IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 58 OF 2014

BETWEEN

BERNARD MAGANGA MJOMBA …….APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Being an appeal from the Judgment of the High Court at Mombasa (Odero & Nzioka, JJ.) dated 26th June, 2012

In

H.C. Cr. A. No. 295 of 2010)

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JUDGMENT OF THE COURT

Haron Juma Odipo employed **Julius Gicengi Lithuti** (the complainant) to drive his taxi registration number KBA 914 K Toyota Caldina Station Wagon. On 12th March, 2008, at about 8 p.m. while operating the taxi in Voi town the complainant was approached by two men who sought his services to drive them to a place called Sisera. They negotiated the fare and settled at Kshs.600/=. The two men asked him to stop by a certain bar where they were joined by two other men, one with a bandaged hand. Upon reaching their destination at Sisera the man with a bandaged hand drew a gun and forced the complainant to proceed towards Msau area, beyond Sisera. They stopped at a homestead whereupon the passengers-turned robbers tied the complainant's limbs with telephone cables as they beat him up. He was thrown to the back seat of the car while the man with a bandaged arm took control of the car. Shortly from the homestead they stopped in the bush, and the complainant and two members of the group alighted while the man with a bandaged hand and another drove away after stealing from the complainant Kshs.2100, a mobile phone, I.D card and driving licence.

Before the vehicle was driven away one of the group members who remained in the bush with the complainant went to the car, took and wore the complainant's red overall. The two men then left on foot and the complainant remained in the bush. After 10-15 minutes the complainant was able to untie his feet and with that freedom he walked to the main road with his hands still tied. He was twice lucky as no sooner had he got to the main road than he saw a bus, flagged it down and boarded. In the bus were police officers among the passengers. A short distance from this spot, variously estimated by the

witnesses to be 2 km, 20 metres and 500 metres, the bus was flagged down by two men who the complainant straight away identified as part of the gang members who had left the bush on foot. As a matter of fact one of them was still wearing the complainant's overall. The police officers who were in the bus asked the complainant to hide to avoid being recognized by the duo. The bus was driven to Voi Police Station where they were arrested.

In the course of investigations a third suspect was arrested. Subsequently the three were jointly charged with violently robbing the complainant of the taxi and other personal effects contrary to **section 296(2**) of the Penal code. In their defence the three denied the charge. Both appellants, however, conceded that on the night in question they boarded the bus at different points on the Taveta – Voi road. Both were attacked by the passengers who claimed they had robbed the complainant who was also in the bus.

The trial court considered this evidence and was persuaded that it disclosed an offence under **section 296(2)** of the Penal Code as against the appellants and not against the third suspect who was acquitted. The appellants, upon conviction were sentenced to death. This is their second appeal brought on separate but identical grounds which **Mrs. Marubu** learned counsel condensed into two and argued as follows;

i. That the evidence of identification was flawed since the complainant failed to explain how he was able to identify the appellants at night, how long he observed them; that having failed to supply to the police the description of the robbers and no identification parade having been held, it was unsafe on the authority of **Joseph Maina v R Criminal Appeal No.4 of 2012** for the trial Magistrate to have convicted the appellants on what counsel stated was mere dock identification.
ii. That the learned trial Magistrate and the learned Judges of the High Court misapplied the doctrine of recent possession to the facts and circumstances of this case; that no stolen item was found in the 1st appellant's possession; that the complainant failed to prove that the red overall belonged to him as it had no unique features.

In opposing the appeal **Mr. Musyoki**, learned counsel for the respondent submitted that the circumstances leading to the appellants' identification were favourable as the complainant spent some time with them and members of their group; that there were powerful lights at the point the taxi fare was negotiated; that after the robbery the 2nd appellant was arrested wearing an overall shortly stolen from the complainant and that the 2nd appellant having failed to offer an explanation regarding it, there was a presumption that he had stolen it.

We are for our part satisfied that in terms of section 361 of the Criminal Procedure Code and on the authority of **Chemangong v R (1984) KLR 22** that the two grounds argued before us (identification and recent possession) are points of law. In that case, therefore, we cannot, as the second appellate court interfere with concurrent factual findings of the two courts below unless they are shown not to have been based on evidence.

The incident in which the complainant was robbed of the taxi and his personal effects occurred at night. He was the only eye witness, and while there is no rule of law or evidence barring a conviction to be based on the testimony of a single eye witness, it is imperative that this evidence be very closely examined and subjected to the strictures laid down in **Abdala Bin Wendo & another v R (1953) 20 EACA**, namely, the court must see if there is other evidence to lend assurance as to guilt of the suspect before it can enter a conviction. It has long been recognized that the accuracy of human being's memory may be affected by many factors which in turn may occasion a miscarriage of justice. This is what led the authors of **Blackstones Criminal Practice**, 2001(12th Ed) by **Peter Murphy**, which has been cited in many cases, to say as follows;

> ***"The visual identification of suspects or defendants by witnesses has for many years been recognized as problematic and potentially unreliable. It is easy for a honest witness to make a confident, but false, identification of a subject, even in some cases where the subject is well known to him. There are several possible reasons for errors of this kind. Some persons may have difficulty in distinguishing between appearance, and***

> ***many witnesses to crime are able to see the perpetrators only fleetingly, often in stressful circumstances. Visual memory may fade with the passage of time and many become confused or disturbed…There is evidence that false identification can sometimes be caused by a process known as unconscious transference, in which the witness confuses a face he recognized from the scene of the crime (perhaps that of an innocent by stander) with that of the offender. Such problems may then be compounded by the understandable, but misguided, eagerness of many witnesses to help the police by making positive identification"***

Both courts below bearing in mind these factors found that the circumstances of the case left no doubt that the complainant was able to identify the appellants; that on account of sufficient lighting, the time spent and the recovery from the 2nd appellant of the complainant's overall, the prosecution's case of robbery with violence was proved beyond reasonable doubt.

For our part, we think that apart from the fact that the appellants were the first members of the group to approach the complainant with a request to hire his services, the two spent considerable time with him. The negotiations of the fare took "over 10 minutes" according to the complainant, and there was electricity light from a nearby shop. They explained to the complainant why they were stopping at Vuria Bar - to pick up their boss. On the way to Vuria Bar, the 1st appellant sat on the passenger seat right next to the complainant. At Vuria Bar there was light and an independent witness, a watchman at the Bar, John Oboun Awoth confirmed having seen the complainant bring the appellants to the bar; that the taxi stopped very close (about 1 metre) from where he was and was able to see the occupants. After picking two more men from Vuria Bar the complainant drove to the scene where he was robbed. At the scene one of the men he had picked from Vuria Bar produced a gun and gave orders. The complainant was categorical that the 1st appellant tied his legs while the 2nd appellant tied his hands. Both appellants pulled him out of the car as they robbed him of the car. These events, in our view, afforded the complaint both the time and sufficient opportunity to positively identify the appellants. That identification did not amount to dock identification.

With his hand still tied, the complainant made his way to the road where he was rescued. It was not long when he identified the appellants as they stopped the bus. In addition the 2nd appellant was still wearing the overall he had shortly before this time from the complainant. The ingredients of the doctrine of recent possession were proved, namely, the property (a red overall) was found with the 2nd appellant, the red overall was positively identified by the complainant, it was recently stolen from him. (See **Arum v R** Cr.App.No.85/2005).

Although the overall was worn only by the 2nd appellant, the 1st appellant having acted in concert and as an accomplice is presumed also to have been jointly in possession. **Section 4** of the Penal Code defines the phrase "*be in possession of*" or "*have in possession*" to include not only,

> ***"...having in one's own personal possession, but who knowingly having anything in the actual possession or custody of any other person…"***

Having failed to offer an explanation of how they came in possession of the overall, the inference to be drawn was that the appellants robbed the complainant.

In the end and for the foregoing reasons we are satisfied that the learned Judges of the High Court came to the correct conclusion on the two issues raised in this appeal. Accordingly this appeal lacks merit and is dismissed.

Dated and delivered at Malindi on 29th day of May, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W.OUKO

….....

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