IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 50 OF 2013

BETWEEN

ANDREA NAHASHON MWARISHA...APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Mombasa (Odero & Muya, JJ.) delivered on 5th August, 2013

in

(Criminal Appeal No. 197 of 2011)

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JUDGMENT OF THE COURT

Rashid Mwakusema Hadidi, *"the complainant"*, operated a motorcycle transport business commonly referred to as boda boda at Kinarini area of Kwale County. On the morning of 4th April, 2010, a would be customer who was well known to him and whose name was **Omari Sanzua** approached him and requested to be ferried to Ndegeni area. They both set off. Midway and in a forested area, Omari Sanzua pulled out a knife and ordered the complainant to stop. He then called out loud to one Hamisi, who emerged from the Golini forest in the company of another person who according to the complainant is the appellant herein. The three men then gagged the complainant, dragged him deep into the forest and tied him to a tree. They then robbed him of his Nokia cellphone, cash Ksh.745/= and the motorcycle on which they rode away.

The complainant struggled and managed to free himself and walked to a nearby home in which he found **Biasha Salim, (PW 2),** who assisted him with the phone which he used to call and report the theft of the motorcycle to the owner, **Mohammed Manlid Almasi, (PW 3)**. He also passed on the information to his colleagues. Led by **Kombo Bora Kidoro, (PW 5),** his colleagues set in motion the recovery process of the motorcycle. As they rode along Golini road in search of the motorcycle, at about 10 a.m. they saw the motorcycle with three men aboard. A pursuit ensued and in the process, the stolen motorcycle suffered a puncture. Whereas two of the three men managed to jump off and make successful escape, the appellant who was the rider was not that successful. He was immediately pounced upon and apprehended with the ignition key still in his hand and taken to Kwale Police Station. He was received thereat by **P.C. Sammy Kipkurui, (PW 7),** alongside the motorcycle. At the time the motorcycle bore a

fake registration number plate being KMCA 105K instead of the genuine number being KMCA 377T. However, the genuine number plate was found in a bag tied on the same motorcycle. PW 3 was summoned to the police station and was able to positively identify the motorcycle as his with appropriate documentation.

Before considering the appropriate charge to lay against the appellant given the above circumstances, PW 7 escorted the complainant to Kwale District Hospital for medical examination and treatment. He was duly examined by **Crispin Myapara (PW 4),** a Senior Assistant Chief Clinical Officer at the facility. After examination he concluded that the injuries sustained by the complainant amounted to harm.

Armed with this evidence, PW 7 then preferred against the appellant, a single charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** with particulars being that the appellant on 24th April, 2010, at about 7.30 a.m. at Ndegeni area of Kwale County jointly with others not before the court arrested robbed the complainant one motorcycle registration number KMCK 377T make Tianma, mobile phone make Nokia 3310 and cash Kshs.945/= all valued at Kshs.85,110/= and immediately before the time of such robbery beat the complainant.

The appellant of course denied the charge when arraigned before the Principal Magistrate's Court at Kwale on 29th April, 2010 and his trial thereafter proceeded in earnest. At the close of the prosecution's case, the appellant was called upon to defend himself. He did so in an unsworn statement in which he denied having committed the offence. He claimed that on the material day he had merely visited Lutsangoni area when he was set upon by a mob claiming that he had stolen a motorcycle belonging to one of their own. It was then that he was arrested and taken to Kwale Police Station and subsequently, charged with an offence he knew nothing about.

On 5th September, 2011, the trial court delivered its judgment in which it convicted the appellant and sentenced him to death. Being aggrieved by the conviction and sentence, the appellant lodged an appeal in the High Court at Mombasa. The appeal was subsequently heard by Odero & Muya, JJ., who in a judgment rendered on 5th August, 2013, once again dismissed the appeal thereby provoking this second and perhaps last appeal.

Initially, the appeal was filed by the appellant in person and five grounds were advanced in support thereof. Subsequently, the appellant engaged the services of **Mr. Mutugi**, learned counsel who with the leave of court filed four supplementary grounds of appeal. At the hearing, however, Mutugi merged all the grounds and argued them globally under the following heads: failure by the police to conduct Police Identification Parade; over reliance on the evidence of a single identifying witness; and failure to produce material exhibits during the trial.

Arguing ground one, counsel submitted that it was common ground that no Police Identification Parade was conducted in respect of the appellant. In the circumstances of this case the complainant having conceded that he did not know the appellant prior, it was incumbent that such an Identification Parade be conducted. Counsel called in aid the case of **Samuel Kilonzo Musau v Republic (2014) eKLR,** in support of this proposition. With regard to exhibits, counsel submitted that the motorcycle was not tendered in evidence and that the photographs tendered did not amount to exhibits. In the premises, it was contended, the court erred in invoking the doctrine of recent possession of the motorcycle. Besides, counsel submitted, the evidence regarding recent possession was merely hearsay as the complainant never saw the appellant in possession of the motorcycle. Rather, he was merely told that the appellant had been found in possession thereof. Lastly, counsel submitted that the trial court did not caution itself of the dangers of relying on the evidence of a single identifying witness in convicting the appellant. That being the case, the charge against the appellant was not sufficiently proved. For this proposition, counsel relied on the case of **John Muriithi Nyagah v Republic, (2014) eKLR.**

Opposing the appeal, **Mr. Kiprop**, learned Principal Prosecution Counsel submitted that there was no need for Identification Parade as the appellant had been seen by the complainant upon arrest. In any event, no prejudice was occasioned to the appellant by failure to conduct such parade. On the question of

a single identifying witness, counsel submitted that the offence was committed in broad daylight and the complainant spent quite some time with the appellant. Accordingly, he had ample time to identify the appellant. In any event, **Section 143** of the **Evidence Act** applies in the circumstances of this case. As regards failure to produce the motorcycle as an exhibit, counsel submitted that the same was produced via photographs and that the appellant had not demonstrated any prejudice suffered by him when the motorcycle was tendered in evidence by way of photographs.

This is a second appeal as already stated. Accordingly, this Court is by dint of **Section 361** of the **Criminal Procedure Code** restricted to consideration of matters of law only. In **Karingo v Republic, (1982) KLR 213**, we stated;

> **"...A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did..."**

What then are issues of law in this appeal? They are basically two; identification and the application of the doctrine of recent possession. On the question of identification, the appellant raises the question of lack of police identification parade, over reliance of the evidence of a single identifying witness and failure by the trial court to caution itself of the dangers of relying on such evidence to found a conviction. With regard to the doctrine of recent possession, it is the view of the appellant that the doctrine should not have been invoked as the stolen motorcycle was not physically tendered in evidence. Instead, only photographs were. He also contends that the evidence regarding the recovery of the motorcycle in his possession was all but hearsay.

The appellant's conviction was based on evidence of identification as well as the invocation of the doctrine of recent possession. The two courts below made concurrent findings that the appellant was positively identified by the complainant and that he was also found in possession of the motorcycle which had been forcefully stolen from the complainant hardly two hours before he was found in possession thereof. Before we can interfere with these concurrent findings we must be satisfied that there was no basis from the evidence on record for such findings. We discern no such omission and misdirection.

We note though that the issues regarding identification that are being canvassed before us were never raised in the trial and the first appellate court. They are being raised before us for the very first time. Thus, we do not have the benefit of the two courts' consideration and determination of the issues. Nonetheless, they are issues of law that we must grapple with.

Identification parades are necessary though not absolutely where the witness purports to identify a suspect did in extremely difficult conditions, say, where the offence is committed at night and when visibility may have been a challenge having regard to the availability or lack of light and when the circumstances under which the offence is committed are harrowing to the witness thereby impairing his ability to positively perceive and with certainty identify the culprit or where the incident lasts for a short time. The purpose of identification parade as explained in **Kinyanjui & Others v Republic, (1989) KLR 60:** "*is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of that event to remove possible later confusion......"* Further identification parades are meant to gauge and test the correctness of a witness's identification of a suspect given the circumstances under which he claims to have identified the suspect. See **John Mwangi Kamau v Republic (2014) eKLR.**

In this case, the offence was not committed in difficult circumstances at all. It was during the day and visibility was not poor. The complainant too spent some time with the appellant at the scene of crime. Indeed, when the appellant and his accomplices dragged him into the forest, it was the appellant who used the complaint's scarf to gag him. He is also the one who tied him to a tree. Thereafter, as soon as the appellant was found in possession of the motorcycle, the complainant was summoned to the scene upon which he identified his motorcycle in the possession of the appellant before they all ended up at Kwale Police Station. In those circumstances, of what evidential value would have been the identification

parade? We cannot think of any. To our mind, it would have been superfluous. The identification parade would even have been hampered by want of earlier description by the complainant of any attributes of the appellant. Even if the complaint by the appellant was valid, we are still of the view that given the circumstances under which the identification was made, there was no room for mistaken identity. The complainant had all the opportunity to properly and positively identify the appellant as one of the robbers. There was also the evidence of the appellant being found in possession of the motorcycle shortly after it had been stolen and with its ignition key.

With regard to the complaint about a single identifying witness, we reiterate what has been said time and time again that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. More so, if it is by a single witness. Such evidence must be examined with considerable circumspection to ensure that it cannot but be true before a conviction is founded upon it. Nonetheless, a fact can still be proved by the testimony of a single witness. As explained in the case of **Kiilu & Another v Republic, (2005) 1 KLR 174**:-

> **"Subject to certain well known exceptions it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from probability or error... ".**

See also **R v Turbull & Others, (1976) 3 ALL E.R. 549, Maitanyi v Republic, (1986)** and **John Muriithi Nyaga,** (supra) and also **Sections 143** of the **Evidence Act**.

As we have already pointed out the circumstances leading to the complainant identifying the appellant were favourable. Besides, there was other direct evidence pointing to the guilt of the appellant. That evidence was provided by PW 5 who led the pursuit that culminated in the arrest of the appellant. When arrested the appellant had in his possession the motorcycle as well as its ignition key. When forced to insert the key and start the engine, he did so and the motorcycle roared to life. So that beyond the evidence of the complainant as a single identifying witness, there was other circumstantial and direct evidence linking the appellant irresistibly to the commission of the offence. Failure by the trial court to warn itself of the danger of relying on the evidence of a single witness would have counted if the evidence on record was only bare. This is not the case here. The evidence against the appellant in this regard was simply overwhelming.

Was the doctrine of recent possession improperly invoked on account of failure by the prosecution to physically present the motorcycle in court as an exhibit and also on account of hearsay evidence as to the recovery of the same? We do not think so. Ideally, in criminal proceedings or, indeed, any other court proceedings it is important if not necessary that the exhibit being referred to in evidence be physically presented in court. However, like every ideal situation, there are exceptions. There could be circumstances which make the availability of such an exhibit in court impossible. For instance, the exhibit may be immovable, perishable or on transit, a tool of trade as in the circumstances of this case; exhibit which may pose logistical or health challenges, for instance, a dead body. The list is endless. In such circumstances, another method ought to be devised to counter the above pitfalls. One such method is by taking of the photographs of the intended exhibit and tendering them in court.

In the circumstances of this case, the motorcycle was the complainant's tool of trade. Appreciating that fact, and the fact that once an exhibit is tendered in court it may not be released until the trial and thereafter, the appellate process is exhausted, it was only logical to have the motorcycle photographed and the photographs thereof presented in court as exhibit. This was done without any objection by the appellant. Indeed, it appears from the record that it was undertaken with his approval. It is now too late for the appellant to turn around and claim that in the absence of the physical availability of the motorcycle in court as exhibit, no exhibit was tendered. In any event, we do not see the prejudice that

the appellant suffered for the omission. In the proceedings, the evidence led was about violent theft of a motorcycle from the complainant. Its registration number and colour was even given. The appellant's defence was that he had nothing to do with the theft and that he was merely a victim of circumstances. The common denominator being the theft of a motorcycle, whether or not it was physically produced in court is neither here nor there given the appellant's defence. The photographs sufficed.

The evidence regarding the appellant's arrest with the motorcycle cannot with slightest imagination be termed hearsay. The complainant was not present when the appellant was pursued and arrested by PW 5 and his group. He only came to the scene after the arrest and was informed the circumstances of the appellant's arrest. However, the court did not rely on that bit of the evidence. If anything, the court actually placed much reliance on the evidence of PW 5 which was direct and independent.

Given that the motorcycle recovered in the possession of the appellant was the very motorcycle that had been stolen from the complainant only a few hours earlier, and the same motorcycle having been positively identified by the complainant and the registered owner (PW 3), and the appellant having been unable to explain how he had come by it, we are persuaded, pursuant to the reasoning in **Arum v Republic, (2006) eKLR** that the two courts below properly invoked the doctrine of recent possession in convicting and upholding the appellant's conviction.

Ultimately, we have come to the inevitable conclusion that this appeal lacks merit and is accordingly dismissed.

Dated and delivered at Mombasa this 22nd day of April, 2016.

ASIKE MAKHANDIA

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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