



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: WAKI, ONYANGO OTIENO & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 226 OF 2010

BETWEEN

THOMAS MORARA NYAMBEGAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Azangalala & Odero, JJ.) dated 20th July, 2010

in

HCCRA NO. 251 OF 2008)

JUDGMENT OF THE COURT

As at 27th June 2007, ***Shenaz Charania (PW1), Mohammed Nassir Hussein (PW2) and Zubeda Hemed Kaloma (PW3)*** were employees of Penguin Forex Bureaux and their offices were along Nyerere Avenue next to Biashara building. Charania was the Managing Director of the forex bureau, Hussein was the Assistant Principal Officer and was also dealing with serialization of the foreign money particularly the Euros, and Kaloma was the cashier. Samuel Okombo Aheha (PW4) was an employee of Wells Fargo Security and on that day he was assigned the duties of guarding the bureau, a job he had done for four years prior to that day. Raphael Mwandoro (PW6) went to the bureau that morning as a customer. Aheha reported on duty that day at 6.45 a.m. and started patrolling the surrounding area. Of course, he could not have access to the inside of the bureau as it was then still too early and the bureau was as yet not open. Kaloma arrived at the bureau at 7.30 a.m. and also stayed outside as it was not opened as yet. He stated in evidence that he waited outside the bureau together with other workmates, such as Muranga, the messenger, Aheha, the guard and others he could not remember. After sometime, about 8.30 a.m. Hussein arrived. Raphael Mwandoro, the customer was there ten minutes earlier at 8.20 a.m. When Hussein arrived at the bureau, he switched off the alarm. He then opened the grill and opened the inner door. He said there were two guards that morning but he did not name the other, guard nor was that guard called as a witness. Immediately Hussein opened the inner door, someone grabbed him by the shoulders and ordered him to keep quiet and obey whatever that man said otherwise he would be killed. That man pointed a gun at him, slapped him, led him to the banking hall, and told him to give him all the money that was there. He did not have the key to the strong room where most of the money was. There was only one key available but the strong room had a combination lock and thus another key was required to open it. However, the key to the cubical was available on the table. After a few minutes, the accountant who had the combination key, one Mohamed Mbarandia came to the hall and was forced to open and did open the safe. The thugs stole the money in that safe plus the money in the cashier's till boxes. As Kaloma reported on duty, he too was forced into the bureau at gun point and was ordered to lie down as well. Her

mobile phone was taken and her necklace and rings each worth Ksh.6000/- and her golden earrings were all taken. They then brought her till box and led her to her teller's office and ordered her to open it. She complied and they took all the money that was there. After a while, Charania also reported on duty and was ambushed and also led to the banking hall. She found Aheha was at the door, having also been forced to lie down. She was in shock but saw her other colleagues lying down in the banking hall. Her mobile phone Nokia valued at Ksh.40,000/- and her bungle were all removed and taken by the thugs. She was forced to open the safe and together with Hussein, they opened the safe for the thugs. The thieves took the money that was inside it together with CCTV. Aheha suffered the same fate in that he was also pushed into the banking hall of the bureau and made to lie down. His Motorola 113, valued at Ksh.1,250/= was taken. He was kicked and hit when he tried to raise up his head. Mwandoro who had been outside, unaware of what was going on inside the bureau pushed the door as he decided to enter the bureau. He met one of the attackers. He was also ordered to lie down as the attacker brandished a pistol at him. He complied. He was searched by the thug who had the pistol. His Samsung mobile phone D100, 200 Euros and Ksh.25,000/= were all taken. He did argue with the one who had a pistol for about three minutes at the door. Seriana Wakesho Mwashwa (PW9) and her driver were also hurled into the same bureau and her mobile and ring, all worth Ksh.16,000/= stolen. After the thugs had taken money from the bureau and the bureau staff, the guard and Mwandoro the customer, together with various mobile phones from the witnesses, they left. Charania, Hussein, Kaloma and Aheha were unable to identify any of the robbers, but Mwandoro was certain that he identified one person who had the pistol and he later identified him as the appellant Thomas Morara Nyambega.

Joshua Mutie Kimeu (PW8) was a cashier with Barclays Bank of Kenya Limited at Ruaraka Branch in the month of June 2007. On 28th June 2007, one day after the robbery at the Penguin Forex Bureau, he was on duty at the customer care desk. A customer, he later identified as the appellant, approached him and enquired if they were exchanging foreign currency. He responded positively and asked him what currency he wanted to exchange. The appellant's answer was that he had several currencies. Kimeu gave him paper to write the currencies and the amount. The appellant wrote on that paper only sterling pounds which was 2000. When asked about the other currencies, the appellant said he had left them in his uncle's house as he was from Mombasa and did not feel free carrying the cash. Kimeu asked him for his identification and he said he had left it outside. He went out but on return he was with another person and requested Kimeu to use the ID Card of the other man with whom he had returned to the bank. That other person who was the second accused in the trial court and who was acquitted, produced a police abstract and a driving licence. Kimeu told him that the amount he wanted exchanged was beyond his limit and so he consulted the branch manager who on hearing the appellant was not a regular customer at the bank directed Kimeu to escort them to the enquiries desk to fill an appropriate form. Apparently the branch manager suspected the appellant. She contacted the police and Sgt. Michael Nkumum (PW7) and another police officer from Divisional CID Kasarani were sent to the bank. They found the appellant and his colleague who was acquitted. They interrogated them and searched them. From the appellant, they recovered some foreign currency and two mobile phones. They arrested them and took them to Kasarani Police Station and placed them in the cells. In the meanwhile, Sgt. Erastus Ogutu (PW10), then attached to urban CID in Mombasa and who had reported to the scene of robbery on 27th June 2007, was detailed to investigate the case. As a result of information received, he and one P.C. Njeru proceeded to Nairobi Kasarani Police Station where they found the appellant and the other man. They arrested the two and took them to Mombasa. P.C. Ogutu made arrangements for Identification Parade to be carried out but the appellant is alleged to have refused to participate in an identification parade and so according to Sgt. Ogutu, no identification parade was held. Sgt. Ogutu retained the foreign currency secured from the appellant. The appellant, together with the other person were arraigned in the Chief Magistrate's Court at Mombasa on seven counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the charge in count one were:-

“On the 27th day of June 2007 at Penguin Forex Bureau along Nyerere Road at Mombasa township Mombasa District within Coast Province, jointly with others not before court while armed with dangerous weapons to wit pistols robbed Shenaz Charania Ksh.6,600,000/-, 3,500 Euros, 7000 Sterling Pounds, 6,300 US, Dollars, 2000 Swiss France (sic), 4,100, Japan Yen, 2,345 Canadian Dollars, 300 South African Rand, 110 Nor Kroner, 5,130 UAE Dirhams, 1,700 Indian Rupees, 55 Australian Dollar

1,590 Zanzibar Shillings, 132,000 Tanzania Shillings, a mobile phone make Nokia 9300 valued at Ksh 40,000/- all valued at Ksh.14,590,330/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Shenaz Charania.”

And the particulars of charge in respect of count 7 were:-

“On the 27th day of June 2007 at Penguin Forex Bureau along Nyerere Road at Mombasa Township Mombasa District within Coast Province jointly with others not before court while armed with dangerous weapons to wit pistols robbed Raphael Mwandolo (sic) 200 Euros, one mobile phone make Samsung D100 valued at Ksh.25,000/- and cash Ksh.15,000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Raphael Mwandoro.”

We have deliberately decided not to reproduce the other charges for reasons that will be apparent hereafter. He denied the offences and at the close of the prosecution case, he gave sworn evidence in which he maintained his innocence saying that he operated a shop at Makande area in which he also did foreign exchange business although he had no licence for the same. On 25th June 2007, he proceeded to Nairobi to buy a printing machine. He carried with him foreign currency as it was lighter. He carried foreign currency worth Ksh.850,000/-. He was not in Mombasa on the date of the offence as he was in Nairobi and never obtained proceeds of the robbery. He only came to know of the robbery at the time he was arrested. He denied refusing to appear in any identification parade and stated that eleven identification parades were organized and none identified him at any of the parades. He ended his evidence by producing a bus ticket which was issued to him when he travelled to Nairobi on 25th June, 2007. He admitted in cross-examination that he was arrested when he went to change foreign currency at the bank namely 200 pounds but he said he had his own ID Card and never sought to use somebody else's ID Card, and he maintained that the foreign currency he sought to change had no relevance to the allegedly stolen foreign currency.

