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

Criminal Appeal 230 of 2009

KENNEDY KIPLANGAT MISOI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Ouko, J) dated 21st October, 2007
in

H.C.CR.A. NO. 3 OF 2006)
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JUDGMENT OF THE COURT

The appellant, ***KENNEDY KIPLANGAT MISOI***, faced four main counts in the Senior Resident Magistrate's Court at Kilifi, and an alternative count. He was acquitted on three counts and convicted on one count, which was the count of Robbery contrary to ***section 296(1)*** of the Penal Code. The particulars of that count read that:

> *"On the 13th day of October, 2004, at about 10.00 p.m. at Mtwapa Township in Mtwapa location within Kilifi District of the Coast Province, robbed Gerlinde Karima of the gold ring, two silver rings, six mobile phones, one wrist watch, one C.D. player, walkman make schpelder, two box speakers, two gold bracelets, one passport-Australian and 25 Euros all valued at Kshs.89,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Gerlinde Karima."*

Having been convicted of this count, the alternative count of handling stolen property contrary to Section 322(2) of the Penal Code, did not come up for consideration as that was no longer necessary. He was sentenced to serve seven years imprisonment. The appellant felt dissatisfied with that conviction and sentence. He appealed to the superior court at Malindi vide Criminal Appeal Number 3 of 2006. In a judgment dated and delivered on 6th March, 2006, the superior court *(Ouko, J),* dismissed the appeal on conviction and confirmed the sentence of seven (7) years imprisonment. The appellant was still not satisfied with that dismissal of his appeal and hence this appeal before us in which the appellant raised only two grounds of appeal and conducted his appeal in person. He made his submissions through a written

document and made few remarks in reply to the submissions by *Mr. Ondari,* the learned Assistant Director of Pubic Prosecutions, who conceded the appeal.

As we have stated above, he faced many charges in the trial court. A total of five witnesses gave evidence at his trial. However, as concerns the charge of robbery in respect of which he was convicted, four witnesses testified. *Gerlinde Karima (PW1)* was an American. She came to Kenya on 6th October, 2004. On 13th October 2004, she moved to a new house in Mtwapa. On that day at 10.00 p.m. a person she identified as the appellant went to her house, introduced himself to her as a neighbour and left his keys in her house as he was expecting a visitor. After about an hour, the same person went back to her house ostensibly to collect the keys but this time he produced a knife, threatened Karima and asked for money. He searched the house and allegedly recovered six mobile phones, a wrist watch, CD player speakers, bracelets, 25 Euros and a passport. After this the appellant left. Karima did not do anything that night, but the next day, she reported the incident to *PC Mwaro (PW4)* of Mtwapa Police Station, who was the crime standby on 14th October, 2004. Pc Mwaro booked the report and the investigations were commenced. On 17th October, 2004, acting on information received, *PC Musa Juneri (PW3)* of Mtwapa Police Station, arrested the appellant, searched him and allegedly found him with a knife and a European passport. He took the appellant to Police station. On 21st October, 2004, while the appellant was still at Mtwapa Police Station, IP Waweru, who was then acting as the OCS Mtwapa Police Station organized an Identification Parade in which Karima was the witness and the appellant a participant. Karima allegedly identified the appellant on that parade. The appellant was thereafter charged as stated above. He denied the charges and at his trial, he gave a sworn statement and called one witness. In his defence he stated that he was a drug dealer. One Hassan was his business rival in that business which we note was illegal. On 17th October, 2004, the appellant went to collect his bicycle from Hassan. Hassan went and called the police and returned with PC Musa who was known to the appellant. Hassan had a handkerchief in which was a knife and a booklet which, he later learnt, was a passport. He was then threatened to shift his place of business or else he would be arrested. Many people arrived at the scene and he was taken to police station by PC Musa, but before that he was beaten and injured by other police officers. He reported the assault on him to one PC Chule who took him for treatment. Further, when he was produced in court, he made the same complaint of having been injured and the court ordered him to be taken for treatment. *Dr. Oduori (DW2)* produced the P3 report on behalf of the appellant confirming the appellant had injury that could have been caused by thin wires.

As we have stated above, Mr. Ondari conceded the appeal on the main grounds that the evidence relied upon by the two courts to convict the appellant which was that the appellant was found in possession of recently stolen property of the complainant, namely a passport and that the appellant was properly identified visually by Karima could not stand as the passport in question did not belong to the complainant and there was no evidence as to how the complainant came to claim it. Further, as to the visual identification of the appellant by the complainant, the complainant did not in the

evidence state that she identified the appellant at the parade. The appellant's written submissions, concentrated on the main, on the allegation that his rights under *Section 72(3)* of the constitution were violated, and the two courts below erred in convicting him notwistanding the violation.

In convicting the appellant, the trial court had this to say:-

> *"The accused said he was also not properly identified. It is noted from the complainant's evidence that the accused was twice at her house, the first time to leave his keys there and the second time when he went to rob her. She said she had enough time to see him with the accused (sic) of the electric light that was on. The court is satisfied he was positively identified. The fact he was found with the passport and knife used in the attack further supports her evidence……. In respect to count one the prosecution evidence is credible consistent and proved beyond reasonable doubt. The accused is found guilty and is convicted accordingly."*

And the superior court, in confirming that conviction stated:-

> *"As far as I am concerned the circumstances for identification were not difficult. The complainant had sufficient time with the appellant and with the aid of electric light she was able to identify him. Further more she was able to pick him out in the identification parade.*
>
> *Finally, there was evidence that a passport stolen from the complainant was found in the appellant's possession some four days later. This is circumstantial evidence of recent possession as was stated in*Republic v. Longhin 35 Cr. App. R69. *Within four days of the commission of a robbery on the complainant the appellant was found in possession of her passport. The appellant explained that it was Hassan who gave him both, the passport and the knife wrapped in a handkerchief in order to set him up.*
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> *In the light of my earlier finding that the prosecution evidence placed the appellant at the scene and that he was clearly identified by the complainant, his defence of alibi and his being set up by Hassan has no merit. There was clear identification and the fact that the appellant was found shortly afterwards with the stolen passport. I come to the final conclusion that the accused was properly convicted and that the evidence of the informer was not going to alter that finding by the court below."*

We have considered the record, the submissions by the appellant and by *Mr. Ondari*, and the law. This is a second appeal. In law we are, by dint of *Section 361(1)* of the Criminal Procedure Code not required to consider matters of fact, unless it is clear to us that the courts below either considered matters they should not have considered or failed to consider matters they should have considered, or that looking at the decision as a whole, no court, properly exercising its mind, would have come to such a conviction, in which case the omission or the commission becomes a matter of law. On the other hand, the first appellate court, is by the provisions of law required to revisit the evidence adduced in the trial court a fresh, analyse and evaluate it and reach its own conclusion bearing in mind that the trial court had the advantage of seeing the demeanour of and hearing the witnesses and giving allowance for that - see the case of *OKENO VS. REPUBLIC (1972) E.A. 32*.

In this case, the main issue in law, we need to consider first, is that of identification. Both courts below relied on the evidence that a passport which the complainant said was hers and which she said was stolen on the night of the robbery was found with the appellant some four days later. The appellant said he did not have that passport and that it was when PC Musa went to him with Hassan that Hassan had the passport and the knife in a handkerchief. One aspect which was important to establish was as to whether indeed the passport allegedly found with the appellant but which the

appellant said was not with him but with Hassan, was the complainant's passport. Complainant's name was Gerlinde Karima. The name in the subject passport was Burkant Stefanie Osterreich Klagaenfart. That is a different name from that of the complainant. Certainly that passport could not be her passport as she alleged in the evidence before the trial court. Further, whereas in the evidence, she said she was an American, the subject passport was an Austrian passport. Lastly, there was no evidence from her as to how she came to hold the subject passport and it is not clear as to whether it was one of the items she had in her house though not her own property because in her evidence she referred to it as her passport whereas it was clearly not her passport. The trial court did not consider this aspect and the superior court, in its duty as a first appellate court did not, with respect, consider it either and merely glossed over it by rejecting the defence case that Hassan gave the appellant the passport to fix him. On our reading of the record, the appellant said he had gone to collect his bicycle from Hassan and Hassan went to the police returning with PC Musa. At that time, Hassan had a passport and knife in the handkerchief. That aspect may very well explain why the passport produced in court was in a different name from that of the complainant. In our view, had the trial court and the first appellate court properly analysed that evidence, particularly, had they perused the alleged passport, they would have found that it was probably a passport of a different person planted on the appellant, and they might very well have reached a different conclusion on the issue as to whether there was evidence to establish a finding based on the doctrine of recent possession.

On the issue of identification, the evidence before the court was that of a single witness, the complainant. The incident took place at night but there was electric light and robbery took place in complainant's house. The court could, in law convict on that evidence but extra care was required before a conviction could ensue. In the case of *Abdallah Bin Wendo v. R (1953) 20 EACA 166,* the predecessor to this court stated:-

> *"Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony by 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."*

In this case, the complainant did not point out the appellant when Pc Musa arrested him. He was arrested on 17th October, 2004 before the complainant's statement was recorded by police. Description of the assailant and name were given to Musa by an unknown informer. The complainant said in her evidence in cross examination as follows:-

> *"I reported to the police the next evening. I did not give the police your description. The statement was recorded on 19th. I was called on 18th that a suspect had been arrested."*

In effect, the appellant's arrest neither proceeded from a description given by the complainant nor after the complainant's statement had been recorded. In those circumstances, it is difficult to understand the basis on which the identification parade was arranged. Further, although IP Waweru who conducted the parade said complainant identified the appellant

at the parade, the complainant herein did not specifically state so. In her evidence in chief, she did not say she attended any parade and identified the appellant thereat. In her evidence in cross examination, she said:-

"*I attended a parade a day after I recorded a statement. The parade was done.*"

She could not be right when she said she attended parade a day after she gave her statement. She gave her statement on 19th October, 2004, whereas the parade form stated and IP Waweru confirmed that the parade was held on 21st October, 2004. Be that as it may, she did not state that she pointed out the appellant at the parade.

The totality of all the above is that, had the two courts analysed the evidence properly as was required of them, they would have found that the evidence of identification fell far short of the standard required and remained no more than dock identification which, in a case of this nature, cannot suffice for a conviction.

Thus in our view, *Mr. Ondari* was plainly right in conceding this appeal. As we have come to the conclusion that this appeal must succeed on the above, we need not consider the other complaints raised in the Memorandum of Appeal.

The appeal is allowed, conviction quashed and the sentence set aside. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MOMBASA this 23rd day of July, 2010.

R.S.C. OMOLO
…….
JUDGE OF APPEAL

M. OLE KEIWUA
…….
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
……
JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR