



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 34 of 2006

DONALD MAJIWA ACHILWA 1ST APPELLANT

DAVID TIEMA ODANGA 2ND APPELLANT

STEPHEN SHEM SHITUBI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Apondi & Kimaru, JJ)

dated 16th November, 2005

In

H.C. Cr. A. Nos. 336, 337 & 338 of 2002)

JUDGMENT OF THE COURT

This is a second appeal by Donald Majiwa Achilwa (1st appellant), David Tiema Odanga (2nd appellant) and Stephen Shem Shitubi (3rd appellant) against their conviction and sentence by the Senior Resident Magistrate Molo, for the offence of robbery contrary to **section 296 (2)** of the Penal Code. Being a second appeal only issues of law fall for consideration by dint of the provisions of **section 361** of the Criminal Procedure Code. Although the 1st appellant was convicted of a second count of rape, in his home made memorandum of appeal he has not said anything about it. Be that as it may, we will consider the case as a whole.

Mr. Akang'o who appeared for the appellants informed us from the bar that he had condensed the appellants' respective grounds of appeal into four broad grounds. These are:-

1. The evidence of identification having been by a single witness in difficult circumstances the trial and first appellate courts erred in basing a conviction on such evidence which in the circumstances of this case was unreliable.
2. The superior court as a first appellate court failed in its duty of re-evaluating the evidence before coming to the decision that the appellants committed the offences charged.
3. The superior court improperly relied upon the doctrine of recent possession of stolen property when the evidence regarding recovery of stolen property was unsatisfactory.
4. The superior court disregarded the appellants' respective defences of alibi.

The conviction of all the three appellants was mainly based on visual identification of them by GWN (G) at night time with the aid of torch light and moonlight, a confession statement by the 3rd appellant which was repudiated, recovery of certain items from the 1st appellant who was pointed out by the 2nd appellant before such recovery.

The alleged robbery was committed at about 2.00 a.m. on 3rd March 2002. A gang of robbers who numbered more than 4 broke into G house at County Council Quarters in Molo. G was at home then and was asleep in her bedroom. In her sitting room, a lady by the name Susan Wangechi (Susan) was there asleep. She was employed by G as a bar attendant in a bar business she was operating within Molo town. In the house there was also a student who had come from Muranga to visit G. The evidence is not quite explicit as to where in the house the student was at the time of the robbery. Upon gaining entry the robbers met Susan. They set on her and beat her thoroughly to compel her to give them some money. While they did so, G, who had come to the sitting room to find out what was happening, was hiding behind a chimney which was in the sitting room area. She crouched under a table and from there observed the unfolding events. It was her evidence that she was aided by light from torches, which the robbers flashed in the house and moonlight to see what was happening. Using that light, she said she was able to identify the 1st and 3rd appellants, and to recognize the 2nd appellant. It was her evidence that she knew the 2nd appellant before that day. He was a hand cart pusher. It was G' evidence that she had ample opportunity to observe the appellants and was therefore able to identify the 1st and 3rd appellants, about ten days later, in well organized identification parades. Susan was unable to identify any of their attackers, and for that reason she did not take part in any identification parade. Likewise, the student who was also present in the house during the robbery did not participate in the identification parades, nor was she called to testify.

If we pause there, it was Mr. Akang'o's submission that the circumstances as outlined above were not conducive to a correct identification of the appellants. In his view, G could not properly identify anybody in the circumstances she was in. She was under a table. The light was poor and in absence of evidence as to how far she was from what she called a vantage point, it could not be stated with any amount of certainty that she was able to identify the appellants. Besides, he submitted, G did not offer any description of any of the appellants to the police. In view of that, he said, one cannot believe that she knew the 2nd appellant before. Had she known him before, she would have mentioned his name. He concluded his submission on this aspect by stating that the trial Magistrate erred when he failed to caution himself as to the dangers of basing a conviction on the evidence of identification by a single witness in difficult circumstances. In his view the caution by the superior court in that regard did not cure the omission. We agree with Mr. Akang'o that the trial Magistrate should have cautioned himself regarding the dangers of relying on the testimony of a single witness in difficult circumstances. However, in this case, it was not the only evidence. There was other evidence to fortify the identification.

There is a plethora of authorities on the issue of identification and more particularly in cases where there is only one identification witness. **R v. Turnbull & Others [1976] 3 ALL ER 549** lays down the principles to guide the courts in cases relating to identification. We also wish to point out that this court has time and again said that a fact may be proved by the testimony of one witness (see **Maitanyi v. R. (1986) 2 KAR 75**). It must, however, be pointed out that the principles enunciated in those cases provide a general guide. In the final analysis each case has to be decided on the basis of its own peculiar facts and circumstances.

We agree that the circumstances under which G said she identified the appellants were difficult. It was night time. The type of light available was not the best. There are, however, certain peculiar facts and circumstances of this case to be noted. The robbers stayed in G' house for a long time. She must have been close enough to observe them. They were in one room. Unlike Susan who was subjected to a lot of beating from the word go, G was free for sometime before she was also attacked by the robbers. Her identification would have been worthless if she had not picked the 1st and 3rd appellants in separate identification parades. We agree with Mr. Akang'o that identification parades are usually held to test the correctness of the identification by a witness. It is not, however, in all cases that a failure to give a description of an assailant before an identification parade, weakens the identification evidence, more so if the identification parade is well conducted.

Mr. Akang'o attacked the identification parade evidence concerning the 3rd appellant because Glaxton Kikwai who conducted the parade is recorded as having said that he placed the suspect between two parade members. The record reads thus :-

“One P.C. Cheruiyot escorted one suspect called Stephen Shem Shitubi to where I had arranged the parade of 8 of the men of same features. I placed him between number 2 and 3 of the men. I also explained him the purpose of the parade.”

Mr. Akang'o submitted that the suspect should have been asked to choose where he was prepared to stand. Learned counsel submitted that by placing the suspect at a given position, it was with a view of making it easier for the identifying witness who according to him may have been tipped about it, to pick the suspect. In other words learned counsel was suggesting that the parade was doctored to favour the identification witness. This is a serious charge against the prosecution. It is not clear whether the recording is erroneous or the parade was meant to fix the 3rd appellant. We do not think that the suspect was placed at a position to enable the witness to point him out. Had that been the intention the same could have been done against the 1st appellant as well. We think that it is a matter of the language employed by either the trial Magistrate or the prosecutor.

The 1st appellant was also picked in a separate identification parade. A different officer conducted that parade. The officer, Inspector Julius Egiles (Julius) is recorded as having testified as follows on the same point:-

“I paraded the 8 members of the parade inside the station in a court yard where we place prisoners. I informed the accused why I was doing the parade and told him to call his lawyer or a friend if he had any but he said he had none. I then told him to chose his position and he chose to stand between the 3rd and fourth members of the parade.”

In his written submissions before the superior court, the 3rd appellant penned as follows:-

“I contend that the manner of the parade conducted by PW3 contravenes the rules laid down in Cap 46. Section 6 (iv) (a) was contravened for the parade officer did not inform me the purpose of the parade and I did not accept to participate in the parade. I therefore pray for it to be nullified for there was no descriptions of assailants given and therefore there was no ability being listed in that parade.”

We have checked the trial court's original record and clearly the parade officer explained to the 3rd appellant the purpose of the parade. Besides, in view of the above submissions, it is clear that the issue of the 3rd appellant being placed between 2nd and 3rd members of the parade is a red herring. It was not an issue before the two courts below. It is being raised as an after thought. Mr. Akang'o also suggested that the identifying witness may have seen the suspects earlier. There is no concrete evidence on this and we believe he is basing his submission on what the 3rd appellant stated in his written submissions presented to the superior court at the hearing of his first appeal. The 3rd appellant submitted thus:-

“PW1 was quoted on page 5 lines 1 – 2 saying that:-

‘the same day during day light the accused were arrested at Subukia but one was not’ this proves that she had seen me on 4/3/2002 and when appearing on parade was first to confirm to make my case difficult.”

The appellant took the complainant's words out of context. If we quote the remaining words on that issue, she stated thus:-

“I did not know them except 2nd accused. I knew the 2nd accused before as he operates a hand cart and used to drink in my bar. He was the first to be arrested after being found with stolen items. He was brought to the police station where I was then. Then he led police officers to Subukia to look for the rest as I went to hospital, Nakuru. The next day on 5/5/2001, I was informed by police; shoes, pillow case had been recovered. I went to the station and identified them. About 12/3/2002 I attended an identification parade in which I identified all the four accused as I had seen them clearly.”

It cannot be that the 3rd and 1st appellants were at Molo Police Station on 4th or 5th March, 2002. The excerpt above has a mistake in dates as the offence was committed in 2002 and not 2001. That is a curable error. In view of what we have stated above, the contention that 3rd and 1st appellants were exposed to the identifying witness before the parades is without any merit. Having come to that conclusion we hold that the identification parade evidence was properly accepted and acted upon to support G visual identification of 1st and 3rd appellants. G was categorical that the suspects were not exposed to her before the parades.

Then there is the evidence of recovery of stolen items which was also relied upon by both courts below to support the visual identification of the appellants by G. The robbery at G's house was reported to the police. The person who first reported it is not mentioned. G in her evidence stated that while she was being raped at a Nursery school compound somebody made a report to the police. When she eventually returned to her house she found when police had already been notified and had come to her house. She made a second report to the police at her house. The information about the robbery was circulated by the police. That is how P.C. Joseph Makelio (Makelio) became aware of the robbery and with other police officers, mounted a road block along Molo-Nakuru Road. Makelio arrested the 2nd appellant in a Nakuru bound motor vehicle. He was arrested with several household items unconnected with the robbery at G' house. He is alleged to have led the police to Subukia to trace his accomplices in crime. Makelio testified, and on this he was supported by P.C. Joseph Okumu (Okumu) that the 2nd appellant led him with other police officers to a house belonging to the 1st appellant. On arrival there, they saw from a distance the 1st appellant and another person seated outside, but on seeing the 2nd appellant under escort, the two men took to their heels. After a chase the 1st appellant was arrested. A search at his house led to the recovery of pillow cases and pairs of shoes which G later identified as part of the items which were stolen from her on the night of the robbery at her house. Joseph and Okumu testified that the 1st appellant later dropped inside the police vehicle in which he was taken away, a Siemens mobile phone, which, too, was later identified by G as part of her stolen items on the night of the robbery at her house. Nothing relevant to this case was recovered from both the 2nd and 3rd appellants.

The trial Magistrate and the superior court found as fact that some items belonging to G were recovered from the 1st appellant's house. They, in effect, invoked the doctrine of possession of recently stolen property to infer that the 1st and also the 2nd appellants who led the police to him were part of the gang that robbed G. Mr. Akang'o submitted that as no inventory was taken of items which were recovered from the 1st appellant it may not be possible to ascertain the specific items which were recovered from there. This submission is untenable. The 1st appellant admitted some items were taken from his house. He never challenged both Makelio and Okumu on the recovery of those items. In those circumstances, both courts below were perfectly entitled to rely on that evidence. The recovery was made only a few hours after the robbery. The lapse of time was so short that it could not be said that those items had changed hands. If they had, the evidential burden was on the 1st appellant to explain how he had come by them. He did not do so. The rebuttable presumption is that he was one of the robbers.

The 2nd appellant who was arrested at Elburgon led the police to the 1st appellant's house at Subukia. The two places are far apart. They fall in different police jurisdictions. That the 2nd appellant knew that the 1st appellant was in some way connected with the robbery at G' house is supportive of the visual identification of the 2nd appellant by G.

As regards the 3rd appellant it cannot be said that the recovery in any way connects him to the commission of the robbery in G' house. There is, however, the confession statement by him. The confession was repudiated. The trial Magistrate, however, accepted it and acted on it. He looked for and found corroboration in the visual identification evidence given by G. There are, however, a few curious aspects of that statement. Inspector Henry Simiyu (Simiyu) recorded the statement. The statement is in English and there is no other version on record. During the trial within trial, Simiyu testified that he read the statement back to the 3rd appellant in Swahili language, which then means that the statement, if at all, was given in Swahili. It is also clear that the statement is short. The superior court accepted the statement without any hesitation.

It is clear from decided cases, and it would be clear even without them, that a confession statement should be recorded in the language it is made, and if the language is not English then a translation thereof should be given. By following that procedure, it obviates any accusation that the statement was extorted or that the accused was forced to sign a statement he himself did not make.

The 3rd appellant's statement was as follows:-

“It is true, I together with Daniel Njoroge (Mwalimu), David Ndiema, Donald Majiwa Achelwa (alias Taifa),we broke and entered the house of the complainant and robbed her.”

The statement is of little if any, probative value. Having come to that conclusion, do we have any sufficient evidence to support the complainant's visual identification evidence of the 3rd appellant?

G picked him at an identification parade which was conducted in accordance with the procedure in the police standing orders. In our view the 3rd appellant was properly identified as one of the people who robbed G.

We have covered the evidence which fortifies the visual identification of G. That evidence, taken as a whole and in conjunction with the visual identification evidence given by G, leaves no doubt that the appellants were properly identified as having been among the people who robbed and raped G. G testified that the 1st and 3rd appellants and another person not before this Court raped her. It is not clear why only 1st appellant was charged with the offence of rape. The evidence was clear that three people raped her and G reasonably identified them.

A part from the foregoing evidence, there was the conduct of the 1st appellant which both courts below pointed out, fortifies the visual identification by G. The 1st appellant was chased for a considerable distance before he was arrested. His escape, we opine, was prompted by a guilty conscience.

The appellants raised the issue of the failure by the first appellate court to re-evaluate the evidence. We have considered the issue but find no merit in it. The superior court analysed and re-evaluated the evidence as it was expected to do.

The appellants raised alibi defences in their defence. Mr. Akang'o submitted that those defences were not considered. In view of the evidence we have discussed above, those defences were displaced. A careful reading of the judgment of the superior court clearly shows that, that was the view of that court.

There was an issue Mr. Akang'o raised obliquely which merits consideration. A student who happened to be at G' house and witnessed the robbery was not called as a witness. Mr. Akang'o submitted that the failure to call that student was prejudicial to the appellants' respective cases. In effect, he wanted this court to infer that had the witness been called, she would have testified adversely against the prosecution case.

The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See **Bukenya & Others v. Uganda [1972] EA 549**). That is, however, not the position here. We find no basis for raising such an adverse inference.

The appellant's respective appeals lack merit. Accordingly they are dismissed. Order accordingly.

Dated and delivered at Nakuru this 2nd day of October, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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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.