



REPUBLIC OF KENYA

COURT OF APPEAL

AT MALINDI

CRIMINAL APPEAL 390 OF 2010

BETWEEN

GEORGE OCHIENG..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and judgment of the High Court of Kenya at Mombasa (Ibrahim & Odero JJ.) dated 5<sup>th</sup> October 2010

in

H.C.C.R.A. NO.115 OF 2007)

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JUDGMENT OF THE COURT

In this second and possibly last appeal, the only issue raised by **George Ochieng**, the appellant, is identification. The appellant who stands convicted of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, was convicted after a trial, and was thereafter sentenced to death. His first appeal to the High Court was dismissed and hence the appeal before us.

The background facts are short. On 17<sup>th</sup> November, 2005 at about 2.30 a.m. while **Mohamed Abubakar Naman (PW1)** and his wife, **Kunsum Ali Mohamed (PW3)** were asleep at their residence then situated at Bakarani, a gang of robbers posing as police officers invaded them. PW1 believing they were police officers opened for them. As they entered the house electric lights were on. Initially only two of the robbers entered the house. Neither of them was familiar to either PW1 or his wife. They were armed with pangas and others who entered later were armed with batons. They interrogated PW1 as to his occupation about alleged sale of hard drugs in the neighbourhood among other matters, after which they ordered PW1 to leave the house, which he did. While outside he was attacked and assaulted by cutting him above his right ear. Thereafter they ordered him to move back into the house, to lie on his bed and cover himself with blankets, which he did.

In the meantime some of the robbers carted away several items from the house, among them, a coloured **JVC Sony TV**, **two mobile Nokia Phones – 3310 and 3100**, **Kshs.3000 in cash**, **a video deck** and a **photo album**. The robbers then escaped and locked the door from outside. The house was a Swahili type with several rooms.

A neighbour who became aware of the robbery telephoned the police, who came to the scene and took

stock of the robbery. It would appear that neither PW1 nor his wife went to any police station to make a report of the robbery.

On 25<sup>th</sup> November, 2005, about 8 days after the robbery, PW3 was at Mwandoni, when he saw a person alight from a **“matatu”** who resembled one of the two men who first entered their house during the robbery of 17<sup>th</sup> November, 2005. He saw him enter a certain house nearby. The time was 4 p.m. She returned home and informed her husband, who, with several other people accompanied her to the house into which she had seen the person, enter. Inside the house, they found the appellant, who was seated on a bed, and one **Lilian Makena (Lilian)**, who was later jointly charged with the appellant with the robbery with violence charge with an alternative charge of handling stolen property contrary to section 322 of the Penal Code. The police were called. They came and arrested both of them.

An issue arose at the trial as to whom between the appellant and Lilian was the owner of that house. **Omar Mohamed Manyama (PW5)**, a member of the Kisauni Policing Group, testified that at the time of arrest, Lilian, is the one who locked the house and handed over the keys to a neighbour. Fearing that accomplices might come in secretly and open the house, PW5 added a padlock of his own and thus made it difficult for a person without the keys of both padlocks gaining access into the house. PW3 also testified that a person who identified himself as the landlord of that house told her that Lilian was the one who had rented the house from him. That person did not, however, testify.

Later the same night Lilian was brought back to the house by the police. The house was opened and a search was conducted in her presence. A video deck, which both PW1 and his wife identified as one of the items stolen from them at the time of the robbery was found under the bed. It had a distinctive identification mark which they pointed out namely, **“ F. Yoma”**. That was the name of PW3’s mother. She had gifted the video deck to PW1 and PW3. Also found in the house was a photo album, but it was not one of the items stolen from PW1 and PW3 during the robbery at their house.

The appellant in his defense stated that the house belonged to him and on this Lilian supported him. In her evidence she testified that she had gone to visit the appellant when police found her there and arrested her. We will revert to the issue of ownership of the house later on in this judgment.

The issue which dominated the appellant’s trial was identification. It is the same issue upon which the decision of the first appellate court was based and upon which a decision of this appeal will be based. The trial court and the High Court on first appeal, found as fact that conditions favouring a correct identification of the appellant were good. The trial magistrate expressed himself on the issue thus:

**“The incident is said to have taken place about 30 minutes. PW1 and PW2 (infact it was PW3) stated on oath that four men entered their house, three stood by the door while one drew closer to them inside the room. He started interrogating them. At this time there was light in the house. None of the four men wore any mask. The man who was interrogating them is said to have worn a cap. He had a panga with him. He asked PW1 to follow him out of the house leaving behind PW2...**

**PW2 on her part said she had clearly seen the man who entered their house, took her husband out. That is why she was able to recognize and identify him when he was alighting from a matatu. To her it was the first accused.”**

On its part the High Court expressed itself on the issue as follows:

**“It is clear that the men who broke into the complainant’s house that night were the least bit bothered whether they were seen or not. They did not cover their faces and made no attempt to disguise their appearance. Indeed they were quite nonchalant – they knocked on the door and demanded to be let in claiming that they were police officers. The whole robbery incident must have taken a fair amount of time. The men took PW1 out into the corridor and then returned to ransack his house. Both witnesses were in the presence of their attackers for more than several minutes and in her view had ample time and opportunity to identify them. We find that the presence of electric lights at the scene enabled both PW1 and PW3 to see and identify their**

attackers clearly.

