



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), SICHALE & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 253 OF 2010

BETWEEN

PETER NJUGUNA KAMAMI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ojwang & Warsame, JJ.)
dated 9th October 2009 in*

H. C. CR. A. No. 632 of 2006)

JUDGMENT OF THE COURT

1. **Peter Njuguna Kamami**, hereinafter referred to as the **appellant**, was arraigned, alongside with three others, before the Chief Magistrate's Court at Thika on two counts of the offence of robbery with violence. The brief particulars on the first count were that on the 10th May 2005, the accused persons being armed with a pistol robbed Martin Nyangi Kimani of a vehicle, registration number KAH 791W, a mobile phone, a driving licence and Kshs. 1,000.00, and at the time of the said robbery threatened to use actual violence to him. On the second count, the brief particulars were that the appellant, alongside with others, robbed Anthony Muiruri Kimani of a mobile phone make Motorola V66 and Kshs. 2,000.00, and at the time of such robbery threatened to use actual violence on him.
2. The evidence led by the prosecution was that the complainants who are Martin Kimaru (PW1) and Anthony Muiruri (PW2) were plying their trade operating a taxi within Gatundu area in Thika. The appellant, posing as a customer who wanted a ride to Mwea, approached Paul Kangethe Wanjiku (PW3) who is also a taxi driver. Paul and the appellant did not agree on the fare to be paid, so the appellant approached the complainants, who agreed to ferry him to his destination. When they got there, the appellant then asked for one of their phone numbers so that he could call them back after he had finished his business. As Martin was writing down the number some people emerged from the nearby bush and started banging on the windows. Martin attempted to drive away, but the appellant disengaged the gears and threatened to shoot Martin if he attempted to run away. The two complainants were pushed out of the vehicle and the appellant got into the driver's seat and drove away. The other robbers then took Martin and Anthony to the nearby

coffee plantation where they were relieved of their possessions.

3. The motor vehicle was later recovered on the 20th May 2005 after the police received information that the vehicle was at the house of Margaret Nyokabi Mungai, the 4th accused. She stated that the vehicle had been taken to her house by her relative, who later turned out to be the appellant.
4. The 1st, 3rd and 4th accused were acquitted under Section 210 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, after the trial court found that the prosecution evidence had not made out a *prima facie* case against them. The appellant was placed on his defence in which he gave a sworn statement. He stated that he was a mechanic living in Makongeni. On the date of his arrest, he was waiting for a customer when he was found by police officers from the Flying Squad. The officers questioned him about a motor vehicle that was in Katwanyaga, and he told them that he had taken it for a road test but the vehicle broke down and that he was now waiting for the owner to buy a spare part for it. He later identified the owner of the vehicle as a man called Bongo; the appellant also claimed that after Bongo was arrested he was released after giving Kshs 70,000.00 to the police. The appellant denied knowing that the vehicle had been stolen and claimed that it had been given to him by Bongo.
5. After consideration of the evidence, the trial court, on the basis of the positive identification of the appellant by the complainants, found him guilty on both counts of the offence and convicted him. After mitigation, he was sentenced to death on both counts with an order that the sentence of death on the second count be held in abeyance.
6. The appellant was aggrieved with that conviction and sentence and filed an appeal to the High Court which dismissed the appeal. The first appellate court found that the identification evidence of Martin and Anthony was cogent and was sufficient to sustain a conviction. Regarding the identification of the appellant, the High Court rendered itself as follows:

“We find the evidence of PW1 and PW2 as regards identification was unshaken even in cross examination. That being the position, it is clear that it points out that the appellant as having been a party to the robbery. This evidence ties well with the evidence produced by the prosecution in terms of possession and recovery of the motor vehicle stolen from the complainant. On the basis of these two lines of evidence, we are satisfied beyond reasonable doubt that the appellant was indeed one of the robbers who robbed PW1 and PW2 on the material day and there can be no merit in his defence.”

7. The first appellate court found further that the appellant was also incriminated since it was he who had taken the motor vehicle to the home of the 4th accused. The first appellate court also considered that the appellant had admitted that he was in possession of the vehicle which had been stolen only ten days earlier. In this regard, the court rendered itself as follows:

“Even if we reject the identification of the appellant as urged by him, we think there is more and credible material to link him with the commission of the robberies as charged and convicted. The evidence of recovery and possession of the motor vehicle stolen from the complainants is a further incriminating piece of evidence, which places the appellant as one of the attackers. The evidence on record is that the motor vehicle was found in the house of an old lady who was charged together with the appellant who tried to distance himself from that situation by saying that the vehicle had developed mechanical problems as he was test driving it. The appellant therefore confirmed that the vehicle was found in a place where he took after it had developed mechanical problems....” (sic)

8. The court also observed that the appellant did not call witnesses to corroborate his version of events - that he had the car as he was repairing it for a customer and concluded that the appellant had not given a clear and reasonable explanation for his possession of the vehicle.

9. The first appellate court consequently found that there was sufficient evidence that pointed to the appellant as being one of the robbers who accosted Anthony and Martin, and declined to interfere with the decision of the trial court. Accordingly, the first appellate court upheld the decision of the trial court and dismissed the appeal, which has provoked the present appeal now before us.
10. Section 361 of the Criminal Procedure Code restricts the jurisdiction of this Court, when it is determining a second appeal, to determine with matters of law. This fact has been stated before by this Court in ***Boniface Kamande & 2 Others v Republic [2010] eKLR (Criminal Appeal 166 of 2004)*** as follows:

“On a second appeal to the Court, which is what the appeals before us are, 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.”

11. The appellant relies on the supplementary memorandum of appeal dated the 30th June 2015, and raises two issues of law upon which he faults the decision of the first appellate court: the failure to consider that the identification of the appellant was improper, and improperly applying the doctrine of recent possession.
12. Mr. Robert Amutallah, learned counsel for the appellant, submitted that the identification of the appellant was not safe. The identification parade undertaken by Inspector John Muu (PW8) was in respect of Anthony Muiruri (PW2) who was the second complainant. There was no identification parade in respect of Martin Nyangi Kimaru (PW1). According to Mr. Amutallah, this was irregular as Anthony was not in the taxi when the appellant allegedly approached Martin to negotiate the fare. Counsel also took issue with Anthony’s identification of the appellant as he claimed to have sat in the back of the taxi, and could therefore not identify the appellant properly. He submitted that although the headlights of the vehicle were on, the only illumination was at the front of the car, thus the appellant could not have been seen properly. In addition, Paul Kangethe Wanjiku (PW3) also admitted that the surrounding area was dark when the appellant approached him, and that he could not identify him.
13. Mr. Amutallah relied on the authority of ***Mutonya Kariuki v Republic [2014] eKLR (Criminal Appeal No 68 of 2013)*** to submit that the conditions were not favourable for a positive identification. In that case, this Court emphasized the need of a trial court and a first appellate court to carefully examine evidence on identification before the same can be used to convict, at trial level, and to confirm a conviction at the first appellate level.
14. Mr. Amutallah also took issue with the fact that there was no first report by the complainants. They only recorded statements on the 31st May 2005 and the 1st June 2005 which was after the identification parade held on the 27th May 2005.
15. Opposing the appeal was Mr. C. O. Orinda, Assistant Director of Public Prosecution, who submitted that the appellant was properly identified since he and the complainants had a long period to interact. There was enough light in the area, and that it was not germane to the case that Anthony was sitting in the back of the car as he saw enough to enable him properly identify the appellant in an identification parade.
16. To determine the first ground of appeal, we ask ourselves whether or not the circumstances were conducive to a favourable identification. In ***Francis Kariuki Njiru & 7 Others v Republic [2001] eKLR Criminal Appeal No. 6 of 2001***, this Court set out the factors that a court that intends to rely on identification evidence should consider:

“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.

17. Paul (PW3) testified that he and the appellant had a conversation during which the appellant bargained for the taxi fee. As it was dark, he was unable to identify the person he had talked to. His evidence was therefore not instrumental in identifying the appellant. Martin (PW1) testified that he was approached by the appellant. He and the appellant had a conversation about the taxi fare. When they got to their destination, the appellant asked him for his telephone number, and he switched on the light in the car so that he could write it down. During the ride, the appellant was sitting next to Martin, which gave him an opportunity to observe him. Anthony's (PW2) testimony corroborated that of Martin, and was to the effect that he had an opportunity to observe the appellant when he was negotiating the taxi fee with Martin and later when the appellant stopped them from driving away after they were attacked by the other robbers. It is therefore apparent that the two witnesses had ample opportunity to observe the appellant having engaged with him before the ride, during the ride, and later, when he asked Martin to write down his phone number. Anthony later positively identified the appellant at an identification parade conducted by Inspector John Muu. Our evaluation of this evidence leads us to conclude that it was sound and free from error. Although the appellant finds fault with the fact that Martin did not participate in an identification parade we place no premium on this point. Anthony's identification evidence was sufficient to place the appellant as one of the robbers who attacked the two. This ground of appeal must therefore fail.

18. Mr. Amutallah also took fault with the courts' reliance on the doctrine of recent possession. He submitted that the motor vehicle was not found with the appellant but with the fourth accused. According to counsel, as the vehicle was not found in the possession of the appellant, the doctrine of recent possession could not apply. For this proposition he relied on Arum v Republic [2006] 2 EA 10 wherein it was stated that :

“Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is there must be positive proof, first; that the property was found with the suspect, secondly, that the property was stolen from the complainant, and lastly; the property was recently stolen from the complainant... in order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice no matter how many witnesses.”

19. Mr. Orinda on his part argued that there was evidence that the appellant was in control of the vehicle on account of mechanical problems, and it was not material that the appellant was not found in actual possession of the car. This was constructive possession, and he submitted that it was not necessary for the appellant to be found in the physical possession of the vehicle. He added that the appellant's evidence given in his defence, that he was only in possession of the vehicle after it was given to him by his customer was properly considered by the two courts below and found to be wanting.

20. Where an accused person is found in possession of items that were recently stolen, then the court may infer that he participated in the theft of those items. In Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR (Criminal Appeal 272 of 2005) this Court succinctly set out the considerations to be undertaken by the Court before such an inference is made in the following terms:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In

other words, there must be positive proof:

i). that the property was found with the suspect;

ii). that the property is positively the property of the complainant;

iii). that the property was stolen from the complainant;

iv). 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.”

21. In the appeal before us, the stolen vehicle was positively identified as the property of John Kimani (PW4), who had given the vehicle to his sons Martin and Anthony. That the vehicle was stolen in the course of a robbery was also not in dispute. The vehicle was also found only ten days after the robbery at a place where the appellant had parked it. He admitted to driving it there, but in his defence stated that the vehicle had broken down and that he was waiting for the owner to buy a part for it so that it could be fixed. In cross examination, he admitted that he had received the vehicle on the 11th May 2005, and confirmed that for the period of nine days before his arrest, the vehicle was in his possession. It is noteworthy that he never called evidence to prove that the vehicle belonged to somebody else, and having failed to do so, did not give a plausible explanation as to why he was in possession of the vehicle that had only so recently been stolen. In the end, it is reasonable to conclude that he must have been involved in the robbery in the first place. This attack on the conviction therefore fails.

22. Ultimately, we are satisfied that the evidence on record directly points to the appellant as one of the robbers who attacked Martin and Anthony on the night of the 10th May 2005. We therefore find this appeal to be lacking in merit, and order it be and is hereby dismissed.

Dated at Nairobi this 2nd day of October, 2015.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

