IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 213 OF 2010

BETWEEN

PAUL MWANGI KURIA ….. APPELLANT

AND

REPUBLIC ….. RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisii (Musinga & Makhandia JJ) dated 30th April, 2010

in

HCCRA NO. 151 OF 2009)

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JUDGMENT OF THE COURT

On 22nd September, 2008, the complainant, in this appeal, ***Kishoe Masitoi Kitete*** *(PW1)* ***(Kishoe)***, a retired Civil servant of unrevealed rank, for some unknown reasons spent most of his evening time drinking from one bar to the other in Kilgoris. At long last, he set out to go back home but it was then too late and no vehicle was available. He moved from former ***Mwangi's Cafe*** then known as ***Wallet bar***, to see if he could get a room at Tumaini Lodging and Bar. He knocked at that lodging but before any response, he got a feeling that somebody was behind him. He turned to check but all he saw was a black thing which appeared to him as a short man. He never saw it as it was dark. Suddenly he was hit on his left eye brow and on his right cheek. He lost his senses and fell down. He did not know what happened thereafter for the next about twenty minutes as he was unconscious. When he came to his senses, he got up and realised that his National identity card, voters card, ATM card for Co-operative Bank and two business cards were missing. His cellphone from Safaricom, black shoes No. 10, a note book, Ksh.2,800/=, and celtel sim card all in a wallet were also missing. He walked to a place where vehicles were being parked and where there were security lights. He saw ***Peter Nyamwange*** *(PW 2)* ***(Peter)*** who was washing vehicles opposite Transmara Hotel, and who was in fact also a caretaker of Silent Lodge in Transmara. He approached him and pleaded with him to help him for he had been beaten by thugs. Peter obliged and after being also instructed by a lady nearby to go and look for help, Peter went to Olmara street and managed to get one policeman and policewoman who were on patrol duties within Kilgoris town. These were ***PC Rahab Theuri*** *(PW 3)* ***(PC Theuri)***, ***PC Joshua Meriti*** *(PW4)* ***(PC Joshua)*** and ***PC Zainabu Dieree*** *(PW6)* ***(PC Zainabu).*** These police officers responded to Kishoe's plea and having put Kishoe into their custody for security purposes, they started searching for the assailants. Their

evidence was contradictory as to how many people they encountered as they went round with Kishoe looking for the assailants, with PC Theuri and PC Zainabu saying they sported *"two persons"* from Wallet bar to the Wahome's shop and those two persons approached them but on realising they were Police officers one of them ran away and the other they identified as the appellant started to run away but was apprehended, while according to PC Joshua they *"saw a man loitering and he was drunk. He was just alone."* They arrested him and he resisted arrest. Be that as it may, the gist of their evidence is that they arrested the appellant and having arrested the appellant, on quick search they recovered from him Identity Card, two ATM cards, Voters card all bearing the complainant's name. They took the appellant and the complainant with them, together with the alleged documents recovered from him. Again, there is a contradiction as to where they went first after arresting the appellant, with the complainant saying they went round with Police and the appellant for one hour and thereafter he was taken to hospital for treatment and then they went to Police Station where the appellant was booked and was placed in the cells, whereas PC Theuri's evidence on that aspect confirms that the police officers, the appellant and complainant being in their custody *"got into the dispensary together,"* meaning that they first took the complainant to the dispensary and thereafter they went to the Police Station where appellant was. That line of evidence was also supported by the evidence of PC Joshua who said:

"We had no handcuffs. I only held him upto hospital where complainant was treated. I remained guarding the accused. Then we took complainant to station."

However, Zainabu's evidence was at variance with evidence of the complainant, Theuri and Joshua on that aspect. Zainabu's evidence was:-

"So we took the suspect to the station and booked him in cells. We then brought Mzee Masitoi to hospital. He was stitched then we escorted him towards his homestead next to Farmers Hotel near there."

The importance of the contradictions will later, in this judgment, be demonstrated. However, the most significant evidence in the entire case was that the appellant was found with certain properties stolen from the complainant in the course of robbery and that evidence was allegedly given by PC Theuri, PC Joshua and PC Zainabu. We will consider later in depth that evidence as relates to how those items reached the Police Station and the importance of that as relates to the basis of the conviction in this case. Suffice it to say that the three police officers eventually took the appellant to Police Station, booked him in the Occurrence Book and had him locked up in the cells.

The next morning on 23rd September, at about 9.00 am, ***CPL John Olima*** *(PW5)* ***(CPL Olima)*** then attached to Kilgoris Police Station as the Officer in Charge Crimes, went to the report office and on checking the Occurrence Book found that the appellant had been booked in for assaulting someone and also for having not been registered as a Kenyan Citizen. He said in evidence that thereafter, an ATM card, Identity Card, Voters Card and two Celtel cards were taken to him, but he did not say who took the items to him. He then started to investigate the case. Interestingly, on 24th September, 2008, he sent for the complainant to report to the Police Station to record a statement. We say interestingly, because, if as complainant, Theuri and Joshua, stated, they went to hospital first before going to Police Station and later they went to Police Station with the complainant after treatment, then one cannot apprehend why the complainant could not record his statement that night of 22nd September, 2008. Further it is difficult to understand why the appellant who was arrested allegedly speaking Kikuyu language and stolen properties found on him could be booked in the Occurrence Book with the offence of not being registered as a Kenyan Citizen and assault only. Whatever was the truth, CPL Olima, after receiving statement of the complainant realised that the complainant was not only beaten but was also robbed of his items. He says.

"So I substituted his charges to that of Robbery with Violence."

CPL Olima admitted in his evidence in chief that he had dealt with the appellant in regard to another case which had been finalised.

The charge preferred against the appellant was that of Robbery with Violence Contrary to ***Section***

296 (2) of the ***Penal Code*** and the particulars were that:

"On the 22nd day of September, 2008, at Kilgoris township in Transmara District of the Rift Valley Province jointly with Others not before court while armed with maasai swords, and rungus robbed Kishoe Masitoi Kitete of a wallet, ATM card, Identity Card, Voters card, a pair of black shoes, spectacles, notebook and cash 2,800/= all valued at Ksh.6050/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Kishoe Masitoi Kitete."

He denied the charge and on being put on his defence, the appellant gave unsworn statement in which he narrated his search for a job, and his temporary appointments ending with his employment at Green Hotel where he served upto that fateful night of 22nd September, 2008. On that day, he reported off duty at 10.30 pm and on his way home, he met two Police officers who, after interrogating him took him with them. When they reached Police Station, he was put under arrest. Before he was locked up in the cells, the Police officer searched him but recovered nothing from him. He was put in the cells for nine days before being taken to the court and being charged. He denied the offence. He had earlier at the close of the Prosecution's case submitted written submissions in which he maintained that he had no case to answer. He incorporated that with statement in his defence at the trial. We add that at his trial, on cross-examination of PC Theuri he had sought Occurrence Book to be produced and the Court made an order to that effect but that was not done.

In a judgment dated and delivered on 7th July, 2009, the learned Senior Resident Magistrate found him guilty as charged, convicted him and sentenced him to death. He appealed to the High Court which on consideration of his appeal rejected it and confirmed the conviction and sentence saying inter alia:-

"Having carefully considered the evidence and re-evaluated the evidence as per the decision in Okeno vs R (1972) EA 32, we have come to our considered opinion that the appellant's conviction was inevitable. Consequently the appeal must be and is hereby dismissed. It is so ordered."

The appellant disputes that decision and hence this appeal premised on seven grounds, two of which were abandoned as Mr. Ondego the learned counsel for the appellant urged us on the appeal. The grounds abandoned were grounds three (3) and four (4). The grounds urged were that:-

"1. The learned Judges erred in failing to direct their mind to the question of proper identification of the accused person having regard to the fact that it was at night and the actual circumstances affording clear vision were not explained.

2. The learned Judges further erred in failing to appreciate that the complainant Prosecution witness 1, could not possibly had (sic) seen his attacker(s) because it was dark and fact that PW1 was drunk as at the time of the attack.

3. …..

4. …..

5. The learned Judges erred in applying the principle of recent possession under circumstances.

6. The learned Judges erred in convicting the appellant of the offence even though there was evidence by PW3 and PW4 that both the complainant, PW1, and the accused were drunk.

7. The conviction is against the weight of the evidence."

Mr. Ondego, in his address to us urged us to accept that the evidence on identification of the appellant as the perpetrator of the offence did not meet the required threshold to warrant a conviction that was entered against the appellant as it was dark at the time the offence was allegedly committed and in any case the complainant was drunk. On the trial Court's application of the doctrine of recent possession as the basis for a conviction, Mr. Ondego's take was that it was not proved as to what items if any were

recovered from the appellant as the appellant had sought the production of Occurrence Book, and the court had ordered

that it be produced by the investigation officer, yet the same officer never produced it and the Court never bothered to ensure its production. In Mr. Ondego's view, as the appellant had maintained that nothing was recovered from him, the non production of the Occurrence Book to verify the same was fatal to the entire case.

Mr. Mongare, on the other hand while conceding that there was no proper evidence on identification, felt nonetheless that the conviction was proper as the appellant was found in possession of recently stolen property that belonged to the complainant and which had been stolen from the complainant that same night. He maintained that the non production of the Occurrence Book was not fatal to the prosecution's case. However, on the Court drawing his attention to other parts of the record, Mr. Mongare conceded that those other parts of the evidence were not fully appreciated by the trial Court. He however was of the view that the first Appellate Court did analyse the evidence as is required by law and having done so reached an independent decision.

It is not in dispute that the complainant was assaulted as he was in a drunken stupor in Kilgoris town on the night of 22nd September, 2008. He did not know and could not identity his attacker or attackers as all he said in evidence was that out of instinct, he felt that somebody was behind him and when he turned round to check all he saw was a figure that looked like a short man. Later in his evidence he talked of figures of two people. Whatever one is required to make of that evidence, it is clear that he did not see and identify his attackers. It was dark, he was drunk and so he could not be blamed for that inability to identify the attacker or attackers. We find it odd that despite this clear evidence that the attackers identity was not established, Mr. Ondego spent a fair portion of his time on the issue of identification. Of course the appellant was not identified at the scene and the Prosecution was also not pressing that issue.

The mainstay of the case upon which conviction ensued, was evidence of the three Police officers that the appellant was found with stolen items of the complainant some minutes after the complainant was attacked and robbed. That allegation by the prosecution witnesses was refuted by the appellant who said he was arrested on his way from his place of work and no complainant's properties were recovered from him. That, in our view was the main issue that the two Courts below were required to consider both in law and in fact. We say so because in law, one can only be convicted under the doctrine of recent possession if it is established that he was found in possession of recently stolen property of the complainant, stolen in the cause of robbery upon the complainant. As to time, it depends on the nature of the property so stolen as to whether it is a property that can move from person to person fast or not. The High Court readily appreciated that legal position. We note however, having fully perused the Senior Resident Magistrate's Judgment that he never at any time considered or even mentioned the appellant's defence. This, in our view was a serious misdirection and we would have expected the first Appellate Court to observe it and to give its view on the effect of the same omission. On our part, we do not with respect think any fresh analysis and evaluation of evidence before the trial court which omits to direct its mind to such a glaring omission meets the standards set out in the case of ***Okeno v Republic*** ***(1972) EA 32*** although the High Court claims to have done so and also claims to have relied on that same case. That case states inter alia:-

“The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgment of the trial court should be upheld, as well of cause, as deal with any question of law raised on the appeal. See Selle v Associated Motor Boat and Co. (1968) EA 123.”

In our view, had the first Appellant Court seriously revisited the entire evidence that was adduced before the trial Court and thereafter evaluated it, they would have noted that the trial Court did not as a matter of law and fact consider the defence adduced much as it stated that the appellant gave unsworn statement in defence and called no witness and that at the close of the case the appellant presented written submission and he had considered the whole evidence on the record. The learned Senior Resident

Magistrate did not refer to the contents of that defence and did not even go as far as saying he considered it and rejected it.

However, apart from that, what we find of greater concern and more disturbing though is the quality of the analysis that the High Court made and the weight they accorded the failure to produce the Occurrence Book by the Prosecution as was ordered by the court. In its view, the failure by the investigation officer to produce the Occurrence Book was inconsequential as in any event the appellant, in his cross-examination of CPL Olima, the investigation officer did not raise any questions on the Occurrence Book and it concluded that notwithstanding the absence of Occurrence Book the appellant was found in possession of items belonging to complainant. In our respectful view, that finding resulted from casual view of the entire matter.

PC Theuri, PC Joshua and PC Zainabu all stated that on responding to information from Peter they went to where the complainant was. They found him beaten and was bleeding. PC Theuri said in evidence that the complainant was not only bleeding but told them his money had also been taken as well. PC Joshua said the complainant told them he was beaten and his things taken from his pocket by unknown people, and PC Zainabu was even more specific. She said of what the complainant told them:-

"He said he was robbed by some two young men who hit him on the head and chest using a nut headed club."

On intercepting the appellant, these three Police officers said the appellant was searched and complainant's properties recovered from him. Thus if the constables were witnesses of truth, then by the time they apprehended the appellant, searched him, and recovered complainant's stolen items from him, the offence of robbery with violence was complete as against the appellant. Being Police Officers, they know the difference between robbery with violence and assault. In any event, as two of them stated, they went with both the appellant and complainant to hospital first and thereafter to Police Station so that the complainant would record his statement and the appellant would be locked up in the cells. We entertain no doubt that after all this time going round up to hospital and then to Police Station, and in any event after seeing complainant with injury and recovering his properties from the appellant, these constables were well aware, if they were honest in what they said, of the offence that the appellant had allegedly committed. Yet the evidence of CPL Olima is that the next day on 23rd September, 2008, when he went to the Report Office and read the Occurrence Book he:-

"found that a person had assaulted someone and also he had not registered as a Kenyan Citizen."

One may ask, if the three Police officers had apprehended a person who had violently injured the complainant and had taken the victim's properties which were found on him then how come when they took him to Police Station they booked him in the Occurrence Book with assault only and failing to register as a Kenyan Citizen, a matter they never alluded to in their evidence in Court? Why did they not book him with robbery with violence as they stated in Court? Even more disturbing is that CPL Olima said that after he read in the Occurrence Book that the appellant was arrested for assault and failing to register as a Kenyan Citizen, an ATM Card, Identity Card, Voters Card and two Celtel Cards were taken to him but he does not state by who. And even more telling, he says after those items were taken to him on 23rd after he had read the Occurrence Book, he sent for the complainant to report to the Station to write a statement. This is more intriguing when one considers that two Police officers said in evidence that the complainant was taken to Police Station that night and PC Theuri said he returned to the Police Station on 23rd September, 2008, when he was issued with a P3 form which was later filled and returned. As if that is not enough, CPL Olima made it clear that it was after he had received the items on 23rd September, 2008 and after the complainant had returned to Police Station on 24th and had recorded a statement that *"it emerged that he was not only beaten but was also robbed of his items."* So he substituted the original charges with that of robbery with violence and that it was as the complainant said Ksh.2800/= was taken that he preferred the charge of robbery with violence against the appellant.

The above scenario can only mean that a charge of assault was elevated as evidence was being gathered to that of robbery with violence. What we find disturbing is why was this necessary? If the

three Police officers and the complainant were telling the truth that the appellant had been found in possession of properties recently stolen from complainant just some minutes after complainant was attacked, beaten and robbed, then why was he booked with a simple assault and failure to register as a Kenyan Citizen? Why was the complainant required to go to Police Station on 23rd, and later on 24th September, 2008, when he had been there on 22nd September, 2008, only to record a statement in respect of such an apparently straight forward case of robbery with violence? Where did these items taken to CPL Olima emerge from even after Olima had decided on assault, and failure to register as Kenyan Citizen charges?

In our view, the above would leave anybody and certainly ourselves with real and reasonable doubt as to whether the Prosecution was telling the whole truth. It could be possible that a case was being made out after appellant had been booked in the Occurrence Book with simple offences of assault and failing to register as a Kenyan Citizen. The first Appellate Court said that the failure to produce Occurrence Book was not of consequence as the appellant never raised any questions on it in cross examination of Olima. With respect, all the appellant wanted to demonstrate to the court by production of the Occurrence Book was probably that he was not booked with robbery with violence and possession of the complainant's stolen items immediately after his arrest and that was a result of an afterthought. When Olima started his evidence, the first thing he said was that the appellant was booked with assault and failing to register as a Kenyan Citizen. That meant the appellant, through Olima had achieved all he wanted and so needed not ask any other questions on the Occurrence Book.

In our view, if the trial court and the first appellate court had directed their minds to the above, they would have probably found that reasonable doubt existed as to whether the appellant was indeed a culprit on the basis of the application of the doctrine of recent possession or not. That doubt must be given to the appellant.

Before we allow the appeal as we must do, we observe that when Olima gave evidence in chief, the Prosecution through him raised matters that would go to the appellant's character. This was not proper. An accused character can only be raised if the accused himself either says in cross examination that he is of good character or if he challenges the character of a witness but not as it happened here, we say no more as the case that was mentioned ended in the appellant's acquittal.

This appeal succeeds. The appeal is allowed. Conviction quashed, and sentence set aside. The appellant is set free forthwith unless otherwise lawfully held.

Dated and Made at Kisumu this   22nd day of November, 2013.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

…............................

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

certify that this is a true copy

of the original.

<u>DEPUTY REGISTRAR</u>