IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 187 OF 2011

BETWEEN

ALI OMAR ABDULRAHMAN ……..……...…. APPELLANT

AND

REPUBLIC ……..…….……...…..…… RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Ibrahim & Odero, JJ.) dated 8th June, 2011

in

H.C.CR.APP. No. 245 of 2003)

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JUDGMENT OF THE COURT

Although the appellant and another were jointly charged with three counts of robbery with violence contrary to **section 296(2)** of the Penal Code, the only incriminating evidence against the appellant was that of PW1 and PW4, both of whom were the complainants in counts 1 and 3, respectively. The complainant in count 2 who was the husband of PW1 was categorical that he was not able to identify any of the people who robbed him. This evidence notwithstanding the learned trial magistrate still went ahead to convict the appellant on this count. It was the evidence of PW1 and PW4, as corroborated by that of three police officers, (PW2, PW5 & PW7), that formed the basis of the prosecution case, which in turn led to the conviction of the appellant.

That evidence was to the effect that in the early hours of the morning of 16th August 2002 at about 2.30 a.m. PW1 and her husband (PW3) returned home from an outing and while her husband went to the back of the house to get someone to open for them, leaving PW1 infront, the latter was attacked by a group of six men. In the cause of the attack, which left her with a right hand injury, they robbed her of her purse, shoes and other personal belongings. The men had torches and were armed with a knife, bows and arrows. As PW1 raised alarm, her husband was also being attacked at the back of the house. The alarm raised by PW1 attracted four police officers among them PW2, PW5 and PW7 who were on patrol nearby. As the officers approached, they saw two men running away from the scene towards them. PW2,

using the butt of his gun hit one of the fleeing robbers thereby disabling and arresting him, while PW5 pursued the second suspect who disappeared in the bush in the darkness. Not even the gun shot in the air by PW5 could stop him. The suspect who had been hit by PW2 was identified as the appellant. He was found with bows and arrows as well as a lady's pair of shoes. He was taken to the scene of the attack when PW1 was able right away to identify him.

Just before PW1 was robbed the gang believed to be the same one that attacked her had attacked and robbed PW4 who was returning home from work. According to him the gang comprised six men who were armed with bows, arrows and pangas robbed him of his wristwatch and pricked him three times with an arrow. As he struggled with them, the neighbours heard the commotion and when they came out to assist, the robbers fled. A short while afterwards he heard a woman screaming calling for help. He and his neighbours rushed to the scene and upon arrival he found one suspect being held by the police. He similarly recognized him as a member of the group that had attacked and robbed him a short while ago. The suspect was the appellant herein. His co-accused was arrested days later. The two, as we stated earlier, were charged jointly, with three counts of robbery with violence. The appellant was charged separately with being in possession of narcotic drugs (bhang) contrary to **section 3(1)** as read with **section 2(a)** of the Narcotic Drugs & Psychotropic Substances Control Act, while his co-accused was charged alone with refusing to have his fingerprints taken contrary to **section 21(1)** as read with **section 21(2)** of the Police Act.

At the close of the prosecution case the trial magistrate found the appellant had a case to answer in respect of all the counts, while she found the case against the appellant's co-accused in respect of robbery with violence counts not proved and acquitted him at that stage. She however found he had a case to answer with regard to count 4 where he was charged with refusing to have his fingerprints taken. In his defence the appellant denied committing the offence, insisting that when he met the police on the morning in question, he was arrested when he failed to produce his national identification card; that while being detained by the police he heard a woman screaming for help; that when they got to the scene still under arrest, one police officer asked the woman to say she had been robbed by him.

The trial court dismissed this defence and found that the prosecution case was overwhelming. Upon conviction the appellant was sentenced to death in all the three counts and to a fine of Kshs.5,000/- and in default to 8 months imprisonment for being in possession of bhang.

His co-accused was convicted for the offence of refusing to have his fingerprints taken, and sentenced to a fine of Kshs.5,000/- and in default 12 months imprisonment.

Being aggrieved, the appellant petitioned the High Court against his conviction and sentence. The High Court (**Ibrahim,** as he then was and **Odero**, **JJ**) agreed with the trial court that the appellant was positively identified by the two victims of the robbery with the aid of torches: that the appellant was apprehended by police as he fled the scene; that he was in possession of bows and arrows as well as a pair of lady's shoes which he failed to account for; and that his defence was not credible. The learned Judges however upset and quashed the conviction in count 2 since the complainant in that count did not identify his attackers. The learned Judges ordered to be held in abeyance death sentence imposed in count 3.

The appellant now brings this second appeal challenging the decision of the High Court confirming both the conviction and sentence on several grounds contained in a supplementary grounds of appeal and what is headed ***"further supplementary grounds of appeal."*** These grounds were condensed and argued before us by **Mr. Nabwana**, learned counsel as follows:

i. that the appellant was not accorded a fair hearing as the trial magistrate had heard another criminal case involving the appellant previously, (Cr. Case No. 1814 of 2002) and she therefore ought not to have tried the appellant for the second time in the case which has given rise to this appeal; that the learned trial magistrate having convicted the appellant in the earlier case was clearly prejudiced; that section 77 of the former Constitution which was then applicable was violated; that due to these facts this Court ought to declare the case in the lower court a mistrial and set the appellant at liberty as a retrial was not viable on account of availability of witnesses, the case

having been heard in 2002;

ii. that the appellant suffered a miscarriage of justice when the High Court relied on wrong written submissions;
iii. that the appellant's right to legal representation was violated when the High Court allowed the first appeal to proceed without his counsel, yet he faced a capital offence;
iv. that the learned Judges erred by failing to see that the trial court did not warn itself of the dangers of relying on the evidence of a single witness to convict;
v. that the doctrine of recent possession was not proved as the pair of shoes was not shown to belong to PW1;
vi. that the appellant's account of how he was arrested was ignored; and
vii. that there was no evidence of common intention.

In opposition **Mr. Wamotsa** learned counsel for the respondent urged us to dismiss the appeal, for in his view there was overwhelming direct evidence supplied separately by the two victims of the robbery and supported by the evidence of the appellant being found in possession of recently stolen items.

Regarding the contention that the learned trial magistrate ought not to have tried the appellant having convicted him in an earlier case, learned counsel submitted that such a complaint ought to have been raised as a preliminary point; and that no details or particulars of the prior case were supplied for the court to ascertain if indeed the learned magistrate had tried the appellant previously. Finally counsel submitted that the appellant cannot claim that his right to counsel was violated when in fact his trial was held under the former Constitution which, unlike the present one, did not guarantee him the right to counsel.

We are only concerned with points of law this being a second appeal as required of us by **section 361(1)** of the Criminal Procedure Code. See also **M'Riungu v R (1983) KLR 455**.

The trial of an accused person by a magistrate or judge who has previously tried and convicted or acquitted him may, depending on the circumstances of the case be prejudicial to the accused person and occasion a miscarriage of justice. The trial magistrate or judge may be perceived to be biased. Any such complaint ought therefore to be raised as a preliminary issue and determined *in limine*.

Although the trial court record shows that the prosecutor brought to the attention of the trial magistrate that the appellant was serving a sentence, there were no particulars of the case, and the issue was only raised in the context of the failure by the prison service to produce him in court for trial. Similarly in the High Court the only issue raised before the commencement of the hearing with regard to the case in which the appellant had previously been convicted and sentenced was only in relation to his appeal to the Court of Appeal. At no time was the learned trial magistrate told or reminded that she had previously tried, convicted and sentenced the appellant and there was no application before her for recusal. Before us, apart from merely giving the (case) number of the previous case, learned counsel did not attempt to persuade us by availing copies of the proceedings and judgment that would have helped us in ascertaining the allegations. This is a court of record and our decisions are made on the contents of the record. We find no substance in this claim and reject it.

Regarding the ground that the High Court relied on the wrong submissions, we find no evidence on record to support this allegation. It has not been demonstrated if it existed how this mix-up prejudiced the appellant or how it would have changed the outcome. This ground for these reasons, is once again rejected.

The answer to the question of right to legal representation in pre-2010 criminal trials is answered aptly by this passage from the decision of this Court in **Charo Karisa Thoya v R, Crim. Appeal No. 274/2002** "***As we have indicated before, in so far as the appellant before this Court is concerned, his trial took place under the old constitution and he would not be entitled to free legal representation during the trial***". This is because under **section 77(14)** of the former Constitution there was no right to legal representation at public expense.

The last four grounds presents the crux of this appeal and we will consider them together. It has been

repeatedly said that in a criminal trial where the only evidence against the accused person is that of identification, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before the court can safely make it the basis of a conviction: See **Wamunga v R (1989) KLR 424**.

The robbery in this appeal was committed in the wee and dark hours of the morning. The attackers were strangers to the complainants. PW1 was attacked first. She screamed and the police officers who by coincidence were only 50 metres from the scene on patrol duties immediately saw two people running away from the scene. As one disappeared in the thicket his colleague, the appellant was not lucky. He was hit by a butt of a gun, fell down and arrested. The screams from PW1 and shortly gun shots attracted PW4. Assembled at the scene of PW1's attack both PW1 and PW4 positively identified the appellant. They both gave corroborative account as to the role the appellant played. According to PW1 only the appellant was armed with bows and arrows. It was him who pushed her to the ground at the beginning of the robbery. PW4 identified the appellant from his height, being the tallest of the gang members; and that he had bows and arrows. Both PW1 and PW4 were able to identify the appellant with the aid of torch lights. In addition to this evidence, when the police arrested the appellant a few minutes later as he fled from the scene he had in his hands a lady's pair of shoes which PW1 positively identified satisfying the doctrine of recent possession. He also still had his bows and arrows, completing the circle and demonstrating that indeed he was in the gang that robbed the two complainants.

The appellant having committed a robbery, stealing personal effects from PW1 and PW4 while in the company of others and armed with bows and arrows, committed robbery with violence contrary to **section 296(2)** of the Penal Code. His defence confirmed the prosecution evidence that he was at the scene of robbery. His account of what he was doing there was incredible and was properly rejected by both courts below.

We find no merit in this appeal and dismiss in its entirety.

Dated and delivered at Mombasa this 27th day of May, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR