REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 58 & 59 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. A. ALEGO – (PM) delivered on 24th March 2014 in ELDORET CM CR. Case No.4961 of 2012)

DANIEL ERUPE..1ST APPELLANT

GIDEON KIPLAGAT CHIRCHIR..............................2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

The Appellants, Daniel Erupe and Gideon Kiplagat Chirchir were charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 15th November 2012 at Ngeria Strabag area in Ngeria Location, Uasin Gishu County, the Appellants, jointly, while armed with dangerous weapons namely rungus and pangas robbed Barnaba Kipyego Serem of his mobile phone Nokia 1110 and Kshs.500/- and at the time of the robbery used actual violence to the said Barnaba Kipyego Serem (hereinafter referred to as the complainant). When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were found guilty as charged. They were sentenced to death. They were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal challenging the conviction and sentence.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they have been convicted on the basis of the evidence of a single identifying witness who made the said impugned identification in circumstances that did not favour positive identification. The Appellants were aggrieved that they were convicted on the basis of hearsay evidence of witnesses who were not called to testify in the court. They were of the view that the prosecution had not adduced evidence which directly connected them to the recovery of the exhibit which was the subject of the case. The Appellants were aggrieved that they were convicted despite the fact that the prosecution had failed to establish the charge against them to the required standard of proof beyond any reasonable doubt. In particular, they were aggrieved that their respective defences were ignored and not considered by the trial court before it reached the impugned verdict. They were finally aggrieved that the trial court had failed to properly evaluate the evidence and reach the correct verdict. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash the conviction and set aside the sentence that was imposed upon them.

During the hearing of the appeal, this court consolidated the two separate appeals filed by the Appellants. This is because the Appellants were convicted from the same proceedings. Prior to the hearing of the appeal, the Appellants filed written submission in support of their respective positions. They urged the court to allow the appeal. Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had adduced sufficient evidence of identification and other evidence that connected the Appellants to the recovery of the stolen item so soon after the said robbery. She urged the court to dismiss the appeal. This court shall revert to the arguments made on this appeal after briefly setting out the facts of this case.

The complainant in this case was walking home on the night of 15th November 2012. It was at about 8.00 p.m. He was walking from Ngeria Shopping Centre. He told the court that while on the road, two people suddenly emerged from the side of the road and accosted him. They were armed with pangas and rungus. He was hit with a rungu. He fell down. He was robbed of Kshs.500/- and his Nokia 1110 mobile phone. He was dazed. He lay on the ground for three hours until 11.00 p.m. when he woke up and went home. He testified that during the ordeal, he was able to identify his attackers. He named them as Maurice and Tanui. The Maurice and Tanui were the 1st and 2nd accused in the trial court. The **"Tanui"** is the 1st Appellant in this case. When he reached home he informed his brother. A decision was made to report the incident to a village elder. A group of youths were mobilized. They went to the house of the 1st Appellant. They apprehended him and took him to Kiambaa Police Station. The complainant made a report to Kiambaa Police Station. He was issued with a P3 form which was duly filled by PW3 Patrick Kiprono, a Clinical Officer then based at Uasin Gishu District Hospital. On examination, it established that the complainant's scapula was swollen. The right hand was swollen and tender. It had bruises. He was of the view that the cause of the injuries was a blunt object. The P3 form was produced as ***Prosecution Exhibit No.4*** during trial.

PW2 Ernest Kiprugut Tarus told the court that he was a member of community policing at Ngeria. On 16th November 2012 at about 9.00 a.m., he was informed by a village elder called Eric Leting that the complainant had been attacked and robbed. Later he obtained information that the stolen mobile phone had been found with one Nickson. He went to Nickson's house and recovered the mobile phone. The mobile phone was positively identified by the complainant. Nickson told PW2 that he had been given the mobile phone by the Appellants. He apprehended both Appellants and escorted them to Kiambaa Police Station where they were re-arrested and detained. He told the court that he also recovered a panga from the house of the Appellants. Both the mobile phone and the panga were produced as prosecution exhibits in the case.

PW4 Corporal Christopher Kiptoo was the investigating officer in the case. He recalled that on 17th November 2012, the complainant made a report that he had been assaulted. He also told him that his mobile phone Nokia 1110 and Kshs.,500/- had been stolen. He issued the complainant with a P3 form. Later, the Appellants were apprehended by members of the public and taken to the police station. PW4 testified that it was the 1st Appellant who took the mobile phone to Nickson. He explained that Nickson could not come to court because he was sickly. At the time of hearing, PW4 was unaware of the whereabouts of the said Nickson.

When the Appellants were put to their defence, they denied that they had robbed or assaulted the complainant. They told the court that they were confronted by a group of youths, who were vigilantes, and accused of having robbed the complainant. They denied the allegation and basically attributed their apprehension and subsequent surrender to the police to their mistaken profiling as criminals.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellants on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission, both written and oral. It was clear from the evidence adduced by the prosecution witnesses that the Appellants were convicted on the basis of the evidence of identification and on application of the doctrine of recent possession. As regards identification, the complainant testified that he was accosted by two men at about 8.00 p.m. while he was walking home. He mentioned the names **"Maurice"** and **"Tanui"** as the persons who attacked him. Incidentally, neither of Appellants is known by the name **"Maurice"** or **"Tanui".** From the complainant's testimony, it was clear that on the material night it had rained. He told the court that he was beaten before he was robbed of his Nokia 1110 and Kshs.500/-.

The complainant did not say how he was able to be certain that he had identified the Appellants as the persons who robbed him noting that the robbery incident took place at night. He did not tell the court the source of light that enabled him to be certain that it was the Appellant who had robbed him. Taking into consideration that it had rained, the possibility that there was no moonlight to aid him to identify his assailants was high. The complainant did not tell the court how long the attack took. This court cannot therefore be certain that the complainant's assertion that he had identified the Appellants as the persons who robbed him is positive and free from the possibility of mistaken identity.

In **Maitanyi –Vs- Republic [1986] KLR 198 at P.200** the Court of Appeal held thus:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***
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> ***"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 greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a 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 the present appeal, it was clear that the circumstances favouring favourable identification were absent. The complainant's testimony regarding his identification of the Appellants was that of a single identifying witness which should be treated with caution. This court cannot convict the Appellants on such evidence of identification unless there is other evidence that supports the prosecution's case that it was indeed the Appellants who had robbed the complainant.

The other evidence offered by the prosecution is that of the recovery of the Nokia 1110 mobile phone that was robbed from the complainant allegedly in the Appellants' possession. From the evidence adduced by the prosecution witnesses, it was apparent that the said Nokia 1110 mobile phone was recovered in possession of one Nickson. It was this Nickson who implicated the Appellants. Nickson was not called to testify as a prosecution witness apparently because the investigating officer stated that he was sick and was unable to attend court. For the doctrine of adverse possession to apply as was succinctly held in **Malingi –vs- Republic [1989] KLR 225**, the chain of possession of the

item stolen or robbed from the complainant must remain unbroken until the recovery of the same from the accused persons. Where that link is broken, evidence must be adduced which will support the irresistible conclusion that the accused had constructive or actual possession of the stolen or robbed item at the time of their arrest.

In the present appeal, it was clear that the chain of possession was broken when Nickson was not called to testify as a prosecution witness. The other witnesses who testified gave hearsay evidence. The failure by the prosecution to call Nickson as a witness meant that the prosecution was unable to irresistibly link the recovery of the Nokia 1110 mobile phone in the Appellants' possession. The doctrine of recent possession cannot be applied to the Appellants because the prosecution did not adduce evidence to connect or link them to the recovery of the Nokia 1110 mobile phone that was robbed from the complainant. This court having found that the evidence of identification was not credible, it is evident that the prosecution did not adduce evidence that established the charge brought against the Appellants to the required standard of proof beyond any reasonable doubt.

In the premises therefore, the Appellants' appeals have merit. They are allowed. Their conviction is quashed. The Appellants are acquitted of the charge. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF SEPTEMBER 2018

HELLEN OMONDI

JUDGE