



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: W. KARANJA, G.B.M KARIUKI, KIAGE, JJ.A.

CRIMINAL APPEAL NO. 536 OF 2010

BETWEEN

DAVID MUTUNE NZONGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Machakos (Waweru & Lesiit JJ) dated 9th July, 2010

in

H.C.C.R.A. NO. 25 OF 2008)

JUDGMENT OF THE COURT

This is a second appeal by **David Mutune Nzongo** (appellant) against the conviction and sentence on a charge of robbery with violence contrary to Section 296(2) of the Penal Code, his first appeal having been dismissed by the High Court of Kenya at Machakos (Waweru & Lesiit, JJ).

The appellant was jointly charged with one **Alex Mwendwa Musyimi** (co-accused) before the Senior Resident Magistrate's Court at Mwingi with three counts of robbery with violence contrary to Section 296 (2) of the Penal Code.

In the first count, the two were jointly charged that, on 20th March, 2005 at Mwingi Township, Mwingi Location in Mwingi District within the Eastern Province, they jointly with others not before the court robbed Donald Wambua Muthiani of a mobile phone make Bird, a wrist watch make 'Seiko 5' and cash Kshs. 3,000/= all valued at Kshs. 14,600/= and at or immediately before or immediately after the time for such robbery used actual violence on the said Donald Wambua Muthiani.

On the second count, they were jointly charged that on 20th March, 2005 at Mwingi township Mwingi location in Mwingi district within the Eastern Province, with others not before the court, they robbed Beatrice Munyiva of Kshs. 500/= and a wrist watch valued at Kshs. 700/= and at or immediately

after the time of such robbery used actual violence on the said Beatrice Munyiva.

The particulars of the third count are that on the same day at the same place, they jointly with others not before the court robbed Penina Nduku of a mobile phone make Nokia 2100, one wrist watch and cash of Kshs. 3,000/= all valued at Kshs. 11,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Penina Nduku.

They pleaded not guilty on all the charges and the matter proceeded to hearing but after the testimony of two (2) prosecution witnesses, the original file appears to have been misplaced. The trial court opened a skeleton file and ordered that the matter commence *de novo*. Consequently, the matter commenced *de novo* and proceeded to full hearing with the prosecution calling a total of four (4) witnesses.

The brief facts of the prosecution case are that on 20th March, 2005 at about mid-night, **Donald Wambua Muthiani (PW1)**, a teacher at Kyakituku Primary school at Makueni District, walked out of a bar known as Moonlight Bar, accompanied by two sisters, that is **Beatrice Munyithya Mulwa (PW2)** and **Penina Nduku Mulwa (PW4)**. The two ladies were heading to their house which was in the same direction as Kitongwe Lodge where **PW1** was to spend the night.

PW1 testified that while they were on their way, he was approached by two young men who he identified before the trial court. He said that the appellant asked him for Kshs. 20/= saying he had not eaten since morning but he gave him Kshs. 100/=. As he was giving out the money, the other person rushed towards him while armed with a stone and demanded for more money. The appellant also drew a knife and demanded to be given more money. They both frisked the complainant and robbed him of his mobile phone, make Bird, and a Seiko watch, which he identified in court and cash of Kshs. 3400/=. He testified that there was electricity light illuminating the scene and therefore he saw the appellant and his co-accused clearly. He was able to identify both of them. He told the court that after robbing him, the appellant and his accomplice ordered him to go and not look back, and he complied.

The robbers then went to where **Beatrice** and **Penina** were standing, petrified, as they watched **Pw1** being robbed. According to Beatrice, the appellant's co-accused robbed her of Kshs. 500/= which he removed from her pocket. She further testified that the appellant robbed her of a quartz watch and a hat. **Penina** also confirmed that the co-accused robbed her of a mobile phone, watch, and cash Kshs. 3,000/=. The two ladies confirmed that they were also able to identify the appellant and his co-accused because there were security lights at the scene.

After the incident **Beatrice** and **Penina** reported the incident at the Mwingi police station. Early the following morning, as **IP David Muli (PW3)**, **PC Njogu** and **PC Habwe**, were doing their normal patrol duties within Mwingi town, their curiosity was aroused by the sight of two young men who were sound asleep under a big rock at the side of river Tyaa. They woke them up and a search conducted on them yielded various properties which they took possession of. They arrested the suspects and took them to the police station. Some of those items were later identified by the three complainants as those stolen from them during the robbery.

When placed onto his defence, the appellant gave an unsworn statement in which he denied the charges leveled against him. He said that his uncle had sent him to that spot to meet a particular old man but when he reached there, he found no one. He said that the police officers went to the scene while chasing two young men, who escaped and instead the appellant and co-accused were arrested and taken to Mwingi police station.

The trial court, after considering the evidence adduced found the appellant and the co-accused guilty on the three counts as charged. They were both convicted and sentenced accordingly. Aggrieved by the decision of the trial court, the appellant and his co-accused filed an appeal at the High Court which was principally based on the grounds of a defective charge sheet; contradictions in the evidence; lack of proper evidence of recovery and lack of proper identification. The High Court re-analysed and re-evaluated the evidence tendered before the trial court and concluded that there was insufficient evidence

against the co-accused. The learned Judges found that the evidence on identification by the complainants could not be relied on as the circumstances pertaining to the identification were not clear. They also stated that the three witnesses had not given any descriptions of their assailants to any person in authority and there was no identification parade conducted. The Court also found that the co-accused could not be linked to the stolen properties because the watches recovered from him were not positively identified by the complainants as any of their stolen properties.

Accordingly, the co-appellant's appeal was allowed. However as against the appellant, they concluded that the prosecution case was watertight as he was found in possession of properties positively identified by PW1. The learned Judges thus, dismissed the appeal, affirmed the conviction on the first count only and the death sentence. The said dismissal is what provoked this appeal.

The appellant filed a memorandum of appeal on 3rd September, 2010 that raised the following substantive grounds:-

- 1. That the first appellate Court Judges erred in law by failing to analyse and re-evaluate the trial record and drew their own conclusions as duty bound (sic).**
- 2. That the first appellate Court Judges erred in law by failing to find that the subordinate did not comply adequately with the provision of section 211 of the Criminal Procedure Code adequately. (sic)**
- 3. That the first appellate Court Judges erred in law by failing to find that provision (sic) of section 85 (1) as read with section 88 of the C.P.C were violated in this case.**
- 4. That the first appellate Court Judges erred in law by failing to find that the incredibility of the witnesses was proved as provided in section 163(c) of the Evidence Act.(sic)**
- 5. That the first appellate court Judges erred in law by failing to find that the subordinate did not comply with provision of section 169(2) Criminal Procedure Code.(sic)**
- 6. That the first appellate court Judges erred in law by failing to find that I was not accorded a fair trial. This violated section 77(1) of the New Constitution.**
- 7. That the first appellate court Judges erred in law by failing to adequately consider my defence which is cogent and plausible to displace the prosecution case.”**

The appeal came before us for hearing on 15th January, 2014. Mrs. Rashid, learned counsel for the appellant, relied on the above grounds of appeal. On the first ground she argued that the learned Judges had failed to adequately re-analyse the evidence before the trial court. She contended that despite the issue of plea being canvassed before the learned Judges of High Court, the learned Judges failed to note or determine that there was no plea taken before the trial court. She asserted that because the original record could not be found then the trial court should have reread the charges to the appellant and recorded the same on the skeleton file it used. On the contrary, the magistrate did not indicate on the skeleton file whether or not plea was taken before the proceedings started *de novo* on 26th April, 2007. She argued that although the appellant was represented in the trial Court, it is the duty of the court to uphold the Constitution, all other statutes and to also ensure that justice is done.

Mrs. Rashid also argued that the High Court disregarded all other evidence as to identification and only convicted on the evidence of recent possession. She submitted that it was only the word of one single witness that was relied on as opposed to that of the appellant. She contended that such evidence of a single witness must be subjected to scrutiny. She urged this Court to disregard the list of stolen items in evidence on the record of appeal as the police had not made an inventory of the recovered items. She submitted that the appellant explained in detail how he was arrested and asserted that the items were planted on him. She argued that the learned Judges of the High Court had shifted the burden of proof to the appellant by finding that the appellant's defence was a mere denial. She implored us to allow the

appeal.

Opposing the appeal, Mrs. Murungi Senior Assistant Director of Public Prosecutions, urged that there was overwhelming evidence against the appellant. She submitted that the High Court relied on doctrine of recent possession. Mrs. Murungi contended that the items were recovered from the appellant only a few hours after the robbery and **PW1** had clearly explained how he was able to identify the mobile phone and his watch. He even had the manual for the cell phone in court and testified that he had been in possession of the phone for a long time.

On the issue of a single witness, the senior assistant director of public prosecutions argued that under **Section 143, Evidence Act, Cap 80, Laws of Kenya** no particular number of witnesses is required to prove a case. She contended that the appellant and his co-accused were total strangers to **PW3** and the other police officers who arrested him and, there was no reason for them to frame him as alleged. She submitted that it was the duty of the appellant to explain how he came into possession of the stolen items as required in **Section 119 of the Evidence Act, Cap 80, Laws of Kenya** as the knowledge as to how he had come into possession of the same was exclusively within his knowledge. That did not amount to shifting the onus of proof.

On the issue of plea being taken when the matter started *de novo*, Mrs. Murungi argued that it is not mandatory that a charge be re-read every time a case commences *de-novo*. It was therefore not fatal. She urged us to dismiss the appeal.

This being a 2nd appeal, only matters of law fall for our determination by dint of the provisions of **Section 361 (1) of the Criminal Procedure Code. In view of the aforementioned, the issues arising for the court's determination are:-**

1. *Whether the Court properly re-evaluated the evidence*
2. *Whether a case that begins de novo requires fresh plea*
3. *Burden of proof for doctrine of recent possession; Whether doctrine of recent possession was properly invoked by the two courts below*
4. *Whether the concurrent findings of the Court can be interfered with*

1. Whether the Court re-evaluated the evidence.

It is now trite law that it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld - see **Okeno v. Republic [1972] EA 32**.

In **David Njuguna Wairimu v. Republic [2010] eKLR** this Court reiterated this duty and pronounced itself as hereunder:-

***“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.*”**

From the record it is evident that the learned Judges analysed and re-evaluated the evidence from the subordinate court in-depth. The learned Judges did not just state their re-evaluation but went a step further to analyse the evidence in view of the law and arrived at their own independent conclusions. It is worth noting that it was as a result of such re-evaluation and re-analysis that the appellant's co-appellant was set

free after the learned Judges concluded that his conviction could not be sustained. The learned Judges cannot be faulted on that ground.

However, even where the evaluation has not been found to be in detail this Court has subjected such a failure to the test of whether it has occasioned any failure of justice to the appellants. If failure of justice has not been occasioned to the appellants, then the findings of the court below would stand. In **Alexander Ongasia & 8 others v Republic** [1993] eKLR the Court of Appeal held that:-

“.....it is not enough; indeed there is no need, to loudly announce in the judgment that the evidence has been re-evaluated. Such re-evaluation must be apparent on the face of the record and if that is done, then there is no occasion to announce it.....but it is clear to us that he broadly agreed with the conclusions reached by the trial magistrate and he also found as a fact that the evidence against the appellants was overwhelming. We think he was right in his general conclusions and in the circumstances of this case, his failure to analyze in detail the evidence before the trial court did not occasion any failure of justice to any of the appellants.”

2. Whether a case that begins de novo requires fresh plea?

BLACK’S LAW DICTIONARY, 4th Edition defines trial *de novo* as:

“a new trial or retrial in which the whole case is gone into as if no trial whatsoever had been heard in the court below.”

In **Peter Gachigwa Migwi v. Republic** [2013] eKLR this Court answered the question as to whether a criminal case that starts *de-novo* requires a fresh plea to be taken. The Court held that:

“Where a.....magistrate decides to recommence a trial pursuant to section 200 (1) (b) of the Criminal Procedure Code, the law does not place an obligation on the trial court to have an accused take a plea again. But even if one were to interpret that subsection to imply that upon recommencement of a trial an accused person is required to take a fresh plea, the primordial issue for consideration in this appeal would be whether the appellant was prejudiced by the fact that he did not take a fresh plea. We do not think so. Procedurally, the appellant was exactly in the same position as he was after he took his plea in the previous magistrate’s court.”

The Court has used the test of whether any prejudice was occasioned by the failure to take plea in the case of **David Irungu Murage & Another v. Republic**, Criminal Appeal No. 184 of 2004 at Nakuru, (unreported), where it held that an accused person was not prejudiced when the trial proceeded on the assumption that he had pleaded not guilty. The Court stated:-

“The issue that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of the opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code.”

The purpose of the process of taking plea was elaborated in **J A O v. Republic** [2011] eKLR by this Court held as follows:-

“The requirement under Section 207 of the CPC for calling upon the accused person to plead serves the purpose of determining whether he admits the offence charged, in which case there would be a summary determination of the case, or denies the truth of it in which case a formal trial would be held. If there was no express denial but a refusal to plead, the trial would still proceed as if a plea of not guilty was entered.”

