REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 364 of 2006

KELVIN OCHIENG OYUGI……..…….…….APPELLANT

AND

REPUBLIC……..…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Kisumu (Mwera & Warsame JJ) dated 2nd November, 2006

in

H.C.CR. A. NO. 45 OF 2003)

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JUDGMENT OF THE COURT

The appellant herein, KELVIN OCHIENG OYUGI alias Sgt. KIPLANGAT together with two others were arraigned before the Senior Principal Magistrate's Court at Kisumu in Criminal Case No. 250 of 2002 on a charge of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence stated as follows:-

"On 5th day of June 2002 at Nyalenda Estate in Kisumu District of the Nyanza Province jointly with others not before the court while armed with dangerous weapons namely pangas and knifes (sic) robbed MILLICENT AKINYI OTIENO her radio cassette make panasonic, four clothes, twelve pairs of open shoes, three sets of seat covers, one half dozen of sufurias, wall clock, two school bags and cash Kshs 14,000/- all valued at Kshs. 70,450/- and at or immediately after the time of such robbery used actual violence to the said MILLICENT AKINYI OTIENO."

The appellant who was the 1st accused and his co-accused pleaded "Not Guilty" to the charge and their trial commenced on 26th September, 2002 before the learned Senior Principal Magistrate (Mrs Olga Sewe).

The prosecution relied upon the following facts. The complainant Millicent Akinyi Otieno (PW1) was sleeping at home on the material night of 5th June 2002 when robbers forced their way into her house at about 3.30a.m. She was beaten and ordered to produce money. She complied with the orders and handed over Kshs. 14,000/- to the robbers. Having forced the complainant to hand over money the robbers

proceeded to ransack the complainant's house as they took away the items listed in the particulars of the charge. In the course of the robbery the complainant was able to identify the appellant as the appellant used to pass near her house in the company of a girl called Dani. The complainant reported this incident to the Assistant Chief John Otieno Kabisai (PW2). The complainant informed PW2 that she had identified the appellant as one of those people who had attacked her.

As a result of the foregoing, Assistant Chief Kabisai (PW2) arrested the appellant who mentioned the others. The appellant was then handed over to the police and on 13th June, 2002 he led the police to a house where sufurias were recovered. These sufurias were identified by the complainant as some of the items stolen during the robbery at her house. While the appellant was in police custody he recorded a statement which he retracted and the statement was produced in evidence after a trial within the trial was conducted.

When put to his defence the appellant gave evidence on oath stating that he was arrested from his house by the Assistant Chief who asked him to produce stolen bags. His house was searched but nothing was recovered. He denied having led the police to a house where sufurias were recovered.

In a reserved judgment which was delivered on 24th January, 2003 the learned Senior Principal Magistrate convicted the appellant and sentenced him to death as mandatorily provided by the law. In convicting the appellant the learned trial magistrate stated, inter alia :-

"**For these reasons, it is my considered finding after putting into account all the foregoing that the evidence against A1 is cogent and worthily (sic) of belief. It is notworthing (sic) too that PW1 after recognizing accused 1 did not keep quiet about it but told the Asst. Chief and the Chief PW2 to whom she made the initial report. It was upon that that the accused 1 was arrested. His arrest led to the recovery of some of the stolen property. I am therefore satisfied beyond reasonable doubt that he (sic) among others jointly robbed PW1 as charged herein. They were more than 4 people and were armed with dangerous weapons including pangas and they wounded PW1. Thus the ingredients of the offence charged have been proved to the requisite standard against him. He is found guilty and convicted of robbery with violence as charged."**

Being aggrieved by the decision of the trial magistrate the appellant preferred an appeal to the High Court at Kisumu (Mwera and Warsame JJ) who after re-evaluating the evidence dismissed the appeal by stating:-

"**In our considered view, the evidence of PW1 and PW2 as regards to recognition, description and arrest, the evidence of PW4, PW5 PW6 AND PW9 as regards to the recovery of some of the stolen items, compounded by the evidence of PW7, the statement under inquiry clearly establishes the guilt of the appellant beyond any reasonable doubt as his involvement in the robbery which took place on the night of 5th and 6th June 2002.**

From the above analysis we are satisfied that there was firm and credible evidence to support the conviction of the appellant. The result is that we dismiss the appeal and confirm the sentence as legal."

The appellant now comes before us by way of a second and last appeal. That being so only matters of law fall for consideration by virtue of **section 361** of the Criminal Procedure Code.

Mr C.B.G. Ouma, the learned counsel for the appellant filed a Memorandum of Appeal setting out six grounds of appeal which he reduced to three main grounds viz, identification, recent possession of stolen property and confession.

As regards identification it was Mr. Ouma's submission that although the two courts below found that the appellant had been recognized by the appellant there were other factors which ought to have been considered, for example, the source of light and how long the attackers were in the bedroom. Mr Ouma pointed out that although the complainant mentioned the appellant to the Assistant Chief, she failed to

mention this fact to her husband (PW3). It was also argued that there was variance between the evidence of PW1 and PW3. Mr Ouma contended that the evidence of PW1 was not reliable and hence there was a possibility of a mistake. To support his submission on the issue of identification Mr Ouma relied on the authorities of this Court in **WILLIS OKEYO ONGUTO V REPUBLIC Criminal Appeal NO. 5 of 2000 (unreported) MAITANYI V REPUBLIC [1986] KLR 198 and ABDI YUSUF ADEN ALIAS KOLE V REPUBLIC – Criminal Appeal NO. 29 of 2001 (unreported**).

On the issue of recent possession Mr Ouma argued that the evidence showed that the appellant led the police to the house of Lilian Anyango (PW5) where sufurias were recovered. Mr Ouma contended that there was no clear evidence as to who was in possession of the sufurias and that even these sufurias were not positively identified. He submitted that the conduct of investigating officer was suspect in that investigations were biased since PW5 was an accomplice.

Finally on the issue of confession Mr Ouma submitted that the confession was accepted without due warning or corroboration. It was Mr Ouma's contention that the confession was not true.

Mr Musau the learned Senior Principal State Counsel supported the conviction and sentence. He asked us to accept the concurrent findings of the two courts below that the appellant was properly identified during the robbery. He pointed out that the appellant led the police to a house where part of the property stolen during the robbery was recovered. It was Mr Musau's contention that there was no need for an identification parade as the appellant was known to the witnesses.

As regards recent possession of stolen property Mr Musau submitted that it was the appellant who led the police to a house where the stolen property was recovered. It was pointed out that the appellant did not claim the sufurias to be his.

And on the issue of confession Mr. Musau submitted that the statement was properly admitted after a trial within the trial and that this was, indeed, a voluntary statement.

Mr Musau urged us to dismiss this appeal.

We have heard both Mr. Ouma for the appellant and Mr Musau for the respondent.

As already stated elsewhere in this judgment, this is a second appeal and hence it must be confined to points of law and this Court would not interfere with concurrent findings of fact of the two courts below unless they are shown to have not been based on evidence – see **KAINGO V REPUBLIC [1982] KLR 213.**

In our view, three points of law raised in this appeal relate to identification, doctrine of recent possession and retracted confession.

We have the concurrent findings of the two courts below that the appellant was identified by the complainant (PW1) during the robbery and that the appellant was not a stranger to the complainant. There is further finding that the appellant was found in recent possession of part of the property stolen during the robbery and finally the appellant recorded a statement in which he confessed to having committed the offence

As regards identification the two courts below were satisfied that the appellant was not only identified but recognized by the complainant as the appellant was known to the complainant prior to this incident. But even though this was a case of recognition we must remember that the robbery took place at night. There was therefore need for caution as was reiterated by the Court of Appeal for Eastern Africa in the case of **ABDALLAH BIN WENDO V R [1953] 20 EACA 166 at p. 168** thus:-

"**Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions**

favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

Although it has been held that recognition of an assailant is more satisfactory more assuring and more reliable than identification of a stranger as was stated in **ANJONONI V REPUBLIC [1980] KLR 59** the way to approach evidence of visual identification was succinctly stated by Lord Widgery CJ, in the well known case of **R V TURNBULL [1976] 3 ALL ER 549 at page 552** where he said:-

"**Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made."**

The learned trial magistrate appreciated the fact that she was dealing with the evidence of identification by a single witness. In the cause of her judgment the learned trial magistrate said:-

"**clearly therefore he was in a position to see accused 1 in the circumstances. What is more she had known him before and therefore this was a case of recognition which had been accepted as better than identification of a stranger."**

In our view the learned trial magistrate had the correct approach with the necessary caution.

On their part the judges of the superior court in upholding the trial court's findings stated:-

"**We think there was sufficient time and light to enable PW1 to see the attackers and retain their correct and proper image in her memory bank. We think she stored and/or saved the correct image in the name of the appellant.**

We cannot fault the superior court in reaching that conclusion.

As regards the issue of recent possession of stolen property it is to be noted that it was the appellant who led the police to where the sufurias were recovered. The complainant identified some of the sufurias as part of the property stolen during the robbery. It is our view that the two courts below were perfectly entitled to find that the appellant was found in recent possession of some of the property stolen during the robbery. This recent possession bolstered the prosecution case against the appellant.

Lastly, we wish to consider the issue of confessionary statement by the appellant. It was argued that the statement was not properly admitted and that it was not true. Our perusal of the record shows that the statement was admitted in evidence after a trial within the trial had been conducted. The statement was found to be quite detailed on how the robbery was planned and executed. In **THIONGO V REPUBLIC [2004] 2 KLR 38 at p.43** this Court said:-

"**In that regard, one of the complaints made before us was that the trial and the first appellate courts acted on the retracted confession of the appellant which was not corroborated in material particulars. In that respect, we hasten to state that there is no rule of law that a court cannot act on a retraced and/or repudiated confession unless it is corroborated in material particulars. What exists is a rule of prudence or practice that a court should be cautious to act on such a confession unless it is corroborated in material particular. However, the court could act on it if it came to the conclusion in the light of all the circumstances that the confession could not but be true. The law, in this respect, was authoritatively laid down by the East African Court of Appeal (the predecessor of this Court) in TUWAMOI V UGANDA [1967] EA 84 at P 91 letter G in the following words:**

"…….. **a trial court should accept any confession which has been retracted or repudiated or both retraced and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true.**

The same standard of proof is required in all cases and usually a court will only act on the confession if it is corroborated in some material particular by independent evidence accepted by the Court. But corroboration is not necessary in law and the Court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."

In view of the foregoing we are satisfied that the appellant's statement was properly admitted in evidence and that the two courts below were entitled to rely on that statement.

We have said enough in this appeal. The appellant's conviction was based on evidence of identification, recent possession of stolen property and confessionary statement.

Having considered the points of law raised in this appeal and the submissions by counsel appearing for the State and the appellant, we are satisfied that the appellant was convicted on very sound evidence. His conviction was indeed inevitable and the superior court was entitled to uphold it. We see no reason to disturb the concurrent findings of the two courts below. Consequently, this appeal is hereby dismissed in its entirety.

Dated and delivered at Kisumu this 22ND day of June 2007

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR