IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 4002 OF 2007

BETWEEN

OUMA OBENJO …….....……...…….. 1ST APPELLANT

STANLEY KINUTHIA ……...……. 2ND APPELLANT

AND

REPUBLIC …….…... RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi (Mutungi & Ochieng, JJ) dated 28th April, 2005

in

H. C. CR. A. Nos. 1017 & 1018 of 2002)

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JUDGMENT OF THE COURT

The appellants, ***Ouma Obenjo*** and ***Stanley Kinuthia***, were tried by the Senior Principal Magistrate at Kibera on a charge of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of that charge were that on the 9th April, 2002 at Ngong township in Kajiado District within Rift Valley Province jointly robbed Benjamin Mutisya Munyao a Panasonic radio, one executive briefcase, one bag, a brown aviation bag, two saving *(sic)* machine *(sic)* black and brown, a stereo walkman, one mirror, electric iron and a kitchen knife all valued at Kshs.15,000/= and at or immediately before or immediately after the time of said robbery wounded the said Benjamin Mutisya.

The evidence adduced against the appellants was that on the 9th April, 2002 at about 10.20 pm Benjamin Mutisya Munyao (PW 1) (the complainant), a student at a Nairobi College, was walking towards his home in Ngong. He had just alighted from a bus, a distance of some 50 metres from his home. Suddenly, the 1st appellant (Ouma) grabbed him by the neck, while the 2nd appellant (Kinuthia) hit him on his back with a rungu. Ouma then removed the complainant's belt, and used the same to tie his hands, while Kinuthia emptied his pockets, taking away Kshs.100/- in cash, and a wrist watch. They then led the complainant to his house and ransacked the same, stealing all the items noted in the charge

sheet. However, before entering the house they covered the complainant's head and face with a towel.

When the robbers left, the complainant informed his neighbours about the incident, and together they tried, in vain, to trace the robbers. However, the complainant ran into some police officers on patrol, and reported the incident to them.

On the following day, by a strange coincidence, two Administration Police Officers (APs) – Charles Mwaniki (PW 2) and Moses Nganga (PW 3) who were on foot patrol, stopped by a butchery in Ngong town to have a meal. There, they noticed a man sitting across who seemed uneasy. They questioned him. The man said he was a watchman at a nearby bar. Upon making further inquiries, they learnt that the man was not a watchman, and decided to search him. They recovered a knife, walkman, rungu and shaving machines. They took him to the police station, and booked him for possession of stolen items.

On the following day, that is on the 11th April, 2002, again by a strange coincidence, the complainant went to the Ngong Police Station and walked into the crime office and saw his walkman and some other items stolen from his house on the table. The "man" that the APs had apprehended was also sitting there, and the complainant identified him as the person who had accosted him, and stolen from his house. At this point, the man offered to lead the police to another person's house who he alleged had also been involved in the said robbery. The second man was arrested upon his "identification" by the complainant, although none of the stolen items were found in his possession. Ouma, the first man and Kinuthia the second, were then arrested and charged as aforesaid, despite their protest that they were not guilty.

The Senior Principal Magistrate heard and recorded the evidence from six prosecution witnesses, and Ouma in turn gave an unsworn statement denying the charge, while Kinuthia gave sworn testimony, also denying the charge. Ouma stated that he was arrested by two drunk APs who he refused to bribe, and offered to lead them to Kinuthia's house only to avoid being beaten further. Kinuthia stated that he was arrested only because of his differences with Ouma, who had consistently failed to pay for *changaa* that he had consumed at his (Kinuthia's) house.

At the end of it all, the Senior Principal Magistrate believed the prosecution case; rejected the appellant's testimony; convicted both the appellants and duly sentenced them to death, the only penalty provided for by law for that offence.

The appellants appealed to the superior court and by its judgment dated 28th April, 2005 that court (Mutungi & Ochieng, JJ) dismissed the appeals against conviction and confirmed the sentences of death. The appellants are now before us on this 2nd (and final) appeal, and that being so the jurisdiction of this Court is confined to considering only issues of law – see ***section 361*** of the Criminal Procedure Code. At the hearing before us on 14th June, 2010, at the very outset, the learned Senior Principal State Counsel, Mr. O'Mirera, conceded the appeal in respect of Kinuthia, the 2nd appellant. He conceded, rightly in our view, that the 2nd appellant, not having been properly identified, and as none of the stolen items were found on him, his conviction was unsafe, and ought to be set aside. Mr. Nyamongo made similar submission, and we agree with the same. Indeed even the superior court was skeptical of the 2nd appellant's conviction, and stated as follows at the conclusion of its judgment:

"In conclusion, although the 2nd appellant's identification did cause us some anxiety, we have been persuaded that there is no merit in these appeals. We therefore dismiss both appeals, and uphold both conviction and sentence."

We express strong surprise that having found "anxiety" about the 2nd appellant's identification the superior court failed to apply the test of proof beyond reasonable doubt and failed to give him the benefit of doubt, applying instead, the test one would apply in civil cases of "the balance of probabilities". On our part, we completely agree with the submissions made before us, and reiterate that the only reason why Kinuthia was arrested was because Ouma led the police to his house. Nothing was found on him to

incriminate him, nor was the evidence of identification against him watertight. Accordingly, we allow his appeal, and set aside the conviction and sentence against the 2nd appellant, and order that he be set free forthwith unless otherwise lawfully held.

With respect to the 1st appellant, in a supplementary memorandum of appeal filed on his behalf by his learned counsel, Mr. Nyamongo, the 1st appellant outlined eleven grounds of appeal, relating both to facts and law. However, Mr. Nyamongo chose to combine and argue them broadly. He argued that the charge was defective in that the alleged date of the offence does not coincide with the evidence on record before the trial court; that the superior court failed to analyze and evaluate the evidence and come to its own conclusions; that the identification of the 1st appellant was unreliable; and that conviction was founded on inconsistent testimony relating to possession of recently stolen property.

Mr. O'Mirera, on the other hand, submitted that there was no error in identification as the incident took place in an area where there was sufficient light from electricity for the complainant to identify the 1st appellant; that there was no inconsistency in evidence relating to recent possession; and finally with regard to the date of the incident stipulated in the charge sheet, the date appeared to be a typographical error, and ought to read 7th April, 2002, as is so clearly evident in the original hand written charge sheet.

We agree with Mr. O'Mirera that nothing much turns on the date of the incident, as clearly it was the 7th and not the 9th April, 2002, as is shown in the original hand written charge sheet.

Let us now turn to the issue of identification, which we believe is the subject of the main complaint in this appeal.

In convicting the first appellant the trial court stated in part, as follows:

"This issue is whether it was accuseds (sic) **who committed the robbery in** (sic) **were the accuseds** (sic) **positively identified to be the robbers and further did accuseds** (sic) **handle stolen goods? The complainant was alone at the time of the robbery and so there was no eye witness to the incident. Therefore the prosecutions** (sic) **relies on the complainant's testimony, adds on the evidence of recovery of the stolen items and arrests of accuseds** (sic) **to were** (sic) **the accuseds culpability.**

The incident occurred at 10.20 p.m. at night. However, the complainant told the court that he could clearly see the robbers faces as he was first attacked 15 metres from a bar as security lights brightly lit up the scene; that even in my (sic) **house accused 2 flashed a torch around his (complainant's house) enabling him to see the accused faces, although accuseds** (sic) **were strangers to complaint prior to the incident, he was able to clearly see their faces and to quickly and positively pinpoint them as the robbers when he next saw them."**

In dismissing the appeal, the superior court delivered itself, in part, as follows:

"The message we get is that PW1 had been very observant indeed. Even before he was attacked, he had noted the exact position where the two persons were. He noted the move made by the 1st appellant and was able to turn round, and engage him in a struggle. In fact, the struggle resulted in a cut to PW1's eye brow and hand. In other words, PW1 was able to see exactly which of his attackers played what role. The 1st appellant ordered him to sit down, and then removed his (PW's) belt, which he used to tie PW1's hands behind his back. As he did so, the 2nd appellant frisked his pockets and took money.

Not only did PW1 describe in detail, the respective roles played by the two robbers, he also categorically stated that:

'The lights – electricity lights from the bar were bright and I clearly saw accuseds** (sic) **faces.'

Of course, the 2nd appellant has challenged the issue of lighting, saying that the witness did not specify how far away the attack was in relation to the lighting. However, a close scrutiny of the record reveals that when PW1 was being cross-examined by the 2nd appellant, he said;

'from the bar to the spot I was first attacked is 15 metres in distance.'

Given the foregoing scenario, we hold that although the claimant was attacked at night, there was sufficient lighting, and he kept his wits about him sufficiently to be able to positively identify the robbers.

After ransacking his pockets, the robbers led PW1 to his house. They did not put on the electricity, but used the light from the torch to help them identify the items which they wanted to steal. Whilst the robbers were so engaged, PW1 was watching them, and he testified that he was able to see them clearly.

In our considered view, the robbers must have appreciated that the torch light provided sufficient lighting, not only for them to see PW1's property, but also for PW1 to identify them. We believe that it is for that reason that the 1st appellant deemed it necessary to then tie up PW1's face and head with a towel. To our minds, that was the second occasion when PW1 was able to positively identify the two persons who robbed him.

According to PW1, when he reported the incident to the police, he told them that he could identify the robbers, if he saw them again. But when the 2nd appellant called for the O.B for 8th April, 2002, there was no indication, in it, that PW1 could identify his attackers. Nonetheless, PW1 kept on emphasizing to the trial court that he had told the police that he could identify the people who had robbed him.

We are fully aware of the importance of first reports, as they provide the court with a bench-mark against which to measure subsequent statements made by identifying witnesses. Thus if a witness did first tell the police that he had not identified a suspect at the time when the offence was being committed, the credibility of such a witness would be in doubt if he later said that he was able to identify the person, even in an identification parade.

But in this case, PW1 insists that when he made his first report, he told the police that he could identify the persons who robbed him. The O.B does not contain such a statement. So what are we to make of it?

The P3 form, Exhibit 10, which was adduced in evidence by PW5, Dr. Zephania Kamau, provides some assistance in this regard. Page 1 of the said form, at Part 1 thereof, is usually filled in by the police officers who issues (sic) **the form to a complainant. It bears the date 9.4.2002, which was before PW1 encountered the 1st appellant at the police station. In other words, it was also before the 2nd appellant was arrested.**

The P3 form has the following statement:

"He was assaulted by two men well known to him physically. Please examine the degree of injury sustained."

That statement persuades us that even before PW1 had encountered the appellants, subsequent to the robbery, he had made it clear to the police that the two men who had assaulted him were well known to him, physically. We are therefore well satisfied that PW1 had positively identified his assailants."

On our reading of the evidence on record, we are of the view that the "identification" of the first appellant as the robber was questionable for the following reasons: given that the entire prosecution case

rested on the credibility and proper identification of a single witness, the complainant, the two courts below failed to note some glaring contradiction in testimony relating to identification. For example, neither of the courts examined critically the lighting conditions on the road given that it was 10.30 p.m. and the complainant was grabbed by his neck from the back, and immediately hit with a rungu for him to be "very observant", and to note "the exact position of the two persons". Secondly, there is clear evidence from the complainant himself that his face and head were covered during the duration of the robbery while in his house. Here is what he stated in evidence:

"Accused 2 took my house keys and opened my house door. The three of us entered the house and accused 1 then tied my head and face with a towel. He ordered me to bend low till my forehead touches my thighs. I did so, with my hands still tied. Accuseds (sic) **then started ferrying goods from my house. I pleaded with them not to steal my property. I noted the accused's voice was hoarse. Accused 2's voice was light. Accused 2 ordered, in his light voice ordered me to shut up.**

Eventually, they left. Accused 1 told accused to leave as he (accused 1) would sleep in my house. After a few minutes, the movements ceased in my house. I shake (sic) **my face and towel fell off."**

This important evidence from the complainant himself appears to have been completely glossed over, as both the courts below came to the conclusion that the torch light inside the house was sufficient to enable the complainant to identify the first appellant. He could not have done so, if his face was covered. Finally, there was no identification parade held, and the only identification here is dock identification, which in our view is unreliable, and insufficient to convict.

Finally, we come to the complaint that the doctrine of recent possession was incorrectly invoked in this case. We agree with the learned counsel for the first appellant that conviction on this ground was based on inconsistent evidence of the two APs, leading to a doubt whether the stolen goods were found in the possession of the first appellant. For example whereas PW 2 says they searched 1st appellant in the bar and then took him to Police Station, PW 3 said they searched him at the Police Station and that it was another police officer who made the recoveries. That police officer was not called as a witness. Secondly, the first appellant was not afforded the opportunity to explain how or why he came to be in possession of the said items. When he explained that the items belonged to him, there was no follow up by the police to verify the same. For that reason also, we are of the view that the doctrine of recent possession was inapplicable in this case, and was wrongly invoked to convict the first appellant. Accordingly, we find the convictions to be unsafe, quash the same, set aside the sentence imposed on both the appellants, and order that they be released from prison forthwith, unless otherwise lawfully held. Orders accordingly.

Dated and delivered at Nairobi this 16th day of July, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR