluded as follows:-

***“On the issue of identification the evidence of PW 6 is very clear that he had seen the appellant among the group of six people together with one who he had known by the name “Nganisha”. The attack was in broad day light and we are therefore satisfied that there was no mistaken identification of the appellant”***.

[27] A critical factor that seems to have eluded both courts below is that, although the attack occurred during the day, the attack took place in the forest; the attack happened suddenly by six people and it was only Cyrus who said he identified one of the attackers as the appellant; the appellant was arrested by members of the public who brought him to the Lodge; none of those members of public was called as a

witness. We are persuaded the evidence of Cyrus required corroboration as the circumstances under which this offence took place cannot be said to have been conducive for positive identification. For example, Cyrus did not describe how he identified the appellant as he did not know him prior to the robbery. It was necessary for the prosecution to adduce evidence that left no gap as far as linking the appellant with the commission of the offence was concerned. Failure by the prosecution seems also to have bothered the trial court as it made the following remarks in the judgment;-

***“This witness told how after the police were called, he went to Bantu Lodge and found the accused having been arrested (it is strange by the way that the hotel guards and or members of the public who arrested the accused were never called to testify-those are the strange ways of the prosecution which only(sic) they understand). He took him to Naro Moru police station”.***[Emphasis added]

[28] The next critical issue is in regard to the doctrine of recent possession. PW4, the arresting and investigating officer said he searched the appellant and recovered 230 USD, Ksh 1,650/= and a withdrawal slip for Barclays Bank of Kenya ATM Advice Slip dated 27<sup>th</sup> October, 2008 which matched the credit card of PW3. This is the evidence of recent possession that linked the appellant to the offence. More so, the advice slip because the dollars and Kenya shillings allegedly recovered from the appellant did not bear any identification mark. We find this evidence problematic, principally because the search and recovery was done by PW4 who did not complete his evidence. The record shows on the day PW4 testified, the prosecutor applied for an adjournment when the appellant was cross examining PW4. The appellant said he had no objection to the adjournment, as long as PW4 was recalled as the appellant had not been furnished with PW4’s witness statement. An order was made to recall PW4 and for the appellant to be supplied with PW4’s witness statements. However, PW4 was never recalled and it is for this reason Mr. Kaigai conceded, and rightly so in our opinion, that the appellant was not accorded a fair trial and that failure to recall PW4 who was a key witness cannot be a minor anomaly curable under **Section 382 of the Criminal Procedure Code.**

[29] We also think the *alibi* defence by the appellant was unfortunately given a casual dismissal given the evidence that the appellant was arrested by members of public when he was going about his business and none of them was called as witness. As indicated above, this issue seems to have bothered the learned trial magistrate but apparently it was left hanging. There was no analysis of whether failure to call the persons who arrested the appellant had any impact on the defence. Bearing in mind the circumstances under which the appellant was arrested, it was necessary for the trial court to observe the guiding principles set out by this Court in the case of;- ***Wang’ombe v Republic, [1976-80] 1KLR 1683*** were not satisfied in this trial. These are:-

***“When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible; but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution”.***

[30] For the foregoing reasons, we find this appeal has merit and as conceded by Mr. Kaigai, there was a major lapse caused by the prosecution’s failure to recall a key witness. However, this is not a proper case to order a re- trial as urged by the ADPP. Apart from the fact we have noted in this judgment, the three victims of robbery were tourists who left the country and it is unlikely to obtain their court attendance, more importantly, we have noted and pointed out some gaps in the evidence and as such it would be prejudicial to subject the appellant to a retrial.

[31] Accordingly, we allow the appeal, quash the conviction and set aside the death sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Nyeri this 17<sup>th</sup> day of February, 2016.***

***P.N. WAKI***

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

**DEPUTY REGISTRAR**