REPBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL NO.10 OF 2000

JOHN MUNENE……APPELLANT

AND

REPUBLIC…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma & Mulwa, JJ) dated 19th October, 1999

in

H.C.CR.A. NO. 342 OF 1999)

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JUDGMENT OF THE COURT

JOHN MUNENE, the appellant herein, was tried and convicted of robbery with violence contrary to ***section 296(2)*** of the Penal Code by the Principal Magistrate *(J.S. Mushele, Esq.)* at Nyeri and upon that conviction was sentenced to suffer death in the manner authorized by the law. He appealed to the High Court at Nyeri but by its judgment dated and delivered on 19th October, 1999 the High Court *(Juma and Mulwa, JJ)* dismissed his appeal. The appellant now appeals to this Court by way of a second and final appeal.

When the appeal came up for hearing before us on 9th May, 2005, the learned counsel for the appellant *Mr. Gacheche wa Miano* submitted that the evidence of identification was not conclusive as the incident is alleged to have taken place at night after 9.30 p.m. He went on to submit that the learned Judges of the superior court did not subject the issue of identification to fresh scrutiny. On the issue of a pair of shoes which the complainant identified to be his, *Mr. Miano* was of the view that the pair of shoes was not properly identified. Finally it was submitted that the defence of *alibi* put forth by the appellant was not given due consideration.

On his part the learned Senior State Counsel *Mr. Orinda* supported the conviction of the appellant on the ground that identification was sufficient and reliable as there was enough light and the complainant was with the appellant for a long time. He further submitted that immediately after the robbery the appellant was found in possession of a pair of shoes which the complainant recognized as his which had been stolen during the robbery. It was *Mr. Orinda's* submission that the appellant had no explanation as to how he came to be in possession of the complainant's pair of shoes. There was then a confession which *Mr. Orinda* submitted was admitted in evidence although retracted by the appellant.

The genesis of this appeal is a charge sheet in which the appellant was jointly charged with two other people with robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars of the offence were that on the 18th day of June, 1998 at about 9.45 p.m. at Blue Valley Estate in Nyeri District of the Central Province jointly with others not before court, being armed with dangerous weapons namely axes, panga and rungus robbed ***Charles Gichuhi Njine*** cash Kshs.4,000/- a pair of shoes, a cap and a motor vehicle registration ***No. KAG 679 U*** Nissan Matatu all valued at Kshs.605,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said ***Charles Gichuhi Njine.***

During the trial before the Principal Magistrate the complainant ***Charles Gichuhi Njine (PW1)*** testified how he was driving his motor vehicle registration ***NO. KAG 679 U*** Nissan Matatu on the evening of 18th June, 1998. Njine went to a nearby shop to watch World Cup and later at about 9.30 p.m passed at a petrol station where he met ***Alice Wanjugu Muruathiga (PW2).*** Alice asked to be driven to her house at Blue Valley Estate and Njine obliged. On reaching Blue Valley Estate, Njine stopped the car for Alice to alight. Suddenly a group of four men appeared and held Alice. When Njine tried to intervene he was forced back into the vehicle where he and Alice were ordered to lie on the floor of the vehicle. These intruders then drove Njine and Alice to a place which the vehicle broke down. These people abandoned Njine and Alice at that place which Njine came to know was Kagumo Teachers College. Njine was robbed of his pair of shoes, a cap and Shs.4,000/- while Alice was robbed of her wrist watch. The robbers forced Njine to assist them repair the vehicle but when their efforts to repair the vehicle failed, they abandoned it there. Out of the four robbers, Njine and Alice were able to identify the appellant. The two witnesses testified that they were able to identify the appellant as the place was well lit by the vehicle lights and according to Njine he was standing next to the appellant most of the time.

From Kagumo Teachers College where Njine and Alice had been abandoned Njine got a lift and reported the matter to the police. As a result of police investigations the appellant was arrested in connection with yet another offence. The appellant led the police to his house on 24th June, 1998 where a pair of shoes was recovered. This pair of shoes was positively identified by the complainant ***Njine (PW1),*** which was stolen during the robbery.

After the arrest of the appellant, an identification parade was conducted and Njine and Alice were able to identify the appellant as one of the robbers during the incident of 18th June, 1998.

There was then the evidence of ***Chief Inspector James Karanja Njue (PW6)*** to the effect that he recorded a charge and cautionary statement from the appellant in which the appellant admitted that he was one of those who had robbed the complainant on 18th June, 1998. This statement was produced in evidence after the learned Principal Magistrate conducted a trial within the trial.

When put to his defence the appellant gave unsworn statement in which he stated that on 23rd June, 1998 he left Nairobi arriving at Nyeri at about 3.00 p.m. He then went to a bar for drinks while watching World Cup on the television. At about 9.30 p.m. he decided to look for a place to sleep, but on the way he was arrested together with other people. They were all taken to the police station. Later, an identification parade was held where a witness identified him.

The learned Principal Magistrate considered the evidence before him and came to the conclusion that the appellant was guilty of the offence and convicted him accordingly. He proceeded to sentence the appellant to death as mandatorily provided by the law. In the course of his judgment the learned Principal Magistrate stated inter alia:-

"***No doubt this offence took place at night on the material date. The issue of proper and positive identification becomes of crucial importance. In the present case, it is clear that the complainant (PW1) and Alice Wanjugu (PW2) were forced to lie on the floor in the front cabin.----------***

An identification parade was conducted. The complainant picked the 1st accused from amongst the members of the parade.

A pair of shoes was recovered from 1st accused. He had led the police to its recovery. The complainant identified the pair of shoes to be his.

This (sic) is no challenge as regards to the recovery of those shoes."

The appellant's appeal to the superior court was dismissed and in their judgment the learned Judges of that court *(Juma and Mulwa, JJ)* stated inter alia:

"***The complainant recognized the appellant because he was with the appellant in the front seat. The appellant was in command of the group and was driving the vehicle. When the vehicle stopped the appellant sought the help of the complainant repairing it. They even went under the vehicle together in an attempt to repair it. All this time they were using light of the vehicle (sic).***

An identification parade was conducted and the complainant picked out the appellant.

Identification by PW2 Alice Wanjugu was criticized by the appellant as being dock identification. Assuming the identification by PW2 was disregarded is there other evidence pointing to the appellant as having been one of the robbers?

PC Stephen Wachira (PW4) testified that on the 26.6.98 the appellant led him to where a pair of shoes was. It had been hidden in a coffee plantation at Kangemi Estate. The pair of shoes was identified by this complainant as being his. The pair had been taken from him during the robbery. This took place barely a week after the robbery.

We hold that even if one disregarded the evidence of PW2 Alice Wanjugu, the fact that the Appellant led the police to the recovery of the complainant's shoes is in itself a corroborating factor."

Having so expressed themselves the learned Judges of the superior court proceeded to dismiss the appellant's appeal.

At the commencement of this judgment we summarized the submissions made by *Mr. Gacheche Wa Miano* for the appellant and *Mr. Orinda* for the State. The main issue in this appeal was identification of the appellant. This incident took place at about 9.45 p.m. The two witnesses ***Njine (PW1)*** and ***Alice (PW2)*** testified to the effect that out of the four robbers they were able to identify the appellant. The trial court considered this issue and came to the conclusion that there was sufficient evidence on which the appellant could be convicted.

Mr. Wa Miano's submission was to the effect that the identification of the appellant was not conclusive.

On this issue of identification we can do no more than refer to the well known case of ***ABDALA BIN WENDO AND ANOTHER V. R (1953) 20 EACA 166*** at P. 168 in which the predecessor of this Court said :-

"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 a 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 be accepted as free from the possibility of error."

In the present case there was the evidence of identification by the complainant ***(PW1)*** and his passenger ***Alice (PW2).*** The evidence of Alice was criticized as being dock identification but even then there was the evidence of the complainant ***(PW1).*** There was then the evidence of the recovery of the complainant's pair of shoes. It was the appellant who led the police to his house and in the coffee plantation where the pair of shoes was recovered. It is to be observed that the evidence of recovery of the

complainant's shoes was never challenged. It was the appellant who led the police to where the pair of shoes was recovered. *Mr. Miano's* late attempt to show that these were ordinary shoes did not advance the appellant's case. Hence here we have evidence of identification whether by a single witness (PW1) or two witnesses (PW1 and PW2) coupled with evidence of recent possession of some of the property stolen during the robbery. Even assuming that this was a case of identification by a single witness there was other evidence of recent possession of some of the property stolen during the robbery.

The two courts below were alive to the fact that the case against the appellant was based on identification and recent possession of stolen property. It is our view that relying on evidence of identification as corroborated by evidence of recent possession of stolen property the trial court was entitled to convict the appellant. The superior court considered the evidence and re-evaluated the evidence as per the decision in ***OKENO V. R ([1972] E.A. 32*** and came to the same conclusion as did the trial court that the appellant was guilty and hence his conviction was upheld.

On our part we would go further than merely considering the evidence of identification and recent possession of stolen property. There was the confession by the appellant. That is to be found in the charge and cautionary statement recorded by *Chief Inspector Njue (PW6).* The statement was retracted by the appellant but after a trial within the trial the statement was admitted in evidence. In *TUWAMOI V. UGANDA [1967] E.A.* 84 at p. 91 the predecessor of this Court said: -

"***We would summarize the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted 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 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."***

To conclude this judgment we wish to point out that the evidence against the appellant was based on identification of the appellant by the complainant, the recent possession by the appellant of some of the property stolen during the robbery and retracted confession by the appellant. In our view the evidence of identification taken together with evidence of recent possession by the appellant of the stolen shoes identified by the complainant coupled with retracted confession by the appellant makes prosecution case watertight.

In view of the foregoing it is our considered opinion that the appellant's conviction was inevitable. Consequently, his appeal must be and is hereby dismissed. It is so ordered.

DATED and DELIVERED at NYERI this 13th day of May, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR