IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: CHUNGA CJ, LAKHA & KEIWUA JJ A)

CRIMINAL APPEAL NO 77 OF 2001

BETWEEN

RAYMOND HERMES ODHIAMBO.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from the Judgement of the High Court at Mombasa, Waki J and Khaminwa CA, dated 21st November, 2000

in

H.C.CR. A No 234 of 1998)

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JUDGMENT

Raymond Hermes Odhiambo (appellant) was tried on and convicted of robbery with violence contrary to section 296(2) of the Penal Code Cap 63 laws of Kenya and sentenced to the mandatory death penalty by acting Senior Resident Magistrate in the Chief Magistrate's Court at Mombasa on 6th August, 1998.

The particulars of the charge alleged that the appellant, on 4th November, 1997, at a place called Magongo along Mombasa/Nairobi Road in Changamwe within the Coast Province, jointly with others not in court, while armed with knives and axes, robbed Naftali Kamau and Linus Kamau of motor vehicle registration No. KAE 842X Nissan *matatu* and the other items mentioned therein.

Following his conviction and sentence the appellant appealed to the High Court of Kenya at Mombasa, where, his appeal was heard and dismissed by Waki J sitting with Commissioner of Assize Khaminwa on 21st November, 2000. Resulting from this, he has now brought a second appeal to this court which, in terms of section 361(1) of the Criminal Procedure Code Chapter 75 Laws of Kenya, must be on matters of law only.

The prosecution case against the appellant rested on three main aspects to wit:-

(a) Evidence of identification.

(b) Evidence of recent possession.

(c) Appellant's extra-judicial statement to the police which amounted to a confession.

Evidence of identification was given by two witnesses PW1 and PW2 who were the driver and conductor respectively of the motor vehicle robbed from them by the appellant and others. The two witnesses gave evidence that on 4th November, 1997 at or about 4.00 a.m, PW1 was driving motor vehicle registration number 842X from Malindi going to Likoni Ferry. They had three passengers and at a place called Magongo, the vehicle stopped and they picked another three passengers. They moved on and at another place called Dolphin, PW1 was told to stop the vehicle. At this time, PW1 was with two passengers in front and four passengers plus PW2 were at the back. The person who told PW1 to stop the vehicle was sitting next to him and immediately pointed a knife at him. This person then alighted and walked in front of the vehicle to the driver's side. PW1 was pushed in the middle and the person took charge of the vehicle and drove it from then onwards. PW1 was then blindfolded and a piece of cloth put into his mouth.

After about half an hour, the vehicle got stuck. PW1 and PW2 were forced out of it and led on foot into some thickets by the roadside where their hands and legs were tied. They were left there as the attackers drove away in the vehicle. They struggled, managed to untie themselves and reported the matter to the nearby police station.

The two witnesses were emphatic that, although the incident occurred in the early hours of the morning, they were able to see and identify the appellant clearly with the aid of light from a nearby building and from the headlights of the motor vehicle as the appellant walked in front of the motor vehicle to gain entry into the vehicle from the driver's side. When they made their reports to the police, the two witnesses described the physical features of the appellant and indicated they would be able to identify him. Indeed, at an identification parade held two days later, namely on 6th November, 1997 by an Inspector of Police (PW6), the two witnesses were able to identify the appellant.

PC George Ogolla (PW5), was on duty at Changamwe Police Station on the night of 4th November, 1997. He received report of the robbery from PW1 and PW2 at about 6.00 a.m. The witness confirmed that PW1 and PW2 gave him full details of the robbery including the description of one of them the appellant herein. He also confirmed that the two witnesses said they could identify the appellant. On receipt of this information, PW5 circulated it to other police stations and exit points in the area, giving particulars of the robbed vehicle.

Police Constable Hezron Adenga (PW4), gave evidence of the appellant's arrest and his possession of the robbed vehicle. The witness said that he was, on 4th November, 1997, on duty on the Voi/Mwatate Road at about mid day. He received information about the robbed vehicle and, shortly thereafter, he saw the same vehicle being driven along the same road and he stopped it. The vehicle had registration number KAE 842X and it was being driven by the appellant herein. PW4 and his colleague entered the vehicle and the appellant started to drive towards Mwatate. As he drove on, the two police officers, at some point, asked him to stop but he refused. It was not until, the two police officers, sought help from other colleagues on the road that the appellant was forced to stop the vehicle. He was told to come out of the vehicle but resisted and a struggle ensued between him and the police officers resulting in serious injury to one officer.

Following the arrest of the appellant and the recovery of the vehicle, the vehicle was towed to the nearby police station where it was subsequently identified by PW1 and PW2.

The appellant, on 6th November, 1997 appeared before one Inspector of Police Oduor (PW3) who recorded an extra-judicial statement from him. In this statement, the appellant admitted participation in the offence charged against him.

At the trial, the appellant objected to the admissibility of the statement upon which, a trial within trial was held and was eventually admitted. The Inspector gave evidence in the trial within trial how the appellant was brought to his office by another officer, he cautioned the appellant and read the particulars of the charge to him. The appellant elected to make a statement in Kiswahili language which the Inspector wrote

down and read back to the appellant after making the translation thereof into English. He denied beating or otherwise mistreating the appellant.

On the other hand, in his sworn evidence in the trial within a trial, the appellant described how he was called to the radio room where he found two people one of them being the Inspector. He alleged to have found the statement already prepared and he was asked to sign but he refused. He alleged he was put in cold water by the two officers and subsequently in a sewage but he still refused to sign the statement. The following day, the officers continued to force him to sign the statement but he refused until his name was written on it by somebody called from the police cells by the Inspector.

After hearing the evidence in the trial within trial, the learned trial magistrate found that the appellant made the statement voluntarily and admitted it in evidence. He dismissed the appellant's allegations and complaints against the police and accepted the evidence of the Inspector.

On conclusion of the prosecution case the appellant elected to give a sworn statement. He alleged that he was a mechanic and he was arrested on the 4th of November, 1997 from his garage. He was questioned about some gemstones and about a certain Mr. Chege all of which he denied knowledge of. He fought with the police till they overpowered him and took him to police station. He described again how he was forced to sign a statement at the police station. He talked about an identification parade which, in his view, was not rightly conducted.

The trial magistrate reviewed all the evidence and rejected the appellant's defence. She accepted the prosecution case and convicted the appellant accordingly. In doing so, she relied on the three aspects of the evidence as we mentioned at the beginning of this judgment namely; identification, the extra-judicial statement which amounted to confession, and recent possession by the appellant of the robbed motor vehicle. Indeed, the learned trial magistrate subjected the entire evidence to very close scrutiny and even quoted judicial authorities to support her conclusions on the relevant law. On the confession, she found that there was ample corroboration in the appellant's recent possession of the robbed vehicle. On identification she was satisfied that there was no mistaken identity.

On his appeal to the High Court, the evidence was, once again, carefully anlaysed by Waki J and Commissioner of Assize Khaminwa and, they upheld the learned trial magistrate's findings on all the three aspects of evidence as we mentioned earlier. Accordingly, they dismissed the appeal and confirmed the conviction and sentence.

At the hearing of the appeal before us, the appellant was represented by Mr. Kiarago Advocate while the Republic was represented by Mr. Gumo the Provincial State Counsel. Both counsel centred their submissions on the three aspects of the evidence we mentioned earlier.

Mr. Kiarago was particularly critical of the evidence on identification. He submitted that the circumstances were difficult and did not favour accurate identification. The lighting, if any, according to him, was far from adequate. The attack was sudden and frightful, leaving the witness with very little opportunity for observation. There were drizzles of rain which impaired vision. The witnesses had only fleeting moments to see the appellant. Additionally, the High Court, on first appeal, did not subject the evidence of identification to critical analysis and examination. Mr. Kiarago referred us to the unreported case of *Shadrack Muteti Maweu v Republic* Criminal Appeal No. 67 of 2000 in support of his submissions.

On the appellant's recent possession of the robbed motor vehicle, Mr. Kiarago submitted that that was not evidence strong enough to support the charge against the appellant. It could only sustain a charge such as handling against the appellant. It fell short of satisfying all the ingredients of the charge preferred against the appellant. He referred us to the unreported case of *Abdula Chibindo Nyasi v Republic* Criminal Appeal No. 84 of 1997 in support of his submissions On the appellant's extra-judicial statement, Mr. Kiarago submitted that it required corroboration because it was retracted or repudiated. According to him, there was no corroboration on record because evidence on identification was weak as was the evidence of the appellant's recent possession of the robbed vehicle.

For the preceding reasons Mr. Kiarago asked us to either allow the appeal *in toto*, or, at the very least, substitute the conviction for handling on the basis of the evidence of the appellant's recent possession of the robbed motor vehicle.

Mr. Gumo for the Republic did not agree with Mr. Kiarago's submissions. He supported the conviction against the appellant and submitted that the evidence of identification was safe enough to justify the same. He said that the circumstances of identification were not difficult because there was evidence of light both from the headlights of the motor vehicle and from the nearby building. He also emphasized that the witnesses immediately reported to the police and gave the descriptions of the appellant to them. Mr. Gumo concluded by referring to the identification parade which he said was conducted so soon after the robbery and the witnesses PW1 and PW2 were able to identify the appellant without any difficulty.

In conclusion, Mr. Gumo submitted that the evidence of identification did not stand alone. There was the appellant's confession which was detailed and there was evidence of the appellant's recent possession of the robbed motor vehicle of which, the appellant gave no explanation whatsoever. For these reasons, Mr. Gumo asked us to dismiss the appeal and uphold the conviction.

We have set out the evidence for both sides as found by both courts below and submissions by both counsel before us. It now remains for us to consider the issues raised in this appeal.

The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which, the court may reasonably conclude that identification is accurate and free from the possibility of an error– See

(1) *Abdala Bin Wendo and Another v Republic* (1953) 20 EACA 166.

(2) *Roria v Republic* [1967] EA 583

In this case, both courts below subjected the evidence of identification to the requisite critical analysis as enunciated by the courts in the two cases we have quoted above. There were two witnesses on identification (PW1 and PW2) and there was light from two sources. Identification parade was held within two days of the offence and the witnesses had no difficulty picking out the appellant. For these reasons, we are satisfied that the two courts below concurrently came to the correct conclusion on this aspect of the evidence. We find no point of law and we are ourselves satisfied that identification was quite safe and accurate.

Similarly, the law on confessions is not subject to any doubt. Where it is retracted or repudiated, it requires corroboration as a rule of practice only. However, a court may, nevertheless, convict, even without corroboration, if the court is satisfied that, the confession cannot but be true, subject, to the court warning itself of the dangers of doing so. – See–*Tuwamoi v Uganda* [1967] E.A 84.

In the present case, although the two courts below did not explicitly direct themselves as they should have in law, they, nevertheless, found that there was corroboration to the confession. The corroboration was in the evidence of the appellant's recent possession of the robbed vehicle. Accordingly, there is no merit on this ground and we are satisfied, once again, that the two courts below concurrently came to the correct conclusion.

Finally, there is the evidence of the appellant's possession of the robbed motor vehicle. The robbery took place on 4th November, 1997 at or about 4.00 a.m. Within about six hours later, the appellant was found driving the same vehicle. When stopped, he was rough with the police and engaged them in a fight which resulted in injury to one of them. It is settled in law, that evidence of recent possession, is circumstantial evidence, which, depending on the facts of each case, may support any charge, however penal. - See

(1) *Republic v Bakari s/o Abdulla* (1949) 16 E.A.C.A 84.

(2) *Andrea Obonyo v Republic* [1962] EA 592.

(3) *Samwel Gichuru Matu v Republic* Criminal Appeal No. 88 of 2000.

We have examined the evidence of recent possession very carefully in this appeal. PW5 who testified on this aspect gave detailed account of what happened and both courts below found him credible. The vehicle in question was properly and positively identified and there was no dispute about that. The appellant's possession of it was within hours of the robbery. The appellant was not only in possession but was actually the one driving the vehicle. His conduct, on being stopped by the police, was violent as we have indicated. He gave absolutely no explanation for his possession. Under all these circumstances, we are satisfied that evidence of recent possession was strong enough and could, even on its own, support the conviction against the appellant.

However, evidence of recent possession did stand alone. There was evidence of identification and there was evidence of the appellant's confession. Both courts were satisfied that it fully and adequately corroborated the confession and identification and, so are we.

Upon review of the entire case and the points argued before us, we are satisfied that the appellant was convicted upon overwhelming evidence and we find no merit in the appeal. We uphold the conviction and we order the appeal dismissed in its entirety.

Dated and delivered at Mombasa this 19th day of July, 2002

B. CHUNGA

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CHIEF JUSTICE

A.A. LAKHA

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JUDGE OF APPEAL

M.O KEIWUA

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR