REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA Criminal Appeal 332 of 2008

MUGANDI MWANGOMBE .....……..... APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa (Sergon & Njagi, JJ) dated 29th October, 2008

in

H. C. CR. A. NO. 11 OF 2006)
****

JUDGMENT OF THE COURT

On the 10th day of October, 2005 three robberies took place simultaneously in a small trading centre known as Meli Kubwa in Mackinon Road Location, Kwale. All three robberies were either committed at 10.00 pm, according to the charge sheet, or 8.00 pm according to the evidence tendered in Court. Some discrepancies between exact timings in the charge sheet and in evidence or between different witnesses would ordinarily be amenable to the application of ***section 382*** of the Criminal Procedure Code, but, as will become apparent shortly, the discrepancy in this case was insidious. In all three robberies, Mugandi Mwang'ombe was said to have been involved.

Mugandi Mwang'ombe is the appellant before us. It was alleged in the first count of the charge sheet before Voi Senior Resident Magistrate that:

> ***"On the 10th day of October, 2005 at about 10.00 pm at Meli Kubwa trading centre Mackinon Road Location in Kwale District within Coast Province, jointly with others not before court being armed with dangerous weapons namely pangas, rungus, bows and arrows robbed Mary David of 20 packets of cigarettes and cash Kshs.20,000/= all to the total value of Kshs.25,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Mary David."***

The complainant was Mary David Thome (Mary) who testified as PW 1. She had a shop at the market but her timing of the robbery was 8.00 pm. A lighted gas cylinder lamp was on a table within the shop and her shop attendant, John Musembi Kalei, (PW 5), was with her. So were two other young men, one Sammy and one Kipindo, who were not called to testify. Just then, two people burst into the shop, one armed with a panga and the other with a metal bar. Three others were behind them. John was hit hard on the head and he fell down. Mary ran off to her bedroom and locked herself in. She started blowing a whistle as the intruders shouted "money, money" threatening to break the door open. She opened and was slapped and beaten until she urinated on herself. The robbers took assorted cigarettes and some loose change from the shop and left. She gave no evidence that Kshs.20,000/= was stolen as stated in the charge sheet. At no time was she able to identify any of the robbers. As for John, despite having been hit hard

and falling down, he testified that he recognized the appellant as the person who hit him. He recognized him, despite a scarf wrapped around the appellant's head, because the appellant used to buy things from the shop and was a brother to one Kambi. Despite such recognition, however, John said nothing about the appellant to anyone. We shall revert to this observation shortly.

As Mary was being robbed, the second robbery was also going on. It was alleged in the second count that the appellant:

> ***"On the 10th day of October, 2005 at about 10.00 pm at Meli Kubwa trading centre Mackinon Road Location in Kwale District within Coast Province, jointly with others not before court being armed with dangerous weapons namely pangas, rungus, bows and arrows robbed Jeniffer Mbala Mwachofi of one handbag and cash Kshs.1,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Jeniffer Mbala Mwachofi."***

Jennifer Mbala Mwachofi (Jennifer), the complainant was a green grocer at Meli Kubwa. She testified as PW 2 and put the time of the robbery at 8.00 pm. She had closed her kiosk and had gone to her room where she removed her clothes to take a bath. As she did so, the door to her room was loudly banged by people calling themselves police officers and it broke open. She was slapped on the face and her hair was twisted. The only source of light was a chimney lamp which they put off. She showed them her purse which had Kshs.1,500/=, and two bed sheets which they took and disappeared one by one towards Voi direction. She was not able to identify any of the robbers.

Then the appellant and another man appeared from the direction the robbers had gone. According to Jennifer, both had a panga each and the appellant said he had come from Mackinon to see a witch doctor and had not met any one on the way. He proceeded on but was arrested after ten minutes. Jennifer also said members of the public who arrested the appellant found him with a hand bag which she identified as hers, black in colour, with a small pocket inside.

The particulars of the third robbery which took place at the same time were that the appellant:

> ***"On the 10th day of October 2005 at about 10.00 pm at Meli Kubwa Trading Centre Mackinon Road Location in Kwale District within Coast Province, jointly with others not before court being armed with dangerous weapons namely pangas, rungus, bows and arrows robbed James Mrami of cash Kshs.3,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said James Mrami."***

James Mrami (James), (PW 3), was a dry cleaner whose house was violently broken into at 8.00 pm and ten armed robbers burst in. They beat him up and stole Kshs.3,000/= before they left. When he went outside he found many people. He did not see the appellant there but testified that he saw his face when the gang broke into his house as the appellant was the first to enter and demand money. He had looked at him for one minute in candle light.

The arrest of the appellant was witnessed by PC Robert Wambugu (PW 6) who was at Meli Kubwa Village with one Sgt Mutua on official duties. At 8.30 pm they received information about the robbery at Mary's shop and headed there. On reaching there they only found members of the public running away claiming robbers had guns. They were also told there were two people seen "running" away on bicycles towards Mgalani area. The officers went towards that direction and arrested the appellant. According to PC Wambugu, the appellant had a handbag on his back covered with a shirt which Jennifer, PW 2, identified as hers.

The three complainants were medically examined by a Clinical Officer (PW 4) on various dates and injuries on them, all classified as harm, were confirmed and treated.

For his part the appellant explained that he was a resident of Taru and that he had returned home after work at 4.00 pm when he found his wife's sickness had increased. He borrowed a bicycle from a friend and went to Mackinon to look for a witch doctor. At Meli Kubwa he was stopped by a woman and a man. He told them where he was going and that he had not met any one on the way as they wanted to know. He continued on his journey. He then met two other men who also asked him where he was going and he told them he was going to see a witch doctor. They said they were police officers and arrested him. That was about 7.30 pm. He was taken to a police station, where he was questioned about a theft he knew nothing about and the following day he was asked about a handbag he had never seen at all. He was

taken to court three days later.

The two courts below rejected the appellant's defence and made two concurrent findings upon which the appellant was convicted and sentenced to death. It was their finding, firstly, that the appellant was identified by way of recognition by John (PW 5) who was the sole witness on identification, and secondly, that the appellant was found in possession of a handbag which was stolen from Jennifer (PW 2). The two findings were corroborative of each other. The superior court however dismissed the evidence of the third complainant, James (PW 3) and acquitted the appellant on the third count stating, *inter alia*:

> *"The mere fright and shock of such a spectacle would not have allowed for a proper identification of the intruders. Secondly even though there was candle light, we are not told how bright it was, or its position in relation to the appellant. Thirdly, for a person who was under a death threat and who was knocked down with the first blow upon saying he had no money, and who continued to be beaten while he was on the ground, it is doubtful that he could have had time to look at the appellant "for one minute", or even the composure and presence of mind to do so.*
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> *We also note that although the witness said in cross examination that he gave the police a description of the robbers, no identification parade was held. We therefore find that the circumstances under which PW 3 was robbed were neither favourable nor conducive to a positive identification of the appellant. The mere fact that there was a spate of robberies in the area during that night is not evidence that the appellant was automatically involved in the robbery from PW 3."*

The appellant now comes before us on this second and final appeal basically challenging the superior court's lack of re-evaluation of the evidence on record, the purported identification of the appellant, and the application of the doctrine of recent possession. Learned Counsel for him, Mr. Charles Opulu, took us through the record and pointed out various inconsistencies, contradictions and omissions to justify the submission that the superior court did not discharge its duty, as the first appellate court, in re-evaluating the evidence on record. He also submitted that there was no basis for the finding that the appellant had a handbag on him and, even assuming that was so, that the "handbag" was the same as the "purse" allegedly stolen from the second complainant, Jennifer. Finally Mr. Opulu submitted that the purported recognition of the appellant by John, the sole witness on identification, was not properly evaluated.

We have carefully considered the complaints raised on behalf of the appellant and we think, with respect, that there is some merit in them. We are alive to the limits of this courts jurisdiction on second appeals as provided in ***section 361*** of the Criminal Procedure Code. We are also aware that where a right of appeal is confined to questions of law, an appellate Court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law ***(M'Riungu vs Republic [1983] KLR 455)***. This Court will nevertheless interfere with findings of fact where they are not based on any evidence at all, or on a misapprehension or perverted construction of the evidence or it is apparent that on the evidence, no reasonable trial court could have reached that conclusion, which would be the same as holding that the decision is bad in law (***Martin vs Glyneed Distributors Ltd, (T/A MBS Fastenings) [The Times, 30th March 1983]***. Put another way, the Court of Appeal may upset a finding of fact by the trial or the first appellate court where there is a misdirection but such misdirection must be of such a nature and the circumstances of the case must be such that if it were a trial by jury, the jury would not have returned their verdict had there been no misdirection ***(Kiarie vs Republic [1984] KLR 739).***

As stated earlier, there was a concurrent finding by the two courts below that the appellant was recognized by John (PW 5) when the robbery took place in Mary's shop. The superior court stated: *"He had known the appellant for as long as one year since the appellant used to buy provisions from the same shop. From this account, we are satisfied that there was sufficient light from the meko gas cylinder lamp by which PW 5 identified the appellant. And not only did he identify the appellant; he also recognized him as a customer who had been buying provisions from that shop for a year, and even knew the appellant's brother called Kambi. The appellant did not contest that he had a brother by that name. This was, therefore, a case of recognition."*

The case of ***Anjononi vs Republic [1980] KLR 59*** was then cited to fortify the finding. With respect, we

think there are serious questions about the veracity of the evidence relied upon for that finding. It is on record that the witness, John, was hit hard and fell down immediately the robbers burst into the shop. There was no evidence about how long it took for him to rise up, if at all, and at what point he looked at the assailant who had a scarf around his head and for how long. There was no evidence about the position of the gas cylinder lamp in relation to the witness and/or the assailants. Indeed, we think the observations made by the superior court in relation to (PW 3) (reproduced above) would aptly apply to John. Furthermore, if the appellant was a regular customer he would probably be known to Mary, but she said he was a stranger to her. Of more serious concern to us, is the conduct of the witness, John, in his failure to divulge such vital information to anyone until he testified in court almost two months later. He said nothing about it to his employer, Mary. He said nothing about it to the arresting officer PC Wambugu, although he said he was present at the arrest. The information he gave to the police officer who completed the P3 form on the day of the robbery under the topic *"General Medical history (including details relevant to offence)"* was:
"reported to have been assaulted by people on a robbery mission".

There is no mention of a person known to him. The P3 was completed on 30th November, 2005. Finally there was evidence of presence of many members of the public at the scene of arrest but no one testified to show that he was a fellow villager in Mackinon and not from Taru as he stated. In all the circumstances, we think the evidence of John (PW 5) was suspect and there was no firm basis for accepting it. The appellant was entitled to the benefit of the reasonable doubts raised in that respect.

As for the second piece of evidence connecting the appellant with the offence, we think once again that reasonable doubts abound. The item stolen from Jennifer was a "purse" containing Kshs. 1,500/-. That was her evidence on oath. She did not describe it either to the police in her first record or in evidence. The item allegedly recovered from the appellant was a "handbag". Beyond the description by Jennifer that it was black with a small pocket inside and that it was hers, there was nothing to distinguish it from other common handbags. We can envisage that there may be "handbags" which are the size of "purses" but in this case the handbag is said to have been hanging on the appellant's neck. Of course, the appellant denied that he had any such handbag. The superior court made no reference or finding on any of these relevant matters. In the absence of clear identification of the item allegedly stolen, we once again give the benefit of doubt to the appellant.

In sum, we reject the submissions of learned Assistant Director of Public Prosecutions, Mr. Ondari that the re-evaluation of the evidence on record was thorough; that the appellant was recognized by one witness; and that he was found in possession of recently stolen property. We allow the appeal, quash the conviction and set aside the sentence of death. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 29th day of January 2010.

P. K. TUNOI
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JUDGE OF APPEAL

P. N. WAKI
……..
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR