IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 47 OF 2011

BETWEEN

KILLION OMOLLO OMOLLO …..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(Appeal from Judgement of the High Court of Kenya at Kisii (Makhandia & Sitati, JJ)

***dated 7th March, 2011* in**

HCCRA NO. 15 OF 2008

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JUDGMENT OF THE COURT

Killion Omollo Omollo, the appellant, was after a trial spanning a period of one year, convicted of simple robbery contrary to ***Section 296 (1)*** of the Penal Code and sentenced to twelve (12) years imprisonment. His first appeal to the High Court at Kisii ***(Makhandia J,*** as he then was, and ***Sitati J,)*** was dismissed, but the conviction for simple robbery substituted for conviction for robbery with violence contrary to ***Section 296 (2)*** of the Penal Code and sentence of death substituted for the 12 years prison term and hence this second appeal.

The particulars of the charge preferred against the appellant upon which he was convicted were that the appellant on the 3rd day of January, 2007 at Ogongo area of Suba District within former Nyanza Province jointly, with others not before the court, robbed ***George Ondieki Nyamanga*** of a mobile phone – make Nokia 2310 valued at Kshs.5,700/=, a wrist watch – make Romano valued at Kshs.500/= all to the total value of Kshs.6,200/= and at or immediately before or immediately after the time of such robbery, wounded the said George Ondieki Nyamanga.

Tito Kipyator Kipkurui (PW 1) (Kipyator), George Ondieki Nyamanga (PW2) (Ondieki) and ***Pascal Owino*** (Pascal) deceased were employees of Super Loaf Bakery Kisii Branch. On the material date, that is 3rd January 2007, they were selling bread in Mbita area. The bread was conveyed in motor vehicle registration number KAV 267 Z which was driven by Kipyator with Ondieki as the conductor and Pascal

as the salesman. On their way back, at about 11.00 am, a white Nissan car overtook them and then blocked their way. Five occupants of the car attacked them, stole Kshs.72,520/= from Pascal and shot him. Ondieki was also injured with a knife and a screw.

The thugs escaped when a vehicle belonging to World Vision came to the scene. Pascal was taken to Hospital and died two weeks later. A report of the robbery was made to the police and the appellant arrested from his house. A search at his house led to the recovery of three mobile phones – makes Nokia 1100, Nokia 3120 and Siemens C25.

An identification parade would appear to have been conducted at which it was alleged Ondieki identified the appellant. Our uncertainty arises from the fact that although Ondieki stated that he attended an identification parade where he picked the appellant, the identification parade evidence was not adduced at the trial.

In his defence, the appellant denied committing the offence charged. He alleged that one, ***George Ziga*** an Administration Police Officer, fought him over a woman and took his mobile phones and was the one who set him up.

The learned Acting Senior Resident Magistrate, ***F.K. Mwaita*** at Homa-Bay, convicted the appellant of simple robbery as already stated and sentenced him to twelve years imprisonment as already stated.

In his first appeal to the High Court, the gist of his complaint was that he was convicted on unreliable evidence of identification which, according to the appellant, was without corroboration. In a reserved judgment, the first appellate court dismissed the appeal and varied the conviction and sentence as already stated.

Before us, the appellant, through his counsel ***Mr. Indimuli,*** relied upon five grounds of appeal contained in the Memorandum of Appeal filed by ***M/s O.M. Onyango & Associates*** on 28th July, 2014. Mr Indimuli condensed the five grounds into one ground that the High Court erred in law in failing to critically re- analyze and re evaluate the evidence on record as a whole and thus arrived at an erroneous conclusion. Learned counsel submitted that the evidence on identification was not positive especially as identification parade evidence was not produced at the trial. Learned counsel further submitted that the doctrine of recent possession was not properly applied by the two courts below. Counsel made that submission because the mobile phone recovered from the appellant was not conclusively proved to belong to Pascal, the deceased, contrary to the findings of the two courts below.

Mr. Sirtuy, the Principal Prosecution Counsel, conceded the appeal on the ground that the High Court failed in its duty of re-evaluating and re-analyzing the evidence and further misapplied the doctrine of recent possession.

We propose to consider the issue of identification first. The identifying witness was Ondieki. It is common ground that he did not know the appellant prior to the robbery. We believe that is why the prosecution found it necessary to conduct an identification parade for him. However, the identification parade officer was not called as a witness. Therefore, identification parade evidence was not produced at the trial. So, even though Ondieki stated that he picked the appellant at an identification parade, his identification in court remained a dock identification. The trial court in convicting the appellant took into account his identification in the dock by Ondieki. Such identification is worthless without an earlier identification parade. See ***Kiarie -Vs- Republic [1984] KLR 740*** and ***Ajode -Vs- Republic [2004] 2 KLR 81*** among many others.

On the issue of identification, the learned Judges of the High Court stated:-

> ***"…. PW2 was emphatic that he identified the appellant during the 20 – 25 minutes that he spent with the appellant. It was PW2's testimony that it was the appellant who was carrying the knife and that it was him who went to the side of the vehicle where PW2 was sitting demanded money and ordered them out of the vehicle. PW2 also stated that the appellant***

held on to PW 2 and that when another vehicle came by, the appellant stabbed PW2 on the chest and hit him with a screw on the head.

.....

...We are satisfied that the evidence of PW2 was believable.....

PW2 was also able to notice the scar at the appellant's head at the scene and was able to pick out the appellant at the identification parade ….....”

(Underling ours).

It is plain from the above extract of the record of the High Court that identification parade evidence was relied upon in convicting the appellant. Yet no such evidence was adduced at the trial. It is also plain that the learned Judges of the High Court in dismissing the appellant's appeal failed to appreciate that Ondieki's identification was a dock identification in the absence of identification parade evidence. That, in our view, was a gross mis-direction.

In ***Cleophas Otieno Wamunga -Vs- Republic [Criminal Appeal No. 20 of 1982 Kisumu] (UR),*** this Court had to decide whether evidence of identification in that case formed a secure basis for a conviction. In doing so, the Court stated:-

“...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 one or more identification 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 identification ...”

And in ***Republic -Vs- Eria Sebwato [1960] EA 174,*** the Court held:-

“Where the evidence alleged to implicate an accused is entirely of identification that evidence must be absolutely water tight to justify a conviction”

In our view, the testimony of Ondieki did not meet the threshold set by these precedents.

We turn now to the evidence on recent possession. It is illustrative that the trial court did not find any such evidence. With regard to the recovery of the mobile phone make Nokia 3120, the trial court said:-

“A part from the above, the prosecution failed to produce the mobile phone which was allegedly (sic) to have been recovered from the accused. On these reasons the alternative charge must fail.”

On the same recovery, the learned Judges of the High Court stated:-

“So. Even if we were to be found wrong on the question of identification, we are satisfied with the testimony of PW5 that the appellant was arrested in possession of a Nokia phone 3120 which phone was positively identified by both PW 1 and PW2 as belonging to Pascal who was shot dead during the robbery. Though the appellant claimed that the phone plus 2 other phones found in his possession belonged to him, he was unable to produce the sim card for the Nokia phone to confirm that indeed the phone belonged to him. He had a duty to prove that the phone was his. He produced no documents at all to back up the claim that the mobile phone was his. Under the doctrine of recent possession, the appellant has such

duty cast upon him. He did not discharge it....”

The above extract of the judgment of the High Court has caused us grave anxiety for two reasons. First, although PW5, IP ***David Kibet Lawendi,*** testified that his team of police officers recovered from the appellant's house, a mobile phone – make Nokia 3120 among other phones, he did not produce any of the phones allegedly so recovered. He merely identified them at the trial. The mobile phones were not therefore part of the evidence the trial court could rely upon and as we have said above, it did not rely upon that evidence of recovery. The finding of the High Court was therefore based on a misapprehension of the evidence and that entitles us to interfere (See ***Chemogong -Vs- Republic [1984] KLR 611*** and ***Gacheru -Vs- Republic [2005] 1KLR 688)***

Secondly some of the remarks made by the learned Judges in the passage quoted above are unfortunate. The learned judges appeared to think that the appellant was under some legal duty to call witnesses in support of his defence and the failure to call those witnesses rendered the appellant's defence worthless. With all due respect to the learned Judges, a person charged with a criminal offence has no such legal duty.

So, the only bases of the appellant's conviction i.e. identification and recent possession were not demonstrated by the prosecution. In our view if the two courts below had properly considered what we have discussed above, we think they would not have made the findings which they did make on the evidence.

In view of the foregoing and as Mr. Sirtuy conceded the appeal, in our view, properly so, we think that the appellant's conviction cannot be allowed to stand. Consequently this appeal is allowed, the conviction of the appellant is quashed and the sentence set aside. We order that the appellant be and is hereby set free forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF FEBRUARY, 2015

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR