



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, GATEMBU & ODEK, JJ.A)

CRIMINAL APPEAL NO. 38 OF 2012

BETWEEN

MICHAEL KIBE NJANE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Sergon & Wakiaga, JJ.) dated 23rd March, 2012

in

H.C.C.R.A NO. 69 of 2010)

JUDGMENT OF THE COURT

1. **Michael Kibe Njane**, the appellant, was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Chapter 63, Laws of Kenya and an alternative count of handling stolen property contrary to Section **322(2)** of the **Penal Code** in the Senior Resident Magistrate's Court at Kigumo.
2. The particulars of the offence of robbery with violence were that on 20th September, 2009 at Ichagaki Village in Murang'a South District within the then Central Province, the appellant jointly with others not before the court while armed with crude weapons namely pangas, knives and metal bars robbed Peter Maina Kamau of motor cycle registration number KMCF 174F make Tiger TG 150 valued at Kshs. 81,000/= and a mobile phone make Samsung M300 valued at Kshs. 5600/= and at the time of such robbery used actual violence to the said Peter Maina Kamau. The particulars of the alternative charge were that on 10th October, 2009 at about 3:00 p.m. at Kamburu Village in Kiambu District of the then Central Province, the appellant otherwise than in the course of stealing, dishonestly retained one motor cycle registration number KMCF 174F make Tiger YG 150 valued at Kshs. 81,000/= knowing or having reasons to believe it to be stolen.
3. The prosecution called a total of seven witnesses in support of its case against the appellant. It was the prosecution's case that PW1, Peter Maina Kamau (Peter), used to operate motor cycle registration number KMCF 174F as a *boda boda* taxi within Murang'a. On 20th September, 2009 at around 7:00 p.m Peter went to the Full Gospel Church at Murang'a to pick the appellant up.

- Upon arriving at the Church he could not find the appellant. Peter called the appellant who directed him to meet him at the Maragua- Ichagaki junction. Peter picked up the appellant who directed him to follow the Ichagaki route. At Ichagaki Secondary School, Peter heard the appellant talking to someone on his mobile phone. When they crossed the river, the appellant asked Peter to stop the motor cycle so that he could speak on his mobile phone.
4. Immediately Peter stopped, three men emerged and held him. Peter gave evidence that the appellant removed a metal bar from his trousers and hit him on the mouth causing him to fall down. The appellant then gave the metal bar to the other assailants and rode off with the motor cycle leaving Peter behind. The men physically assaulted Peter and stopped when they thought he was dead. After the robbers left, Peter tried to wake up but he collapsed. At around 7:30 p.m while PW3, Samuel Kimani (Samuel), was at Irembu Shopping Centre he noticed a crowd had gathered around a man who was lying on the ground. He went closer and recognized the man on the ground as Peter. He realised that Peter was unconscious and seriously injured. He decided to go to Peter's father, PW2, Venacio Kamau Macharia (Venacio), house to inform him what he had seen.
 5. Venacio testified that Samuel informed him that Peter was lying unconscious at Irembu Shopping Centre. He rushed to the scene but was informed that Peter had been taken to hospital by a motor cycle. On the way to the hospital at Gakoigo junction, Venacio saw Peter on the ground. With the assistance of good Samaritans, Venacio took Peter to Maragua Hospital. After being examined, Peter was referred to Murang'a District Hospital. Venacio took Peter to Murang'a District Hospital. On their way, they stopped at Maragua Police Station where Venacio reported the incident. PW6, PC Charles Odhiambo (PC Charles), gave evidence that on 20th September, 2009 at around midnight, Venacio reported that Peter was robbed off motor cycle registration number KMCF 174F. He confirmed that Peter was unconscious.
 6. Peter testified that he regained consciousness after three days and realised he was at Murang'a District Hospital. Peter informed Venacio that the appellant was one of the robbers who had attacked him and stolen the motor cycle. Peter maintained that the appellant was a neighbour and he had known him for a long time before the incident. Peter was not able to identify the other robbers. Peter also informed the police that he had recognized the appellant as one of the robbers. On or about 6th October, 2009 PC Charles informed Venacio that he had received information that the stolen motor cycle had been seen at Kiambu. He gave Venacio a letter to take to Githunguri Police station so that they could assist in tracing the motor cycle. Before Venacio got to Kiambu he saw the appellant who was known to him at Githunguri Bus stage. Venacio with the assistance of members of the public arrested the appellant. The members of the public began beating the appellant. PW5, PC Rodger Nalinya (PC Rodger), attached to Githunguri Police Station rescued the appellant from the members of the public and re-arrested him. He took the appellant in the company of Venacio to Githunguri Police Station.
 7. At the Police Station, the appellant informed PC Rodger that the motor cycle was at Kagwi. They went to Kagwi and found the motor cycle abandoned. Venacio identified the motor cycle as the one which was stolen. Venacio noticed that wind breakers on the front tyre of the motor cycle were missing. The appellant led the police in the recovery of the said wind breakers in his house. PC Charles who was also present when the recovery was made, testified that the appellant claimed that he had bought the motor cycle from one Joseph Mwangi Wanjiku for Kshs. 82,000/= and produced a sale agreement; the seller and the witnesses to the agreement were at Kenol. PC Charles gave evidence that they went to Kenol with the appellant who was unable to identify the alleged seller of the motor cycle. Consequently, the appellant was charged with the above mentioned offences.
 8. In his defence, the appellant gave unsworn statement. He testified that on 18th September, 2009 at around 1:00 p.m he received a phone call from one Joseph Mwangi Wanjiku (Joseph) requested him to loan him Kshs. 50,000/= to enable him meet his father's medical bill. The appellant asked for security for the said loan. The appellant gave evidence that Joseph produced a motor cycle log book and informed him the motor cycle was worth Kshs. 90,000/=. The appellant instead requested Joseph to sell the said motor cycle to him. Vide a sale agreement executed by the appellant and Joseph, the appellant agreed to purchase the motor cycle for Kshs. 82,000/=. The appellant paid Kshs. 72,000/= and Joseph agreed to deliver the motor cycle on 19th September, 2009. Thereafter, he met Joseph at Githunguri Bus stage and since he did not have the balance, Joseph gave him the motor cycle but retained the logbook. He maintained that both he and Joseph

- agreed that he would get the log book once he paid the balance of Kshs. 10,000/=.
9. The appellant used the motor cycle as a *boda boda*. On 8th October, 2009 he received a telephone call from his employee informing him that he had been arrested by some people who claimed that the motor cycle belonged to them. The appellant went to Githunguri Town and he recognized Venacio who was from his Village. The members of public arrested him and started beating him. He testified that Venacio stole Kshs. 8,600/= and his mobile phone make Motorola L7 valued at Kshs. 7,000/=. He maintained that he gave the sale agreement between him and Joseph to both PC Charles and PC Rodgers; he informed them that he could take them to where Joseph used to work. He took the police to Kenol where Joseph used to work and Joseph was arrested. Joseph admitted that he knew the appellant. It was the appellant's evidence that the police took Joseph into the front cabin of the police vehicle wherein he stayed for thirty minutes and was later released. The appellant was later escorted to the Maragua Police Station. According to the appellant, PC Charles demanded Kshs. 35,000/= from the appellant to secure his release. When the appellant declined to pay the amount he was charged with the above mentioned offences. He denied committing the offence.
10. Being convinced that the prosecution had proved its case, the trial court convicted the appellant on the count of robbery with violence and sentenced him to death. Aggrieved by the said decision, the appellant filed an appeal in the High Court. Vide a judgment dated 23rd March, 2012 the High Court (Sergon & Wakiaga, JJ.) dismissed the appellant's appeal and confirmed his conviction and sentence. The appellant has now filed this second appeal based on the following grounds:-
- ***The learned Judges of the Superior Court erred in law and in fact by failing to find the evidence presented in the trial court fell below the standard required.***
 - ***The learned Judges of the Superior Court erred in law and in fact by failing to find that the trial court did not warn itself on convicting on the evidence of a single identifying witness.***
 - ***The learned Judges of the Superior Court erred in law and in fact by failing to consider the appellant's defence.***
 - ***The learned Judges of the Superior Court erred in law and in fact by upholding the conviction and sentence based on inconsistent evidence.***
11. Mr. Muhoho, learned counsel for the appellant, submitted that the two lower courts did not consider the appellant's defence. He argued that the appellant's defence was credible; that the appellant had purchased the said motor cycle from one Joseph and had produced a sale agreement in support of the said evidence. According to Mr. Muhoho, the two lower courts did not inquire into this crucial evidence tendered by the appellant. Mr. Muhoho further submitted that the conditions at the material time were not favourable to warrant positive recognition of the appellant as one of the robbers. He argued that the evidence relating to the mobile phone calls allegedly made by the appellant to Peter ought to have been examined by the courts. Mr. Muhoho stated that the evidence of Peter on the events that took place on the material day contradicted the evidence of PC Charles. He urged us to allow the appeal.
12. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal, maintained that the prosecution had proved its case against the appellant. He submitted that the case involved recognition evidence which ruled out the issue of mistaken identity. Peter gave the appellant's name as one of the robbers when he made his initial report to the police. Mr. Kaigai stated that the doctrine of recent possession was applicable in this case since the appellant was found in possession of the motorcycle which Venacio positively identified as belonging to him. He maintained that the appellant's defence was considered and rejected by the two lower courts. Both lower courts made concurrent findings of fact which this Court should not interfere with.
13. This being a 2nd appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Chemangong -vs- R [1984] KLR 611***. In ***Kaingo -***

vs- R (1982) KLR 213 at p. 219 this Court said:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact 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 (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)”

14. Having considered the grounds of appeal, submissions by counsel and the law we are of the considered view that the following issues fall for our determination:-

- ***Was the recognition evidence of a single witness sufficient to warrant the conviction of the appellant?***
- ***Was the appellant's defence properly considered?***
- ***Was the prosecution's evidence full of contradictions?***

15. It is not in dispute that the evidence of recognition was based on the evidence of a single witness, Peter. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. See this Court's decision in John Njoroge Mwangi -vs- Republic- Criminal Appeal No. 55 of 2007. In Abdulla Bim Wendo & Another -vs- Reg (1953) 20 EACA 166, it was held that,

“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult.”

See also Roria -vs- Republic (1967) EA 583 and Ogeto -vs- Republic (2004) 2 KLR 14.

16. Peter gave evidence that on the material day at around 7:00 p.m he went to pick up the appellant at the Full Gospel Church at Maragua; the appellant had called him on his mobile phone to pick him up at the said Church. Peter did not find the appellant at the church and after calling the appellant, the appellant directed him to meet him at the Maragua-Ichagaki junction. Peter and Venacio gave uncontroverted evidence that the appellant was their neighbour and was well known to Peter before the incident; he had on several occasions hired Peter's services. This fact was not disputed by the appellant. Peter gave detailed evidence of what occurred on the material day, from when the appellant hit him with an iron bar, took his motor cycle and the other robbers assaulted him until they thought he was dead. Further, it was Peter's uncontroverted evidence that when he regained consciousness three days after the robbery he informed his father Venacio and the Police that the appellant was one of the robbers who attacked him. He further gave the appellant's name in his initial report. Based on the foregoing we find that the evidence on recognition was free from error and there was no possibility of mistaken identity. In Anjononi & others -vs- Republic (1976-80) 1 KLR 1566, this Court held at page 1568,

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.”

17. It was the appellant's case that he had purchased the said motor cycle from one Joseph Mwangi Wanjiku for Kshs 82,000/= and produced a sale agreement in support of his evidence. We find that the appellant's defence was properly considered by the two lower courts as set out below:-

The trial court expressed itself as follows:-

“The accused's defence is that he had bought the motor cycle on 18th September, 2009 relying on photographs. He produced an agreement duly signed by three people. He further stated that Pastor Habert was present when the motor cycle was delivered on 21st September,2009. It is noteworthy that the prosecution also attempted to investigate the case along the leads given by the accused- PC Odhiambo stated that on the way from Githunguri, they stopped at Kenol Township, but the accused person stated that he could not remember where the alleged seller stayed, promising to contact him later. I find that there is no evidence to support the accused's claim of purchase. There would have been nothing easier than to call the alleged seller, or the three (3) witnesses or at least Pastor Habert who was present when the motor cycle was delivered. The accused's defence is not substantiated. The alleged agreement produced by the prosecutor is suspect and was only a ploy by the accused to hoodwink people that he had purchased the motor cycle. I dismiss the accused's defence.”

The High Court held that,

“ We have also re-considered the appellant's defence. It is the evidence of the appellant that he purchased the motor cycle from one Joseph Mwangi Wanjiku. The appellant was unable to summon the evidence of the seller nor those who witnessed the execution of the agreement. We are of the opinion that the sale agreement was a make up story by the appellant to cover up his tracks. We are satisfied that the trial magistrate rightly dismissed the defence.”

18.We concur with the two lower courts' that the appellant's defence was not credible and did not offer a reasonable explanation of the appellant's possession of the stolen motorcycle. In Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005, this Court held,

“...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, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, 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.”

In this case Venacio produced a log book in respect of the motor cycle to prove ownership of the same and the stolen motorcycle was found in the appellant's possession a few days after the robbery. Therefore, the doctrine of recent possession was applicable in this case and corroborated the recognition evidence.

19.We have perused the record and cannot help but note that there are no contradictions in the prosecution's evidence against the appellant. Therefore this ground has no merit.

20.Having expressed ourselves as above we see no reason to interfere with the concurrent findings of the two lower courts. Accordingly, the appeal has no merit and is dismissed.

Dated and delivered at Nyeri this 21st day of January,2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR