



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWILU, KIAGE & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 144 OF 2008

BETWEEN

SIMON KINGORI KARIBU.....APPELLANT

AND

REPUBLICRESPONDENT

**(An appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang & Warsame, JJ)
dated 24th September, 2008**

in

H.C.CR A. No. 747 of 2007)

JUDGMENT OF THE COURT

Introduction

The appellant jointly with two others, faced the charge of robbery with violence contrary to **Section 296(2) of the Penal Code** in the Chief Magistrate's Court at Kiambu. The particulars of the offence were that on the 31st day of May, 2007 at Muchatha village in Kiambu District, the appellant in the company of two others, while armed with dangerous weapons namely knives, jointly robbed **JANET MWIHAKI NJOROGE** of a handbag, one purse, one mobile phone make Nokia 1600, a bunch of keys, two sim cards and KShs.5000/- in cash all valued at KShs.11,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Janet Mwihaki Njoroge. The appellant and his co-accused were also charged with an alternative charge of handling stolen goods contrary to **Section 322 (2) of the Penal Code**. The particulars of the offence were that on the 1st day of June, 2007 at Muchatha village in Kiambu District Central Province otherwise than in the course of stealing they dishonestly handled one mobile phone make Nokia 1600 knowing or having reason to believe it to be stolen goods.

The trial court convicted and sentenced the appellant to death. The two co-accused were acquitted of the first charge under **Section 215 of the Criminal Procedure Code**. They were, however, convicted of the alternative charge and sentenced to two years imprisonment.

Dissatisfied with his conviction and sentence, the appellant preferred a first appeal before the High Court, (Ojwang & Warsame, JJ [as they then were]). The learned Judges considered the appeal and by a judgment delivered on 24th September, 2008, dismissed it, provoking this appeal.

The appellant's grievances, from his memorandum of appeal and supplementary memorandum of appeal, can be summarized as follows:

- i. The learned judges failed to re-analyse and re-evaluate the evidence.
- ii. The prosecution case was not proved beyond reasonable doubt.
- iii. The requisite ingredients of a charge of robbery with violence were not present.
- iv. Due consideration was not given to the defence.
- v. The conviction based on identification was erroneous.

Submissions by counsel

At the hearing of the appeal, learned counsel Elvis Obok represented the appellant, while the State was represented by learned Assistant Director of Public Prosecution (ADPP), Miss Mary C. Oundo.

Relying on the supplementary grounds of appeal, Mr Obok submitted that PW1 testified that she knew the appellant but there was no evidence that she was able to recognize his voice; that the trial court relied exclusively on the fact that there was sufficient lighting at 8pm; further that there was no other witness and the circumstances prevailing were not right for recognition or identification.

It was Mr Obok's further submission that the trial magistrate and the learned Judges failed to address the issue of the discrepancy in the OB and that there was no inventory of the items recovered. On the issue of the weapon used to attack PW1, counsel submitted that a knife was not recovered from the appellant's house.

Miss Oundo opposed the appeal and supported the conviction and sentence meted out against the appellant. She submitted that this appeal turns on recognition and recent possession of stolen items; that evidence of identification by recognition is more satisfactory, more assuring and more reliable than identification of a stranger; that PW1 and PW3 testified that they knew the appellant and led police officers to his house where the stolen items were recovered; that the appellant did not explain how he came into possession of recently stolen goods.

Regarding the appellant's counsel's contention that there was no violence used during the offence, Miss Oundo submitted that other ingredients of the offence of robbery with violence were present and the offence was, therefore, proved. Counsel urged us to dismiss the appeal.

Analysis and determination

We have considered the record, the submissions by learned counsel and the law.

As a second appellate court, our jurisdiction is limited by *Section 361 (1) of the Criminal Procedure Code* to hearing appeals on matters of law. This Court reiterated this position in *NJOROGE V R, (1982) KLR 388 at 389* as follows:

"... on this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence." See *M'Riungu v R, (1983) KLR 455*.

Having duly considered the record and the facts of this appeal, we are unable to find that the conviction of the appellant was based on no evidence. We, therefore, pay homage to the concurrent findings of fact by the two courts below and will only consider the questions of law raised in the appeal.

This appeal turns on the issues of identification and recent possession and it is, therefore, imperative that

we consider the evidence adduced.

Janet Mwhaki Njeri, [PW1], testified that she was coming from work and on arrival at her gate was accosted by an assailant who hit her on the neck and as a result she fell to the ground. The attacker was holding a knife and after hitting her on the neck, he snatched her handbag, one purse, one mobile phone make Nokia 1600, a bunch of keys, two sim cards and cash KShs.5000/-.

She testified that she knew the appellant and that she was able to recognize him from the light of the electric bulb at her gate. She knew the appellant as Kingori who was her immediate neighbour but she did not call out his name for fear of reprisal. There were two other people standing with the appellant at the time of the attack but they did not attack her and she was not able to identify them. She went to her neighbour's house who escorted her to her home where she told her husband that she was attacked and robbed by the appellant. PW1's husband reported the incident to Karuri Police Station and police officers arrived at the scene at about 5am the following morning. The officers were directed to the appellant's house, where the appellant was arrested and a mobile phone belonging to PW1 was recovered from him. The appellant directed the police officers to his accomplices' house where other stolen items were recovered.

PC Cyrus Omondi (PW2), testified that after answering a call of distress from PW1's husband, he and the other police officers rushed to the house where the appellant was sleeping. Upon conducting a search, a Nokia mobile phone belonging to PW1 was recovered from the right pocket of the appellant's trouser. A sum of KShs.2,000/= was recovered hidden under his mattress. Upon further interrogation the appellant volunteered to show PW2 and the other police officers the persons who were in possession of the other items that were stolen from PW1 including a booklet inscribed with PW1's name.

Joseph Njoroge Kamau (PW3) (PW1's husband), testified that he was informed by his wife, PW1, that she was robbed by the appellant of items and money as listed in the charge sheet. He telephoned Karuri Police Station and reported the incident. Police officers went to the scene and were directed to the appellant's house. The appellant was arrested and PW3 was informed that the stolen items had been recovered from the appellant and his co-accused.

PC Francis Njuguna's (PW4) evidence fortified PW2's evidence that after they received a report from PW3, they went to the appellant's house where the appellant was arrested and upon conducting a search, a mobile phone belonging to PW1 was recovered from the appellant.

The learned Judges of the High Court conducted a thorough and exhaustive re-appraisal and assessment of the evidence as a whole, consistent with their duty as spelt out in a long list of authorities including **OKENO V R, [1972] EA 32.**

Regarding the identification of the appellant, the High Court stated:

"It is clear from the evidence of PW1 that she was able to recognize the appellant with the help of security light at the gate of her house. In her evidence, she stated that the appellant was her neighbor and that she gave the names of the appellant to her husband PW3 who subsequently reported the incident to the police officers PW2 and PW4. With the information given by PW1 and PW3, police officers from Karuri police station were able to arrest the appellant and recover some of the stolen items from him the following morning of the incident.

The learned trial magistrate correctly analysed all the evidence in detail and came to the firm conclusion that the recognition of the appellant by PW1 and the recovery of the stolen items was compelling, leaving the trial court in no doubt of the involvement of the appellant in the robbery

It is a well settled principle that evidence of visual identification in criminal cases must be carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence

on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. In WAMUNGA V R, (1989) KLR 424, this Court held:

"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"

In ABDULLA BIN WENDO & ANOTHER V REG, (1953) 20 EACA 166, the predecessor of this Court held that:

"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 v R, (1967) EA 583 and Ogeto v R, (2004) 2 KLR 14.

The evidence on recognition of the appellant was given by PW1 and in her testimony, she stated as follows:

"On 31st day of May, 2008 at 8:00pm I was coming from work. On arrival at my gate somebody accosted me, hit me by the neck and felled me down (sic). The man was holding a knife. He started snatching by (sic) handbag. I identified him because he was not masked and the gate security lights were on. I knew him as Kingori but I did not call out his name for fear of reprisal. The lighting was electrical and bright. Kingori is a person I knew. He was a neighbour. There were other two people standing by but I did not identify them." [Emphasis supplied]

In cross-examination, PW1 testified that the gate lights were on and she was, therefore, able to see the appellant whom she knew as Kingori. The honourable Judges in evaluating the evidence on recognition expressed themselves as follows:

"In the instant case we think the trial court analyzed the evidence of each of the prosecution witnesses. She was certainly alive to the fact that the prosecution case was dependent on the recognition of the appellant by PW1 and the fact that few hours after the robbery a mobile phone stolen from her was recovered from him. We think the trial court considered the circumstances obtaining to the night of the robbery and analyzed all the facts properly to dispel or discount the possibility of mistaken identity. On our part we find that there can never be any explanation on how the appellant came to have items stolen from PW1 in his possession, taking into account the short span of time between the time of the incident and the time when the appellant was arrested with the mobile phone belonging to PW1, other than that he was the thief and/or he had knowledge that it was unlawfully obtained ... it is clear that the appellant was convicted because he was properly recognized by PW1 as one of the attackers. PW1 immediately shared the information on the identity of her attacker with her husband (PW3). PW3 then relayed that information to PW2 and PW4 who arrested the appellant. Upon arrest, a quick search was conducted and a mobile phone earlier stolen from PW1 was found on the appellant"

Guided by the findings in the case of ANJONONI & OTHERS V R, (197680) 1 KLR 1566, where 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."

we have considered the honourable Judges' re-evaluation of the evidence of recognition as adduced by PW1. PW1 testified that she knew the appellant by virtue of being his neighbour and was able to recognize him as the gate security lights were on, and that he was not wearing any mask and he did not dispute knowing PW1. We are satisfied that the evidence of identification by recognition was free from error.

On the question of recent possession, in the case of **OGEMBO V R,[2003] EA** it was held that:

"For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen."

Further, in the case of **MALINGI V R, [1989] 225** this Court stated:-

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts; that the item he had in his possession has been stolen, it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items." (Emphasis added).

See also **ISAAC NGANGA KAHIGA ALIAS PETER NGANGA KAHIGA, CR.A No. 82 OF 2004 (unreported)**.

The doctrine of recent possession is a rebuttable presumption of fact. Accordingly, the appellant is called upon to offer an explanation in rebuttal, which if he fails to do, an inference is drawn, that he either stole or was a guilty receiver.

As was aptly stated in the case of **HASSAN V R, (2005) 2 KLR 151:**

"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 the receiver".

In the instant appeal, PW3's evidence corroborated that of PW1; the appellant was found in possession of stolen items a few hours after the robbery and the appellant took the police to where other stolen items were. The appellant did not give any or any reasonably credible explanation of how he came into possession of stolen items a few hours after the robbery. Accordingly, we find that in the circumstances of this appeal, the doctrine of recent possession was applicable and fortified the evidence of identification by recognition.

On the issue that the ingredients of the offence of robbery with violence were not present in view of the fact that no violence against PW1 was proved, this Court in the case of **NICHOLAS OUMA OBONYO V R, CR. NO. 47 OF 2006**

(Bosire, O'Kubasu & Deverell, JJ.A.) reiterated the following ingredients of a charge of robbery with violence:

"We think it would be appropriate to say a little bit more about the charge of robbery with violence contrary to section 296(2) of the Penal Code. We can do no better than cite what this Court has already said in its decision in JOHANA NDUNGU v. REPUBLIC, Criminal appeal No. 116 of 1995 (unreported) in which it was stated, inter alia:

In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredients of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or after to further in any manner the act of stealing.

Thereafter the existence of the afore-described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute that offence under the sub-section:

- (1) If the offender is armed with any dangerous or offensive weapon or instrument, or**
- (2) If he is in company with one or more other person or persons, or**
- (3) If at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence too any person " [Emphasis supplied]**

The use of the word "**or**" implies that the ingredients are to be read disjunctively, not conjunctively. Thus, if any of the three conditions is fulfilled, then the offence would be said to have been committed. Accordingly, proof of any one of the above ingredients is sufficient to establish an offence under **Section 296 of the Penal Code**.

In the circumstances of this case, we find that the ingredients of the offence of robbery with violence were present and proved.

The learned Judges of the High Court cannot, therefore, be faulted for finding as they did. We are satisfied that the appellant was convicted on sound evidence and the case against him was proved beyond any reasonable doubt. In the result, we find that the appellant's appeal has no merit and we accordingly dismiss it in its entirety.

Dated and delivered at Nairobi this 14th day of November, 2014.

P. M. MWILU

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR