



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 652 OF 2010

BETWEEN

MARTIN IRUNGU MURIGI..... 1ST APPELLANT

JAMES MUHIA MUIRURI..... 2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court at Nyeri (Kasango & Makhandia, JJ.)

dated 21st October, 2008

in

H.C.CR.A NO. 214 OF 2007)

JUDGMENT OF THE COURT

1. **Martin Irungu Murigi**, the 1st appellant herein, **James Muhia Muiruri**, the 2nd appellant herein and one Elijah Ngugi Muchoki were jointly charged with one count of robbery with violence contrary to **section 296(2)** of the Penal Code, Chapter 63, Laws of Kenya. The particulars of the offence were that on 3rd July, 2006 at Gichungu Village in Maragua District within the then Central Province they jointly while armed with offensive weapons namely knife and rungu robbed Peter Warui Mburu a paper bag which contained 48 pieces of waist belts worth Kshs. 2400/=, 4 CD radio players valued at Kshs. 800/=, one coat and cash Kshs. 3340/= and at or immediately before or immediately after such robbery used actual violence on the said Peter Warui Mburu.
2. They were charged with a second count of handling stolen goods contrary to **section 322 (2)** of the Penal Code. The particulars of the offence were that on 5th July, 2006 at Gichungu Village in Maragua District, they otherwise than in the course of stealing dishonestly received or retained a paper bag which contained 48 pieces of brown leather waist belts knowing or having reasons to believe it to be stolen goods or unlawfully obtained.
3. They were also charged with a third count of assault causing actual bodily harm contrary to

- section 251** of the Penal Code. The particulars of the offence were that on 3rd July, 2006 at Gichungu Village in Maragua District, they unlawfully assaulted Stanley Njogu Muiruri thereby occasioning him actual bodily harm.
4. The prosecution called a total of 5 witnesses. It was the prosecution's case that on 3rd July, 2006 at around 11:00 p.m. while PW1, Peter Warui Mburu (Peter) was heading home in the company of PW2, Stanley Njogu Muiruri (Stanley), a man who they both identified as the appellant attacked PW2. Thereafter, the 1st appellant emerged on the right side of Peter and hit him. Peter hit the 1st appellant with the belts he was carrying in a paper bag and a struggle ensued. Peter fell down and the 1st appellant pinned him down. The 1st appellant took Kshs. 340/=, keys and 48 waist belts valued at Kshs. 2,400/= from Peter. The appellants also took Stanley's coat which had Kshs. 3,000/= and 4 CD players. When the robbers left, Peter realised that Stanley had been stabbed on the face. They reported the incident the following morning at the Maragua police station.
 5. Peter and Stanley maintained that they were able to recognize the 2nd appellant through Stanley's torch which had been turned on during the robbery. They also maintained there was sufficient moonlight to enable the said recognition. Both Peter and Stanley testified that they knew the 2nd appellant very well. Peter was also able to recognize the 1st appellant who was known to him by using the moonlight and also through his voice. PW3, Inspector Josephine Wambua (Inspector Josephine) testified that as the investigating officer, she was taken to the 1st appellant's home at Gichugu by Peter. She was able to retrieve the 48 waist belts that were stolen from a freshly dug pit latrine on the 1st appellant's land. The 2nd appellant was later arrested at Githurai in Nairobi, where he had gone underground. Inspector Josephine testified that both Peter and Stanley gave the names of the appellants as the robbers who had attacked them. The appellants were subsequently charged with the above mentioned offences.
 6. In their defence both appellants gave sworn statements. The first appellant testified that on 4th July, 2006 he went to see his wife who had been admitted at the Maragua hospital. Peter came to the hospital and told him that his day had come. Peter arrested him and took him to Maragua police station where he was charged with the above mentioned offences. He maintained that the said offence was a fabrication by Peter who had a grudge against him. He further testified that he owned the waist belts that were produced as stolen items. He produced receipts in support and stated he used to hawk the same to earn a living.
 7. The 2nd appellant testified that on 17th August, 2006 at around 4:00 p.m while he was at work in Kaharati, a police officer approached him and ordered him to surrender the chicken he was selling. The officer handcuffed him and took him to Maragua police station. He was later charged with the above mentioned offences. He denied committing the same.
 8. Based on the foregoing evidence, the trial court acquitted Elijah Ngugi and convicted and sentenced the appellants to death. Aggrieved with the said decision the appellants' appealed to the High Court. The High Court in its Judgement dated 21st October, 2008 dismissed the appeal and confirmed the conviction and sentence. The appellants have now filed this second appeal.
 9. Mr. Muchiri wa Gathoni, learned counsel for the appellants, submitted that the two main issues in this appeal is whether the High Court had properly re- evaluated the evidence and whether the evidence of recognition was proper and free from error. He submitted that the circumstances that were prevailing during the robbery could not have warranted proper recognition of the appellants. He stated that since the attack was sudden the probability of recognition of the appellants being mistaken was high. He maintained that despite the two lower courts finding that the circumstances of identification were difficult, they failed to put the said evidence through a proper test. He stated that no evidence was tendered in respect of the intensity of the moonlight or the torch. Mr. Muchiri, maintained that the two courts also relied on the evidence of voice recognition which was also not properly tested. He further submitted that the High Court had erred in disregarding the 1st appellant's evidence that he owned the 48 waist belts that were produced as evidence. He maintained that the receipts that were produced by the 1st appellant clearly demonstrated he was not in possession of stolen items. He finally urged this Court to allow this appeal.
 10. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal submitted that the evidence of recognition was overwhelming. He maintained that this case involved both voice and visual recognition. There was no chance of mistaken identity. He emphasised that Peter and

Stanley used a 'spotlight' which is brighter than a torch. He finally submitted that it was the 1st appellant who led the police to the pit latrine where he had hidden the stolen waist belts. He emphasized that there could have been no other reasonable explanation why the 1st appellant hid the belts in the latrine other than that he was concealing the stolen belts.

11. 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)'

12. The two courts below made concurrent findings that the evidence of both visual and voice recognition was safe and free from error. 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**.

'..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.'

13. We agree with the submissions of Mr. Muchiri that the evidence of recognition was not put through the proper test to ascertain its accuracy. Firstly, there was no evidence tendered as to the intensity of the moonlight or the torch that aided Peter and Stanley to recognize the appellants. This test was particularly important because both courts below rightly held that the circumstances surrounding the identification of the robbers were difficult. In **Maitanyi -vs- Republic (1986) KLR 198**, this Court in, holding that an inquiry as to the nature of light is essential in testing the accuracy of evidence of identification held,

' The strange fact is that many witnesses do not properly identify another person even in daylight.. It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into....' See **Wanjohi & Others -vs- Republic (1989) KLR 415**.

We also find that the High Court misdirected itself when it held that there was proper voice recognition. This is because no evidence was tendered as to the actual words uttered by the 1st appellant during the robbery which enabled the said recognition. See **Maghenda vs. Republic [1988] KLR 255**. We further find that both courts erred in not taking into account that Peter admitted that he did not give the names of the appellants in his initial report to the police because he was confused. This admission by Peter raises doubt as to the accuracy of the recognition evidence. Therefore, we find that the evidence of recognition was not free from error and cannot without corroboration sustain a conviction.

14. From the record it is clear to us that the learned Judge found that the possession of the stolen belts by the 1st appellant corroborated the evidence of recognition. In our view, Stanley who allegedly owned the stolen belts did not prove ownership of the same. Inspector Josephine testified that Stanley was unable to produce receipts of the said belts because they had been misplaced during the robbery. We are of the view that the learned Judge erred in refusing to take into account

the receipts produced by the 1st appellant in support of ownership of the belts that were recovered in his house, simply due to the fact that he did not initially give the receipts to the investigating officer. This evidence clearly touched on the question of proof of ownership which is essential in the doctrine of recent possession. In *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic - Criminal Appeal No. 272 of 2005*, this court held,

'...It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.'

The prosecution having failed to prove that the belts found in the 1st appellant's possession belonged to Stanley, the doctrine of recent possession could not apply. However, one issue that comes to mind relates to the recovery of the 48 belts. The belts were retrieved and recovered from a freshly dug pit latrine in the premises of the 1st appellant. The 1st appellant contends that he owned the belts. Why should a person hide his property in a pit latrine? Were these the same belts that were taken from the complainants? The prosecution's case relating to the identity of the 1st appellant is corroborated by recovery of the belts in his premises. At the time of recovery, the belts were still in the paper bag that the complainants had. Taken in totality, we are satisfied that it is not normal for the owner of an item to wit belts to keep them in a pit latrine. The belts were positively identified and this fact corroborates the identity of the 1st appellant and places him at the scene of crime.

15. For the various reasons given, the upshot of the foregoing is that we allow the appeal of the 2nd appellant, Mr. James Muhia Muiruri, quash his conviction and set aside the death sentence. Accordingly, we order that the 2nd appellant be set at liberty forthwith unless otherwise lawfully held. In relation to the 1st appellant, Mr. Martin Irungu Murigi, we confirm and uphold the conviction for robbery with violence and the sentence of death meted upon him.

Dated at Nyeri this 13th 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