



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MUSINGA, KIAGE, JJ.A)

CRIMINAL APPEAL NO. 471 OF 2007

BETWEEN

JOHNSON MUHUTHU WANJOHIAPPELLANT

AND

REPUBLICRESPONDENT

*(Appeal from judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.) dated
25th May 2006*

in

H.C. CR. A NO. 1085 OF 2003)

JUDGMENT OF THE COURT

Some time past midnight on the morning of 25th January, 2003 IRENE MUTHONI KARIUKI (PW1) was at her home at Kegendo village near Zinat Estate of Kiambu District. She was in the company of her daughters CHRISTINE KARWITHA KARIUKI (PW2), SUSAN WANJIKU KARIUKI (PW3) and NAOMI NJOKI engaged in the entirely homely and idealic enjoyment of watching videos when her world and that of her family was shattered.

A gang of robbers invaded the homestead and for about an hour unleashed a reign of terror on the family. The gang smashed the windows and the doors to the house in an attempt to gain entry all the while threatening the terrified household that they would burn the house down in an attempt to gain down unless they voluntarily opened the door to allow them entry. They eventually did find their way into the house where they demanded that PW1 give them money or they would kill her. PW1 gave them some 2000 US Dollars, 10 Sterling Pounds and Kshs. 6000. During the commotion and as mother and daughters ran from room to room, PW3, believing that she would be secure outside of the house, managed to sneak out into the night, intent on making it to a neighbour's house. It was a fateful mistake.

PW3 came face to face with some of the robbers who proceeded to seize her, beat her up, tear her clothes to pieces and off her body before two of them took turns in raping her. She managed to cut herself loose from their violation, and run to the neighbour's house but she found the gate locked. She ran to a maize farm nearby where she collapsed. Only when it was day was she able to make it to the neighbour's house before being taken, in the nude, to her home. Her ordeal at the hands of the robber-rapists was confirmed by DR. GEORGE MWAURA (PW4) who examined her and confirmed the dastardly acts that had despoiled her innocence.

In the course of the robbery, PW1 who had at some point locked herself in her bedroom, managed to contact her husband who at the time was at Kinoo Shopping Centre and he in turn telephoned policemen who were on patrol. Mr. Muchui drove to where the police were and picked up PC WILLIAM MAYOR (PW5) and PC. ATHMAS NGANGA (PW6) then proceeded to the scene of the robbery in two vehicles. As they approached PW1's home the police officers met some three men who were walking from that house while carrying electronic items. The trio on seeing the police took to their heels but one was caught up with and arrested in the ensuing chase. He was carrying a computer which was later identified by PW1 as one of the items stolen from her by the gun-totting gang that also wielded other weapons including pangas and runqus.

The one who was arrested went by the name JOHNSON MUTUTHU WANJOHI, the appellant herein. He was arraigned before the Senior Resident's Magistrate's Court at Kikuyu on a single count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that;

“On the 25th day of January 2003 at Ragendo Village in Kiambu District of the Central province, jointly with others not before court, while armed with dangerous weapons namely pangas and axes robbed IRENE MUTHONI KARIUKI of Kshs. 6,000, 200 United States dollars, one handbag, one computer and one video deck all valued at Kshs. 194,000.”

He also faced an alternative charge of handling suspected stolen property contrary to Section 322 (2) of the Penal Code the particulars whereof were that on the same date and place, otherwise than is the course of stealing, the appellant dishonestly handled one video deck believing it to be stolen or unlawfully obtained.

After a full trial in which the prosecution called a total of seven witnesses, the trial magistrate found that a *prima facie* case had been established and placed the appellant on his defence. The appellant elected to give an unsworn statement whereafter judgment was delivered. The learned magistrate found the main offence proved and convicted the appellant. She discharged him on the alternative count.

At the sentencing, the learned magistrate heard from the prosecution that the appellant was a first offender while he pleaded in mitigation that he suffered from tuberculosis that and there [was] no proper medical treatment at Kamiti Maximum Prison. The learned magistrate proceeded to sentence the appellant to death as provided by law and ordered that proper medical treatment be availed to him for his ailment.

Aggrieved by the conviction and sentence meted out by the subordinate court, the appellant preferred an appeal to the High Court. The appeal was heard by Lesiit and Makhandia JJ, who found it devoid of merit and dismissed it, hence the appellant's appeal before us.

The appellant initially filed some homegrown grounds, which he styled 'Petition of Appeal', challenging the judgment of the High Court but these were effectively abandoned by Mr. Evans Ondieki, his learned counsel, who filed a Supplementary Memorandum of Appeal containing some dozen-odd grounds as follows;

- 1. The superior court erred in law by relying on evidence of identification that did not meet the required legal standards.**
- 2. The superior court erred in law by confirming the conviction on the basis of a defective charge sheet.**
- 3. The superior court erred in law by relying on circumstantial evidence that did not meet the required legal standards to convict.**
- 4. The superior court erred in law by confirming the conviction whereas critical witnesses were never called to the prejudice of the appellant.**
- 5. The trial court and superior court misapprehended the facts and misdirected itself (sic) to the issues of law to the prejudice of the appellant.**
- 6. The trial and the superior court erred in law by failing to appreciate that Section 77(2) (c) (d) (e) of the Repealed Constitution as read with Section 74 (1) of the said Constitution had been breached.**
- 7. The trial and superior court erred in law by failing to analyze and consider the plausible defence given by the appellant.**
- 8. The charges (sic) of robbery with violence contrary to Section 296 (2) of the Penal Code (Cap 63) Laws of Kenya were never proved beyond reasonable doubt.**
- 9. The superior court erred in law by failing to re-evaluate the entire evidence and drew their**

(sic) own conclusions.

10. The superior court erred in law by failing to allow the appellant to mitigate.

11. The superior court erred in law by failing to appreciate that the doctrine of recent possession did not apply in this case.

12. The superior court erred in law by shifting the burden of proof to the appellant to his prejudice.

13. The superior court erred in law by failing to appreciate that Section 85(2) of Criminal Procedure Code (Cap 75) Laws of Kenya was never complied with.

Urging the appeal before us, Mr. Ondieki started by attacking the conviction of the appellant on the ground that it was vitiated by the violation of the appellant's fundamental rights as enshrined and protected by **Section 74 (1)** of the former Constitution. Mr. Ondieki submitted that it was cruel and degrading treatment for the trial magistrate to have proceeded with part of the hearing whilst the appellant was unwell and in the absence of his advocate then on record.

The portion of the record of which the appellant complains shows that on 15.10.03, the learned trial magistrate recorded as follows;

Accused: I am still sick (shaking) I cannot proceed. I am still spitting blood. My advocate is not here. I cannot proceed with the defence hearing.

Prosecutor: I leave it to the court.

Court: Accused to be taken for medical attention at Kenyatta National Hospital and a report filed on 22/10/03. Remanded in custody."

Come 22.10.03, the record is as follows;

Accused: I have not recovered. I was taken to hospital I have not finished medicine.

Court: The Accused person who has asked for adjournment has been taken to hospital. I find that his application for adjournment today is not warranted. I order that the hearing proceeds.

Accused: I will give unsworn evidence. No witness."

From the foregoing excerpt of the record, the appellant was visibly indisposed on 15.10.03 and his application for adjournment was allowed by the learned trial magistrate who went ahead to order that the appellant be taken for medical treatment. The trial did not proceed on that day. When the same plea was made on 22.10.03, however, the learned magistrate found it unwarranted the appellant having already

received medical treatment as previously ordered.

As there is nothing to suggest that the appellant was in no condition to effectively or comfortably follow and participate in the proceedings, we do not find merit in the complaint as the appellant who was not unwell was not prejudiced and hence fair hearing was not compromised. What is more, ‘cruel, inhuman and degrading treatment’ as conceived by the former Constitution must, to our mind, consist of treatment sufficiently grave so as to fail to accord with the standards of decency and respect for the essential dignity of a person. We are not satisfied that by ordering that the matter proceed to the defence hearing on 22.10.03, the learned magistrate violated the appellant’s rights.

His ability to fully and effectively participate in the proceedings is attested to by the fact that he expressly elected to proceed with his defence by way of an unsworn statement and proceeded to give a long and detailed unsworn statement. There is no indication that the appellant was in any way hindered, hampered or curtailed in mounting of his own defence.

We note, moreover, that the complaint as to the alleged violation of the appellant’s constitutional rights was not raised at any time before the hearing of the appeal before us. Such belatedness in raising of the grievance casts it in the hue of an after-thought.

On the related issue of the absence of the appellant’s advocate, we note that the appellant raised it before the learned trial magistrate on 15.10.03. On that day the matter did not proceed to hearing as the adjournment the appellant sought was in fact granted. He did not raise the matter of counsel on 22.10.03 and as we have already stated, he elected to proceed with his own defence and gave an unsworn statement. In those circumstances we do not find much substance in Mr. Ondieki’s contention that the learned trial magistrate should first have sought to know whether the appellant wished to proceed without his advocate.

The record shows that the appellant had on a previous occasion sought and obtained an adjournment on the grounds, *inter alia*, of his advocate’s absence. On the material date he made no such application. At any rate, we are not persuaded that any rule of law or practice dictates that the absence of counsel compels a court to adjourn a case. Advocates are officers of the court. They owe a professional duty of courtesy and diligence to the court. They are duty bound to attend all court sessions either in person or by representative to hold their brief. That an advocate should be absent from court without explanation or excuse smacks of disrespect to the court. Moreover, it constitutes dereliction of duty for an advocate to fail to attend court when he knows that his client’s liberty and other rights could well be at stake. We do not accept that the negligence, inattention or misdeeds of counsel should be blamed on the court.

Mr. Ondieki next tackled ground 7 of the Supplementary Memorandum of Appeal charging that the appellant had presented a plausible defence but both courts below failed to analyze or consider it. A complaint such as was made would, if true, of course seriously compromise a conviction. Looking at the record, however, we find that the complaint is not borne out. The learned trial magistrate dealt with the appellant’s defence as follows;

“I believe the testimony of PW5 and PW6 concerning the circumstances under which the accused person was arrested. Although the accused person was not identified at the scene of the crime, I find that there is evidence that he was arrested while fleeing from the scene of the crime carrying the computer CPU shortly after the robbery had taken place ... the accused person was caught red-handed fleeing from the scene of the robbery. I do not believe the testimony of the accused person that he was going to look after his uncle’s home when he was arrested. I see no reason evident from the record why PW5 and PW6 could fabricate evidence against the accused person. They did not know him prior to the incident and they had no reason for implicating him in this case.”

The learned judges of the High Court, contrary to the appellant's complaint, fully discharged their duty as the first appellate court to exhaustively reconsider and evaluate the whole evidence and arrive at their own independent conclusions as required by a long line of authorities including OKENO Vs. REPUBLIC [1972] EA 32, WAGUDE Vs. REPUBLIC [1983] KLR 569 and OKUMU Vs. REPUBLIC [1985] KLR 803.

They had this to say of that defence, and we respectfully concur;

“However it is the contention of the appellant that he was a victim of circumstances, that he was arrested as he proceeded to his uncle’s house. He was forced into a police vehicle, where he found the alleged stolen items. Why, if we may ask, should PW1, PW5 and PW6 frame the appellant and plant the exhibits on him [?]. How would they have known that they would meet with the appellant so that they could come with the exhibits and plant on him [?]. There was no history of bad blood between the appellant and PW1, her husband [and] daughters or even with the police. We agree with the finding by the learned trial magistrate that all these witnesses did not know the appellant prior to this incident and had no reason for implicating him in this case.”

We are satisfied that the appellant's defence to the effect that he was innocently going to take care of his unnamed uncle's house at 1 O'clock in the morning was duly considered and, being displaced by the very circumstances of the case and on the whole quite incredible and far-fetched, was properly rejected.

When the appellant was arrested, he was carrying the computer CPU which had been stolen from the complainant's house just a few minutes previously. We are therefore unable to agree with the appellant's contention in the Memorandum of Appeal and in submissions by his advocate before us that the learned judges of the High Court erred in law by failing to appreciate that the doctrine of recent possession did not apply in this case. Indeed, Mr. Ondieki seemed to suggest, for which he cited the case of OKETHI OKALE & OTHERS Vs. REPUBLIC [1965] EA 155, that both courts below had put forward the doctrine as a theory not supportable by the evidence.

As we have already stated, the appellant was arrested in the dead of night just a few minutes after the robbery incident and very much within the vicinity of the *locus in quo*. He had with him a computer CPU being one of the items stolen from the complainant's house. This is the kind of scenario that provides the classic application of the doctrine of recent possession, one of the best enunciations of which is found in the English case of R Vs. LOUGHIN [35] CR. APP. R 69 as follows;

“If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker.”

What is referred to as a doctrine is really no more than the application of a commonsensical approach to a situation such as obtained in this case. We are satisfied that in all the circumstances of this case, the conclusions arrived at by the two courts below that the appellant was one of the robbers at the complainant's residence whence the computer was stolen, was sound and proper.

Mr. Ondieki's next submission was to the effect that the trial court was wrong to convict the appellant and the 1st appellate court erred in affirming that conviction on circumstantial evidence that “did not meet the required legal standards.” The standard he had in mind is that set out in many decisions including JAMES MWANGI Vs. REPUBLIC [1983] KLR 337 cited by Mr. Ondieki where this Court

(Madan, Potter JJA and Chesoni Ag JA) put it thus; at P 331;

“In a case depended (sic!) on circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis other than that of his guilt (Sarkar on Evidence – 10th Edition P31). It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference – Teper Vs. Queen (1952) AC 480 at page 489”.

We do of course agree with that formulation as the test of circumstantial evidence capable of founding a proper conviction. The test was fully satisfied in this case where the appellant was accosted at an ungodly hour in close proximity to the locus of the crime a few minutes after the robbery and while in possession of one of the items recently stolen. The police gave chase never losing sight of him along a road with walls on either side and with security lights on. The fact that the evidence was circumstantial in the sense that the appellant was not caught in the act of the actual robbery in **PW1’s** residence does not mean that it is weak kind evidence. We are in full agreement with what the court had to say in the old English case of **R Vs. TAYLOR WEAVER and DONOVAN** [1928] 2 CR. APP. R 20;

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.”

The circumstantial evidence presented against the appellant proved the case against him with the requisite degree of exactitude.

The appellant also assailed the judgment of the High Court for confirming the conviction of the appellant by the trial court yet the same, he contended, was based on evidence that was riddled with contradictions and the charges were not proved. He termed the contradictions as ‘material’ and went as to say that the failure by the prosecution to call some witnesses such as the complainant’s husband and neighbours and more policemen was fatal to the prosecution’s case.

We were unable to appreciate this line of argument.

Proof is not dependent on the numerousness of the witnesses called but rather on the weight and cogency of the evidence adduced no matter the number of witnesses. It is only where the prosecution calls evidence that is barely adequate or marginal that a court may be entitled to infer and presume (as was decided in the cases of **BUKENYA & OTHERS Vs. UGANDA** [1972] EA 549; **KING Vs. REPUBLIC** [1972] EA 280 and **NGUKU Vs. REPUBLIC** [1985] KLR 412), that if certain material evidence which should have been tendered is not tendered or is withheld, then such evidence, if tendered would have been adverse to the party who should have tendered it, namely the prosecution.

The situation obtaining in the instant case does not at all call for such adverse inferences. The witnesses Mr. Ondieki submits should have been called would have been no more than cumulative and their evidence, if at all relevant, little more than mere surplus-age. The learned judges of the first appellate court properly directed themselves on this aspect of the appellant’s lamentations and we share their doubt whether the witnesses not called were in any way essential to the case.

Mr. Ondieki also took issue with the charge sheet which he attacked as being fatally defective in that it did not mention a pistol as one of the weapons that the gangsters wielded yet the witnesses in the

house testified about it. True, the charge sheet does not state that the appellant and his accomplices were armed with a pistol at the material time but it does state that they were “armed with dangerous weapons namely pangas and axes” and the evidence of the witnesses, as was pointed out by Miss Nyamosi, the learned Senior Principal Prosecution Counsel for the respondent who ably resisted the appeal for the respondent, did testify to the fact that the robbers were so armed. Miss Nyamosi submitted that the ingredients of the offence of robbery with violence were satisfied by the charge sheet as framed.

We have considered this Court’s decision in **YONGO Vs. REPUBLIC [1983] KLR 319** and are convinced that its proper and true ratio decidendi on which that appeal was allowed related to the requirement that upon amendment of charges a trial court should invite an accused person to further question witnesses on the charge as amended. Its relevance to the matter before us is not immediately discernible and does not, at any rate, advance the argument, which we reject, that the charge sheet herein was defective.

The upshot of what we have said is that the conviction of the appellant was safe and the sentence meted on him, (after he mitigated – contrary the contention that he was not given an opportunity to do so) was fully deserved. His appeal to this Court fails in its entirety and is accordingly dismissed.

Dated and delivered at Nairobi this 5th day of July 2013.

G.B.M. KARIUKI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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