From the record, the appellant was represented by counsel and was given opportunity to participate fully in the trial process. At no stage of the trial was there any indication that the appellant was ready to plead

guilty nor was any complaint raised at all. It is our finding that no prejudice whatsoever was occasioned to the applicant by the failure by the trial court to retake the plea when the matter started *de novo*.

3. The burden of proof in respect of the doctrine of recent possession; whether doctrine of recent possession properly invoked by the two courts below.

There is a rebuttable presumption of fact under **Section 119 of the Evidence Act, Cap 80, Laws Kenya** that the appellant was either the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of suspected stolen items.

In the case of *Francis Kariuki Thuku & 2 others v. Republic [2010] eKLR* this Court held that:-

“Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R. V. Loughin 35 Cr. Appl. 269 by the Lord Chief Justice of England and this Court’s own decision of Samuel Munene Matu V. R. Criminal Appeal No. 108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the MATU case (supra) a period of 20 days was held to be recent. We accordingly uphold the superior court’s view of the law on the point. In this regard we would re-echo the decision of this Court in the case of Hassan -vs- Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-

“Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver.”(Emphasis supplied)

In this case **PW1** identified the *Bird* mobile phone, Exhibit 1, as the one stolen from him on the material night. He produced its manual as exhibit 1(a). Furthermore, he identified the *Seiko* watch, Exhibit 2, as his and explained that he could recognise it because it illuminates at night. **IP Muli (PW3)** testified that when he arrested the appellant, he recovered several watches including that identified by **PW1** from the wrist of the appellant. The appellant was wearing all the five watches. He also testified that he also found the mobile phone which was positively identified as belonging to **PW1** with the appellant. The two courts below made a concurrent finding to the effect that the complainant had identified the recovered items to their satisfaction.

In *George Otieno Dida & Another v. Republic [2011] eKLR* the appellant therein had been found in possession of the stolen goods less than five hours after the robbery and this Court held that:-

“There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies.....In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands.”

The appellant’s case is on all fours with the above case. We find that the appellant was found with the properties robbed from **Pw1** only a few hours after the robbery and he did not offer any explanation as to how he came to be in possession of the stolen items. Therefore the conclusions of the two courts below were correct based on evidence of recent possession. From the foregoing there can be no explanation other than that the appellant was one of the robbers. We have no basis whatsoever for departing from those concurrent findings.

It is important to note that even though the High Court made a finding that the evidence on identification with regard to the appellant and co-accused was not sufficient, the evidence of recent possession alone is

sufficient for the conviction of the appellant. In the case of Douglas Sila Mutuku & 2 others v Republic [2014] eKLR the Court of Appeal held that:

“Although none of the witnesses identified the 3rd appellant, the fact that shortly after the robbery, he was found in possession of some of the items stolen from the victims there is a rebuttable presumption of fact under Section 119 of the Evidence Act, that he was either the robber or a guilty receiver, unless he offers a reasonable explanation as to his possession of those items.”

We agree with Mrs. Murungi that under **Section 143, Evidence Act, Cap 80, Laws of Kenya** no minimum number of witnesses is required to prove a case. Therefore the testimony and evidence of arrest and recovery of items by **IP Muli** cannot be discredited for the reason that he is a single witness.

From the record, it is evident that the High Court noted that the evidence of arrest and recovery of the exhibits was by a single witness and therefore considered it with the necessary circumspection. In doing so the court addressed itself as follows:-

“The appellant and co-accused were total strangers to IP David. He had decided to search the appellants purely as part of routine police work, not because of any prior descriptions he had of any robbery case reported to the police the previous night. We are satisfied that IP David had no reason to falsely implicate the appellants with the items produced as exhibits in support of the prosecution case. We find no reason to disagree with the conclusion arrived at by the trial magistrate that IP David was telling the truth, and that his evidence should be believed. ”

Therefore the evidence of the single witness in this case is sound, credible and reliable.

From the foregoing analysis, it is evident that the judgment of the High Court stands on sound law and proper analysis and evaluation of the evidence before the court. We cannot fault it.

In sum, we find this appeal devoid of merit and dismiss the same and affirm the conviction and sentence against the appellant.

Dated and Delivered at Nairobi this 21st day of March, 2014.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

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