



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), MWILU & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 123 OF 2004

BETWEEN

SILAS PAMBA PHILIP APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a Ruling of the High Court of Kenya at Nairobi (Mbogholi Msagha & Mutitu, JJ.) dated 30th July 2003 in C. Cr. A. 1289 of 1999)

JUDGMENT OF THE COURT

1. Silas Pamba Philip, the appellant herein, was on the 6th November, 1998 arraigned before the Chief Magistrate's Court at Kibera and charged with two counts of the offence of robbery with violence contrary to **section 296** of the Penal Code, Chapter 63 of the Laws of Kenya. The particulars of the first count were that on the 13th September, 1998, at Kawangware within Nairobi area, jointly with others not before the Court, the appellant robbed Francis Waweru of a Seiko wristwatch and a wallet, all valued at Kshs.9,300.00, and immediately before or immediately after the time of such robbery, threatened to shoot the said Francis Waweru.

- The particulars on the second count were that on the same day and time, the appellant robbed Catherine Waweru of Kshs.3,700.00 and at, or immediately before or immediately after the time of such robbery threatened to shoot her.
- The evidence as led before the trial court was that at around 10:00 pm on the 13th September, 1998, Francis Waweru (PW1) and his wife Catherine Waweru (PW2) were walking towards their house in Gatina, Kawangware. As they neared their home, three people emerged from the nearby thicket.

One of them, the appellant, was holding a pistol, while the other two were holding *pangas*. The appellant asked Francis for money but before Francis could respond, the appellant ordered his accomplices to search him. One of the accomplices dipped his hand into Francis's pockets and retrieved Ksh.1,800.00. The appellant also took his watch and Kshs.3,700.00 from Catherine. After the robbery, Francis and Catherine were ordered to proceed in the direction of their home and when the gate was opened, the robbers ran away. The following day, they made a report to the

Muthangari Police Station and the matter was assigned to Corporal Joshua Mbogholi (PW3) to investigate.

4. On the 23rd September, 1998, Catherine and Francis saw the appellant at a shoe shining place, and they alerted Corporal Mbogholi. By the time Corporal Mbogholi arrived at the scene, the appellant had managed to escape. A month later, on the 23rd October, 1998 at around 6:00 am, Francis and Catherine heard a lot of noise from the bus stop that was nearby. They got out of the house and found that there had been a suspect who had been arrested by a mob. They followed the mob to the police station, where they recognised the suspect as the appellant who had robbed them. Corporal Mbogholi and APC Fredrick Lumiria (PW4) went to the appellant's house the same day, where they conducted a search and recovered a toy pistol.
5. In his defence, the appellant denied committing the offences for which he was charged. He stated that on the 13th October, 1998, he was on his way to work when he passed through a chang'aa den. He had one glass of chang'aa, after which the police came in, searched the premises and recovered a pistol. He was then arrested and taken to the police cells where he stayed for thirteen days before he was charged.
6. After considering all this evidence, the trial court held that the appellant had been positively identified as one of the robbers who had committed the crime against the two complainants. The trial court rendered itself in the following manner:

“The circumstances were such that positive identification of accused (sic) by PW 1 and 2 was highly probable or possible, that is why they even recognised him ten days later at a shoe shine and 1½ months later upon his arrest.”

7. The trial court therefore convicted the appellant on both counts and subsequently sentenced him to death as is provided by law.
8. The appellant preferred a first appeal to the High Court of Kenya at Nairobi. In that challenge to his convictions, the appellant faulted the trial court for relying on the identification evidence of the complainants, yet the identification was undertaken under hectic circumstances. The appellant further took issue with the trial court for failing to find that the pistol had not been proved to have been recovered from him, and also for failing to consider his defence.

That appeal was heard and determined by Msagha and Mutitu, JJ, who upheld the findings of the trial magistrate and dismissed the appeal.

9. The appellant is aggrieved by that finding, and he preferred this second appeal to this Court. He relies on his supplementary grounds of appeal filed on his behalf on the 28th October, 2013, and in particular that:

- a. ***The learned judges failed to note that the particulars of the charge sheet were at variance with the evidence;***
- b. ***The learned judges erred in law by failing to properly evaluate and re-analyse the evidence on record as they were duty bound to do.***

10. The appeal was canvassed before us by Mr. Ogesa Onalo, learned counsel for the appellant. On the first ground, learned counsel submitted that the first appellate court failed to note that **section 137 (c) of the Criminal Procedure Code** had not been complied with. Counsel submitted that this section requires that there be or there ought to be a specific description of the property yet in the charge sheet, the property described as having been stolen is a watch and a wallet, while in the evidence adduced before the court, there is mention of a Seiko watch and no reference to the wallet that is described in the charge sheet. He submitted therefore that there is variance in the

evidence and the charge sheet.

11.Regarding the identification of the appellant, counsel submitted that there was a contradiction between the evidence of the complainants regarding the manner of identification of the appellant. He further argued that the High Court failed to evaluate the conditions prevailing, yet these conditions were not conducive for a proper identification. He urged that the High Court misdirected itself by finding that there was no mistaken identity since there was contradiction in identification, which should have given the appellant the benefit of doubt.

12.The appeal was opposed by Miss Mary Oundo, Senior Assistant Director of Public Prosecution, on behalf of the respondent. Miss Oundo submitted that there was no contradiction in the evidence; that both Francis (PW1) and Catherine (PW2) referred to electric light which enabled them to identify the appellant.

(13) Regarding the omission of the wallet, counsel submitted that this was a minor variance that is curable under **section 382** of the Criminal Procedure Code. Miss Oundo submitted that the mode of arrest of the appellant was clear: that the appellant committed the crime on the 13th September, 1998 and he was arrested on the 23rd October, 1998.

14.We are cognisant of the fact that this is a second appeal, and sitting as a second appellate court, we are enjoined by law to consider issues of law only. See the holding of this Court in the oft-cited authority of *M'Riungu v Republic* [1983] KLR 455, in which it was held that:

“Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.”

15.This was reiterated in *J. A. O. v Republic* [2011] eKLR (Criminal Appeal No. 176 of 2010) where this Court stated that:

“... [A] second appeal ought to be on matters of law as the Court will be slow to interfere with concurrent findings of fact unless they were based on no evidence at all or on a perverted appreciation of the facts.”

16.We are also alive to the fact that in a second appeal, the Court is bound by the concurrent findings of fact and law of the lower courts, unless we find them perverse or unsupported by the evidence. These principles were stated by this Court in *Boniface Kamande & 2 Others v Republic* [2010] eKLR (Criminal Appeal No. 166 of 2004) in the following manner:

“On a second appeal to the Court, ... we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.”

17.See also the holding of this Court in *Adan Muraguri Mungara v Republic* [2010] eKLR (Criminal Appeal No. 347 of 2007) where it was stated that:

“As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings.

That would mean that the decision is bad in law, thus entitling this Court to interfere.”

18. When relying on evidence of identification, the court must examine that evidence carefully in order to satisfy itself as to the correctness of the evidence. The words of this Court in ***Wamunga v Republic [1989] KLR 424*** at 426, are instructive in this regard:

“... it is trite law that where the only evidence against a defendant is evidence of identification or recognition, 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 it can safely make it the basis of a conviction.”

19. In ***Francis Kariuki Njiru & 7 Others v Republic [2001] eKLR (Criminal Appeal No. 6 of 2001)*** this Court reiterated itself as follows:

“... The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”

20. In the appeal before us, the cogent and consistent evidence of both Francis (PW1) and Catherine (PW2) is that they had ample opportunity to get a look at their assailants during the commission of the robbery and also during the time when the robbers walked with them in the direction of their house. In addition, there was ample light from the electric security lights, and also because of the light that came from the flash light that Francis (PW1) was holding. Both complainants therefore had ample time to look at the appellant, and it is for this reason that they recognised him when they saw him ten days later, and again when they saw him on the day of his arrest. We, like the two courts below, are satisfied that the identification of the appellant as one of the assailants was proper, and there was no opportunity for mistaken identity. We therefore reject this ground of appeal.

21. We now turn to consider Mr. Onalo’s submission that the evidence tendered was at variance with the particulars in the charge sheet. From our perusal of the record, we note that the evidence of Francis (PW1) was that he lost a Seiko watch and Kshs.1,800.00 during the robbery, while the particulars of the charge sheet indicate that Francis (PW1) was robbed of a Seiko watch and a wallet. In his evidence, Francis (PW1) did not make any reference to the wallet. Miss Oundo for the respondent conceded that there was indeed a variance but one of a minor nature. We however do not consider this discrepancy to be fatal so as to warrant setting aside of the convictions of the appellant. We remind ourselves of the words of this Court in ***Joseph Maina Mwangi v Republic [2000] eKLR (Criminal Appeal No. 73 of 1992)*** where it was stated that:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.

22. **Section 382** of the Criminal Procedure Code states that:

“382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.”

23.The minor discrepancy in the evidence of the first complainant and the particulars of the charge sheet would be cured by application of that section. The omission of the wallet did not serve to prejudice the appellant, and neither did it occasion a failure of justice. This ground of appeal therefore fails.

24.In the result, we find that there is not a single reason to warrant our interference with the concurrent findings of the two courts below. This appeal lacks merit, and we accordingly order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 23rd day of January, 2015.

P. KIHARA KARIUKI (PCA)

.....

JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR