



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 82 OF 2014

BETWEEN

MICHAEL OTIENO alias JAYALO
APPELLANT

AND

REPUBLIC
RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa

(Odero, & Muya, JJ.) dated 8th February 2013

in

H.C.Cr.A. No. 64 of 2008)

JUDGMENT OF THE COURT

At 5.45 a.m. on 17th May 2004 as **Charles Otieno Okuna** (the complainant) was cycling to work, he was ambushed and attacked by a group of four robbers. Apart from inflicting on him injuries which the doctor classified as harm, the robbers stole his bicycle, valued at Kshs.3,000/-. When they hit him on the head with a metal bar, he raised an alarm. As three of the robbers fled from the scene as a result of the alarm, the complainant got an opportunity to draw a knife he had in his possession and stabbed the last robber on the upper left arm.

The first person to arrive at the scene following the alarm raised by the complainant was the complainant's workmate, **Wilson Odhiambo Agina**, PW2, who witnessed the struggle between the complainant and the last member of the

gang. The witness noticed, as he approached the two that the gang member was bleeding from the left arm. Following this interruption the last gang member also fled and disappeared. Two weeks after this incident **P.C. Reuben Mutua** received information that led to the arrest of the appellant, Michael Otieno alias Jayalo, and recovery of a bicycle believed to belong to the complainant and a rain coat answering to the description of that worn by the robbers during the attack.

An identification parade was mounted at which the complainant and PW2 picked out the appellant. The appellant was then charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and also with attempting to escape from lawful custody contrary to **section 123** as read with **section 389** of the Penal Code. No evidence was called in support of this last count and both courts below did not say anything about it.

After the prosecution closed its case, having called five witnesses, the appellant elected not to present evidence in his defence. Upon conviction on the evidence available at the trial, the court sentenced the appellant to death in accordance with the law. The conviction and sentence imposed by the trial court were confirmed on first appeal by the High Court. Both courts below made concurrent findings that the appellant was properly identified as the member of the gang who remained behind as his confederates fled; that he was stabbed by the complainant; that both the complainant and PW2 were able to identify him from his physical appearance with the aid of electricity light from nearby houses; that the two were also able to pick him out in the police identification parade; that the bicycle stolen from the complainant in the course of the robbery was recovered from the house where the appellant was arrested, and finally that the appellant had a fresh wound on the left arm, and the rain coat recovered from this house was perforated on the left sleeve, consistent with the complainant's evidence of stabbing during the robbery.

Being aggrieved by the dismissal of his appeal by the High Court, the appellant now challenges this decision in this appeal relying on six grounds condensed into three by **Mr. Adalla**, learned counsel for the appellant and summarised by us as follows;

- i. *that the learned Judges of the High Court failed to analyze the evidence before them by failing to see that the doctrine of recent possession was not properly applied; that there was no proof that the house from which the bicycle was recovered belonged to the appellant; that the record in the*
- ii. *Occurrence Book (O.B.) was doctored to include the recovery of the bicycle yet the two courts below did not consider this obvious fact.*
- iii. *that the conditions leading to the identification of the appellant were not favourable; being a dark morning while the attackers were disguised in rain coats, goggles and caps.*
- iv. *that the identification parade was not conducted in accordance with Chapter 46 of the Force Standing Orders since the complainant was at the police station and saw the appellant a day before the parade was held.*

These grounds were canvassed by Mr. Adalla for the appellant who urged us to find that the High Court failed to re-evaluate the evidence before it and as a result misdirected itself on the question of identification at the scene identification parade and on the doctrine of adverse possession.

In opposing the appeal **Mr. Wamotsa** learned counsel for the respondent urged us to dismiss the appeal as, in his opinion, it had no merit; that the appellant was positively identified and the doctrine of recent possession properly applied.

We are satisfied that these grounds meet the requirement of **Section 361(1) (a)** of the Criminal Procedure Code, constituting matters of law. In **Chemagong v R (1984) KLR 213 at p. 219** the Court defined its jurisdiction on second appeals as follows;

“A second appeal must be confined to points of law and this Court will not interfere with the concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did.”

The only two issues arising from the grounds in support of this appeal as set out above are, identification of the appellant and the application of the doctrine of recent possession.

There is evidence on record that the appellant was not known to the complainant and PW2 prior to the date of the robbery, and that the attack was at 5.45 a.m. Evidence of visual identification such as the one

we are dealing with here,

must be examined carefully before it is relied on to minimize the dangers of mistaken identity. See **Wamunga v R (1989) KLR 424**.

While both the complainant and PW2 are unanimous that it was still dark though morning-time, they maintained that there was light at the scene of the attack emitted from the nearby houses. According to the complainant these houses were only three (3) meters from the scene, while PW2 estimated the distance as between 5 – 7 meters. The complainant spent considerable period of time with the appellant. He stabbed him with a knife from close proximity. He described to the police the appellant's physical appearance that very day, that he was black and short with a big head. Upon his arrest the appellant participated in an identification parade at which the complainant and PW2 picked him out.

Based on the totality of this evidence, we find no fault in the concurrent conclusions of the two courts below regarding identification. The evidence of identification by the complainant and PW1 was further fortified by the recovery of a bicycle in the circumstances that could only lead to the inevitable conclusion that it was in the appellant's possession, considering the evidence of identification linking the appellant to the robbery and also the recovery of a rain coat that had a mark of a knife-tear on the sleeve. It is firmly settled that the doctrine of recent possession will apply only where the following elements are present;

- a. *that the property was found with the suspect*
- b. *that the property was positively identified by the complainant*
- c. *that the property was recently stolen from the complainant*

See **Isaac Ng'ang'a Kahiga v R Cr. Appeal No. 275 of 2005**. We may add another element, that the suspect's possession of the stolen item is not explained. In addition, while evaluating the question of recency the court will consider the easiness with which the stolen item can move from one person to another.

The recovery of the bicycle was hardly two weeks from the date of the robbery. The bicycle had been repainted and some parts removed to conceal its identity. That notwithstanding the complainant was able to positively identify it by the serial number. The appellant never offered any explanation as to how it came to be in his possession. Both courts below, we hold, analyzed this evidence properly, applied the doctrine of recent possession correctly and arrived at the correct conclusion.

Although it is discernible from the record that on three occasions the appellant applied to the trial court to order for the production of the Occurrence

Books of 17th May 2004 and 9th June 2004 to ascertain whether there was any entry regarding the recovery of the bicycle, we note that the trial court did not pursue this question and made no mention of the Occurrence Book in the judgment. The appellant renewed a similar application in the High Court. Once more the High Court, even after admitting the copy of the Occurrence Book as additional evidence made no reference to it when considering the doctrine of recent possession. We hold, taking into account all the circumstances of this case, first, that the question of whether or not the Occurrence Book entry was falsified is a question of fact hence not available for our determination under section 361 aforesaid. In addition, even in the absence of this evidence, there still remains overwhelming evidence meeting the criminal standard of proof that the appellant was positively identified.

Regarding the contention that the identification parade was conducted in contravention of the Force Standing Orders because the complainant saw the appellant at the police station a day before the parade was conducted, it is in evidence that indeed the complainant had been called to the police station on 12th June 2004 to identify the bicycle that had been recovered earlier.

That evidence is clear that that was all the complainant did when he got to the station. There is no suggestion, least of all evidence, that he saw or met the appellant at the station. That complaint lacks merit and we dismiss it.

We come to the conclusion that none of the grounds proffered has been proved with the result that this appeal, in its entirety fails. It is dismissed.

Dated and delivered at Malindi this 17th day of July,2015

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