



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA, MARAGA & J. MOHAMMED, JJA)

CRIMINAL APPEAL NO. 318 OF 2012

BETWEEN

JOHN KASYIMI KAKITI .....1<sup>ST</sup> APPELLANT

JOHN MWENDO KATIWA.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the judgment of the High Court of Kenya at Nairobi by the Hon. Dulu and Makhadia J. dated 15<sup>th</sup> June, 2012)*

*In*

*H.C.C.R.A 285 OF 2010*

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JUDGMENT OF THE COURT

1. **JOHN KASYIMI KAKITI** (the 1<sup>st</sup> appellant) and **JOHN MWENDO KATIWA** (the 2<sup>nd</sup> appellant) were jointly charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The first appellant faced an alternative charge of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. They denied those charges but after trial, they were convicted on the main charge and sentenced to death. In a judgment delivered on 15<sup>th</sup> June 2012 in Nairobi HCCRA No. 285 of 2010 the High Court dismissed their appeals thus provoking this one.
2. The facts of the case were fairly simple and straightforward. It was alleged that on 11<sup>th</sup> December 2009, at Katengo Village, Syomunyu sub-location, Kanyangi Location of Kitui District, while armed with pangas and whips, the appellants violently robbed Kataa Munyiilo of one pressure stove and one table cloth both valued at Kshs.2000/=. The alternative charge against the 1<sup>st</sup> appellant alleged that at around 7.30 p.m. on 13<sup>th</sup> December, 2009 at Kavoo Village in Kitui District of Eastern Province, otherwise than in the course of stealing, he dishonestly handled a

pressure stove and table cloth knowing or having reason to believe that the same had been previously stolen from the said Kataa Munyilo. As stated, the appellants pleaded not guilty but after trial before the Senior Resident Magistrate at Kitui, they were both convicted of the main charge of capital robbery and sentenced to death. Their appeal to the High Court having been dismissed, they have preferred a second appeal to this court.

3. In their respective memoranda and supplementary memoranda of appeal, the appellants have listed 8 fairly similar grounds of appeal and challenged their identification/recognition; the application of the doctrine of recent possession; complained that the learned Judges of the High Court failed to properly re-evaluate the evidence; complained that the two courts below shifted the burden of proof to them and ignored their defence; and that the two courts below failed to note that their prosecution was premised on an incomplete record thus resulting into a mistrial.
4. Presenting the appeal for both the appellants before us, their learned counsel Mr. Odhiambo contended that there was no sufficient evidence to support the conviction of either of the appellants. On identification, counsel submitted that although PW1, PW2 and PW7 testified that there was moonlight at the material time and PW1 said there was, in addition, a lamp in his kitchen, none of them gave the intensity of the moonlight or the lamp. He said that failure in respect of a robbery committed at about 8.00 pm was fatal to the prosecution case. Counsel dismissed the High Court's finding that the moonlight was bright as there was no evidence to support it.
5. On recent possession, counsel submitted that there was no evidence that the stolen items were found with the 1<sup>st</sup> appellant. The prosecution witnesses claimed that the stolen items were found in a gunny bag but the same was not produced.
6. On the whole, counsel submitted that had the High Court properly re-evaluated the evidence on record, it would have found that the police relied on the investigation of the case by the area villagers and did nothing themselves and that prosecutor Nyambachae's rank having not been stated, he may very well have not been competent to prosecute part of the prosecution case. On those submissions, counsel urged us to allow this appeal by quashing the appellants' conviction and setting aside the death sentence imposed upon them.
7. For the State, Mr. Monda, Senior Principal Prosecution Counsel, dismissed this appeal as unmeritorious. He submitted that both the appellants were properly identified and the 1<sup>st</sup> appellant did not proffer any explanation as to how he came to be in possession of the stolen items hardly two days after they were stolen. He said there was nothing wrong in ordinary citizens assisting police in the investigation of the case. They were simply keen citizens who wanted to see that justice was done. As regards the rank of Nyambache, counsel submitted that there was no way IP Mwale could have prosecuted the case before a Resident Magistrate and Nyambache, if he was a junior officer, prosecuting the case before a Senior Resident Magistrate. He urged us to dismiss this appeal in its entirety.
8. We would like to start with the issue of the rank of Nyambache, one of the police officers who prosecuted the case giving rise to this appeal. This issue was raised because **Section 85(2)** of the **Criminal Procedure Code** (the CPC) requires all police prosecutors to be of the rank of Inspector of Police or above and this court has previously held that the trial of a case prosecuted by a police officer below that rank is a nullity. See **Roy Richard Elirama v. Republic, Cr. App. No. 67 of 2002 (CA MSA)**.
9. A perusal of the trial court's proceedings shows that all the officers who appeared for the prosecution even during the mentions of the case were Inspectors of Police. At times the trial court recorded their ranks and at others it did not. We agree with Mr. Monda that it is too late in the day to raise the issue for the first time before us as the second appellate court with no opportunity for the State to ascertain Nyambache's rank. At any rate, Nyambache may very well have been of the rank of Inspector of Police or above. The defence counsel wants this court to

speculate simply because Nyambache's rank is not stated anywhere in the proceedings. We agree with Mr. Monda that if Nyambache was a junior police officer, he could not have been a prosecutor before a Senior Resident Magistrate while IP Mwale was prosecuting before a Resident Magistrate. In the circumstances we dismiss that ground of appeal.

10. The major ground in this appeal is the one of identification. The appellants alleged that they were not properly identified or recognized. We agree with their counsel that basing a conviction solely on the evidence of visual identification can easily cause a miscarriage of justice as witnesses have been mistaken even in the identification of their relatives or close friends--**Kiarie Vs Republic [1984] KLR 739**. It is for this reason that this Court further held in the said case of **Kiarie Vs Republic [1984] KLR 739** that for a conviction resting entirely on the evidence of visual identification to be upheld, that evidence must be watertight. It must be shown that conditions at the scene including lighting and the time taken in the commission of the crime were favourable for a positive identification-- **Ogeto-Vs-Republic, [2004] 2 KLR 14**. This requirement is, however, relaxed when dealing with the case of recognition. This is because "*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other*"- **Anjononi & Others Vs R. [1980] KLR 59**.
11. In this case PW1, PW2 and PW7 knew John Mwendo Katiwa well. He had worked for their relative for about three months. At the material time, that is, on 11<sup>th</sup> December 2009 at about 8.00 pm, PW1, who was in her house with her grandchildren including PW7, heard a knock at her door. PW7 opened and with the aid of moonlight saw three people. They pushed her into the house where there was a lamp on a table. They took the lamp and moved around with it in the house for about 20 minutes as they ransacked it for prized old items like stoves and old padlocks. PW1 and PW7 recognized the 2<sup>nd</sup> appellant as he had worked for PW1's daughter.
12. In the course of the robbery PW7 slipped out and screamed for help. Neighbours including PW2 came out of their houses and saw the robbers running away from PW1's house. They chased them and arrested the 2<sup>nd</sup> appellant who had a *panga*.
13. The 2<sup>nd</sup> appellant gave the name and direction to the home of the 1<sup>st</sup> appellant. The following day PW2, PW3 and other neighbours went to the 1<sup>st</sup> appellant's home. They found he had gone to his *shamba* and they followed him there. Upon hearing their approach, the 1<sup>st</sup> appellant left his hoe in his *shamba* and hid in a nearby bush. As it had rained PW2, PW3 and others followed the 1<sup>st</sup> appellant's footprints to his hideout. They arrested him and took him to his house where they recovered the PW1's stove and tablecloth.
14. In this scenario, we are satisfied PW1 and PW7 were able to recognize the 2<sup>nd</sup> appellant whom they had known and stayed with in the same home for about 3 months. PW7 even said she recognized the 2<sup>nd</sup> appellant's voice. Although the intensity of the lamplight was not stated, PW1 said the robbers carried the lamp as they ransacked her house for valuables for about 20 minutes. Holding the lamp as they moved around in the house well illuminated the robbers' faces for a positive identification.
15. The moonlight may or may not have been bright enough for a positive facial identification but it enabled PW2 and other neighbours to see the figures of people running from PW1's house. They chased without losing sight of them and arrested the 2<sup>nd</sup> appellant with a *panga* about 400 metres away. In the circumstances we are satisfied that there was no mistake in the identification and arrest of the 2<sup>nd</sup> appellant.
16. On hearing the approach of PW2, PW3 and other neighbours, the 1<sup>st</sup> appellant left his hoe in his *shamba* and hid in a nearby bush. That act of hiding alone gave him away. That is not all, upon arrest, he was taken to his house where a stove and a table cloth, which PW1 had been robbed of

the previous night, were found. Even if we were to doubt PW1 and PW7's identification of the 1<sup>st</sup> appellant, which we do not given the proximity of the lamp from the robbers' faces and the 20 minutes the robbery took, this evidence of recent possession of stolen items sealed the fate of the 1<sup>st</sup> appellant.

17. On the above analysis, we are satisfied that the identification and recognition of the appellants as two of the three people who robbed PW1 of a stove and a table cloth cannot be faulted. The ground of identification therefore fails.

18. Having carefully read the judgments of the two courts below, we find no merit in the appellants' claim that there was no proper evaluation or re-evaluation of the evidence on record. The two courts below evaluated and re-evaluated the evidence on record in more or less the same way we have done. They also considered the appellants' defences and found them wanting. In the circumstances we find that these appeals have no merit and we accordingly dismiss them.

**DATED and delivered at Nairobi this 30<sup>th</sup> day of May, 2014.**

**P. KIHARA KARIUKI**

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**PRESIDENT OF COURT OF APPEAL**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

**DEPUTY REGISTRAR**