REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 146 OF 2013

JARED ISICHE MAKUTSA..........................1ST APPELLANT

JAMES ONYANGO OGUTU.........................2ND APPELLANT

VERSUS

REPUBLIC...STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru

Hon. J. Mwaniki. – Ag Senior Principal Magistrate delivered on

the 18th July 2013 in CMCR Case No.* 3759 of 2010*)

JUDGMENT

The two appellants namely **JARED ISICHE MAKUTSA** (hereinafter referred to as the 1st appellant) and **JAMES ONYANGO OGUTU** (hereinafter referred to as 2nd appellant) have both filed this appeal challenging their conviction and sentence by the learned Senior Principal Magistrate sitting at the Nakuru Law Courts.

The appellants had both been arraigned before the trial court on 16/7/2010 facing two counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charges were as follows

Count No. 1

"On the 4th day of June 2010 at Hyrax Estate of Nakuru township in Nakuru District within Rift Valley Province jointly with others not before court while armed with dangerous weapons namely iron bars and rungus robbed Elizabeth Nyarua of her cash Kshs 30,000/= one digital camera make Sony, one mobile phone make Samsung L – 3010, one mobile phone make Nokia 2600, two flash discs (2 GPS), one bible, one Television set make Panasonic, 21 inch, one gas cylinder, one DVD player, one radio speaker make Sony and one hand bag all to the total value of Ksh 98,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Elizabeth Nyarua"

Count No. 2

"On the 4th day of June 2010 at Hyrax Estate of Nakuru District township in Nakuru District within Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely iron bars and rungus, robbed Mary Muthoni Wainaina of her mobile phone make Sony Ericcon model W395 and one neck lace all to the total value of Ksh 15,250/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Mary Muthoni Wainaina"

Both Appellants pleaded **'Not Guilty'** to both the charge. Their trial commenced on 9/12/2010 before **Hon. Atiang** – Senior Resident Magistrate who heard three (3) witnesses. Thereafter **Hon. Mwaniki** Principal Magistrate took over the hearing of the case. The new trial magistrate did correctly explain the provisions of Section 200(3) to the two accused and they both opted to proceed with the matter from where the first trial magistrate had stopped. However on 18/2/2013 succeeding trial magistrate noting that the record was torn with many parts of pages missing and therefore not decipherable ordered ***suo moto*** that **PW1, PW2** and **PW3** be re-called to testify. This was done and the three witnesses were re-called to testify.

PW1 ELIZABETH NYARUA NJOROGE and **PW2 MARY MUTHONI WAINAINA** told the court that on 4/6/2010 at about 8.00pm they were heading back to the compound of **PW1** laden with shopping baskets. As they entered the compound about ten (10) men armed with sticks and other crude weapons forced their way into the house.

PW3 D M, the 13 year old son of **PW1** was also home at the material time. He told the court that he heard a knock on the door and upon looking he saw his mother, and **PW2**. As the two ladies entered the compound a group of six (6) men entered with them.

Once inside the house the thugs began to beat and harass the occupants demanding to be given valuables. They stole cash, personal documents and household goods like a gas cylinder TV, DVD player speakers, clothes etc from the house of **PW1**. The intruders also beat up **PW2** and stole her mobile phone and her neck chain. The robbers then made off with the stolen goods.

One month later **PW1** was called to the police station where she found that her phone had been recovered. **PW1** positively identified her stolen phone **P. exb 2**. The police arrested several persons in connection with the murder but ultimately only the two appellants were charged.

At the close of the prosecution case the two appellants were found to have a case to answer and were both placed onto their defence. They each gave sworn statements in their defence.

On 18th July 2013 the learned trail magistrate delivered his judgment in which he convicted both appellants for the offence of Robbery with Violence and thereafter sentenced each to serve twenty-five years imprisonment. Being aggrieved the appellants filed this appeal.

This being a first appeal the court is obliged to re-examine and re-evaluate the prosecution case and to draw its own conclusions on the same. **(see AJODE Vs REPUBLIC [2004]2KLR 81).**

The key issue which requires proof in this case is that of identification. Both witnesses told the court that when they arrived home at about 8.00pm a group of 6-10 men forced their way into the house. The men who were armed with sticks beat them up together with the son of **PW1** and stole from them. This was an incident which fell within the ambit of section 296 (2) of the Penal Code. The robberies were committed to more than 1 person. The men were armed with sticks and they attacked and beat the victims. The incident had all the hallmarks of a robbery with violence as envisaged by Section 296(2) of the Penal Code and I do so find.

The incident occurred at 8.00pm. Obviously it was dark as it was night time. However the robbers did enter into the house of **PW1**. The witnesses all state that inside the house the lights and the robbers had not covered their faces thus they were able to see their attackers. **PW1** and **PW2** identified the appellants as amongst the men who robbed them. In her evidence at page 47 line 1, **PW1** stated

"There was light. We got into the sitting room. The intruders entered the different rooms and took several items including gas cylinders, speakers, clothes. The intruders took about 15 minutes in the house. The lights were on. The intruders spoke to me very often. I did recognize a number of them……."

PW1 went on to state with clarity the precise role that each appellant played in the robbery. This confirms the fact that she saw each appellant well. At page 47 line 5 **PW1** says

"Accused 1 was the one who kept on telling me to keep quiet. I saw his face clearly. Accused 2 was the one who switched off the light as they left ….."

Under cross examination by the 1st appellant at page 48 line 1 **PW1** reiterates

"I saw you at the scene clearly. The electric lights were on. I saw your face clearly. You kept telling me to shut up when I screamed. I told the police I would identify the intruders. I said one was short and dark you are that person……"

On her part **PW2** states at page 49 line 4

"………There was electricity lights. The intruders took several items. One tall intruder ordered the lights to be switched off……"

PW2 went on to clarify that she saw the robber who relieved her of her mobile phone. She stated at page 49 line 5

"……….. The one who took my phone came and asked if the phone was mine. He then kept it in his packet. One short and black person had a metal rod and entered the house. That was accused 1 in the dock"

Both **PW1** and **PW2** have described the 1st appellant as a short black man. It is clear that they both saw and were describing the same person.

PW3 the son of **PW1** also testified that he saw and identified the attackers. However, I do not that **PW3** only claimed to have identified the robbers when he was re-called to give evidence a second time. When **PW3** first testified in this matter he told the court that he was unable to identify any of the

robbers as he was too fearful to look at them. I cannot rule out the very real possibility that **PW3** has only identified the appellants the second time because he had already seen then in the dock when he testified the first time. As such I will disregard the evidence of **PW3** regarding identification.

From the evidence available I am satisfied that there was a clear, positive and reliable identification of the 1st appellant by **PW1** and **PW2**. The two witnesses both described the role which the 1st appellant played. The lights in the house were on and they were able to see. The 1st appellant spent ample time in the room and he spoke to the witnesses. They had ample time and opportunity to see him well. I also note that both **PW1** and **PW2** described the 1st appellant in the same terms. I therefore find that the 1st appellant has been positively identified as one of the men who robbed **PW1** and **PW2** on the night in question.

Regarding the 2nd appellant his identification by the witness was not as robust. The witnesses did not give a description of the 2nd appellant as they did for the 1st appellant. They did not clearly explain what role the 2nd appellant played in the robbery incident.

The prosecution have sought to link the 2nd appellant to the robbery in question from the evidence of recovery of a mobile phone said to have been stolen by **PW1**.

PW1 told the court that about a month after the robbery she was called to the police station and shown a

mobile phone which she identified as her stolen phone. That mobile phone was produced in court as an exhibit **P Exb 2**. **PW1** produced her receipt for the purchase of the mobile phone make Nokia 2600 **P. exb 1**. The details on the receipt being the serial number of the phone and the IMEI number corresponded with the details on the mobile phone. There can be no doubt that this mobile phone belonged to **PW1**.

PW3 STANLEY ANGIYA MATHIUS told the court that the 1st accused **'Jared Isiche'** who was a friend came and gave him the mobile phone as security for a loan of Ksh 700/=. Thereafter on 9/7/2010 **PW3** sold the phone to one **BEATRICE WANJIKU**. After some time the police came to **PW3** to enquire about the phone. **PW3** led the police to the 1st accused whom he claimed had given him the phone. On his part the 1st accused claimed that it was the 2nd accused who had given him the phone. The 1st accused led police to the home of the 2nd accused who was then arrested.

Thus the only person linking the 2nd accused to this stolen mobile phone is the allegations made by the 1st accused. This being a co-accused the evidence is not reliable as it is quite possible that the 1st accused only named the 2nd accused in order to deflect attention to himself. The 2nd appellant was not found in actual possession of the phone. It was actually found on this **'Beatrice Wanjiku'**. **PW3** did not name the 2nd appellant person who gave him the phone. Thus I find that the evidence connecting the 2nd accused to the stolen mobile phone is shaky at best and cannot be relied upon as proof of his involvement in the robbery.

Regarding the 1st appellant **PW3** has identified him as the person who brought to him the stolen phone. **PW1** was a friend of **PW3** a person whom he knew very well. **PW3** was operating as what is commonly known as a **'loan shark'**. He would advance money to people and retain their property as collateral. In this case **PW3** said that he advanced a sum of Ksh 700/= to the 1st appellant who gave him the mobile phone as security.

However **PW3** has tendered no evidence to prove that he did advance the 1st appellant this sum of Ksh 700/= nor has **PW3** tendered any proof that it was the 1st appellant who gave him the phone in question. There is no document signed by either party to show that this transaction/exchange ever took place.

PW3 did not record the details of the phone which he allegedly received from the 1st appellant e.g the serial number. Thus the court cannot be certain that the phone stolen from **PW2** is the exact phone which the 1st appellant handed to **PW3**. I also take note of the fact that this mobile phone was recovered more than one month **after** the robbery incident. A mobile phone is a small and relatively cheap item which is easily disposable. It could have changed hands several times. This period of one month cannot be deemed **'recent'.**

Therefore the evidence linking the 1st appellant to this stolen phone remains tenuous at best and cannot be relied upon by the court.

The court is not able to place much reliance on the evidence of **PW3**. Indeed I am unable to place any reliance on this evidence of recovery of the mobile phone to positively link the 1st or 2nd appellant's to the robbery in question.

Having said that it means that the only remaining tangible evidence linking the two appellants to the robbery is the evidence of **PW1** and **PW2**. Both witnesses identify the appellants as amongst the men who robbed them on the night in question. I do agree with the learned trial magistrate that the identification by these two witnesses was reliable.

However this court cannot fail to take into account the fact that the situation at the time was a robbery incident. **PW1** and **PW2** had been confronted by a group of 6-10 men who were armed. The men beat them up and robbed them. It was certainly an atmosphere of confusion and fear.

In the circumstances the police ought to have conducted an identification parade to confirm the identification of the appellant's by the two witnesses. Only in this way could the identification have been termed water-tight. The failure by the police to conduct an identification parade leaves a sliver of doubt in the mind of the court regarding identification. The benefit of such doubt must be accorded to the appellants. For this reason I find that the conviction of the two appellants was not safe and I quash those convictions. The attendant sentences imposed by the trial court are also set aside.

Finally this appeal succeeds. The two appellants are each to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered in Nakuru this 3rd day of November, 2017.

Read in open court

Maureen A. Odero

Judge