



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARIUKI (PCA), OUKO, MURGOR, JJ.A)

CRIMINAL APPEAL NO. 366 OF 2007

BETWEEN

PETER MWANGI KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ) dated 26<sup>th</sup> October, 2006*

*in*

*H. C. Cr. A. No. 190 of 2004)*

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**JUDGMENT OF THE COURT**

***Peter Mwangi Kamau*** was charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charges were that:

***Count 1-*** on the 11<sup>th</sup> day of September 2002 at 3.45 AM at Flat No. 6 along Tagore road off 1<sup>st</sup> Parklands Avenue within Nairobi, jointly with others not before the court, being armed with crowbars robbed Joseph Henry Ashimala cash Kshs 5,500 one mobile phone make siemens M30 valued at Kshs. 6,000/- and a certificate of Appointment all valued at Kshs. 11,500/- and at or immediately before or immediately after such robbery used actual violence against the said Joseph Henry Ashimala.

***Count 2-*** on the 11<sup>th</sup> day of September 2002 at 3.45 AM at Flat No. 6 along Tagore road off 1<sup>st</sup> Parklands Avenue within Nairobi, jointly with others not before the court, being armed with crowbars robbed Rose Osengo Ashimala cash Kshs. 5,000/-, one mobile phone make Motorola V50 valued at Kshs 11,000/-, golden ring valued at Kshs. 7,000/- golden watch valued at Kshs. 15,000/- all valued at Kshs. 53,000/- and at or immediately before or immediately after such robbery used actual violence against the said Rose Osengo Ashimala.

The brief facts of the case are that on 11<sup>th</sup> September, 2002 at 3.00 am as ***Senior Superintendent Joseph***

**Ashimala, (PW1)** and his wife **PC Rose Asengo Ashimala, (PW2)** were asleep in their house in Flat No. 6 Tegui Road 1<sup>st</sup> Parklands Avenue on the ground floor, PW2 was woken up by a red light shining through the window of their bedroom. Believing that the house was on fire, she got out from her bed and walked towards the door, and noticed that the corridor light was on. PW2 thought one of her children had left the light on. As she was going to switch the light off, she realized there were other people in the house. She opened the bedroom door, and found 5 men all wearing green coats, standing at the door of her bedroom. One pointed a pistol at her while the others told her not to scream. She promised not to scream, and they ordered her back into the room, where PW1 was still asleep. The intruders demanded that she give them the trousers which her husband had been wearing. At this point, PW1 woke up and was ordered by the intruders to cover his head and remain in bed. They put on the bedroom lights and ordered PW2 to give them money. PW2 told them to open a wardrobe from which they took a watch, and money Kshs.5,000/=, a gold ring, gold watch, and a mobile phone. They demanded more money and threatened to beat up PW1. PW2 pleaded with them not to harm him, but to take everything else that was in the house. The intruders then ransacked the house assembling the various items specified in the charge sheet, after which they demanded to go into the children's room. As they were ransacking the house, PW1 managed to get hold of his firearm, jump out of the bed and run outside into the verandah of the flat. One of the robbers pursued him outside. PW1 shot the robber who had pursued him, injuring him in the left leg. The robber ran back to the toilet in the house leaving a trail of blood. By this time the other robbers, were outside trying to open PW1's car. Upon hearing the shots, they attacked PW1 with iron bars injuring him on the hand. PW1 continued to shoot at them successfully repulsing the robbers, whereupon they ran off leaving the iron bars. The two robbers who were still in the house also managed to escape. PW1 after pursuing the robbers immediately ran to report the incident at the Parklands police station.

At about 7.15 a.m. members of the public informed PW1 that a person was lying about 50 metres away from PW1's house who appeared to have been shot and injured. By this time, **Sergeant Ali Athman (PW4)** had arrived at the scene, where he saw the items assembled during the robbery. He also saw blood stains in the toilet and a trail of blood leading into the grass outside the house and in the direction of the slum where the appellant lived. Upon receipt of the information from the members of the public that a person suffering from injuries was lying near the river, beyond the perimeter fence that surrounded the PW1's compound, PW1 and PW4 proceeded to the location of the injured person. PW1 confirmed that it was the same robber that had been shot in the left leg at his house, the appellant. PW4 searched the appellant, and a watch was recovered from his trousers pocket which, was positively identified by both PW1 and PW2 as belonging to PW2 and which had been stolen during the robbery. PW4 then arrested the appellant.

The scenes of crime investigator, **Gerald Wasike (PW6)** visited the scene where he took photographs of the house, the stolen items assembled during the robbery, the blood stains, the iron bars and chain.

The Government analyst **Jeremiah Muita Munguti (PW5)**, analysed the blood stains that had been collected from the scene the toilet basin and from the appellant. The blood samples from the appellant were found to be similar to that collected from the crime scene and also from the toilet. This led PW5 to conclude that the blood sample from the toilet belonged to the appellant.

After hearing a total of seven witnesses, the trial magistrate placed the appellant on his defence. The appellant gave a sworn statement and did not call any witnesses. In his defence, he testified that he had been walking towards a petrol station when he was shot by three people.

The trial magistrate, having considered the entire evidence and being satisfied that the appellant had committed the offence, convicted and sentenced him to death by law prescribed.

The appellant being aggrieved with the decision of the trial court, filed an appeal in the High Court against both the conviction and sentence.

The appeal came up for hearing in the High Court and was heard by (Lesiit and Makhandia (as he then was) JJ), who being equally satisfied that the prosecution had proved the case against the appellant,

dismissed his appeal and upheld the conviction and sentence.

The appellant, being further aggrieved by the decision of the High Court lodged this appeal which is before us.

In the memorandum of appeal and a further amended memorandum of appeal the appellant advanced eight grounds of appeal.

**Ms. Khaemba**, learned counsel for the appellant, argued the appeal more particularly in respect of the following issues. Firstly, that the High Court failed to evaluate the evidence, in that the appellant was convicted on circumstantial evidence, but was not found in possession of a dangerous weapon, nor was he in the company of other robbers, and neither did he use violence on the complainants. Secondly, that no proper identification of the appellant had been undertaken, and that an identification parade should have been conducted. Thirdly, that contrary to PW5's evidence the photographic print certificate and the blood sample swab were not produced, and that **Police Constable Chepkonyi** who had taken the swab, and **Mohammed Bashir** who had analysed the swab evidence should also have testified. That the doctor who examined the appellant was not called to testify. Fourthly, that the language of the Court was not utilized throughout the proceedings, that fifthly, the appellant was forced to proceed with his defence, despite having made requests for the proceedings prior to being placed on his defence, finally, that the appellant's defence and alibi were not taken into consideration by the High Court.

**Ms. Oundo** Principal prosecuting counsel opposed the appeal and submitted that the High Court had re-evaluated the evidence afresh and arrived at its own findings, that the conviction was not based on identification of the appellant, but on circumstantial evidence which was sufficient to point at the appellant; with respect to the language **Ms. Oundo** submitted that the language specified was English/Kiswahili and that the appellant actively participated in cross-examination of all the witnesses, which indicated that the appellant understood the charges facing him. On the question of his *alibi* in his defence, learned counsel submitted that this, should have been raised early on in the proceedings, and that in raising it at this juncture in the appeal was an afterthought, and therefore the conviction should be upheld.

Upon considering the record and the submissions before us, this Court as a second appellate court by dint of the case of ***Chemogong V R [1984] KLR 611*** and a contingent of other authorities, as well as **Section 361(2)** of the ***Criminal Procedure Code***, can only address a point or points of law, and not interfere with the concurrent finding of facts by the two courts below, unless such findings are based on no evidence or on a misapprehension of the evidence, or the courts below are shown to have taken into account wrong principles in making the findings.

We now turn to the first issue on whether the High court failed to re-evaluate the evidence. **Ms. Khaemba** argued that in convicting the appellant the High Court did not consider that the appellant was not found in possession of a dangerous weapon, nor was he in the company of other robbers, and neither did he use violence on the complainants and finally, that PW3's evidence did not place the appellant at the scene of crime as one of the robbers.

The issue for the consideration of the court is whether the appellant was one of the persons who took part in the robbery. In this respect the High Court stated thus,

***“The appellant claims that the offences were not proved beyond reasonable doubt. We have no hesitation whatsoever in rejecting this ground of appeal. There is evidence that the appellant was in the company of others when they committed the robbery. This fact alone is sufficient to find a conviction for capital robbery. It is also on record that the appellant and his men were armed with a pistol, which is a dangerous and offensive weapon. This fact was sufficient to sustain a conviction. Finally there is evidence that violence was visited upon PW1 and PW3 in the course of the robbery. Once again this was sufficient evidence to nail the appellant for the offence with which he was charged.”***

As regards proof of the necessary ingredients under **Section 296(2)** and whether the prosecution was able to demonstrate that an offence under the section had been committed in the circumstances of this case, the case of **Johana Ndungu v. Republic Criminal Appeal No. 116 of 1995** sets out the requirements in these words:-

***“(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the 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 to any person.”***

From the evidence of PW1, PW2 and **Bonventura Aporo Imwana (PW3)** a watchman guarding the residential premises where PW1 lived, and whose hands and legs were tied by the robbers, it is unequivocal that a robbery took place at the complainants’ home, where the appellant was in the company of others when they committed the robbery. It is also clear from the record that, the robbers were in possession of a pistol, a dangerous weapon and with iron bars which were used to inflict harm upon PW1. Thirdly, they did in fact inflict violence upon PW1 and PW2 in the course of the robbery. Any one of these three ingredients was sufficient to support a conviction of the appellant with the charge of robbery with violence.

The next issue for consideration is whether the appellant was properly identified as one of the robbers that was involved in the attack and robbery of the complainants. The High Court, in upholding the appellant’s conviction, did not rely on the evidence of identification as, it reached a finding that the material requirements for the proper identification of the appellant were missing, and that the learned trial magistrate erred in its decision that the appellant had been properly identified. We agree with the High Court Judges when they stated that:-

***“There was no evidence of the intensity of both the electricity ant the torchlight. There was no evidence led as to the distance between the source of light and the appellant. As it were, there were a total of 5 robbers in the house. How was it possible for these witnesses to pinpoint the Appellant out of the five and given that there was a lot of movement in the house was not clearly explained. There was no evidence as to how long the Appellant was kept under observation by any of these witnesses as to subsequently identify him. In our view the general rule of inquiry into the circumstances under which evidence of visual identification was made at night was not observed at all by the learned trial magistrate and that the requirement of R. VS TURNBULL were not in the identification process.”***

The matter would have ended there, but when the evidence is analysed, there are various aspects that establish a clear link between the appellant and the robbery, and point to his having been at the scene of the crime. As a consequence, both the Trial magistrate’s court and the High Court found that there was overwhelming circumstantial evidence that connected the appellant to the robbery.

In the **R V Taylor, Weaver and Donovan 1928 (Cr 21 Cr. Appl R2)**, the principle as regards the enumeration of circumstantial evidence was enunciated in these words,

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

In the celebrated case of *Rex vs Kipketering arap Koske & Another (1990 Volume 16 at Page 135)*, the Court of Appeal for Eastern Africa held as follows,

***“That in order to justify on circumstantial evidence, the inference of guilt, the incompatible facts must be incompatible with the innocence of the accused, and incapable of an explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.*”**

In the case of *Simon Musoke vs Republic (1958) EA 715* this Court stated thus,

***“The learned judge did not express directly himself that in a case depending exclusively upon circumstantial evidence, he must find before deciding upon conviction that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. As it is put in Taylor on Evidence (11<sup>th</sup> Edition) 74:-*”**

***“The circumstance must be such as to produce moral certainty, to the exclusion of every other reasonable doubt.”***

From the evidence, it is undisputed that, PW1 shot one of the robbers in the left leg. The following morning, the appellant was found with a gunshot wound to his left leg, 50 metres from the complainants' house. The appellant himself did not deny that he had been shot, but stated in his defence that, he had been shot by three men while he was walking towards the petrol station to collect his matatu. Further evidence linking the appellant to the robbery was that, PW1 testified that after he had shot the appellant, the appellant ran back to the toilet in the house, leaving a trail of blood. A blood sample was collected, and when compared with a blood sample obtained from the appellant, the Government analyst, was of the opinion that the blood sample from the scene of crime matched the blood sample obtained from the appellant, and therefore, it could have come from the appellant. Other evidence linking the appellant to the robbery, was that upon arrest, when the appellant was searched, a watch was recovered from him. The appellant stated that the watch was his, but could not state how it came to be in his possession. PW1 and PW2 in their evidence identified the watch as one of the items stolen during the robbery.

At this stage, we consider it imperative that we have consider the question of the doctrine of recent possession with respect to the watch being found in the appellant's possession, and would reiterate the decision of this Court in the case of *Hassan vs Republic (2005) 2 KLR 11*, where as regards recently stolen goods it held thus,

***“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 a receiver”.***

We are satisfied that, from the evidence, the watch found in the appellant's possession, was a recently stolen item, and that, his inability to explain as to how it came to be in his possession, further pointed to his being one the robbers.

After full and careful consideration of the record, we find no merit in this ground and agree with the High Court on this question when it which stated thus,

***“Taking all these factors and circumstances into consideration we are of the strong view that the circumstantial evidence irresistibly points to the appellant's guilt there are no other co existing circumstances which can weaken or destroy or erode the inference of the appellant's culpability.....”***

***“In our view, the appellant's injury, place of his arrest, his blood group and possession***

***of PW2's watch all point to the appellant's involvement in the crime. We are satisfied that the trial court below reached the correct decision in the circumstances of this case."***

**Ms. Khaemba** complained that the evidence concerning the analysis of the blood sample taken from the scene could not be considered conclusive as the person who took the blood swab from the scene and the person who analysed the blood samples were not called to testify. Both courts below made a factual finding that the appellant who after being shot, left a trail of blood, a sample of which was collected and analysed, and found to match the appellant's blood group. We find no merit in this ground.

As regards the appellant's *alibi*, we consider that the trial magistrate, and the High Court carefully and methodically analysed the appellant's defence and *alibi*, and did not find it to be credible. We are in agreement with the observations and conclusions of both the courts below, and find that this ground also lacks merit and as such fails.

On the issue that, the appellant proceeded with his defence despite the proceedings not being available, we have ascertained that, once the appellant requested for the proceedings, the Court adjourned severally. On four occasion, the appellant reminded the Court that he had applied for the proceedings. However, on 6<sup>th</sup> February 2004 the appellant stated that he would give his defence without the proceedings as it was taking too long and thereafter gave a sworn statement. The issue was not raised in the High Court. Consequently, we are satisfied that the appellant waived his right to be provided with the proceedings, and therefore this ground is without merit.

With respect to the issue of the language of the Court, which according to the record was specified as "**English/Kiswahili**", an examination of the record indicates that the appellant actively participated in cross-examination, and directed relevant questions to the witnesses without exclusion, more so, to the Government analyst from whom he required details of the blood sample analyses. In the circumstances, we are satisfied that the appellant understood and followed the proceedings, and as such was not prejudiced in any way.

For the aforesaid reasons, we are satisfied that we have no reason to interfere with the concurrent findings of the two courts below, and we find that the appellant's appeal is without merit, and we order that the same be and is hereby dismissed.

***Dated and delivered at Nairobi this 20<sup>th</sup> day of September, 2013.***

**P. KIHARA KARIUKI**

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**PRESIDENT, COURT OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

