



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO, KIAGE & GATEMBU, J.J.A.)**

**CRIMINAL APPEAL NO. 234 OF 2010**

**BETWEEN**

**BENSON MAXWEL MUIGAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (F. Ochieng' & J. Lesiit, JJ.) dated 20<sup>th</sup> May, 2010*

*in*

*H.C.CR.A. NO. 690 OF 2006)*

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**JUDGMENT OF THE COURT**

1. The appellant, **Benson Maxwell Muigai**, was charged, tried and convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code by the Magistrate's court at Kibera Nairobi. He was sentenced to death. His appeal against conviction and sentence to the High Court was dismissed in a judgment delivered on 20<sup>th</sup> May 2010. He has, in this second appeal, challenged the conviction and the sentence.

**Background**

2. On 10<sup>th</sup> February 2006 at about 9.00 pm, the complainant Chief Inspector Boniface Mwaura (PW1), a Criminal Investigations Department Officer based at the then Provincial Criminal Investigation Department Headquarters in Nairobi alighted from a Matatu at Kawangware Market in Nairobi. He was walking through the market when six men approached him. One of the men ordered him to stop. He complied. He was attacked and hit with a blunt object by one of the men turned assailants. He sustained injuries. He submitted to the assailants and lay down on the ground. His pockets were ransacked. The assailants helped themselves to his mobile cell phone, Nokia 8310 in make, his certificate of appointment, his national identity card, his Kenya Commercial Bank ATM card and cash in the amount of Kshs. 10,000.00. Once relieved of his

- property, the assailants let him go. According to Chief Inspector Boniface Mwaura (PW1) the place where he was attacked, within the market was very “well lit with huge floodlights” that had recently been installed and he could see his assailants clearly.
3. After his release by the assailants, Chief Inspector Boniface Mwaura (PW1) walked to a nearby Administration Police Camp escorted by a watchman. He was at the threshold of the Administration Police Camp when he heard a gunshot from the direction of the place where he had been attacked. Administration Police Officers emerged from the camp and together with Chief Inspector Boniface Mwaura (PW1) rushed to the place where the gunshot came from which was within the vicinity of where he had been robbed. There they found uniformed police officers from Muthangari Police Station. Close by was a dead body of a male person and some distance from that body, Chief Inspector Boniface Mwaura saw the appellant under arrest lying on the ground. He identified the dead man and the appellant as among the persons who had attacked him.
  4. The police officers searched the appellant and recovered from his pocket the personal documents belonging to Chief Inspector Boniface Mwaura (PW1), intact in the small polythene paper in which they were stashed.
  5. Chief Inspector Boniface Mwaura (PW1) subsequently received treatment for the injuries he sustained during the attack at Kenyatta National Hospital where he was admitted that day and discharged on 12<sup>th</sup> February 2006.
  6. Police Constable Jackson Kiprotich Clemoro (PW2) and Police Constable Christopher Sigori (PW3), both based at Muthangari Police Station Nairobi were on patrol in Kawangware, Nairobi on 10<sup>th</sup> February 2006 at about 9.30 pm when they responded to screams behind Kawangware market. They met two men and on challenging them to identify themselves, one of the men drew from his pocket what appeared to be a pistol. The police officers shot one of the men fatally injuring him as the other one tried to escape. Police Constable Christopher Sigori (PW3) chased after the man who tried to escape, the appellant, and arrested him. On being searched by Police Constable Jackson Kiprotich Clemoro (PW2), documents and property belonging to Chief Inspector Boniface Mwaura (PW1), namely police identification card, ATM card, national identity card all bearing the name of Boniface Mwaura (PW1) were recovered from the appellant.
  7. When Dr. Zephaniah (PW5) examined Chief Inspector Boniface Mwaura on 13<sup>th</sup> September 2006 he noted that he had a scar on left parietal skull and on the lower 3<sup>rd</sup> left middle finger and on top of the left. The injuries were over 7 months old. He assessed the degree of injury as harm.
  8. Police Constable Paul Mwangi (PW4) based at Muthangari Police Station the investigating officer charged the appellant and arraigned him before the Magistrate’s court at Kibera Nairobi for the offence of robbery with violence.
  9. In his defence the appellant stated that on 10<sup>th</sup> February 2006 between 8.45 pm and 1.00 am the following morning, he was watching football at a bar in Kawangware. He was on his way home after watching the football match when he met about 8 police officers. He was arrested and detained in the police station for 42 days before being charged with an offence he knew nothing about.
  10. On the evidence, the Magistrate’s court was satisfied that the charges against the appellant were proved beyond any reasonable doubt and accordingly convicted the appellant and sentenced him to death. The appellant’s appeal to the High Court on grounds that he was not positively identified; that his conviction was based on weak circumstantial evidence; that he was detained in the police station for a longer period than permitted by law before being charged and that his constitutional rights were thereby violated, was rejected by the High Court.

### **Submissions by Counsel**

11. In the appeal before us, learned counsel for the appellant Mr. R. O. Odhiambo relied on the appellant’s supplementary memorandum of appeal containing 11 grounds of appeal and submitted that the circumstances prevailing at the scene of crime when the crime was committed were not conducive for positive identification; that the incident took place at 9 pm in the evening and the complainant was allegedly attacked by 6 people and he did not identify the assailants; that in his testimony the complainant stated that he could see the attackers but did not identify them; that he was beaten and was bleeding profusely and in those circumstances the complainant could not identify his attackers; that after the attack the complainant went to seek help and then heard

- gunshots and upon returning, (he did not return where he was where there was but) returned to a different location along a dark corridor way from where he had been attacked; that it is unclear and questionable why the police officer recorded statement one month after the incident; that the things allegedly recovered from appellant were planted on the appellant and it is also questionable why the police officers omitted from their witness statements mention of the things that were recovered from the appellant; that in the course of the trial the appellant applied for the production of the occurrence book to confirm whether the recovered items were listed and that although the occurrence book was produced, it was never scrutinized and the hearing continued without reference to it; that the purpose for calling for the occurrence book was to verify what items were recorded but this was not done and it should therefore be inferred that the production of the occurrence book would have been adverse to the prosecution.
12. Counsel further submitted that the High Court misdirected itself on the question of substitution of the charge sheet and that had it addressed itself properly on this issue, the High Court would have allowed the appeal; that the purpose of amendment was to change the serial number of the mobile telephone and to include a list of recovered items and the High Court therefore failed to properly analyze the evidence.
  13. Finally, counsel submitted that at the close of the trial, the magistrate did not invite the appellant to mitigate. With that Mr. Odhiambo urged us to allow the appeal.
  14. Opposing the appeal, Ms Jacinta Nyamosi, learned Assistant Deputy Public Prosecutor submitted that it is clear from the evidence of the complainant that there was floodlight at the scene of crime and that he saw the people attacking him and identification was therefore positive; that by stating in his evidence that he did not identify the attackers, the complainant must be understood to have meant that he did not know the attackers; that upon arrest of the appellant shortly after the complainant was attacked, the appellant was found in possession of things specific or peculiar to the complainant and therefore identification of the appellant was also supported by the recent possession of the complainant's property; that the allegation that the documents were planted on the appellant has no basis as there is nothing to show any grudge between the appellant and the police officers. Regarding the omission of the items recovered from the witness statements, counsel submitted that it is possible to omit reference to certain aspects in statements.
  15. As regards the occurrence book, counsel for the respondent submitted that it was the appellant who applied for its production and once it was presented, it was the appellant's duty to look at it or scrutinize it and the fact that he said nothing of it leads to the inescapable conclusion that he was satisfied.
  16. Regarding the amendment of the charge sheet to include the model of the mobile phone that was stolen from the complainant and to include other items that had been omitted, counsel submitted that that amendment was not prejudicial.
  17. Finally, counsel for the respondent submitted that the sentence meted out to the appellant is legal and this Court should not therefore interfere with it. For those reasons Miss Nyamosi urged us to dismiss the appeal.

### **Analysis and our decision**

18. The issues for determination as we see them are whether the appellant was positively identified; whether the doctrine of recent possession was applicable; whether the High Court properly reviewed, reevaluated and analyzed the evidence; and whether the charge was proved to the requisite standard of proof.
19. On identification, the need for caution in relying on evidence of a single identifying witness cannot be over emphasized. In **Wamunga vs. Republic (1989) KLR 424** this Court held at page 426:

***“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”***

20. In **Abdulla Bin 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.”***

21. In the present case, the complainant was categorical in his evidence that although he was attacked at about 9.00pm in the night, the place where he was attacked was well lit. The complainant’s testimony in that regard is worth repeating and was as follows:

***“I walked through the market. It was well lit with huge floodlights it had recently been installed... I was within the market directly before the huge floodlights when I saw six (6) men approached me they had sticks and other crude weapons...when I was about four meters away one of them shouted at me ordering me to stop. I could see them clearly but I did not identify any of them”***

22. That evidence was not challenged in cross-examination. We agree with learned counsel for the respondent that when the complainant stated that he could see the assailants clearly *“but I did not identify any of them”*, the statement that he did not identify the assailants must be construed in context to mean that the complainant did not know the assailants and could not therefore recognize them at that point.

23. PW 2 and PW3 arrested the appellant shortly after the complainant’s attack. The complainant was then able, as *“the light was very bright”* to recognize the appellant *“as among the thugs who robbed”* him.

24. We are therefore satisfied that both lower courts were right in holding that the circumstances were conducive for proper identification of the appellant as one of the robbers.

25. The conviction in this case was not based solely on the evidence of identification. There is also the consideration that the complainant’s bank ATM card, his national identity card, his Kenya Police Certificate of Appointment was found in the appellant’s possession so soon after the attack. The appellant offered no explanation how he came to be in possession of those documents. The contention by the appellant that the documents were planted on him was first raised on appeal before the High Court and never put to the police witnesses at the trial. It can only have been an afterthought.

26. The lower courts were right in our view in the application of the doctrine of recent possession. In **Odhiambo v R [2002] 1 KLR 241** this Court stated:

***“It is settled in law, that evidence of recent possession, is circumstantial evidence, which, depending on the facts of each case, may support any charge, however penal.”***

27. In this case, positive identification by the complainant was buttressed by evidence of recent possession. In a matter of minutes after the robbery, the appellant was found in possession of the complainant’s personal identification documents that could only belong to the complainant without any plausible explanation as to how the appellant came into their possession. The inevitable conclusion must be that the appellant was involved in the robbery.

28. In our view, the High Court, as it was duty bound to do, carefully reviewed and analyzed the evidence and came to the right conclusion that the complainant, did with certainty positively identify the appellant as one of his attackers and that the doctrine of recent possession was applicable. We are satisfied that the charge was proved beyond any reasonable doubt.

29. The upshot of the foregoing is that the appellant’s appeal lacks merit. It is dismissed in its entirety.

**DATED and DELIVERED at Nairobi this 7<sup>th</sup> day of February, 2014.**

**W. OUKO**

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***JUDGE OF APPEAL***

***P. O. KIAGE***

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***JUDGE OF APPEAL***

***S. GATEMBU KAIRU***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**

*ewm*