After full hearing which included submissions by two learned counsel who represented the appellant and the other accused, the learned Senior Resident Magistrate (T. Mwangi) found the appellant guilty of counts 1 and 7 reproduced hereinabove, convicted him and sentenced him to death on the first count. The sentence on the second count was left in abeyance. His co-accused was found not guilty and acquitted. The appellant was not satisfied with the conviction and sentence. He appealed to the superior court vide HC Criminal Appeal No. 251 of 2008. That appeal landed for hearing before Azangalala and Odero JJ who dismissed it saying in their concluding remarks as follows:-

“Taken in its totality the prosecution did in our view prove a watertight case against the appellant. There was evidence of positive identification of the appellant at the scene of the robbery, and in addition there was evidence of recent possession by the appellant of the stolen currency. In the circumstances we are satisfied that the conviction of the appellant was sound both in law and on fact we have no hesitation in confirming the same.

The trial magistrate did impose the only lawful sentence which was the death sentence. We do hereby uphold the same. Finally this appeal fails in its entirety. The conviction and sentence rendered by the lower court are confirmed and upheld.”

The appellant is still not satisfied and hence this appeal based on seven grounds of appeal filed by the appellant in person in what is commonly termed “*home-made grounds of appeal*”. Mr. Buti, the learned counsel for the appellant adopted the same grounds but crystallized them into two main grounds and we think with respect, that he was plainly right in doing so. The two main grounds are whether or not there was proper evidence of identification of the appellant as one of the perpetrators of the subject robbery and secondly, whether the alleged evidence of possession of recently stolen property could be relied upon to sustain a conviction on the doctrine of recent possession of stolen property.

Mr. Buti's take was that there was no proper identification of the appellant at the scene of the offence as the only witness who purported to identify the appellant, Raphael Mwandoro, could not be

relied upon to convict the appellant as he was not consistent and at times was not clear in his evidence and further there was no identification parade held and it was not true that the appellant refused to attend any identification parade. Mr. Buti referred to the appellant's defence and submitted that the appellant appeared at eleven identification parades and so did not refuse to attend any other identification parade. On the second ground, Mr. Buti submitted that there was no evidence that the appellant was found in possession of the relevant foreign currency. He asked us to allow the appeal as in his view the superior court did not analyse the evidence as is required in law, and in any case, the alleged serialization of foreign currency was done on a paper dated 27th June 2007 which was the date of theft and the date of serialization. Mr. Ondari, the learned Assistant Director of Public Prosecutions submitted that Raphael Mwandoro testified that he had an argument with the appellant for three minutes and that was enough time for identifying the appellant as the offence took place in broad day light. As the appellant refused to attend an identification parade, that evidence of Mwandoro must be accepted and thus, there was no need to organize one for him. He submitted further that serialization was done before the foreign currencies were recovered, for it was done on a day before the money was taken to the bank. Thus according to Mr. Ondari, the serialisation was genuine and was rightly relied upon by the courts below to establish the doctrine of recent possession. He urged us to dismiss the appeal as in his view, there was proper evidence of identification of the appellant as one of the thieves at the scene and further the appellant was found in possession of some of stolen Euros and he could not explain his possession.

We have anxiously considered the record before us, the grounds of appeal, the decisions of the learned Senior Resident Magistrate and the High Court, the submissions and the law. As a second appeal, by dint of the provisions of **section 361 (1)** of the Criminal Procedure Code, we have no jurisdiction to consider matters of fact unless it is demonstrated before us that the trial court and/or the first appellate court failed to consider matters it should have considered or considered matters it should not have considered or that looking at the entire decision, the two or either of the two were or was plainly wrong in which case it becomes a matter of law. In this appeal, Mr. Buti's main point was that the superior court failed to analyse and to evaluate facts that were on record as was its duty to do, and thus came to a wrong decision on appeal. His approach was that evidence on identification and establishing the doctrine of recent possession were not properly analysed and evaluated by the superior court as was required of it. We have on our own carefully perused and considered the superior court's judgment. We do with respect agree with Mr. Ondari, that the superior court in its lengthy judgment, dedicated pages 88 to 100 to analysis of the evidence that was before it and went into details in analyzing that evidence. For example from page 89 of the record, the superior court went through the evidence of Raphael Mwandoro with what we may call a toothcomb, quoting the witnesses' evidence at pages 90, 91 and 92 and thereafter the superior court warned itself about accepting his evidence as he was a single witness on identification. The court also referred to the judgment of the trial court all in an attempt to bring out a full analysis not only of the evidence adduced in the trial court but also the learned Magistrate's response to such evidence. We are satisfied that the first appellate court complied with the legal requirements enjoining it to analyse and evaluate the evidence that was tendered in the subordinate court and to come to its own independent conclusion but always being aware that the trial court had the advantage of seeing and hearing the witnesses and giving allowance for that. We are not persuaded by Mr. Buti's argument on that aspect.

On identification, although Mwandoro was a single witness on identification, and although there was no identification parade held as the appellant allegedly refused to attend any such parade, we think, Mwandoro's evidence was reliable and could be accepted provided a caution was applied. In our view, the need for identification parades to confirm witness's evidence of visual identification cannot be whittled down at any time, but there are circumstances such as is in this case where the two courts below accepted that the appellant refused to attend such a parade, where the courts would be obliged to accept a witness's evidence of visual identification particularly when the conditions prevailing for such identification are as clear as were in this case. The offence took place in broad day light. The witness had three minutes to argue with the appellant and the appellant and his colleagues took his Euros and Kenya Shillings from his pocket. In such circumstances, we do accept that such evidence can be acceptable and relied upon though it be evidence of a single witness. This is in tandem with the decision of the predecessor to this Court in the case of ***Roria vs. Republic (1967) EA 583*** in which Sir Clement De Lestang VP stated:-

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardener, L.C. said recently in the House of Lords in the course of a debate on s. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdict:-

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.”

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

As we have said, we are fully aware and there are several authorities stating that visual identification which is not preceded by an identification parade has little probative value. However, as we have also emphasized, circumstances also matter. In a case such as this where the acceptable evidence is that the appellant refused to attend such a parade, it would set a bad precedent for such evidence to be rejected if in the opinion of the court it is reliable. It would be playing into the hands of an accused person and injustice might ensue.

Even if there was no evidence of visual identification, in this case there is still the evidence that the appellant was found with Euros some of which were stolen during the subject robbery. There was evidence which was accepted that these Euros had been serialized in readiness for banking on the date the offence took place. Mr. Buti raised a lot of dust on the date that was on the paper bearing the serial numbers of the Euros some of which were recovered from the appellant. In our view, again with respect, not much turns on that complaint because there was evidence that Erastus received the Euros on 28th June 2007 when he went to Nairobi and the list was with the bureau witnesses. In any case, the appellant, on re-examination stated:-

“I never serialized my money so I cannot tell which is mine and which is not.”

He never denied that he was found with the Euros. Both the subordinate court found as a fact that the appellant was found with the Euros only one day after the complainants were robbed of them. He never gave any reasonable explanation as to his possession of them. The accepted facts are that he wanted to change some of them, at least some pound sterling, without his identification documents. In that scenario, the trial court cannot be faulted for basing its conviction partly on that evidence. Neither can the first appellate court be interfered with in confirming that conviction. We think the decision in the case of ***Arum v. Republic (2002)2 EA 10***, relied upon by the High Court sums it all. The Euros found with the appellant fitted those serialized by Hussein. Those Euros were positively identified as those of the complainants and were identified as having been stolen from the complainants.

We are of the view that even if the identity of the appellant was not established, still on the evidence that was before the court which established that the appellant was found in recent possession of stolen property, a conviction could ensue as he offered no reasonable explanation for that possession.

The appeal lacks merit. It is dismissed.

Dated and delivered at Mombasa this 6th day of October, 2011.

P. N. WAKI

.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR