



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 163 OF 2010

BETWEEN

SAMUEL OCHIENG MIGAI .....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Kisii (Musinga & Makhandia, JJ.A)  
dated 23<sup>rd</sup> April, 2010*

in

H.C.CR.A. NO. 37 OF 2009)

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JUDGMENT OF THE COURT

The appellant in this appeal **Samuel Ochieng Migai** was charged before the Senior Resident Magistrate's Court at Homa Bay with three counts of robbery with violence contrary **Section 296 (2)** of the Penal Code and one alternative count of handling stolen goods contrary to **Section 322 (2)** of the Penal Code. The particulars of the robbery charges were the same in respect of the date of such robbery and of the robbers being armed with dangerous weapons namely pistols and knives and that at or immediately before or immediately after the time of such robbery they threatened to use actual violence upon their various victims. In the first count the complainant was **Peter Kimeu** and he was robbed of cash Kshs.21,000/=, whereas in the second count **Samuel Mwita** was robbed of one mobile phone Nokia 62220 valued at Kshs.6,500/=. In the third count, the victim was **Jared Mboya** who was robbed of one jacket and identity card both valued at Kshs.500/=. The alternative count alleged that on 3<sup>rd</sup> day of September, 2008 at Arujo Sub-location in Homa Bay District within Nyanza Province, otherwise than in the course of stealing the appellant dishonestly retained one jacket knowing or having reasons to believe it to be stolen goods.

The appellant pleaded not guilty to all the charges but after full hearing in which the prosecution called four witnesses and he gave a sworn statement, the learned Senior Resident Magistrate (C.A.S Mutai) in a judgment dated and delivered on 20<sup>th</sup> February, 2009 found him guilty of all the three robbery with violence offences, convicted him and sentenced him to death without making it specific as to whether that sentence applied to each count or was an omnibus sentence covering all the three counts. The alternative

charge was dismissed.

The appellant felt dissatisfied with that conviction and sentence. He appealed to the High Court at Kisii vide **Criminal Appeal No. 37 of 2009**. Musinga and Asike Makhandia, JJ. heard that appeal and in a judgment dated and delivered on 25<sup>th</sup> April, 2010 dismissed it but ordered that the appellant would only suffer death in respect of the first count whereas the sentences of death in respect of the second and third counts be held in abeyance. In coming to this conclusion the learned Judges; after what appears to us admirable analysis of the evidence afresh and detailed consideration of the legal principles involved stated as follows:-

*“Under all the circumstances, we are satisfied that the evidence of recent possession was strong enough and could, even on its own, support the conviction against the appellant. However, that evidence did not stand alone. There was evidence of identification of the appellant by PW1, 2, 3 and 4. Upon review of the entire case and points canvassed before us, we are satisfied that the appellant was convicted upon overwhelming evidence and we find no merit in the appeal. We uphold the conviction and we order the appeal dismissed in its entirety.*

*However on sentence, we wish to correct the procedural mistake committed by the trial court. The appellant shall only suffer death in respect of count 1. The sentence of death in respect of counts 2 and 3 is otherwise held in abeyance.”*

The appellant still felt dissatisfied and hence this appeal premised on four grounds filed by his firm of advocates. These are: -

*“1. That the High Court Judges erred in law and fact by failing to find that the proof presented in the trial court was not beyond reasonable doubt.*

*2. That being the first appellate court, the High Court Judges erred in law and fact by failing to subject the entire evidence rendered in the trial court to a fresh evaluation and assessment so as to reach their own conclusion as to the guilt of the appellant and hence arriving at a wrong conclusion.*

*3. That the High Court Judges erred in law and fact in failing to find that the appellant was not correctly identified by the complainants.*

*4. That High Court Judges erred in law and fact in failing to find that in the circumstances death sentence meted out against the accused person (sic) was not proportional to the offence allegedly committed and that death penalty is not only the sentence that can be meted in the circumstances.”*

In urging the above grounds, Mr. Abande, the learned counsel for the appellant addressed us at length submitting that it was not proper in law for police to present the appellant, together with a jacket and a knife found in that jacket to the complainants without first organizing a properly conducted identification parade where the complainants would identify the appellant if they were indeed able to identify him before he could be charged. He also submitted that the evidence as to the recovery of the jacket allegedly recently stolen from the complainants was contradictory and that no court of law should have relied on it to found a conviction. He also stated that as no member of the public was called, the evidence was not sufficient to warrant a conviction. As to sentence, Mr. Abande submitted that the offence that was allegedly committed did not warrant death sentence and referred us to the now well known case of **Godfrey Ngotho Mutiso vs. Republic (2010) e KLR.**

Mr. Kiprop, the learned Prosecuting Counsel, on the other hand was of the view that the appellant was positively identified by the first, second and third witnesses, all being complainants and further he was found with a recently stolen property namely a jacket which belonged to the third complainant, the possession of which he could not explain in his defence and added that whether he was wearing it or not,

there was evidence that he was found in possession of it only a short time after the third complainant was robbed of it. On sentence, Mr. Kiprop submitted that *Ngotho's* case (supra) did not outlaw death sentence and the present Constitution also does not outlaw death sentence. In his mind, this was a suitable case for the sentence meted out to the appellant.

We will consider the judgment of the trial court, that of the High Court, the issues raised in the appeal, the able submissions by both learned counsel and the law, but first the brief facts forming the genesis of all the above.

These are straight forward. **Peter Kimeu Kilonzo** (PW1) (Peter), **Samuel Sasi Mwita** (PW2) (Samuel) and **Jared Mboya Nyachenga** (PW3) (Jared) were all employees of Mini Bakeries based in Kisii. They were salesman, driver and turnboy respectively. On 3<sup>rd</sup> September, 2008, they went to their employer's factory in Kisii at about 3.00 a.m. and were assigned to go to Mbita travelling in a Canter registration no. KAV 267Z. They had no problem on their way to Mbita although the road was rough. However, on the return journey, as the road was not good they were going at a slow speed. When they reached a place known as Kodiera at about 1.00 p.m., a person appeared on the right side of the vehicle holding a gun. That person pointed the gun at the driver and ordered him to stop and alight from the vehicle. Other thugs appeared from both sides of the vehicle with *pangas* and what appeared like guns. Peter was slapped with a *panga* and ordered to lie down and give out money. He gave them Kshs.19,905/=. Samuel and Jared were tied and placed behind the vehicle in the luggage cabin. They took Samuel's phone Nokia 6020. Later Peter was also placed in the boot. Jared's jacket and identity card were stolen. The attackers took control of the vehicle and drove it to the bush with the three i.e Peter, Samuel and Jared in the vehicle and they abandoned the vehicle together with the occupants there. It is not certain as to who contacted the police on the matter as Peter said in evidence that some driver of another vehicle telephoned the police but **Inspector Peter Mwangangi** (PW4) (Mwangangi) merely said the police received information on the same day at 1.30 p.m. and reacted on it immediately. He in company of **IP. Muhia, IP. Kadia** and **PC. Mwangi** rushed to the scene and upon arrival received another information that the vehicle was abandoned one (1) kilometer off Mbita Road. They proceeded to where the vehicle was, guided by members of the public; found the vehicle with Peter, Samuel and Jared inside the boot which was locked from outside. They opened the boot and released the three. The police then continued with their search along Arujo River guided by members of the public. One person was cornered by members of the public and that person was according to Mwangangi wearing a maroon jacket. They arrested him and upon searching the jacket they found a small knife in one of the pockets of the jacket. Each of the three complainants identified the appellant as a member of the gang that had robbed them and each identified the jacket as that of Jared which was one of the items Jared was robbed of. The appellant was taken to police and subsequently charged as stated above. In his defence at his trial, given on oath, the appellant stated that on the relevant day and time he had come from Sakwa where his in-laws live. He had left Sakwa at 1.30 p.m. and at 4.45 p.m., he was arrested at Kabunde Junction as he was heading towards Homa Bay District Hospital where his father was hospitalised. He did not know why he was arrested and he did not know the people who arrested him. He denied the charge. In cross-examination, he said he was arrested at 4.05 p.m. and was arrested by police in civilian clothes. They removed his Kshs.150/= and asked him if he had seen people running away and he said no jacket was removed from him and he did not know about the knife allegedly recovered from one of the pockets of that jacket.

This is a second appeal and by dint of the provisions of **Section 361 (1)** of the Criminal Procedure Code, only matters of law fall for our discussion, unless it is shown that the first appellate court failed to revisit the evidence adduced at the trial court afresh, analysed it and reevaluated it as is required by law and thus came to a wrong conclusion or that looking at the entire evidence, their decision was plainly wrong.

In our view, three main issues are raised in this appeal. These are whether visual identification of the appellant by Peter, Samuel and Jared was proper and sufficient to sustain the conviction. The second point is whether notwithstanding the answer to the first issue, the appellant could still be convicted upon the application of the doctrine of possession of recently stolen property in the case. The third is whether in law the sentence that was pronounced of death was appropriate in the circumstances of this case.

On the visual identification, the law is now well settled that the court has to consider with greatest care evidence of visual identification in cases where an accused person denies being at the scene of crime or taking part in a crime and although such an identification by a single witness under difficult conditions such as at night requires greatest care – see case of **Abdala Bin Wendo and another V. R. (1953) 20 EACA 166**, nonetheless even in other cases of identification by many witnesses in conducive conditions, and where evidence adduced is that of recognition, that court still needs to exercise extra care before basing a conviction on such evidence. This is because possibilities of mistaken identification of suspects can occur even where many witnesses say they identified a suspect as a perpetrator or where witnesses, say they recognised the suspect. The easiest way to assist the court in considering such cases of visual identification in case of strangers is for the police to seek and receive description of the suspect from the witnesses; using such description, to organize an identification parade where witnesses would, if they are certain identify the suspect. In the case of **Njoroge vs. Republic (1987) KLR 19**, where the complainant purported to identify the appellant in court as one of the people who had taken part in the robbery whereas the appellant denied the same, this Court held as follows *inter alia*: -

“1. ....

2. ... ..

3. **A dock identification is worthless and a court should not rely on such an identification unless it has been preceded by a properly conducted identification parade. A witness should be asked to give a description of the accused and then a fair identification parade should be arranged.”**

In our view, though we think it was difficult in the circumstances for police who had first visited the scene, released the complainants from the boot of the vehicle where they were confined by the thugs and had just arrested one of the thugs, to avoid the complainants, take the same thug to police custody, take statement of the complainants which would give a description of their attackers and then probably next day organize an identification parade, nonetheless that is what they should have done. It was not proper once they arrested the appellant at a place away from the presence of the complainants to take him to the complainants so as to be identified. We agree with Mr. Abande that this was not proper though in the circumstances of this case it was an attractive venture. However, we observe that the first appellate court was equally perturbed by that action of the police. It stated as follows on the issue: -

**“Of course, we are aware of the fact that it is undesirable and unprocedural for the police to arrest a suspect and bring him to the scene of robbery for purposes of identification. The proper procedure is for the police to arrest a suspect and take him straight to the police station and thereafter arrange for a police identification parade to be carried out where the complainants are called upon to identify the suspect. Had this however been the only evidence against the appellant, we would have had doubts as to his positive identification.”**

Thus the first appellate court was well aware of the issue, addressed it and made it clear that that evidence if it stood alone, without anything more, no conviction would have been sustained. We think the court was plainly right on that aspect and we too are of the view that had that been the only evidence against the appellant, we would have interfered with the decision of the two courts on that aspect.

That leaves the second issue we have raised above and that is whether there was evidence as regards the alleged possession of a jacket recently stolen from Jared during the robbery in this case and if so, was the doctrine of recent possession applicable in this case? The robbery took place on 3<sup>rd</sup> September, 2008 at about 1.00 p.m. according to Samuel and at about 1.30 p.m. according to Jared. We do not think a difference of 30 minutes is material when one considers that none was looking at his watch as the robbery was going on. It would not have been conceivable under the circumstances then obtaining. We think it could have taken place between 1.00 p.m. and 1.30 p.m. Inspector Mwangangi received information about the robbery at 1.30 p.m. and rushed to the scene. The vehicle had been driven only one kilometer off the main road. In the vehicle there was a jacket that belonged to Jared and that was stolen during the

robbery. When the police arrested the appellant Inspector Mwangangi said in evidence: -

*“After leaving the abandoned vehicle with the assistance of members of the public we extended our search along Arujo River where one suspect was cornered by members of the public. He was wearing a maroon jacket and upon search we found a small knife in one of his pocket. The employees of the company who had been carjacked identified the suspect as one of the gang members who had robbed them earlier. One of the employees identified the jacket as his and they took the suspect to the police station.”*

The appellant in his sworn statement says he was arrested at about 4.45 p.m. Even if that time is accepted, still the jacket was recovered about three hours after the robbery. That was recent. However, Mr. Abande says the evidence of such a recovery was so contradicting that it could not be relied upon for a conviction with Peter saying the appellant was shown to him wearing the jacket, whereas Samuel said when police approached them with the appellant the police were carrying the jacket and yet Jared's evidence was that *“when they brought over the accused my jacket was in the police vehicle.”* Inspector Mwangangi however said that when they arrested the appellant, he was wearing the jacket as we have stated. These were various versions but were all on the matters of facts and in law were not matters for our consideration on second appeal. They were matters to be ventilated, analysed and evaluated by the trial court and the first appellate court – see the case of **Okeno vs. Republic (1972) EA 32**. We note that the trial court merely took the view that the jacket was recovered from the appellant without delving into the various issues and analyzing them. That was of course not proper. However, that flaw was clearly covered by the first appellate court which discussed that aspect in details. They went about it as follows:

*“Of course we have noted some discrepancies in the testimonies of PW1, PW2 and PW3 with regard to where the jacket was when the appellant was presented to them. According to PW1, the appellant was brought to them wearing the jacket. However, according to PW2 the police were carrying the jacket. As for PW3, the jacket was in the police vehicle. PW4 however states that he arrested the appellant wearing the jacket. These discrepancies are not wholly unexpected in cases of this nature. People perceive things differently. As long as such discrepancies are minor and do not go to the root of the prosecution case they can be tolerated. The fact of the matter is that the jacket was found on the appellant. In the circumstances of this case therefore we are satisfied that the discrepancies were tolerable. In any event the appellant did not claim that this jacket his nor has he claimed that jacket was used to frame him up.”*

This was a sound analysis as regards the apparent contradictions in the prosecution's evidence as regards the discovery of the jacket. We may add that the appellant in his entire evidence in chief which was sworn, never denied having been found with the jacket. It was at the very end of his cross examination when he said *“no jacket was recovered from me.”* In our view, the High Court carried out its duty of revisiting the evidence afresh as was required of it on matters of fact and make a finding after considering the contradictions and we see no reason to interfere. In our view Inspector Mwangangi is the witness who arrested the appellant and at that time the appellant was wearing the jacket which was immediately identified by Peter, Samuel and Jared as one of the items stolen from Jared in a robbery against all the three only three hours back. We think the doctrine of recent possession was rightly applied in this case. In the case of **Njoroge v. Republic** (supra) this Court, after rejecting the evidence on visual identification, however went on to consider the evidence that established recent possession of stolen property by the appellant and held: -

**“4. There was evidence though not overwhelming that the appellant was found in recent possession of the complainant's firearm and accordingly the Court of Appeal would not interfere with the findings of the lower courts in that regard.**

**5. The inference to be drawn from the appellant's possession of the firearm was a matter of law. The High Court had properly drawn the inference that the appellant was in recent possession of the stolen firearm and that he had participated in the first robbery. He was**

**therefore rightly convicted.”**

This case before us falls squarely in the category of Njoroge’s case, except that in this case the fact that Samuel and Jared also identified the appellant found with the jacket as one of those who had just robbed them of other items is an added strength to the evidence establishing recent possession and thus the conviction was well founded in our view. We thus have no reason to interfere with the conviction that was entered by the trial court and confirmed by the first appellate court. As to the complaint that no member of public was called, we see no merit in it on the simple matter of law that the main issue in this case was as to whether the appellant was found in recent possession of stolen property and Inspector Mwangangi’s evidence which was accepted established that. **Section 143** of the Evidence Act makes it clear that no number of witnesses is required to prove a fact unless the law states so. In this case calling a member or members of the public would have, in our view amounted to superfluity of witnesses. We say no more on it.

On the sentences, as we have stated Mr. Abande referred us to the decision of this Court in **Godfrey Ngotho Mutiso’s** case (supra). We have perused the decision and noted that it specifically applied to murder cases but reasons could be used in capital offences such as robbery with violence but that part of it was obiter and the court is not bound to apply it to robbery cases as yet. However, even if it were to be applied, we do think this case which was one of highway robbery must have been some of the offences the makers of the law wanted to discourage by enacting death sentence in respect of robbery with violence under **Section 296 (2)**. Robbery with violence carried out on a highway affects the economy of the country and like in this case it was meant to discourage commercial contacts between Kisii and Mbita and that is in our view aggravated robbery with violence. We think the sentence of death was deserved even if it might have by now been commuted to life imprisonment.

In the result, the appeal lacks merit. It is dismissed.

***Dated and delivered at Kisumu this 14<sup>th</sup> day of June,2013.***

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**