IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: CHUNGA CJ,GICHERU & TUNOI J.J.A)

CRIMINAL APPEAL 88 OF 2000

BETWEEN

MATU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nairobi (Mr Justice J L A Osiemo and Lady Justice S C Ondeyo) dated 13th July, 1998,

in

HCCRA No 1543 of 1996)

****

JUDGMENT OF THE COURT

This is a second appeal from the judgment of the superior court, Nairobi, dated 13th July, 1998, in which the superior court dismissed the appellant's first appeal and upheld his conviction and sentence.

In the Court of the Principal Magistrate, Kibera, Nairobi, the appellant had been charged with, tried, 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.

The particulars of the charge against the appellant alleged that he, jointly with others not before Court, on 1st November, 1995, at Hardy Estate, Nairobi, by use of violence, robbed one Daniel Muganga Hezekia of an assortment of goods and properties as set out in the charge.

Daniel Muganga Hezekia gave evidence as PW 1 at the trial and will be referred to accordingly in this judgment. He said he was employed by one Erick Muhia at Erick Muhia's house in Hardy Estate, Nairobi.

PW 1 testified that on 1st November, 1995, at about 10.30 am, he and one Milka Musau, Erick Muhia's house help, were washing clothes at their employer's residence. Three unknown men came and attacked them and one of the three men held PW 1 by the neck while another one held him (PW l) in front. The third person went where Milka Musau was.

The two workers (PW 1 and Milka Musau) were then forced into their employer's house by the three attackers. PW 1 was locked in the toilet while Milka Musau was locked in the master bedroom. It is not clear whether the toilet where PW l was locked was attached to the master bedroom where Milka Musau was detained or otherwise. Nevertheless, PW l gave evidence that, as he was in the toilet, the appellant kept checking on him from time to time.

According to PW 1, the attackers, locked them up as aforesaid, ransacked the house and took away the items narrated in the particulars of the charge. Among these were, pairs of assorted sports shoes (Ex 12), and another two pairs of sports shoes (Ex 15 and 16). PW 1 further testified that the attackers removed their own shoes and left them behind in the house and these were exhibits Ex 1a, b & c. Instead, PW1 said, the attackers took and wore the sports shoes which they robbed from the house (Ex 15 & 16).

It was PW 1's evidence that the appellant and one other person among the three attackers were armed with knives - Ex 17.

When the attackers left the house after three hours, PW 1 said he managed to pull himself along the floor to the master bedroom where Milka Musau was detained. Milka untied him and he pressed the alarm whereupon neighbours came. The neighbours chased the attackers and arrested the appellant and another person both of whom were thoroughly beaten by members of the public. Indeed there was evidence that the other person arrested along with the appellant subsequently died of the beatings.

PW 1 did not himself take part in the chase of the attackers and arrest and beating of the appellant and the person who died. However, PW 1 saw the appellant and the dead person after their arrest and it was PW 1's evidence that the two were wearing sports shoes, which the attackers had taken from the house. These were identified by PW 1 as exhibit 15, which the appellant was wearing, and exhibit 16 which the dead person was wearing.

Finally PW 1 was emphatic that he saw and identified the attackers quite well, particularly the appellant. He saw the appellant clearly at the first place of attack where he and Milka Musau were washing clothes. It was the appellant who caught him (PW l) on the neck. He also saw the appellant quite well when he was in the toilet where the appellant checked him from time to time.

Report of the robbery eventually reached Hardy Police Post. A police officer (PW 3) visited the scene and found two people seriously injured. The two people were the appellant and his accomplice who died. PW 3 confirmed that the appellant was wearing (Ex 15) while the dead person was wearing Ex 16.

The employer of PW 1 and Milka Musau gave evidence as PW 2. He was not at home when the robbery occurred. He had gone to his place of work and was only informed of the robbery by a neighbour through telephone. He rushed back home to find the robbery had occurred and the items in the particulars of the charge recovered. He identified exhibits 15 and 16 as his property. He also identified the assorted pairs of shoes (Ex 12) as his property. Indeed, he identified all the items mentioned in the charge.

At the close of the prosecution case the appellant was placed on his defence. He denied the charge. He said that on 1st November, 1995, he left his house at Ongata Rongai and went to his place of work at Hardy Estate. On reaching the estate, he saw some three people who called him. He went to them and they suddenly set upon him, beat him and he fought back. He said he had no claim over the items mentioned in the charge and exhibited in evidence at his trial.

The trial magistrate analyzed all the evidence and accepted the prosecution case while dismissing the appellant's version of the events. She found that prosecution witnesses including PW l were truthful. She found and was satisfied that PW l saw and positively identified the appellant. She also found that the appellant was wearing Ex 15 at the time of arrest and the said shoes were among the items robbed from PW 1 in PW 2's house shortly before the chase and the arrest. She, therefore, convicted the appellant as charged and sentenced him to the mandatory death sentence as earlier stated in this judgment.

On first appeal, the High Court reviewed all the evidence as required of it by law. It concurred with the

trial court on all the issues in the preceding paragraph and, consequently dismissed the appeal on conviction and sentence.

Before us on second appeal, the appellant was represented by Mr Oira, advocate, who took and argued several points even though he had filed no petition of appeal but sought to rely on the appellant's own homemade grounds of appeal.

The State was represented by Mr Bwonwonga, Assistant Deputy Public Prosecutor, who supported conviction and sentence.

Mr Oira's first submission was that identification of the appellant by PW l was not good enough to support conviction. He said there was no identification parade and, therefore, what PW l said cannot be relied upon.

On the other hand, Mr Bwonwonga submitted that evidence of identification was strong enough to support conviction. According to him, there was no need for identification parade because PW 1 saw the appellant at the time of arrest. He also emphasized that the robbery occurred in broad day-light at about 10.30 am and PW 1 had ample opportunity to see the appellant fully, not only outside the house, but also in the toilet where the appellant checked on PW 1 from time to time.

We have carefully considered the submissions made before us by both counsel on identification. We bear in mind that it was a case of identification by a single witness who did not know the appellant before the robbery. The test in law is settled and needs no special emphasis. Suffice it to say that a conviction may well be based on evidence of identification by a single witness, if the Court is fully satisfied that conditions under which identification took place were favourable and eliminated all possibility of mistaken identification.

Here, we note that both courts below carefully considered conditions of identification and concurrently found that they were favourable to positive and accurate identification. Indeed, the High Court referred to and relied on the well known case of *Abdalla Bin Wendo vs R* (1953) 20 EACA 166.

The robbery occurred in broad daylight and PWl had ample opportunity to see the appellant at two stages. First, he saw the appellant at the place of the initial attack outside the house. The appellant was the one who caught him by the neck. Second, he saw the appellant when he (PW l) was in the toilet where he was locked up and where the appellant kept checking him from time to time.

Taking into account the preceding factors, we are satisfied that the appellant was seen and positively identified by PW l under conditions favourable to accurate identification and Mr Oira's first ground of appeal must, therefore fail. There was no need for identification parade as the witness had seen the appellant at the time of arrest. In such circumstances, identification parade would have been, in fact, prejudicial to the appellant.

Mr Oira's second submission was that a key prospective witness Milka Musau was not called by the prosecution to give evidence. He urged us to find that failure to call her was fatal to the prosecution case because she was, according to PW 1, present at the time and place of attack. If called, Mr Oira submitted, she could have confirmed or failed to confirm PW I's evidence that the appellant was one of the attackers.

Mr Bwonwonga did not agree with Mr Oira on failure by the prosecution to call Milka Musau as a witness. While recognizing that she should have been called, Mr Bwonwonga submitted that failure to do so was not fatal because there was other evidence which supported and proved the charge beyond reasonable doubts.

The discretion to call prosecution witnesses is always left to the prosecution. But it is a discretion to be fair and judiciously exercised so that no material evidence, whether in favour or against the prosecution, is kept away from the Court. Here, we agree with Mr Oira that Milka Musau was a material witness and should have been called or availed by prosecution to the defence for cross- examination.

We note however, that, after several adjournments, the prosecution informed the Court that Milka Musau could not be traced. Accordingly, the prosecution closed their case without calling her. We are satisfied, in the circumstances, that failure to call Milka was not based on any improper or oblique motive.

On the other hand, we are in agreement with Mr Bwonwonga that there was other evidence, which was strong enough to prove the charge against the appellant beyond reasonable doubt. For example there is the evidence of identification PW 1 which, as we have said, was found by the two courts below to be positive and accurate, a finding with which we fully agree.

For all the foregoing reasons, Mr Oira's second ground of appeal before us must, similarly fail. Omission to call Milka Musau did not occasion injustice or prejudice to the appellant.

Mr Oira's third argument was that nobody, among the neighbours who chased and arrested the appellant was called by the prosecution to give evidence. Once again, Mr Oira invited us to find that the omission was fatal to the prosecution case. Mr Bwonwonga's submission on this was similar to his stand on Milka Musau. He said omission to call any of the neighbours who arrested the appellant was not fatal.

We must repeat what we said earlier. Discretion lies on the prosecution to call all material witnesses, though that discretion must be exercised reasonably and fairly. All material evidence whether for or against the prosecution should be placed before the Court to enable the Court to arrive at a fair and just decision.

We find absolutely no explanation on record for prosecution's failure to call even one witness among the neighbours who chased and arrested the appellant. Though this is so and though we deprecate the omission, we are unable to hold, as Mr Oira invited us to do, that the omission was fatal to the prosecution case. There was, as we have found earlier, other independent and credible evidence to support and prove the charge beyond reasonable doubt.

Lastly, Mr Oira complained about the evidence that the appellant, at the time of arrest, was wearing a pair of shoes (Ex l5) which had been robbed from PW 1 only moments earlier. Mr Oira asked us to disregard the evidence of PW 1 and PW 3 on this point because, he submitted, none of those who arrested the appellant was called to describe what the appellant was wearing at the time of arrest. If called, Mr Oira said, they would have confirmed whether or not the appellant was wearing Ex l5 as alleged by PW l and PW 3.

We have already dealt with omission to call the neighbours who arrested the appellant. What remains is basically an issue of evidence and facts. PW l and PW 3 gave evidence that the appellant was wearing Ex l5. PW 2, the owner of the house and PW l identified exhibit 15 as the property of PW 2, which had been robbed from PW 2's house moments before arrest. The appellant himself disowned Ex l5.

The two courts below believed PW l, PW 2, and PW 3 on what they said on Ex l5. There were, therefore, clear concurrent findings of fact on Ex l5 and, this being a second appeal, we cannot disturb those findings in the absence of any misdirection by the two courts below.

We, accordingly, confirm and accept the evidence as found by the two courts below on Ex l5. In the result, the appellant was, as the High Court said, in possession of property proved to have been robbed only moments before his arrest. The doctrine of recent possession therefore came into play against him.

The High Court was prepared to uphold the appellant's conviction even on the doctrine of recent possession alone. Mr Oira pointed to this and submitted that it showed that the High Court was in doubt about the evidence of identification. We do not think so. The High Court merely observed that identification of the appellant by PW 1 was positive and safe enough to support conviction as was the doctrine of recent possession. Can the doctrine of recent possession be relied upon as the only basis of a conviction on a charge carrying mandatory death sentence such as murder or robbery with violence contrary to section 296 (2) of the Penal Code? That seems to us to be the view the High Court was putting forward in this appeal.

Dealing with a similar point, the Court of Appeal for Eastern Africa (as it then was) said as follows in the case of *R vs Bakari s/o Abdulla* (1949) 16 EACA 84:-

> "That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal."

The passage was quoted with approval by the same Court in the case of *Andrea Obonyo vs R* [1962] EA 592. Where the Court stressed:

> "If all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal."

We are satisfied that the law still remains the same to-day on recent possession as was expounded by the Court of Appeal for East African in the two cases quoted above. We find, therefore, that the High Court was right in its observation that, in this appeal, possession by the appellant of Ex 15 was so recent as to be capable of safely supporting the conviction on the robbery with violence charge. The circumstances pointed to no other reasonable conclusion than that the appellant was one of the robbers. In the final analysis therefore, we arrive at the conclusion that the appellant was safely convicted on strong evidence of identification by PW l and his very recent possession of Ex l5. Both aspects of evidence were capable of supporting conviction on their own, or, in their combined effect that is, when taken together.

For all the reasons given in this judgment, we find no merit in this appeal and the same is dismissed in its entirety.

Orders accordingly.

Dated and Delivered at Nairobi this 15th day of December 2000.

B.CHUNGA

.....

CHIEF JUSTICE

J.E.GICHERU

.....

JUDGE OF APPEAL

P.K.TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUT REGISTRAR