IN THE COURT OF APPEAL

AT KISUMU

(CORAM): MWILU, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 11 OF 2009

BETWEEN

AMOS OGWANG DOLA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisumu (Mwera and J.R. Karanja, JJ) dated 6th August 2008,

in

H.C.CR.A No.84 of 2007)

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JUDGMENT OF THE COURT

The appellant Amos Ogwang Dola, and his co accused ***Erick Michael Adongo,*** were jointly charged before the Senior Resident Magistrate at Maseno with the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. The particulars of the offence are that on the 11th May 2006 at Kanyawegi Sub-location, Usawi District within the former Nyanza Province being jointly armed with dangerous weapons namely pangas, robbed Bernard Odhiambo Oyata of his television, video deck, video tapes, mobile phone make Nokia, assorted clothes and shop items valued at Kshs. 90,000/- and at such time threatened the use of actual violence against the complainant, ***Bernard Odhiambo Oyata (PW 1).***

Both the appellant, and his co accused pleaded not guilty.

Upon consideration of the entire evidence, the learned trial magistrate having found that the charges against the appellant and his co accused were proved to the required standard, convicted and sentenced them to death as by law prescribed.

Aggrieved by the decision, they both appealed to the High Court against the convictions and sentence. The High Court not being satisfied that a case was founded against Erick Michael Adongo, set aside his

conviction and quashed the sentence. But the court upheld the decision of the trial court in the appellant's case, and dismissed his appeal,

The appellant was further aggrieved by the High Court's decision and lodged this appeal setting out four grounds of appeal which were, that the prosecution failed to prove its case beyond reasonable doubt; that the identification of the appellant was not proper and in accordance with the law; that the appellate court failed to evaluate the evidence; and that the courts below failed to take into account the appellant's testimony.

Ms. M. Onyango, learned counsel for the appellant stated that she would address all the grounds together, and submitted that the conditions were not suitable for the identification of the appellant; that Bernard (PW 1) testified that he was able to identify the appellant with the aid of torchlight and a tin lamp, yet the intensity of the light was not indicated, and nor was a description of the appellant provided.

On the doctrine of recent possession of the two pieces of curtain material, counsel submitted that this was inapplicable to the case as the evidence did not show that Bernard had positively identified them, as he acknowledged that it was possible to buy similar materials anywhere. Furthermore the curtains were not itemized on the charge sheet, and Bernard acknowledged that when he wrote his statement on 12th August 2006, 3 months after the incident, he was confused and could not remember all the items that were stolen. Counsel further submitted that his statement was recorded after the appellant had been arrested and the goods including the curtains had been recovered. Counsel concluded that the court should not have taken this evidence into account.

Mr. Ketoo, learned counsel for the State conceded that the identification was not free from error. The complainant did not state how long the attackers were present or the intensity of the light, so as to have been able to identify them.

Finally, counsel also conceded that since the charge sheet did not specify the curtains as some of the stolen items, it was apparent that the courts below wrongly applied the doctrine of recent possession.

We have considered the grounds of appeal, the submissions by counsel on both sides and carefully read the record of appeal. The issues for our determination are whether the appellant was properly identified and whether the doctrine of recent possession was applicable to the circumstances of the case.

This being a second appeal, only matters of law fall for the consideration of this Court – See ***section 361 (1)*** of the ***Criminal Procedure Code*** and ***Njoroge vs Republic [1982] KLR 33.***

We will begin by considering whether Bernard properly identified the appellant. According to Bernard (PW1) , he was in the retail business and on the night of 11th/12th May 2006 he was sleeping in his house alone when at about 1.00 am he suddenly woke up to find two people standing over his bed and one held a torch. The other assailant attacked and strangled him, at the same time demanded for the keys to the main door. Bernard testified that the assailant strangled him with a mosquito net and bed sheets, and held his mouth as if he wanted to tear his "mandibles", and when he saw that Bernard was losing his breath, he loosened the net and used it to tie his hands. A sack was used to cover his head. Bernard testified that he heard many people walking round his house. After the attackers left he untied his hands and legs, and by this time the sack had fallen off his head.

The next day, he found that the assailants had gained access into his house by digging a hole in the mud wall. He also discovered that his television, video deck, video tapes, mobile phone make Nokia, assorted clothes and shop items had been stolen.

Based on this evidence, the trial court found that Bernard had properly identified the appellant while he was strangling him and while the appellant was tying his legs and hands with a mosquito net. The High Court on its part found that the conditions for the identification of the appellant with a torchlight were favourable.

In the case of ***Abdulla Bin Wendo & Another vs Republic (1953) 20 EACA 166,*** the Court there addressed the manner in which the evidence of a single identifying witness should be treated and stated thus;

"Subject to 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 the conditions favouring a correct identification were difficult."

In ***Maitanyi -vs- Republic (1986) KLR 198****,* this Court further observed in, holding that an inquiry as to the intensity of light is essential in testing the accuracy of evidence of identification when it stated;

*"**The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into....' See Wanjohi & Others -vs- Republic (1989) KLR 415."***

In the instant case, Bernard was alone in his house on the night of the attack. He therefore testified as a single identifying witness. In such circumstances it was necessary for the courts below to carefully test the evidence, paying particular attention to whether the prevailing conditions were favourable for identification.

From our reevaluation of the evidence, we are not satisfied that the two courts below properly interrogated Bernard's evidence as a single identifying witness. The attack took place at night. Bernard stated that he identified him with the aid of light from a torch that was held by one of the assailants, no indication was provided as to the intensity or size of the light, the direction in which the light was shone, or whether or not it was shone directly on the appellant's face, and if so, for what length of time.

When this is coupled with the attempt at strangulation with a mosquito net so that he nearly lost consciousness, and the fact that a sack covered his head obliterating his ability to observe the assailants, our view is that the prevailing circumstances were inordinately difficult for the proper identification of the appellant. As such we entertain doubts that the appellant was properly identified by Bernard.

The appellant's conviction by the courts below was also grounded on the doctrine of recent possession, where it was found that the appellant was found in possession of curtains belonging to Bernard.

A review of the charge sheet shows that it merely referred to "assorted clothes", and not specifically to curtains. Bernard's complaint was that pieces of his curtains were found in the appellant's house, spread on a stool and a table, which matched the curtains that remained in his house. On cross examination, he conceded that it was possible to find similar materials readily available elsewhere.

In his defence, the appellant testified that he was arrested on 10th August 2006 at 1.00 pm when a person suddenly appeared and accused him of having robbed a customer he had transported the

previous day. He was arrested and taken to Maseno Police Station, and thereafter to his house which was searched, and his tablecloths taken away.

For the doctrine of recent possession to apply, it must be proved that the stolen items were found with the suspect, that they positively identified the property of the complainant, thirdly that the property was recently stolen from the complainant. See ***Isaac Nanga Kahiga alias Peter Nganga Kahiga v/s Republic,*** **Criminal Appeal No. 272 of 2005** (unreported).

The charge sheet listed television, video deck, video tapes, mobile phone make Nokia, assorted clothes and shop items valued at Kshs. 90,000/- as amongst the items stolen from Bernard on the night in question. The curtains were not listed as one of the stolen items and there was no reference to the theft of any household items. There had also not been prior mention by Bernard to the police that curtains from his house had been stolen.

Three months later, when the police searched the appellant's house save for the tablecloths which they took away, none of the other items indicated on the charge sheet were recovered. Bernard contended that they had been stolen from his house on the material night, and he sought to match them against curtains from his house.

The curtains were not distinctly particularized in charge sheet, and were not found together with any of the stolen items particularized on the charge sheet, and there is nothing to show that they were stolen items. We cannot therefore be certain that they were stolen from Bernard's house that night. Had the two courts below examined and reevaluated the charge sheet as it related to the evidence, they would have appreciated that without specific reference to the curtains in the charge sheet, the doctrine of recent possession was inapplicable to the circumstances of this case.

Accordingly, since the evidence of identification and recent possession was insufficient to establish any connection between the appellant and the robbery on the material night, we find that the prosecution failed to prove its case beyond reasonable doubt, thereby rendering the conviction unsafe, and we further find that we must interfere with the decision of the courts below.

In sum, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Kisumu this 29th day of July, 2016.

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR