



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CRIMINAL APPEAL NO. 656 OF 2010

BETWEEN

JOSEPH GICHUKI GITONGA

alias Smoky Joe APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 30th January, 2009

in

H.C.CR. A NO. 3 OF 2007)

JUDGMENT OF THE COURT

1. **Joseph Gichuki Gitonga**, the appellant herein was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**, Chapter 63 of the Laws of Kenya, in the Senior Resident Magistrate's Court at Nanyuki. The particulars of the offence were that on 20th May, 2006 along Sportsman Arm Hotel at the Nanyuki show ground in Lakiapia District within the then Rift Valley Province while armed with weapons namely daggers and knives, the appellant jointly with others not before the court robbed Scott Davis of a wrist watch make 'Ben Swieman' valued at 150 sterling pounds and at or immediately before or immediately after the time of such robbery used actual violence to the said Scott Davis.
2. The prosecution called a total of three witnesses in support of its case. It was the prosecution's case that on 20th May, 2006 at around 11: 00 p.m. PW1, Scott Davis (Scott), a British army officer, was heading to the British Army's camp at the Nanyuki show ground in the company of a lady known as Becky and other army officers. Scott and Becky were walking behind the army officers. The appellant and two other men approached Scott and Becky near the Sportman Arm Hotel. The appellant who was known to Scott started asking Scott for money and the two men the appellant was with held Scott by his wrists. The appellant started searching Scott's pockets and took Scott's wrist watch. Thereafter, the robbers ran away. Scott maintained that he recognized one of the robbers as the appellant who he had known before the incident. Scott testified that he

- had met the appellant who had introduced himself as Smoky Joe on numerous occasions at the curio shop at the Nanyuki show ground. He maintained that he used to speak with the appellant almost on a daily basis. Scort was able to recognize the appellant using the security lights from the Sportman Arm hotel which were very bright. He reported the incident at the Nanyuki police station and indicated that he had recognized one of the robbers as Smoky Joe.
3. After carrying out investigations, PW2, PC David Gitahi (PC David), learnt that the said Smoky Joe was the appellant, a son of a Councillor of Likii Ward. Following information given to him by an informer, PC David arrested the appellant in Nanyuki town. After he informed the appellant that Scort was not interested in pursuing criminal proceedings and that he only wanted his wrist watch back, the appellant led him to PW3, George Mwangi Kakwai (George), who had the wrist watch. George testified that on the material day at around midnight while he was in his Kiosk, the appellant in the company of two other young men approached him and offered to sell to him a wrist watch they had been given by a white man. George bought the wrist watch for Kshs. 600/=.
 4. Scort identified the wrist watch as the one that was stolen on 20th May, 2006.
 4. The appellant chose not to tender any evidence in his defence. The trial court being convinced that the prosecution had proved its case, convicted and sentenced the appellant to death. Aggrieved with the decision of the trial court, the appellant appealed to the High Court. The High Court (Kasango & Makhandia, JJ.), in the judgment dated 30th January, 2009 upheld the conviction and confirmed the sentence issued by the trial court. The appellant has filed this current appeal based on the following summarised grounds:
 - *The learned judges failed to consider that the offence of robbery with violence had not been proved to the required standard by the prosecution.*
 - *The learned judges erred in failing to consider that the appellant's conviction was based on the evidence of a single identifying witness. The prosecution failed to call vital witnesses who were present during incident to corroborate the evidence of recognition.*
 5. At the hearing of this appeal, Mr. Gichuhi Mwangi, learned Counsel for the appellant, submitted that the appellant was not properly recognized by Scort. He stated that it was the prosecution's case that during the robbery Scort was in the company of a lady known as Becky and other soldiers, yet the said people were never called to testify as witnesses. He further stated that Scort never gave the description of how the appellant was dressed during the robbery. According to Mr. Mwangi, the appellant's conviction was wrongly based on the evidence of a single identifying witness.
 6. Mr. Mwangi further submitted that the evidence which was tendered at the trial court did not disclose an offence of robbery with violence. He maintained that there was no evidence that the offensive weapons listed in the charge sheet were in the possession of the appellant or the other robbers during the robbery. He urged this Court to allow the appeal.
 7. Mr. J. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal submitted that Scort was able to recognize the appellant as one of the robbers. He maintained that the light from the security lights was adequate to warrant proper recognition of the appellant who was known to Scort. He further maintained that there was no requirement in law that a specific number of witnesses must testify to prove a certain fact. Therefore, Scort's evidence on recognition was sufficient to warrant the appellant's conviction.
 8. While admitting that there was no violence used against Scort during the robbery, Mr. Kaigai maintained that the appellant was in the company of two other men who held Scort by his wrists. According to him the holding of Scort by the robbers amounted to restraint which was an ingredient of robbery with violence
 9. Mr. Kaigai, finally submitted that it was the appellant that led the police to the recovery of the stolen wrist watch. This clearly pointed to the appellant's guilt.
 10. This being a second appeal and by dint of **Section 361(1)** of the **Criminal Procedure Code**, Chapter 75, laws of Kenya, this Court's jurisdiction is limited to matters of law only. In **Chemagong vs. Republic (1984) KLR 213** at page 219 this Court held,

' A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 s/o Karanja vs. Republic 17 EACA146)

11. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not 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 vs. Republic (1989) KLR 424, this Court held,

' ... 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.'

12. After taking into account the requisite caution in respect of the evidence of a single identifying witness, both lower courts concluded that the evidence of recognition was sufficient to sustain the appellant's conviction. The trial court in its judgment held,

' On recognition, the complainant testified he knew the accused very well before the date of the offence. He told the court that the accused went close to him. The offence took place near Sportman Arm hotel. The complainant said there was security bulb that was near them. He recognized accused as Smoky Joe and he immediately reported to the police he was robbed by three men and Smoky Joe was among those men.'

The High Court in its judgment held,

' The appellant was well known to him because he used to see him at the show ground at the curio shop. He used to speak to the appellant on almost daily basis. He recognized him because of the security light at the hotel were on. The incident occurred close to the hotel near security bulb. He was able to recognize him because of their close proximity.'

13. Scort in his initial report informed the police he had recognized the appellant who he knew as Smoky Joe as one of the robbers. Further Scort gave evidence that he knew the appellant very well because he used to meet the appellant at the curio shop at the Nanyuki show ground and he to talk to him almost on a daily basis. This evidence was uncontroverted. We find that the evidence on recognition was proper and safe. 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.'

14. We further find that the evidence tendered by Scort concerning the incident was sufficient and there was no need for the prosecution to call Becky and the other officers who were present during the incident. More so because Scort's evidence on recognition was corroborated by the fact that the appellant after his arrest led PC David to George who had possession of the wrist watch; which the appellant had sold to him on the material day at around midnight. **Section 143** of the **Evidence Act**, Chapter 80, Laws of Kenya provides,

'No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact

In Julius Kalewa Mutunga -vs- Republic- Criminal Appeal No. 31 of 2005, this

Court held,

'..As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive..'

15. The information on the charge sheet indicates that the appellant and others not before the court were armed with offensive weapons namely daggers and knives. No evidence was produced to prove that knives or daggers were used during the offence. The complainant did not testify as to the presence of any offensive weapon. We believe that the alleged possession of the offensive weapons is what formed the basis of the charge of robbery with violence. We cannot help but note that Scott testified that the robbers were not armed with any offensive weapons. We disagree with Mr. Kaigai that the holding of Mr. Scott's wrists by the robbers should be construed to mean violence and that the use of violence should be interpreted to include holding. We find that the evidence adduced by the prosecution did not prove the offence of robbery with violence. We find that the facts of the case disclosed an offence of robbery under **section 295** of the **Penal Code** which provides,

'Any person who steals anything, and, at or immediately

before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.'

16. The totality of the above is that we allow the appeal against conviction for the offence of robbery with violence and set aside the death sentence meted to the appellant. We substitute in its place a conviction for the offence of robbery under **section 295** of the **Penal Code**. The appellant is sentenced to serve imprisonment for a period of 7 years effective from the date of sentence by the trial magistrate's court.

Dated and delivered in Nyeri this 20th day of June, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR