



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 233 OF 2008

BETWEEN

DAVID MWANGI WAIGWA..... APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Kasango, Makhandia JJ.) dated 2nd October, 2010

in

H. C. Cr. A NO. 45 OF 2006)

JUDGMENT OF THE COURT

1. **David Mwangi Waigwa**, the appellant was charged with one count of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**, Chapter 63, Laws of Kenya, one count of rape contrary to **Section 140** of the **Penal Code** and alternative count of handling stolen property contrary to **Section 322 (2)** of the **Penal Code** in the Senior Resident Magistrate's Court at Nanyuki. The particulars of the count of robbery with violence were that on the night of 8th and 9th May, 2005 in Nyeri District within the then Central Province, the appellant robbed BNW 4 Kg of sugar, 3 Kg cooking fat, ½ dozen of bar soap, 5 packets of wheat flour, sweets and chewing gum all valued at Kshs 1,280/- and at or immediately before or immediately after the time of such robbery, the appellant used actual violence on the said B N W.
2. The particulars of the alternative count of handling stolen goods were that on the above mentioned dates and place, the appellant otherwise than in the course of stealing dishonestly received or retained 4 Kg of sugar, 3 Kg cooking fat, ½ dozen of bar soap, 5 packets of wheat flour, sweets and chewing gum knowing or having reasons to believe them to be stolen goods. On the count of rape, the particulars were that on the above mentioned date and place the appellant had carnal knowledge of B N W without her consent.
3. The appellant pleaded not guilty to all counts. The prosecution called a total of four witnesses in support of its case. It was the prosecution's case that on the night of 8th and 9th May, 2005 while PW1, B N W (B), was asleep in her canteen she was woken up by a beam of torch light that had

been flashed on her face. When she woke up she saw a man armed with a somali sword in the canteen. The man asked B why she was alone. Thereafter, the robber looked for money in the canteen but did not find any. He then asked B to remove her skirt which he searched but did not find any money and he asked her to remove the petticoat and searched it for money. B testified that the robber ordered her to lie down on the table and he proceeded to look at her private parts using the torch he had. The robber ordered B to put on her clothes and to go to the counter. At the counter, the robber ordered B to put cooking fat in a cartoon. He stole several items from the shop and put them into two cartoons. The robber ordered B to carry one of the cartoons' and he carried the other. They came out of the canteen and after walking for a distance of about 600 metres along the road, the robber told B to place the cartoon on the ground and to place the stolen items in a sack he had taken from the canteen. Thereafter, the robber raped B. B testified that she recognized her assailant as the appellant who was known to her prior to the incident; the appellant was a regular customer in her canteen.

4. After the appellant left, B woke up her landlord, PW3, Simon Njoroge Macharia (Simon), and informed him about the robbery. Simon in the company of other members of public went to B canteen and noticed that the window had been broken. B informed Simon and the members of public that she had recognized the appellant as the robber. Thereafter, B went to the ASTU camp and reported the incident. B, PW2, PC Hassan Komba (PC Hassan), PC Ndemu and members of the public proceeded to the appellant's home. They found the appellant's door open and the appellant asleep. PC Hassan testified that after searching the appellant's house they recovered 4kgs of sugar, 3kg cooking fat, ½ dozen of bar soap, 5 packets of wheat flour, 3 packets of maize flour sweets and chewing gum. B identified the said things as those that were stolen from her canteen. It was PC Hassan's evidence that a Somali sword was also recovered in the appellant's house.
5. PW4, Dr. Walter Kayagwa (Dr. Walter), testified that he examined B on 9th May 2005 and found that she had lacerations on her genital area. He testified that he also found a white discharge and spermatozoa on B genital area. According to Dr. Walter the bruises on B genital area confirmed that she had been raped within 72 hours of the examination.
6. In his defence, the appellant gave an unsworn statement. He testified that on 8th May, 2005 he went to Naromoru where he met his friend and they proceeded to drink alcohol in a bar; he stayed in the bar until 6:40p.m when he left for his house. When he arrived at his house, he fell asleep without locking the door as he was very drunk. He was woken up at around midnight when he felt someone hitting his legs. When he woke up he saw police officers who ordered him to get out of the house. According to the appellant he saw a sack outside his house and he neither knew what the contents of the bag were or who brought the sack there. He was arrested and charged. He denied committing any of the offences.
7. The trial court convicted the appellant for the offences of robbery with violence and rape and sentenced him to death in respect of the offence of robbery with violence and life imprisonment in respect of the offence of rape. Aggrieved with the decision of the trial court, the appellant filed an appeal in the High Court. The High Court (Kasango & Makhandia, JJ.) in a judgment dated 2nd October, 2008 confirmed the appellant's conviction on both counts. The learned Judges confirmed the death sentence issued against the appellant for the offence of robbery with violence and set aside the sentence of life imprisonment for the offence of rape and directed the same to be held in abeyance. It is that decision that has prompted this second appeal based on the following grounds:-

- ***The learned Judges erred in law by failing to consider that the charge sheet was defective in that it did not disclose that the appellant was armed with a somali sword during the robbery.***
- ***The learned Judges erred in law by invoking the doctrine of recent possession to convict the appellant yet the stolen items were not recovered from the appellant.***
- ***The learned Judges erred in law by failing to sign the judgment dated 2nd October, 2008.***
- ***The learned Judges erred in law by failing to consider the appellant's defence.***
- ***The learned Judges erred in law by shifting the burden of proof to the appellant.***

8. Mr. Gathiga Mwangi, learned counsel for the appellant, submitted that from the prosecution's evidence, it emerged that the appellant was allegedly armed with a dangerous weapon namely a somali sword during the robbery. He argued that the said weapon was never mentioned in the charge sheet which was to the prejudice of the appellant. Mr Gathiga submitted that Dr. Walter testified that the rape had taken place within 72 hours yet he examined B within 12 hours of the incident. He further submitted that Dr. Walter did not examine the appellant to determine if indeed he was the one who had carnal knowledge of B. According to Mr. Gathiga this Court should disregard the medical evidence tendered by the prosecution. In support of this submission he relied on the case of *Nyinge s/o Suwatu -vs- Republic (1959) EA 974*. He urges us to interfere with the concurrent findings of facts of the two lower courts and allow the appeal.
9. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal supported the appellant's conviction. He argued that this was a case of recognition as the appellant was known to B prior to the incident; he was a regular customer at B canteen. Mr. Kaigai submitted that the appellant was found in recent possession of the stolen items. He stated that even if the charge sheet was defective, it was curable under **Section 382** of the **Criminal Procedure Code**.
10. This being a second appeal and by dint of **Section 361(1)** of the Criminal Procedure Code, 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)”

11. We have considered the record, grounds of appeal, able submissions by counsel and the law. It is not in dispute that the prosecution's evidence was to the effect that the appellant robbed B using a Somali sword. We cannot help but note that the charge sheet did not indicate that the appellant was armed during the robbery. Therefore, did this omission in the charge sheet render any prejudice to the appellant? We are of the considered view that despite the fact that the charge sheet did not disclose that the appellant was armed during the robbery did not prejudice the appellant in any way. This is because the appellant was well aware from the evidence on record of the nature of the offence he was charged with before he was put on his defence. We further find that the omission in the charge sheet is curable under **Section 382** of the **Criminal Procedure Code** because it was inconsequential to the appellant's conviction and sentence. In *Joseph Maina Mwangi -vs- Republic Criminal Appeal No. 73 of 1993*, this Court held:-

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”

12. As correctly pointed out by Mr. Kaigai this instant case involved recognition evidence. It was the prosecution's evidence that B recognized the appellant as the robber and that the appellant was known to B prior to the robbery. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always 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* this Court held at page 426 that:

“..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. Both lower courts made concurrent findings that the recognition evidence tendered by the prosecution was free from error. We concur with the above findings of fact. This is because firstly,

B testified that she had known the appellant prior to the incident and that he was a frequent customer in her canteen. In Anjononi & others -vs- Republic (1976-80) 1 KLR 1566, this Court held at page 1568:

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.”

Secondly, B also testified that she was able to recognize the appellant's voice when he asked her why she was alone in the canteen. See Maghenda -vs- Republic (1988) KLR 255. Thirdly, immediately after the robbery B told her landlord, Simon, that it was the appellant that had robbed her. Further, in her initial report to the police on the same day, B indicated that she had recognized the appellant as the robber.

14. On the doctrine of recent possession, it was the appellant's contention that the stolen items were found outside his house in a sack. He stated that he did not know who the bag belonged to or who placed it in front of his house. On the other hand, the prosecution's case was that the bag containing stolen items was found inside the appellant's house. Both lower courts made concurrent findings that the stolen items were found inside the appellant's house. B testified that the stolen items were found in the appellant's house near the door. Her evidence was corroborated by PC Hassan and Simon who were also present during the recovery. Based on the foregoing we see no reason to interfere with the findings that by the two lower courts that the stolen items were found in the appellant's house. We further find that by virtue of the foregoing and the fact the appellant was found in possession of the stolen items on the same day of the robbery the two lower courts correctly invoked the doctrine of recent possession in this case. 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.”

We also note that the appellant did not give any explanation of being in possession of the stolen items. In Stephen Njenga Mukiria & Another -vs- Republic- Criminal Appeal No. 175 of 2003, this Court held:

“The burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts, Firstly, that the item he had in his possession had been stolen a short period prior to the possession, that the lapse of time from the time of the loss, to the time the accused was found with it was, from the nature of the items and the circumstances of the case recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver..... See Maingi -vs- Republic (1989) KLR 221.”

15. Based on the foregoing we find that the evidence of recognition was corroborated by the fact that the appellant was found in recent possession of the stolen items. Therefore, we find no fault in the trial court convicting the appellant for the offence of robbery with violence.
16. Finally, on the offence of rape there was clear medical evidence that B had been raped. B gave evidence that it was the appellant who had raped her. We find that the fact that the appellant was

never medically examined to establish if he had raped B did not exonerate him of that offence. The provision to **Section 124** of the **Evidence Act, Chapter 80**, Laws of Kenya provides:-

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

Both lower courts found B evidence to be truthful in respect of the person who raped her and we see no reason to interfere with the said findings. We find that the appellant's defence of *alibi* was considered by the two lower courts and we concur with the two courts that the same did not displace the prosecution's case.

17. The upshot of the foregoing is that the appellant's appeal has no merit. Accordingly, the appeal is dismissed.

Dated and delivered at Nyeri this 13th day of November, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR