IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 464 of 2007

BETWEEN

NICHOLAS AMBUGA LIMANYE ……APPELLANT

AND

REPUBLIC ……..…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Kimaru, JJ.) dated 14th February, 2007

in

H.C.CR.A. NO. 189 OF 2005)
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JUDGMENT OF THE COURT

The appellant in this appeal ***Nicholas Ambuga Limanye***, was charged in the Chief Magistrate's Court at Nakuru with two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, with an alternative charge of handling stolen property contrary to ***section 323*** of the Penal Code; and one count of being in possession of Narcotic Drugs contrary to ***section 3 (2)*** of the Narcotic Drugs and Psichotropic Substances Act – Act No. 4 of 1994. Later, in the course of trial, the alternative count was amended by substituting the words *"was found in possession"* for the words *"he undertook the disposal of"* but the provisions under which the charge was preferred remained the same. He denied all charges together with the alternative charges, but after full hearing, the learned Senior Resident Magistrate (M.W. Onditi) found him guilty of the two counts of robbery with violence, convicted him and sentenced him to death on both counts – sentences to run concurrently. He was acquitted of the third count of being in possession of Narcotic Drugs and having been convicted of count 2 of robbery with violence, no finding was made on the alternative count to that count. The particulars of first count on which he was convicted were that:-

"On the 29th day of September 2004 at about 5.30 p.m. along section 58 within Nakuru Municipality District of the Rift Valley Province, jointly with others not before court while armed with pistols, robbed JN N one motor vehicle Reg. No. KAC 139F, wristwatch make Seiko, Radio make Sonny and cash Kshs. 4,300 all valued at Kshs.200,000/= and at or immediately before or immediately after time of such robbery used actual violence to the said J2 "

And as to the second count, the particulars were similar, except that the victim was JWM and the value of the stolen items was Kshs.7,800/=. They read as follows:-

"On the 29th day of September 2004 at about 6.30 p.m. along section 58 within Municipality, Nakuru District of the Rift Valley Province jointly with others not before court, while armed with pistols, robbed J M a wrist watch make Rado Jacket and cash money Kshs.7,100/=. All valued at Kshs.7,800/= and at immediately before or immediately after the time of such robbery used actual violence to the said JW M."

He was not satisfied with his conviction and sentence on the two counts. He lodged an appeal in the superior court which after considering his appeal, dismissed it and hence this appeal which was originally premised on nine grounds, and those were contained in a memorandum of appeal filed by the appellant in person. After he secured the services of an advocate, he filed supplementary memorandum of appeal through his advocates. These were:-

"1. That the learned Judges of the superior court failed in their duty as the 1st Appellate Court of evaluating the entire evidence and reaching an independent conclusion.

2. That the learned Judges of the superior court fell into error by relying on the evidence of an alleged recovered wrist watch to convict the appellant without properly directing their minds to the fact that the wrist watch was not recovered from the appellant and

further that even the person from who the watch was never recovered neither charged of any offence nor called as a prosecution witness to shed light on the circumstances and how she came into possession of the watch.

3. That the learned Judges of the superior court just like the subordinate court fell into grave error when they placed unnecessary and undue reliance on contradicting evidence by the prosecution to convict the appellant while unfairly rejecting the appellant's defence."

The brief summary of the facts as can be deciphered from the record may be stated as follows: J2 Njoroge Njunge was a businessman in Nakuru. He was operating a taxi business with his motor vehicle KAC 139F, a Toyota Corolla. On 29th September 2004 at 6.00 p.m, he was at ***section 58*** on his way to his residence when his vehicle ran short of fuel. He left it at a spot there and went for fuel on foot. On coming back with fuel, he met JWM (PW2) who was his tenant. J had a child and was going to Kiamunyi. J2 decided to give her a lift to town. J2 refueled the vehicle as J was still waiting nearby. After refueling, J2 entered the vehicle to start it, but before opening the vehicle for J to enter, three men attacked him from his right hand side. He tried to ignite the vehicle but it could not start. These three people hit his vehicle with a pistol and demanded that J2 open the vehicle. One of the gangsters hit him at the back of his head with a pistol. He was moved to the back seat together with J and her child. One of the attackers drove the vehicle, another sat on the passenger seat whereas the third one sat at the back with J2, Wangare and the child. The vehicle was driven towards Milimani direction. The gangsters on the passenger seat infront placed tobacco into the eyes of J2 and J. The two screamed for help. At that point, that gangster assaulted J2. J2 was robbed of Kshs.4,300/= plus his wrist watch make Seiko, whereas J's jacket, worth Kshs.200/= together with Kshs.7,000/= in it and wrist watch make Rado were all taken by the thugs. J2's Sonny radio which was installed inside the vehicle was also taken. All goods stolen from J2 were valued at Kshs. 200,000/=. One of the thieves who was identified by both J2 and J as the appellant, passed his hands over J private parts, hit her and threatened to rape her as the vehicle was being driven by one of the gangsters. They then used the vehicle to block other vehicles. When they reached Kiti area, the gangsters hijacked another vehicle. At Teacher's area, they abandoned J2's vehicle together with J2, Jand her child. They took off in another hijacked vehicle but they went with the keys to J2's vehicle. Fortunately, J2's mobile phone had fallen down in the vehicle. He picked it and used it to call his relatives. Police officers from Central Police Station were contacted. They responded, and the incident was reported to the police. J2 recognized the appellant as the gangster who sat with them behind the seat and as the one who wanted to rape J. Prior to the incident, he had known the appellant as his neighbour at section 58 where J2 owned a plot. He had seen him previously on several occasions and he informed the police that he could identify the appellant. J also recognized the appellant whom she had known as Nicholas prior to the incident and he had been her neighbour at Kamji estate near section 58. J testified further that the appellant used to stay near her salon business and she knew the appellant's wife as well for she used to make appellant wife's hair at her salon and it was the appellant who used to pay for the services and used to pay promptly.

On 1st October 2004, acting on information received from J2 and J, PC Joshua Otieno (PW3) of CID Flying Squad Unit at Nakuru Police Station, together with PC Geoffrey Nyerere (PW6) and another Police Constable went to Kanyani area within section 58 Estate, and found the appellant outside his house making a structure. On seeing them, the appellant started walking off steadily, but the police officers chased him and apprehended him. They searched appellant's house but did not recover anything. On 8th October, 2004, I.P. David Keya Simiyu (PW4) organized an identification parade where J2 identified the appellant as one of their attackers. On the same day, a woman identified as appellant's wife was going to the police station to check on the appellant. She had a wrist watch. J had also been to the same police station and had made her statement on the incident. As she was going home, she met appellant's wife on her way to the police station. Immediately, on meeting her, J noted that she was wearing her wrist watch which had been stolen from her in the course of the robbery. J returned to the police station, and reported the matter. As both J and appellant's wife were at the report office, PC Joshua went for the appellant, brought him to the report office and asked appellant's wife to surrender the watch she was wearing. Jpointed out certain features on the watch that made her identify it as her watch. On 12th October 2004, the appellant was arraigned in court as stated above. After the close of the prosecution's case, the appellant, made a sworn statement denying the offence. He stated that he was in the business of selling chang'aa. On 29th September 2004, he was busy in his chang'aa business as he was alone because his wife had travelled to his home in Western Province. On 1st October 2004 at 9.00 a.m. he was arrested in his house, because people were drinking chang'aa in the house. On 8th October 2004, he was identified at an identification parade. According to him, the evidence against him was fabricated because earlier, on 20th September 2004, one of his customers fell on J's verandah, vomitted, and urinated there and that did not please J, hence the allegations before the Court. He was not arrested with a wrist watch nor with any bhang. He maintained that all his problems were caused by J with whom he had grudges.

The above, was in a summary, the evidence that was before the trial court as regards the offences for which the appellant was convicted. We have left out the evidence as regards count III before that court because, as we have stated, the appellant was acquitted of that charge.

Mr. Akang'o, the learned counsel for the appellant, in his submission to us, stated that there was no proper evidence upon which a conviction could be based as the evidence that was adduced was full of contradictions and the court did not also consider that once J2 was hit, he must have been under shock and could not have identified his attackers properly. He pointed out the parts of the record which he felt demonstrated contradictions. He also submitted that both the trial court and superior court did not consider the appellant's defence, particularly that there was grudge between the appellant and J. And lastly, that the person found with the wrist watch should have been called as a witness. Mr. Nyakundi, the learned State Counsel, on the other hand supported the conviction and sentence, submitting that both were based on sound evidence as the appellant was identified by recognition and watch found with appellant's wife who could not in law be called as a witness as she was not a compellable witness. In his view, the doctrine of recent possession was applicable.

We have considered the record, the grounds of appeal, the submissions of counsel and the law. This is a second appeal and that being the case, pursuant to the provisions of ***section 361(1)*** of the Criminal Procedure Code, matters of fact such as the matters of contradictions Mr. Akang'o raised before us do not fall for our consideration more so because the alleged contradictions are not fundamental. The trial court is expected to analyse and evaluate the evidence. The first appellate court is also by law (see case of ***Okeno vs. Republic, (1972) EA 32,*** supposed to revisit the same evidence a fresh, analyse it and evaluated it again. We are now only required to consider matters of law. We note however, that the first ground of appeal is that the superior court did not evaluate the entire evidence a fresh. We have considered that aspect, but with respect, we are unable to fault the superior court on that score because the alleged contradictions did not go to the root of the entire case. It is true, the record shows that J2 said the gangster who sat on the left seat of the driver was the one who placed tobacco in his eyes and J's eyes whereas J said it was the appellant who spread tobacco into her eyes and nose. It must however be noted that the superior court in approaching that evidence gave an apt summary of it by merely saying *"They sprinkled tobacco on the eyes of PW1 and PW2."* We call this an apt summary because, whether it was the thug seated on the left of the driver or the appellant, the truth remains that the thugs did sprinkle the victims eyes with tobacco and the appellant would be in law held liable for that even if the other thug who escaped did it, on the doctrine of common intention. On the complaint that, J did not describe the appellant to the police, whereas J2 did, no contradiction can be read into that for each witness, had to give her version of the matter. In any event, J clearly said she knew the appellant and vividly described how she knew him and his wife whose hair she used to make. Jsaid she was a neighbour to the appellant and the appellant, in his sworn

statement confirmed that evidence. PC Joshua further confirmed J's evidence on her recognition of the appellant. In our view, nothing turns on the first ground. We are satisfied that the superior court, analysed and re-evaluated the evidence as is required of it.

On the application of the doctrine of recent possession, the superior court had this to say:-

"Although there was no evidence adduced to confirm that the person from whom the wrist watch was recovered was the appellant's wife this was a strange coincidence……
In present case, we find no other hypothesis on how a woman would turn at the police cells to check on the appellant while wearing the wrist watch which was stolen from PW2 other than to link the appellant with the robbery."

We add that J, in her evidence clearly identified that woman as appellant's wife and went further and stated that she had made her hair at her salon on several occasions and the appellant promptly paid for the services. Further, PC Joshua said when the issue of that woman wearing Js watch came up at the police station, he went for the appellant from the cells, brought him to the police report office and in the appellant's presence and presence of J and the woman he told that woman to surrender the watch she was wearing. The appellant never denied having any relationship with that woman. In his sworn defence, which he gave after hearing the allegations that that woman was his wife, he never denied that allegation. In our view, the trial court was in those circumstances, plainly right in inferring that that woman was his wife. That being so, she was a competent witness but not a compellable witness by virtue of the provisions of ***section 127(3)*** of the Evidence Act, being the wife of an accused person. The watch recovered from her in the presence of the appellant had been recently stolen from J in the course of robbery ordeal. Coincidentally it was found with a person very closely connected to the appellant. She had gone to check on him at the police station. In that scenario, we are of the view that the doctrine of recent possession was properly applied. We say no more on that.

The last ground of appeal is a complaint that the appellant's defence was not considered by both courts below. The superior court, at the bottom of page 5 of its judgment set out the appellant's defence in extenso and it was clearly in its mind throughout the judgment. It however, found that the evidence adduced by the prosecution ousted the alibi defence by the appellant and negated the allegations by the appellant that the evidence had been fabricated against him. On our own consideration of the evidence on record, we are unable to disturb that finding.

In conclusion, we agree that in this case, where the offence took place just after 6.00 p.m. as found by the trial court, which was still day time, and near and later inside a small vehicle, the circumstances for a proper identification of the attackers were not difficult. There was no press of people nearby. It was not dark, the attackers and the victims were all in one small vehicle with two attackers in the front seat, one driving and one seated next to him and the victims were together with one attacker behind. The appellant even touched J's private parts as he was seated near her. We are aware that in law, as spelt out in the well known case of ***R vs. Turnbull (1976) All ER 549,*** and amplified in several local decisions such as that of this Court in the case of ***Wamunga v. Republic (1989) KLR 424,*** where the only evidence against an accused person is evidence of identification or recognition, a trial court is enjoined to examine such evidence with greatest care and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction, and that recognition may be more reliable than identification of a stranger, but mistakes in recognition of close relatives and friends are sometimes made. However, in this case, the evidence of identification by recognition was overwhelming such that even if the issue of recent possession were to be ignored, there would still be enough evidence on which to base a conviction. We have no basis for disturbing the conclusions reached by the trial court and the superior court.

Before we dismiss this appeal as we must do, we note that the trial court, after sentencing the appellant to death on both counts, made an order that both sentences would run concurrently. The superior court did not interfere with that order. The correct order that should have been made is that the second sentence of death was to be stayed. The sentences of death cannot be carried out simultaneously. As the appeal has been dismissed we order that the sentence of death on the second count shall be stayed. Secondly, we have not attached any importance to the identification parade that was organized and held in this case. This is advisedly so. The identification parade served no purpose at all in this case. J2 told police that he recognized one of their attackers and gave the description of that person. Indeed Joshua said he arrested the appellant on information received from J2. In such a situation, J2 had no option but to identify a neighbour of his tenants whom he had also known prior to the incident. We make it clear that where the police, having investigated the case, are proceeding on the basis of identification by recognition, an identification parade will serve no purpose. If held, it would only serve to confuse the Court in the matters.

The appeal is dismissed.

Dated and delivered at Nakuru this 28th day of May, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR