IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 15 OF 2014

BETWEEN

EDWARD OTSUDI……APPELLANT

AND

REPUBLIC……RESPONDENT

(An appeal from the Judgment of the High of Court of Kenya at Mombasa (Kasango & Muya, JJ.) dated 26th November, 2013

in

H.C.CRA. No. 77 of 2012)

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JUDGMENT OF THE COURT

Victoria Waithera, the complainant in the trial court was a student at Jomo Kenyatta University, Taita Taveta Campus. On 20th January, 2011 at about 6 p.m., whilst on her way home at Diani, she encountered two men. One of them was leaning against a wall while the other, dressed in a T-shirt and jeans with a paper bag, stood in the middle of the path of the complainant. As it was still daylight, the complainant did not suspect anything untoward from the two men. However, as the complainant got close to the men, the one on the path immediately drew a panga from the paper bag and told her to co-operate and keep quiet or face dire consequences. This man then snatched the complainant's handbag and the duo then ran away. The complainant screamed for help. Members of the public came to her aid, pursued the duo albeit unsuccessfully. In the snatched handbag were Kshs.4,000/- Nokia and Motorola cellphones, jewellery and clothes belonging to the complainant. Because of her university commitments, she was unable to report the incident immediately to the police.

While at the university, she was pleasantly surprised when on 13th January, 2011, she received a call from her stolen Nokia phone from **P.C. Bernard Chirchir** (*PW 3*) of Diani Police Station. She was invited to the police station where she was shown some items that had been recovered in an operation by the police. Among the items were her Nokia and Motorola phones, tights, hand bag and a key holder. She positively identified the items as belonging to her with the necessary supporting documentation and by special features on some of them.

P.C. Sigei (*PW 2*) of Diani Police Station was on 12th November, 2011 at about 11 p.m., on the beat with **PC Too** in Ibiza area when they spotted three men. Upon seeing the police officers, the three men fled. However, PW 2 pursued one of them and managed to apprehend him. That person is the appellant. Upon conducting a quick search on his person, PW 2 recovered a panga wrapped in a cloth, 5 rolls of bhang and two phones, Nokia, Motorola and a bag. Inside the bag, PW 2 recovered two hats, a jungle green/grey hat, black lady tights and two half navy blue shorts. PW 2 became suspicious, arrested the appellant,escorted him to Diani Police Station and handed him over to PW 3, the investigating officer.

As the investigations progressed, the appellant claimed that the items recovered were his but he could not recall who had sold them to him. PW 3 examined the Nokia phone and noted 96 inbox messages and a woman's photograph. The appellant claimed that the woman in the photograph was his girlfriend. He was able to call the woman who responded. The woman was the complainant. She informed PW 3 that she had been robbed of her bag with two phones, Nokia and Motorola, clothes and jewellery. It was then that PW 3 advised her to come to the Police Station and see whether she could identify some of the items that had been recovered. She did and as already stated, positively identified the items stolen from her. In the course of the investigations, PW 3 was also able to establish that the appellant was not a Kenyan but of Ugandan origin. It was on this basis that PW 3 preferred against the appellant one count of robbery with violence contrary to **Section 296(2)** of the Penal Code and a second count of being unlawfully present in Kenya contrary to **Section 13(2)** of the Immigration Act. When arraigned in the Principal Magistrate's Court at Kwale on 6th June, 2011, the appellant entered a plea of not guilty and his trial ensued.

Defending himself through a sworn statement, the appellant claimed that on 12th January, 2011 at about 9.30 p.m., he was on his way from a video shop where he had been watching a football match when two police officers accosted him. The two police officers ended up fabricating the charges against him after he failed to pay them the bribe they had demanded from him. Otherwise he denied committing the offences.

The trial court having pondered over the evidence tendered by both the appellant and the prosecution, convicted the appellant on the first count but acquitted him on the second. Upon conviction, the appellant was sentenced to death. His conviction was upheld on first appeal to the High Court at Mombasa hence this second and perhaps last appeal.

The appellant faults his conviction by the trial court and dismissal of his first appeal on the grounds that his prosecution was in breach of his fundamental rights under **Articles 49(1) (f) (i)** and **50(2) (J)** of the Constitution and therefore invalid, void and a nullity *ab initio*, that the High Court abdicated its duty to analyse, evaluate and weigh conflicting evidence so as to reach its own independent conclusion, that the first appellate court, like the trial court erred in shifting the burden of proof to the appellant and failed also to consider his defence. Finally, the appellant claimed that his identification was neither safe, credible nor free from the possibility of mistake and error.

Urging the appeal on behalf of the appellant, **Mr. Odera**, learned counsel, submitted that the trial and conviction of the appellant was in contravention of the appellant's rights as enshrined in **Articles 49(1) (f) (i)** and **50(2) (J)** of the Constitution. That though the appellant was arrested on 12th January, 2011, it was not until 6th June 2011, that he was arraigned in court. The delay of almost 6 months in arraigning the appellant after arrest was unexplained thereby rendering the proceedings a nullity. That further the appellant was denied copies of witness statements in contravention of **Article 25** of the Constitution; thereby rendering the proceedings unfair. For this proposition, counsel relied on the case of **Abdalla v Republic, Criminal Appeal No. 236 of 2006** (**UR**). On the evidence of identification, counsel submitted that the first appellate court did not subject that evidence to thorough scrutiny considering that the evidence was of a single identifying witness. That such evidence need to be treated cautiously and that the court should warn itself of the dangers of relying on such evidence. That both courts below failed to adhere to this legal requirement. That the complainant never described the appellant to the police in her first report nor did she testify as to how long she had observed her attackers. On this, counsel relied on the case of **Kimani v Republic [1991] KLR 224**. Counsel further submitted that the doctrine of recent

possession was wrongly invoked as the appellant denied being in possession of the complainant's goods at the time of his arrest. The appellant also accused the two courts below of failing to consider his defence and to give reasons why the same was rejected, though sworn. Finally, the appellant maintained that the two courts also shifted the burden of proof to him which was contrary to the law.

Opposing the appeal, **Mr. Yamina**, learned Principal Prosecution Counsel submitted that, there was no delay in bringing the appellant to court. During that time the appellant was being prosecuted in several courts and serving sentences as well. In any event, even if there was such delay, his remedy does not lie in an acquittal, but in damages. Counsel further submitted that there was no evidence that after applying for witness statements, the appellant was denied the same. Accordingly, there was no violation of fair trial provisions of the Constitution with regard to the appellant. On identification, counsel submitted that the offence was committed at 6 p.m. when it was still daytime. The complainant saw the appellant sufficiently to be able to identify him. In any event, even if the identification evidence was weak, it was rendered safe by the doctrine of recent possession.

This being a second appeal, by dint of **Section 361** of the Criminal Procedure Code, this Court is restricted to delving into matters of law only. See **Karingo vs Republic [1982] KLR 213**. We have no doubt at all that all the issues raised in the grounds of appeal by the appellant are matters of law and therefore our jurisdiction has been properly invoked.

Dealing with the first issue, it is readily apparent from the charge sheet and testimonies of PW 2 and PW 3, that the appellant was arrested on 12th January, 2011. The record also shows that the appellant was arraigned in court on 6th June, 2011, roughly 6 months after his arrest. Under **Articles 49(1) (f)** and **(i)** of the Constitution, an arrested person has the right to be brought before a court as soon as reasonably possible, but not later than 24 hours of his arrest. On the face of it, therefore, it would appear that, that right was violated. However, a close scrutiny of the record, explains why the appellant was arraigned in court after such period of time. Soon after his arrest, the appellant was charged in another court with the offence of possession of narcotic drugs to which he pleaded guilty and was sentenced to 3 years imprisonment. This was in **Criminal Case Number 73 of 2011**. Soon thereafter, the appellant was again charged with the offence of assault in **Criminal Case Number 661 of 2011**, was convicted and sentenced to 30 days imprisonment. Because the appellant was in and out of court on these other cases, he could not be immediately arraigned in court over this case. The appellant admitted to these facts. We are therefore satisfied that though the appellant was brought to court late, considering the peculiar circumstances that the appellant found himself in, his rights were not violated at all. He was all along in prison and not police custody on account of those other two cases. In any case, and as properly submitted by counsel for the respondent, even if it was proved that the appellant had been detained in police custody for a period in excess of that permitted by the Constitution in the absence of evidence that the delay would have prejudiced his fair trial, his remedy does not lie in his acquittal, but in a civil claim for damages.

With regard to the alleged failure by the State to provide the appellant with written statements of witnesses in advance and which he alleges contravened **Article 50(2) (j)** of the Constitution, the record once again does not support that contention. The record shows that he applied for witness statements which were given albeit in instalments. His cross-examination of the three witnesses leaves no doubt at all that he was in possession of the witness statements, because as he did so, he kept referring the witnesses to what they had said in their statements, which he claimed contradicted their testimony in chief.

On the whole, we are satisfied that there was no violation of the fair trial provisions of the Constitution with regard to the appellant. The case of **Abdalla v Republic** (*supra*) is irrelevant and not supportive of the appellant's complaint. The case dealt with the failure by court to avail to the appellant an interpreter.

With regard to the evidence of identification, this Court has said so many times that single evidence, be it of visual identification or recognition of an accused, should be tested with the greatest care and should also be watertight to justify a conviction. It must also be appreciated that there are possibilities of a witness to be honest but mistaken and for a number of witnesses to be all mistaken. Accordingly, such evidence should not only be credible but should also be free from any possibility of error before it can be

safely relied upon to found a conviction. This is more so where there is only a single identifying witness and the conditions for positive identification are known to be difficult. See **R v Turnbull [1976] 3 ALL ER 549.**

In this case, the only witness to the crime was the complainant. Therefore she was the sole identifying witness. In her testimony, she stated that after the robbery she went home and merely informed the uncle she was staying with about the incident. She never contacted the police over the same immediately. Thereafter she went on with her studies until one day when she was called by PW 3 using her stolen cell phone and requested to go to the police station. That is when she recorded her statement. The delay was occasioned by her busy schedule at the university. According to her, the robbery was committed at about 6 p.m., and it was still daylight. This is what enabled her to see the appellant sufficiently to be able to identify him. What is surprising however, is that she never gave a description of the appellant to the police in her report. It is also possible that she saw the appellant at the police station before the identification parade could be arranged. This is what she stated ***"….I was called for identification parade but I could see accused was already charged at the prosecution office..****(sic)"* Small wonder that the appellant subsequently refused to participate in the parade. In any event such parade would have been worthless in the absence of the description of the appellant to the police by the complainant. Given the foregoing, we are satisfied that the evidence of identification was of the weakest kind. Indeed, it ended up being dock identification evidence which as reiterated in the case of **Kiarie v Republic [1984] KLR 739 *"…It is almost worthless without an earlier identification parade…"***

The High Court appreciated this fact and quoted in extenso, the case of **Moses Kinoti Nkoroi v Republic, Nyeri Criminal Appeal Nos.333 & 335 of 209 (UR)** regarding the probative value to be attached on dock identification evidence. However, we are surprised that at the end of it all, the High Court left the issue hanging. It never determined whether the trial court was right in attaching a lot of weight on such evidence, which was an error on its part. Had this been the only evidence against the appellant, we would have had no hesitation whatsoever in allowing the appeal. However, there is some other evidence linking the appellant to the crime.

The evidence of PW 2 is to the effect that when he arrested the appellant the following day after the robbery and searched him, he recovered the items listed in the charge sheet. When called upon to identify them, the complainant positively did so by producing receipts for some of the items and pointing out special features on others. When called upon to explain how he had come by the said items, he claimed to have been sold the items by someone else whom he did not disclose. It is quite obvious that the appellant did not account satisfactorily for his possession of the complainant's items. Given these set of circumstances, were the two courts right in invoking the doctrine of recent possession to convict the appellant?

In the case of **Erick Oherio Arum v Republic, Criminal Appeal No. 85 of 2005**, this Court outlined the circumstances or what needs to be proved before the doctrine can be invoked. It delivered itself thus:-

> **"In our view, before a Court of law can rely on the doctrine of recent possession as 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; that 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 person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses…"**

As already stated, the appellant was apprehended and searched by PW 2. The items recovered on him are those particularized in the charge sheet. The complainant was able to positively identify them as her property. These items were found on the person of the appellant a day after they had been stolen from the complainant violently. The appellant was unable to account to the satisfaction of the court how he had

come by them when given a chance. In the circumstances, we are satisfied that the two courts were right in invoking the doctrine. Having reached this conclusion, we find it unnecessary to deal with the other two complaints regarding failure by the two courts to consider the appellants and the alleged shifting of the burden of proof to the appellant.

It is for this reason that we must dismiss this appeal in its entirety. It is so ordered.

Dated and delivered at Mombasa this 14th day of October,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