**This evidence of identification is further strengthened by the fact that on 25<sup>th</sup> November 2005, eight (8) days after the robbery PW3 saw the appellant alighting from a matatu. She recognized him as one of the men who had robbed them and followed him to see which house he entered.”**

Those are concurrent findings of fact by the two courts below. The findings are based on the evidence which was adduced before the trial court. The trial Magistrate believed both PW1 and PW3, and we have no basis for disbelieving them. Moreover, the trial Magistrate saw and heard the witnesses testify and was best placed to assess their credibility. The High Court on its part found as fact that the evidence adduced by the prosecution was credible, reliable and cogent and did meet the standard of proof beyond a reasonable doubt.

On the basis of those findings we accept as fact that the appellant was correctly identified by both PW1 and PW3. There was ample light. The appellant was with both witnesses for more than a moment and were therefore able to observe the appellant as to register his appearance in their minds.

The foregoing notwithstanding, in the appeal before us, Miss Jenniffer W. Wachira, counsel on record for the appellant, attacked the correctness of the witnesses identification of the appellant on the basis that they did not give a description of the appellant to the police. She cited several decisions in support of her submission, among them, **John Kuria Gatembu v. R.** Criminal Appeal No. 25 of 2000 (C.A) **Abel Monari & Others v. R.** Criminal Appeal No. 86 of 1994 (C.A) ( unreported). Those, among other authorities she cited, emphasize the importance of proper identification of robbers even where they involve people the witnesses knew before. She further submitted that in the case before us the appellant does not have any distinctive feature which would have made his identification unmistakable and in those circumstances, it is possible and probable that PW1 and PW3 could have mistaken the appellant for one of the people who robbed them.

The issue whether PW1 and PW3 gave a description of their attackers to the police did not feature at the trial. PW3, was however asked by the appellant whether she told the police she could be able to identify her attackers if she saw them. Her answer was as follows:

**“There was no distinctive feature that I noted but I saw your face well. I identified it by appearance. I never knew you prior thereto. After you took out my husband, you ordered me to switch off the light. I did so. I could not therefore identify those who came back into the house. After you and others left neighbours came. They called police who came. I told him what had happened. I told the police I identified one of the thugs and would recognize him if I saw him again.”**

Indeed PW3 saw and recognized the appellant. She said so in her evidence and was believed by the trial and first appellate courts. The appellant was arrested from a house she pointed out. A search in the house led to the recovery of a video deck which had been stolen 8 days earlier from the house of PW1 and PW3. Although both the appellant and Lilian denied the recovery, the trial magistrate and the High Court believed PW1, PW3 and Police Constable, **Samuel Maina (PW4)** who conducted the search and recovered the video deck. That evidence confirmed the correctness of PW3’s identification of the appellant on the night of the robbery.

An issue was raised regarding the ownership of the house. Both the appellant and Lilian stated that the house belonged to the appellant. PW3 and PW4 testified that it belonged to Lilian. Whether it belonged to the appellant or Lilian, is not an issue in this appeal. The prosecution produced a photo album they got in the house which carried photographs of the appellant and Lilian photographed together. Lilian stated that she was the appellant’s girlfriend. The appellant was silent on his relationship with Lilian. The circumstances of the case are that both were obliged to explain the presence of the video deck in that house. Lilian explained that the house did not belong to her and on that she was not believed by the trial magistrate. He held that the appellant is the person who took the video deck to that house, which, in his view belonged to his girlfriend. The police did not visit any other house alleged to belong to the

appellant. The appellant did not say he owned any other house. He perhaps did not do so for fear that if the police went there they would find more incriminating evidence. That is however conjecture. It is however, curious that even though the evidence herein points to Lilian as the owner of the house from where a video deck was recovered, the appellant insisted he was the owner of the house. On the basis of that insistence, the trial magistrate, by way of an alternative argument, should have called upon the appellant to explain the presence of the video deck in that house. The High Court, accepted the appellant's admission that the house belonged to him, and proceeded to consider whether the appellant had given an explanation as to how the video deck came to be found there. That court, held, clearly in error, that the appellant did not offer any explanation for his possession of it. But the appellant in his defence denied the video deck was recovered as alleged by prosecution witnesses. He was however disbelieved by both courts below, and we have no basis for holding otherwise. That being our view of the matter, we come to the conclusion as the High Court did, that the doctrine of recent possession confirmed PW3's identification of the appellant at the scene of the robbery and thus placed him there.

Miss Wachira also submitted before us that an identification parade should have been held. Mr. Kemo, Senior Principal Prosecution Counsel did not think such a parade would serve any purpose. We agree. It should be recalled that it was PW3 who led people to the house from where the appellant was arrested. If the suggested identification parade would have been held who would have been the identifying witness in the circumstances ? That submission is untenable and we reject it.

We have said enough to show that the appellant's appeal against conviction has no merit. Accordingly it is dismissed. Order accordingly.

**Dated and delivered at Mombasa this 15<sup>th</sup> day of March, 2012.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**