



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO 306 OF 2005

CHRISTOPHER NYOIKE KANGETHE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and judgment of the High High Court of Kenya at Nairobi (Lesiit & Makhandia JJ) dated 27th September 2005

in

H.C.CR.A. NO. 415 of 2003)

JUDGMENT OF THE COURT

CHRISTOPHER NYOIKE KANGETHE, the appellant, was on 8th May 2003 convicted by the Senior Resident Magistrate at Nairobi of three counts of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. His first appeal to the High Court of Kenya at Nairobi (Lesiit and Makhandia JJ) was dismissed and hence this second and final appeal.

The evidence adduced by the prosecution in the trial court was to the following effect. Manfula Kana (PW1) and her two employees Geoffrey Kijedi (PW2) and Richard Musala (PW3) were in PW1’s shop known as Wakefield Trading Company along the busy Moi Avenue, Nairobi, when at about 4.30 p.m. they saw three men enter the shop. The men posed as genuine customers and started enquiring about different items on display.

Suddenly, a person the witnesses identified as the appellant removed a gun from his waist and pointed it at PW1 and demanded money. Trembling she opened the cash box and the robbers scooped the cash inside and emptied it. The robbers then ordered her and PW3 into a room in the rare part of the shop but PW2 was left lying down near the counter. It is his testimony before the trial court that while in that position he had ample opportunity to identify the appellant as the robber with the gun before the appellant returned from the backroom and stepped on his head while threatening to shoot him. The robbers stole cash shs 30,000/-, two white bags containing keys and assorted documents and articles. These were all put in a green bag. After the attack, the robbers casually walked away. As they left, PW1 and her said employees shouted “thief” “thief” as they followed the appellant. The shouts attracted members of the public who joined PW2 and PW3 in the chase. They hotly pursued the appellant all the way to Lagos road

where Cpl. Sammy Luseno (PW4), a City Askari, saw a person being chased by a mob. Near where PW4 stood, that person was tripped and he fell down. As the mob administered blows on the person PW4 rescued him. PW4 then arrested the person whom he identified as the appellant. He had in his hands the green bag containing PW1's property which had earlier on been stolen from the shop.

PW2 and PW3 confirmed to PW4 that the appellant was the robber who had stolen from their shop. The witnesses also testified that at no time did they lose sight of the appellant after he bolted out of the shop.

The appellant in his testimony before the trial court admitted having been arrested by the members of the public at the time and the place stated by PW2, PW3 and PW4, but, averred that this was a case of mistaken identity. He disowned the bag that was recovered from him.

The two courts below rejected the appellant's defence and made two concurrent findings upon which the appellant was convicted. It was their findings; first, that the appellant was positively identified as a participant in the crime charged; and secondly, that the appellant was found in possession of the green bag which was stolen from PW1. The two findings, of course, were corroborative of each other.

The appellant now appeals to this Court against the said conviction and sentence on two main principal grounds which were argued before us by his learned counsel, Mr. Kenyariri. He submitted that the superior court did not re-evaluate the evidence on record, as regards the purported identification of the appellant and that had it done so it would have found that the appellant was not positively identified. Further he argued that the doctrine of recent possession was not at all applicable herein. He 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 bag on him and, even assuming that was so, that the bag was the same as the bag allegedly stolen from PW1's shop.

As stated earlier, there was a concurrent findings by the two courts below that the appellant was identified by PW2, PW3 and PW4. The superior court stated:-

“In our view, therefore the totality of the evidence irresistibly point to the appellant as having been a participant in the crime. The question of mistaken identity cannot therefore arise.”

And also:

Right from the scene of crime to the point of arrest of the appellant, we note from the recorded evidence that there was no break in the chain of events as to have left some doubt in our minds that the appellant could have been mistakenly identified. During the chase, PW2 and PW3 never lost sight of the appellant, a fact which was not seriously challenged by the appellant.

Even if the evidence of identification was doubtful, which we hold was not, the appellant would still be guilty of the offence on the doctrine of recent possession. As we have already pointed out the appellant was soon after the crime found in possession of a paper bag which had been taken from PW1's shop. Inside the paper bag were special coins and keys which were positively identified by PW1 as belonging to her”

By learned counsel for the appellant submitting that the appellant was not conclusively identified as one of the robbers and that there was a possibility of mistaken identity, the appellant is in effect asking this Court to depart from concurrent findings of facts by the two lower courts. In that regard, we would reiterate what we said in Nyeri in Criminal Appeal No. 131 of 2002: **Daniel Kabiru Thiongó v Republic (unreported)** that an invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were

perverse and therefore bad in law. If authority was imperative for such a fundamental principle of criminal procedural jurisprudence, we would refer to what this Court had earlier posited in **Stephen Muriungi & Another v Republic [1982-88] 1 KAR 360**. In delivering the majority judgment, Chesoni, Ag. J.A (as he then was) said at page 366:-

“We would agree with the views expressed in the English case of Martin V Glywed Distributors Ltd (t/a MBS Fastenings) [1983] ICR 511 that where a right of appeal is confined to questions of law only, an appellate Court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

In the appeal now before us, this Court is exercising the jurisdiction of a second appellate court from a decision of the subordinate court and by dint of the provisions of **section 361(1)** of the Criminal Procedure Code we are confined to matters of law only. Bearing in mind the principles we have elucidated above, we are far from being persuaded that the findings of both the trial and the first appellate court on the appellant’s involvement in the robbery could not reasonably have been arrived at on the basis of the evidence on record. On the contrary, we are of the persuasion that the evidence of the complainant PW1, her workers PW2 and PW3 and the council askari, PW4, whose evidence we have outlined hereinbefore, and which was believed by the trial court, squarely proves that the appellant was not an innocent passerby who was the victim of mistaken identity, but, he was a robber who was in broad day light chased, felled down, arrested and, unfortunately, also received a dose of mob injustice. There was no possibility of mistaken identification.

On our independent assessment of the entire evidence on record, we find that the appellant was properly convicted and that the convictions are safe. We uphold them.

We reject the appeal which we hereby order that it be dismissed.

Dated and delivered at Nairobi this 19th day of February, 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR